CHAPTER THIRTEEN

Easements

I. INTRODUCTION

Easement law is complex, troubling, counterintuitive, and very emotional because it forces neighbours to work together. This area of law is not well understood even by real estate lawyers and there is a great deal of litigation generated in it. While the principles have not changed radically in 150 years, the application to modern society has resulted in much bending, softening, and stretching of the principles that were developed when the Industrial Revolution was in its infancy.

An easement is a right, usually given by your neighbour but sometimes imposed by law, over your neighbour's land, which makes your land more useful to you. The right usually allows you to do something on your neighbour's land but may also prevent your neighbour from doing something on her own land that will affect your land. Your land may become more valuable as a result of an easement, but that is not the test. The test is whether your land is made more useful.

Goddard on easements (John Leybourn Goddard, *A Treatise on the Law of Easements* (Boston, Mass: Houghton, Mifflin, 1880) at 2) defines an easement as follows:

> An easement is a privilege without profit, which the owner of one tenement has a right to enjoy in respect of that tenement in or over the tenement of another person, by reason whereof the latter is obliged to suffer or refrain from doing something on his own tenement for the advantage of the former.

Why is it so important that a right be an easement as opposed to something else, such as a licence or a lease? An easement is primarily a contract for the use of land. Contracts are enforceable only against the parties to them (a concept known as privity of contract). Accordingly, at common law, a right to use your neighbour's land could not be enforced against a person purchasing your neighbour's land even with notice of your right. The contract did not run with the land. In order to get around this injustice, the courts determined that some rights ought to run with the land. As a result, the burden and benefit of the right is binding on purchasers (or assignees) of that land. This concept is known as privity of estate and creates a relationship enforceable in law between owners of adjoining lands even if there is no privity of contract between them. Easements and leases run with the land. Licences do not. So if you want a right to run with the land, it must be either a lease or an easement. A lease gives exclusive possession and must be for a time certain. It cannot be perpetual. If you want a perpetual right and the other side also wants to use that part of their land, then you want an easement, not a lease.

There are also natural rights incidental to the ownership of land that create rights in favour of your neighbour or that give you rights over your neighbour's lands. These natural rights arise inherently out of the nature of real property and do not rely on any grant or prescription. The right to vertical and lateral support; the right to air, water, and light; and the right to discharge air to an adjoining property even when the air contains odours are all natural rights. The flow of water through a channel, the right to shade, the right to protection from the weather, and the right to a view are not natural rights.

The servient tenement (or the servient lands) is the land over which the easement runs and the dominant tenement (or the dominant lands) is the land that benefits from the easement.

There are four characteristics that define an easement. These were summarized in *Re Ellenborough Park*, [1956] Ch 131. They are: (1) there must be a dominant and a servient tenement; (2) the easement must accommodate the dominant tenement; (3) the owners of the dominant and servient tenements must be different persons; and (4) the right must be capable of forming the subject matter of a grant.

A. Dominant and Servient Lands

For a right to be an easement, there must be both a dominant and a servient tenement. For instance, a right to land helicopters, dock boats, fish, picnic, camp, attend a movie, or golf on another's land is not an easement because there are no benefiting lands. The dominant lands must be identified in the grant of easement or ascertainable.

In *Laurie v Bowen*, [1951] OR 104 (CA), the Ontario Court of Appeal stated:

> It is my opinion that when a dominant tenement has not been specified in an express grant, the Court can properly examine the circumstances existing at the time when the instrument was executed, and from the evidence make a finding as to whether or not the parties intended the right granted to be appurtenant to a dominant tenement, and, if so, to find what was the dominant tenement. The Court can admit and give effect to evidence as to the circumstances existing at the time the instrument was made for the purpose of ascertaining the true nature of the transaction between the parties. Easements in gross are easements without a dominant tenement and are invalid when expressly authorized by statute.

B. Right Accommodates Dominant Lands

The right must benefit, enhance, or accommodate the dominant tenement in order to be an easement. In *Re Ellenborough Park*, the court summarized this principle as follows:

> [A] right enjoyed by one over the land of another does not possess the status of an easement unless it accommodates and serves the dominant tenement, and is reasonably necessary for the better enjoyment of that tenement, for if it has no necessary connection therewith, although it confers an advantage upon the owner and renders the ownership of the land more valuable, it is not an easement at all, but a mere contractual right personal to and only enforceable between the two contracting parties.

In *Caldwell v Elia* (2000), 30 RPR (3d) 295, 2000 CanLII 5672 at para 9 (Ont CA), the court defined "accommodation" as a use that "confers a convenience which enables a better enjoyment of the [dominant] tenement, and in all likelihood, confers an advantage upon [the dominant owner] which renders his ownership of the land more valuable."

C. Dominant and Servient Owners Different

The issue of whether the dominant and servient owners are different persons is reasonably straightforward. However, developers are often required by municipalities to create easements over newly created building lots when the developers own both the dominant and the servient tenements. These easements in theory are void and would have to be regranted. The practice is for A to hold the servient lands and for B to hold the dominant lands as trustee for A, and the Land Titles Office in Ontario accepts these easements and certifies them to be valid.

D. Capable of Being Granted

The final characteristic of an easement is that the right must be capable of forming the subject matter of a grant. In *Re Ellenborough Park*, the court examined this characteristic on three grounds: (1) whether the right granted was too vague; (2) whether the right amounted to joint occupation of the servient lands, which substantially deprived the servient owner of the fee simple estate; and (3) whether the right granted was for recreation or amusement.

The requirement that the right not be vague is a general proposition of property law that interests in land cannot be so vague as to be unenforceable. Rights may be wide in their scope without being uncertain. Some rights, however, may be too broad to form an easement, such as the right to wind, the right to a view, the right to protection from the weather, and the right to shade. However, easements for vertical and lateral support, easements to receive light through windows, easements to have water flow through a defined channel to the dominant lands, and easements for burial plots have found acceptance in the law as easements, even though they are very broad.

In the second test, the easement cannot be so substantial in terms of use or possession that it amounts not to an easement but to joint ownership or possession of the fee simple. Another way to look at this is that the easement cannot allow permanent occupation of the servient lands. For instance, a right to build and occupy a building on the servient lands may allow permanent occupation of the servient lands and not be an easement. There is a sense of transient use to an easement—that is, use from time to time.

If the right effectively excludes the servient owner, the right cannot be an easement. However, some exclusive occupation of the servient lands by the dominant owner is permitted. This is most clearly seen in pipelines: they exclusively occupy part of the servient lands but they are still easements. See *Husky Oil Operations Ltd v Shelf Holdings Ltd*, 1989 ABCA 30.

II. KINDS OF EASEMENTS

There are four kinds of easements: express easements, prescriptive easements, implied easements, and easements by estoppel.

A. Express Easements

Express easements are those created by grant or reservation. The servient owner/grantor signs her name to a document creating the easement. This is done by way of conveyance or an agreement or both. The language used is that the dominant lands are "together with" the easement and the servient lands are "subject to" the easement.

If the servient lands are sold, the purchaser acquires the servient lands subject to all registered easements. The easements run with the servient lands. The dominant owner cannot assign an easement to a third party who does not also acquire the dominant lands. An easement benefits all of the dominant tenement so that if the dominant lands are subdivided, every part benefits from the easement.

An easement is a grant of an interest in land. Accordingly, an agreement to give an easement must be in writing to be valid. The writing must set out all the essential terms of the easement. An oral agreement to grant an easement is not enforceable unless there is unequivocal part performance.

In an express grant, the wording of the grant governs what the easement can be used for. In *Husky Oil Operations Ltd v Shelf Holdings Ltd*, 1989 ABCA 30 at para 12, the Alberta Court of Appeal stated:

> The Grant of Easement must be recognized as a contract reflecting the terms of the agreement made by the contracting parties. It is elementary that any contract is the primary source of reference to determine a dispute involving the rights and obligations of those parties. Where a dispute arises over the rights involving the acquisition of lands those rights are also subjected to and governed by legislative enactments regulating land titles.

Unless there is an ambiguity or unless the surrounding circumstances at the time of the grant demonstrate that a particular use could not have been intended, then normal rules of contract interpretation apply. The words of the grant are the primary determinant of the intention of the parties. The words will be given their ordinary meaning.

In *Vantreight v Gray*, 1993 CanLII 2669 (BCSC), aff'd (1994), 43 RPR (2d) 179, 1994 CanLII 1189 (BCCA), the BC Supreme Court stated "simply because a right is determined to be 'wide' does not mean that it is also vague or uncertain." The court ignored the conduct of the parties insofar as their actions might indicate particular interpretations of the contract. The BC Court of Appeal concluded (at para 5) that the test for interpreting easements was that "a document will not be set aside for vagueness unless, after the application of legal reasoning and legal analysis, it is impossible to decide the meaning that should be given to the document."

B. Prescriptive Easements

A prescriptive easement is an easement acquired not by grant but by use or enjoyment for a period of time prescribed by law. A prescriptive easement must comply with the four easement characteristics in *Re Ellenborough Park*—that is, there must be a dominant tenement, which is accommodated by the easement that is owned by a person who is different from the servient owner, and the right must be capable of forming the subject matter of a grant.

A prescriptive easement cannot be acquired over land that is subject to the Land Titles system of land registration unless the prescriptive right had been established before the lands were moved to the Land Titles system. The onus of establishing a prescriptive easement is on the person asserting it.

The time period for establishing a prescriptive easement in Ontario is 20 years. This is set out in the *Limitations Act, 2002*, SO 2002, c 24, Schedule B. The theory is that the servient owner's right to bring an action to stop use of her property is barred by the *Limitations Act* after 20 years. There are two mechanisms for obtaining a prescriptive right. The first, based on the *Limitations Act*, requires you to show use for the 20-year period immediately before a legal proceeding to either assert the right or deny the right is commenced. The second is the doctrine of lost grant, which establishes the right if you can show the requisite 20 years of use at any time (not limited to the 20 years before a proceeding is commenced). To clarify the difference between the two mechanisms, if you can show 50 years of continuous use up to one year before an action to deny your right, you could not rely on the *Limitations Act*, because of the one-year gap, but you could rely on the doctrine of lost grant.

The doctrine of lost grant is a completely fictitious legal principle developed by the courts. The court presumes that if the dominant owner can establish continuous use for 20 years, the dominant owner must have received a grant of the right which grant was lost. Since the right was based on an express grant (even if fictitious), it did not matter what factually occurred before the 20-year period commenced, because the right is no longer based on the common law right of prescription. The rationale was explained as a simple matter of good conscience.

The doctrine of lost grant can be applied even if it is clear that no grant of the easement ever occurred. However, if a grant of easement was legally impossible because of, for example, statutory restraints, then the doctrine of the lost grant cannot be applied; or if the right of way or easement is used with permission of the servient owner, then the doctrine will not apply.

Where there has been at least 20 years of uninterrupted use, the law will presume a lost grant. Once the use has been established for the 20-year period and the lost grant has been presumed, the use cannot be changed. If, during the 20-year period, the use changes, the lost grant for the changed use will not be presumed.

In order to establish a prescriptive right, the dominant owner must show use of the right without force, without secrecy, and without permission. The use required by the courts is summed up by the Latin phrase, *nec vi, nec clam, nec precario*. In addition, the right must be continuous. The burden of proof that the use was without force or secrecy falls on the dominant owner asserting the right. Once the 20-year continuous period is established, the onus to prove the use was with permission shifts to the person opposing the easement.

The concept of without force is intended to show that the servient owner acquiesced in the use of her property for 20 years and neither prevented nor objected to the use and that

it would be unfair to not permit the use to continue. Accordingly, acquiescence is required to start the prescriptive period running. To show acquiescence, it must be shown that the servient owner (1) had knowledge of the acts done; (2) had the power to stop the acts or to sue in respect of the acts done; and (3) abstained from exercising such power.

The real test is whether the servient owner has protested the use by the dominant owner. If the servient owner has protested the use, the use is considered to be by force. What constitutes protest? The servient owner can block the use by putting up a fence or by removing the dominant owner's property from the servient lands. The servient owner can protest by letter, by confrontation or by legal action. It has also been held that a statutory provision prohibiting the use is a "statutory" protest which prevents the prescriptive period running.

For acquiescence to be found, the prescriptive use must not be secret. The servient owner must know, or have the means of knowing, of the use. If the use is not visible or is clandestine, then the use is secret. For instance, a pipe buried in the ground or water discharged in a remote wooded part of a property would not constitute acquiescence by the servient owner. A use only at night or a seasonal use when the servient lands are unoccupied would not be notorious enough to constitute acquiescence.

Knowledge may be imputed to the servient owner where an ordinary owner, diligent in the protection of her interests, would have known of the prescriptive use. The servient owner cannot turn a blind eye to the use of his property by his neighbour and then argue that the use was secret. If the use should have been discovered by a reasonable person exercising ordinary care, then the prescriptive period will run.

You can acquire a prescriptive easement only if your use was "as of right," which means without permission. If you are using someone's lands with their permission, then you are not using it as of right. Permission is meant to be something transient.

This concept is difficult. As of right means you are using the lands because you think you own them, you think you have an agreement to use them (but not mere permission), or you think you have an easement or lease to use them. Or you are using them because your predecessor had a right to use them. If in fact you have an agreement, a lease, or an easement to use the lands, you are using them as of right but pursuant to a contract and the prescriptive period does not run. But if you think you have a right to use the lands and you actually don't, then the prescriptive period runs. If you know you are a trespasser, then you are not using the lands "as of right."

In *Garfinkel v Kleinberg and Kleinberg*, [1955] OR 388, 1955 CanLII 112 (CA), the Ontario Court of Appeal stated:

> "User as of right" is defined in 11 Halsbury, 2nd ed. 1933, pp. 296-7, para. 537, as follows:
>
> > The user or enjoyment of an alleged right in order to support a prescriptive claim, under the doctrine of prescription at common law, must be shown to have been user "as of right," having been enjoyed *nec vi, nec clam, nec precario*, neither as the result of force, secrecy, or evasion, nor as dependent upon the consent of the owner of the servient tenement. Consent or acquiescence on the part of the servient owner lies at the root of prescription. He cannot be said to acquiesce in an act enforced by mere violence, or in an act which fear on his part hinders him from preventing, or in an act of which he has no knowledge actual or constructive, or which he contests and endeavours to interrupt, or which he sanctions only for temporary purposes, or in return for recurrent consideration.

"As of right" means the use is pursuant to a binding contract or some other legal right. For instance, a lease, license or grant of easement would be a use as of right. An agreement might provide the dominant owner with a right of entry or a right to maintain an encroachment. These uses would be "as of right." Permission on the other hand is not elevated to a contractual right and is in the nature of a transient, informal or temporary authorization. It is sometimes referred to as "good neighbourliness."

If the dominant owner believes he has the right to use the servient lands but is mistaken, he is still using the servient lands as of right and not by permission of the servient owner.

Permission must be something active involving an exchange between the dominant owner and the servient owner. Silence as to use is acquiescence and the prescriptive period runs. If the use amounts to a trespass at law, the prescriptive period runs.

A prescriptive easement is available only for actual use over the 20-year period. If your use materially increases during the 20 years, you cannot get a right for the increased use.

C. Implied Easements

It is open for a court to find an easement by implication, also known as an implied easement. There are several possible legal theories for establishing easements by implication:

1. easements of apparent accommodation;
2. easements of necessity; and
3. easements of common intention, where the words of the grant or the surrounding circumstances require the court to find an implied easement to prevent an equitable fraud on the grantee.

An easement of apparent accommodation arises where the court can conclude that the grantee would have expected to obtain certain easements over the servient tenement if she had turned her mind to it at the time of the grant.

In order to have an implied easement of accommodation, the following must exist:

1. the servient and dominant lands must be in common ownership immediately before the conveyance of the dominant lands to the dominant owner;
2. the servient owner must have used the servient lands for some purpose related to or benefiting the dominant lands;
3. the use must have been apparent to the dominant owner prior to the grant;
4. a reasonable person taking a grant from the servient owner would have expected to get the right as part of the transfer of the dominant lands;
5. the right or use must meet the four characteristics of an easement; and
6. the omission of the easement must not have been purposefully intended.

In addition, the courts have added the following tests:

1. the use must be continuous and apparent;
2. the use must be necessary for the reasonable use of the property; and
3. the servient owner must have exercised the use immediately before the transfer.

Barton v Raine
[1979] OJ No 3150, 10 RPR 1 (Co Ct)

KILLEEN Co Ct J:

[1] The plaintiff, George Barton, claims for a declaration that he has the benefit of an easement either by prescriptive right or by necessary implication from a deed, over a portion of the lands of the defendants, Kenneth and Muriel Raine.

[2] The relevant historical facts—all virtually uncontradicted—are now described in roughly chronological order.

[3] By a deed registered on June 30, 1919 (Ex. 1) the plaintiff's father, Fred Barton, purchased a house located on the south half of Lot 17, Plan 395 for the city of London. The municipal number for this lot is 219 Egerton Street; it has a frontage of 33 feet on Egerton by a depth of 165 feet (Ex. 13). Mr. Barton lived in this house until his death in 1968.

[4] Immediately to the north of the Barton premises is 221 Egerton, now owned by the defendants jointly, but purchased as a vacant lot in 1923 by one Percy Meecham (Ex. 4). Mr. Meecham constructed a house on his lot in 1924.

[5] There were no changes in the title to either of these properties until 1941 when Fred Barton, by Deed No. 31850 registered on November 29, 1941 (Ex. 5), purchased Mr. Meecham's property. This meant, of course, that the title to the two adjoining lots was now merged in Mr. Barton.

[6] In 1952, Fred Barton sold the premises at 221 Egerton to his son and daughter-in-law, Raymond and Margaret Barton, as joint tenants under Deed No. 40860 registered on June 25, 1952 (Ex. 6). Raymond Barton is a brother of the plaintiff. Fred Barton had apparently allowed his son, Raymond, and Raymond's wife and family, to live at 221 Egerton from about the time of the 1941 purchase from Meecham before deciding to sell this property to them in 1952. Raymond Barton died on January 27, 1956, but his wife, Margaret, and their children continued to live there. In 1971, Margaret sold the property at 221 Egerton to the defendants in joint tenancy under Deed No. 164671 registered on September 21, 1971 (Ex. 7).

[7] Meanwhile, Fred Barton conveyed 219 Egerton to his wife, Emma Barton, by Deed No. 103 543 registered on April 27, 1962 (Ex. 2). This conveyance has no particular significance in this case because Mr. & Mrs. Barton continued to live together at the premises until their respective deaths in the late sixties: Fred Barton had a serious stroke in the summer of 1967 and finally died on August 8, 1968. His wife, the mother of the plaintiff, lived on after his death at 219 Egerton until her own death some nine months later on May 23, 1969.

[8] The plaintiff inherited 219 Egerton through his late mother's estate. He allowed the house to remain vacant until he permitted his son, Greg Barton, and Greg's family, to live there in October 1970. Greg Barton was still living there when the Raines bought the next-door property at 221 Egerton from his Aunt Margaret in 1971, and, in fact, he only moved out of 219 Egerton in 1974. The plaintiff remains the owner of 219 Egerton to the present time and now has tenants living there.

[9] Before coming to grips with the legal issues in this case, it is necessary to describe, in more detail, the facts on the lands.

[10] The plaintiff stated that, by the late 1920's, if not earlier, the Barton family and their neighbours, the Meechams, were using a well-defined area running from the street line of Egerton and going westward between the houses for the movement of the respective family cars to family garages located at the rear of the properties: the Barton garage was a two-car garage and that of Meechams, a one-car garage. In the early years, it appears that this driveway area had three paved strips on it, presumably to act as tire tracks; during the second world war, the whole of the defined driveway area was paved. …

[12] I have already mentioned Fred Barton's purchase of 221 Egerton in 1941. This change of ownership did not involve a change in the use of the driveway. He quickly installed his son and daughter-in-law at 221 Egerton but the access use of the driveway was consistently maintained and, as I have pointed out, the full driveway was paved in the war years.

[13] After Fred Barton sold 221 Egerton to his son, Raymond, in 1952 the same common pattern of use prevailed as before. It is only when one moves forward into the late 1960's and early 1970's that anything changes. And some of these changes are a function of the inevitable illness and death of some of the main actors.

[14] Fred Barton, the family patriarch, had a stroke in 1967 and between then and his death in 1968 he was unable to use his car: the car remained in the garage at the rear. After his death, his wife, who did not drive, did not, of course, use the car.

[15] 219 Egerton remained vacant between the time of Mrs. Fred Barton's death in May of 1969 and October 1970, when Greg Barton, his wife, and family were allowed to live there by the plaintiff. Greg and his wife both had cars and used the driveway.

[16] After the Raines bought 221 Egerton in September 1971, the driveway user continued as before until the May 24 weekend, 1972, when the Raines, in an unannounced move, brought in workmen to construct a gate and fence which had the effect of preventing the Bartons from using the driveway for its intended purpose. The gate was strung from the rear driveway corner of the Raines' house at 221 Egerton across their portion of the driveway to a newly installed post in the lot line; fencing was then strung from this post down the lot line westward into the rear yard area to a point near an old post site. The gate was of the "swing gate" type which conveniently enabled the Raines to drive their own car or cars into their own rear yard and garage but, because only about 4 feet of the paved driveway was on the Barton side, it was now impossible for the Bartons to use the driveway to gain access to their own double garage. …

[23] On the facts of this case, it has been shown that, after Fred Barton sold 221 Egerton in 1952, he continued to use the driveway in the usual way until he suffered a stroke in the summer of 1967. After that summer, he was unable to drive up to the time of his death on August 8th, 1968, but his car remained in the garage. The evidence disclosed that his wife did not drive the car but that it remained in the garage until her death. Thus, the driveway was not used by anyone residing at 219 Egerton until October of 1970 when the plaintiff authorized his son and family to move into the house. The result is, therefore, that, after the 1952 severance deed, the plaintiff and his predecessors had less than 20 years of prescriptive user when the Raines constructed their fence in May 1972, and, in any event, there was a substantial gap or interruption in user of the driveway by occupants of 219 Egerton from the summer of 1967 until, at the earliest, October 1970, a matter of over three years. This latter interruption of user of the driveway would have a similar effect on maturing prescriptive rights to the 1941 merger deed. Thus, in my view,

counsel for the defendant is on firm ground in arguing that both the statutory time period set out in s. 31 of the Act—twenty years—and the interruption in user—over 3 years—had the effect of wiping out possibly maturing prescriptive rights from and after the 1952 deed from Fred to Raymond and Margaret Barton. If, therefore, there is no other way in which the plaintiff may assert his claim to a right of way, he is effectively out of court.

[24] Counsel for the plaintiff submits that the plaintiff does have that "other way" and that it arises by necessary implication from the circumstances surrounding the conveyance from Fred to Raymond and Margaret Barton in 1952.

[25] On the face of it, the 1952 deed to 221 Egerton contains no express reservation of a driveway right of way in favour of 219 Egerton. That much is crystal clear. There was, in fact, no express reference to easements over the driveway in any of the deeds affecting the two properties.

[26] Mr. Unger, for the plaintiff, argues, however, that there is an irresistible and necessary implication from the surrounding circumstances of the 1952 transaction between the father and the son and daughter-in-law that the father should have a right of way over the driveway, which driveway extends onto the 221 Egerton property for roughly 8 feet.

[27] Mr. Bitz, for the defendant, counters this argument by submitting than an easement by necessary implication may only arise in the case of lands which are "landlocked" and that, here, the plaintiff's lands were not landlocked, as that term is understood and used in the case law, by the effect of 1952 deed, or otherwise, for that matter. …

[31] One must, therefore, address the problem of the failure of Fred Barton to reserve an express right of way or create a common right of way in the 1952 deed, over the area running between the houses and which was being used, for all practical purposes, as a common driveway since the late 1920's. Does the silence of the 1952 deed now preclude the present plaintiff from relying on the circumstances of the 1952 transaction as the basis for an implied grant or reservation of the right of way claimed for? Upon the answer to this question, in my view, rests the fate of the plaintiff's case.

[32] It has been said that easements may be variously created by statute, deed or prescription: see Megarry and Wade, *The Law of Real Property* (4th ed., 1975), p. 827. Here, only issues as to prescription and deed implications arise. I have already held that prescriptive claims must fail on the evidence. That holding leaves open for consideration the application of a doctrine of implication peculiar to easement law or, perhaps, more broadly explicable now under what I would call the "implied terms" or "common intention" doctrine of modern contract law.

[33] While there was much confusion and some conflict in the early cases in the 19th century on the question of the creation of easements by implication, the level of controversy was considerably reduced by the famous case of *Wheeldon v. Burrows* (1879), 12 Ch. D. 31 (C.A.), where Thesiger L.J. resolutely attempted a summary of the state of controlling law at that point in time. Thesiger L.J. hinged his analysis on what he called "two propositions," which he said were subject to "certain exceptions." He put his approach this way at p. 49 of the report:

> The first of these rules is, that on the grant by the owner of a tenement of part of that tenement as it is then used and enjoyed, there will pass to the grantee all those continuous and apparent easements (by which, of course, I mean quasi easements), or, in other words, all those easements which are necessary to the reasonable enjoyment of the property granted,

> and which have been and are at the time of the grant used by the owners of the entirety for the benefit of the part granted. The second proposition is that, if the grantor intends to reserve any right over the tenement granted, it is his duty to reserve it expressly in the grant. Those are the general rules governing cases of this kind, but the second of those rules is subject to certain exceptions. One of those exceptions is the well-known exception which attaches to cases of what are called ways of necessity; and I do not dispute for a moment that there may be, and probably are, certain other exceptions, to which I shall refer before I close my observations upon this case.

He pointed out that these propositions or rules were founded on the ancient maxim of real property law that "… a grantor shall not derogate from his grant."

[34] While the Lord Justice's judgment contained an admirable synthesis of difficult and evolving concepts, I do not think it unfair to say that he did not entirely succeed in curbing or limiting the exceptions to his rules. His views on this aspect of the matter are stated at pp. 58-9:

> … in the case of a grant you may imply a grant of such continuous and apparent easements or such easements as are necessary to the reasonable enjoyment of the property conveyed, and have in fact been enjoyed during the unity of ownership, but that, with the exception which I have referred to of easements of necessity, you cannot imply a similar reservation in favour of the grantor of land.
>
> Upon the question whether there is any other exception, I must refer both to *Pyer v. Carter* [[1857), 1 H. & N. 916, 156 E.R. 1472] and to *Richards v. Rose* [(1853), 9 Ex. 218, 156 E.R. 931] ; and, although it is quite unnecessary for us to decide the point, it seems to me that there is a possible way in which these cases can be supported without in any way departing from the general maxims upon which we base our judgment in this case. I have already pointed to the special circumstances in *Pyer v. Carter*, and I cannot see that there is anything unreasonable in supposing that in such a case, where the Defendant under his grant is to take this easement, which had been enjoyed during the unity of ownership, of pouring his water upon the grantor's land, he should also be held to take it subject to the reciprocal and mutual easement by which that very same water was carried into the drain on that land and then back through the land of the person from whose land the water came. It seems to me to be consistent with reason and common sense that these reciprocal easements should be implied; and, although it is not necessary to decide the point, it seems to me worthy of consideration in any after case, if the question whether *Pyer v. Carter* is right or wrong comes for discussion, to consider that point. *Richards v. Rose*, although not identically open to exactly the same reasons as would apply to *Pyer v. Carter*, still appears to me to be open to analogous reasoning. Two houses had existed for some time, each supporting the other. Is there anything unreasonable—is there not, on the contrary, something very reasonable—to suppose in that case that the man who takes a grant of the house first and takes it with the right of support from that adjoining house, should also give to that adjoining house a reciprocal right of support from his own?

In other words, Thesiger L.J. is apparently developing a two-step thesis in this order:

[35] (1) Assuming a grant away by an owner of part of his lands, you may imply a grant of such easements as are necessary to the reasonable enjoyment of the grantee's lands and which were enjoyed informally during unity of ownership;

[36] (2) But, you may only imply a grant or reservation to the grantor of "easements of necessity" or "reciprocal or mutual easements."

[37] While, as I have said, Thesiger L.J. made a noble effort at synthesis and systematization, his mere acknowledgment in passing that his exceptions to the general rules—(1) easements of necessity and (2) reciprocal or mutual easements—might not be exhaustive of the possible exceptions led, almost inevitably, to later judicial restatements of his rules in ways which have softened the rigour of the rules or enlarged the scope of the exceptions.

[38] There already were shifts away from the pigeon-holing efforts of Thesiger L.J. by the last decade of the 19th century but two early 20th century cases perhaps best exemplify a change in emphasis and focus: those cases are *Jones v. Pritchard*, [1908] 1 Ch. 630, 77 L.J. Ch. 405 and *Pwllbach Colliery Co. v. Woodman*, [1915] A.C. 634 (H.C.). In *Jones v. Pritchard*, a case dealing with a party wall between adjoining houses, Parker J. said this at p. 408 [[1908] 1 Ch. at pp. 635-6]:

> Now if a man grant a divided moiety of an outside wall of his own house, with the intention of making such wall a party-wall between such house and an adjoining house to be built by the grantee, *the law will, I think, imply the grant and reservation in favour of the grantor and grantee respectively of such easements as may be necessary to carry out what was the common intention of the parties* with regard to the user of the wall, the nature of those easements varying with the particular circumstances of each case.

(The italics are mine.) This case was followed by the *Pwllbach Colliery* case, *supra*, where Lord Parker of Waddington, amplifying really on what was said in *Jones v. Pritchard*, commented in this way on implied easements at pp. 646-7:

> My Lords, the right claimed is in the nature of an easement, and apart from implied grants of ways of necessity, or of what are called continuous and apparent easements, the cases in which an easement can be granted by implication may be classified under two heads. The first is where the implication arises because the right in question is necessary for the enjoyment of some other right expressly granted. … Thus the right of drawing water from a spring necessarily involves the right of going to the spring for the purpose. The implication suggested in the present case does not fall under this principle; there is no express grant of any right to which the right claimed must be necessarily ancillary, nor is there any evidence that the nuisance is necessarily incidental to the defendants' mining operations.
>
> The second class of cases in which easements may impliedly be created depends not upon the terms of the grant itself, but upon the circumstances under which the grant was made. The law will readily imply the grant or reservation of such easements as may be necessary to give effect to the common intention of the parties to a grant of real property, with reference to the manner or purposes in and for which the land granted or some land retained by the grantor is to be used. See *Jones v. Pritchard* and *Lyttelton Times Co. v. Warners* [[1907] A.C. 476, [1904-7] All E.R. Rep. 200 (P.C.)]. But it is essential for this purpose that the parties should intend that the subject of the grant or the land retained by the grantor should be used in some definite and particular manner. It is not enough that the subject of the grant or the land retained should be intended to be used in a manner which may or may not involve this definite and particular use.

In the *Pwllbach Colliery* case, Lord Parker was dealing with the question of whether the colliery company, a sublessee, should have the implied right by way of easement or quasi-easement to discharge coal dust from screening operations upon the premises of the plaintiff, who, in turn, was a lessee of adjoining lands. There had been a common owner of the two properties when the respective leases were executed. The screening operations were commenced after the plaintiff got his lease. Lord Parker, in attempting to get at the common intention of the parties, emphasized, at p. 648 of the report, that, in order to determine what implied rights the colliery company had, if any, it was necessary, to look at the circumstances and conduct of the parties at the time its lease came into being:

> My Lords, if, as I think, the principle is as above stated, the real question is whether the use of the screens which occasioned the coal dust was in the contemplation of the parties when the lease was granted. There is no evidence of any circumstance pointing to such an intention. The lessee company was a tin-plate company and even if it had power to carry on the business of coal mining there is no evidence that it ever did so or ever intended to do so. The business of coal mining now carried on on the demised premises appears to have been started by the defendants, and it is only recently that the defendants have commenced to use the screens which occasioned the dust. There appears, therefore, to be no room for any implication based on common intention.

[39] Lest there be any doubt about the strong line of authorities which has developed in this century, in which the implication doctrine has been employed and approved of by Courts of high authority, I would refer to the following cases: (1) *Cory v. Davies*, [1923] 2 Ch. 95, per Lawrence J.; (2) *Simpson v. Weber*, [1925] All E.R. Rep. 248, 133 L.T. 46, per Salter J.; (3) *Aldridge v. Wright*, [1929] 2 K.B. 117 (C.A.), per Scrutton L.J. at pp. 125-127 and Sankey L.J. at pp. 132-134; (4) *Re Webb's Lease; Sandom v. Webb*, [1951] Ch. 808, [1951] 2 All E.R. 131 (C.A.), per Sir Raymond Evershed M.R. at pp. 135-139 and Jenkins L.J. at pp. 141-145 and Morris L.J. at pp. 146-7; (5) *Wong v. Beaumont Property Trust Ltd.*, [1965] 1 Q.B. 173, [1964] 2 All E.R. 119 (C.A.), per Lord Denning M.R. In some of these cases the party asserting the easement by implication succeeded; in some he did not. But in each of these cases the Court had no doubt that, given the appropriate showing of justifying evidentiary circumstances, an easement could be implied by reservation in favour of a grantor, as it could be implied by grant in favour of the grantee.

[40] As I read these modern authorities, then, and construe them against the linch-pin decision in *Wheeldon v. Burrows*, *supra*, the current, recognized principles appear to be these:

[41] (1) Upon a grantor's severance of his lands, the broad controlling maxim is that he may not derogate from his grant;

[42] (2) As to implications from the viewpoint of the grantee, there will pass to the grantee by implied grant all those easements which are necessary to the reasonable enjoyment of the lands conveyed;

[43] (3) A corollary to principle (1) above is that, generally, if a grantor intends to reserve any rights over the conveyed property, he must do so in express terms in the granting instrument;

[44] (4) The principle (1) maxim and principle (3) corollary are subject to at least the two specific classes of exceptions referred to in *Wheeldon v. Burrows*: (1) ways of necessity; and (2) mutual or reciprocal rights of way. (Greer L.J. in *Aldridge v. Wright*, *supra*, developed

an "exhaustive" list of 5 exceptions, or categories of exception, in a *dictum* but, it is suggested, his efforts were far from conclusive or satisfactory);

[45] (5) From the "unclosed" list of exceptions hinted at by Thesiger L.J. there has evolved the "common intention" principle, which more or less overrides the acknowledged exceptions in the individual decided cases: The "common intention" principle will operate where the circumstances at the time of the grant are such as to raise a necessary inference that the common intention of the parties must have been to reserve some easement to the grantor or such as to preclude the grantee from denying the right consistently with good faith;

[46] (6) Subordinate to but highly important to the appropriate application of the above principles are the following evidentiary burden rules:

> (A) The onus is upon the grantor to prove, and prove clearly, that his case is an exception to the main rule in *Wheeldon v. Burrows*;
>
> (B) The satisfaction of the onus requires the grantor, on the circumstantial evidence, to be able to define precisely the terms and character of the easement asserted: Put alternatively, this means that, if the reservation is to be justified in order to give effect to what the parties must be presumed to have intended, the terms and nature of the reservation should be capable of certain statement.

[47] In my view, an implied reservation of an easement can be easily justified here using one of the acknowledged major exceptions first fully articulated by Thesiger L.J.—the mutual or reciprocal easement exception—as well as by reference to the broader, umbrella-like "common intention" principle. Let me explain.

[48] On the evidence, a broad strip running westward from street line and between the houses at 219 and 221 Egerton to a point about 20 feet west of the rear sides of both houses, had been openly and continuously used by the respective occupants of the houses up to the time of the 1952 grant for the passage and re-passage of vehicles to and from the garages at the rear of the properties. Originally, there were three paved strips down this area (on the evidence of the plaintiff) which probably were used as tire tracks but, by the middle of the second world war, the entire, and roughly 12-foot wide area, was paved; it is not exactly clear who paved the entire area but, of course, at this time both properties were owned by the father, Fred Barton. It is, however, crystal clear on the evidence from about 1925 onwards, and running throughout the period of common ownership between 1941 and 1952, that the 12-foot wide area was used as a mutual or reciprocal right of way for cars belonging to the occupants of the two contiguous houses. And this was the commonly and consistently used passageway even though there might have been occasional, permissive access to the rear yard of 219 Egerton via the business premises at 596 Hamilton Rd. owned by the Barton family corporation, Canadian Mines Equipment Company Ltd.: see Ex. 13. The scope of mutual or reciprocal easements has never been narrowly defined in the cases—perhaps, because wise judges have felt that this class of easement should be kept flexibly open to allow for the orderly growth of law in meeting new and unanticipated situations—and I hold, therefore, that this passageway was precisely such a mutual or reciprocal easement, inchoate during the common ownership but brought into fruition upon the delivery of the 1952 severance deed.

[49] The other approach to the issue can be in virtue of the "common intention" principle. The most useful and compelling test for the applicability of the "common

intention" principle is that developed by MacKinnon L.J. in *Shirlaw v. Southern Foundries (1926) Ltd.*, [1939] 2 K.B. 206 at 227, [1939] 2 All E.R. 113 (C.A.) [affirmed (*sub nom*, *Southern Foundries (1926) Ltd. v. Shirlaw*) [1940] A.C. 701, [1940] 2 All E.R. 445 (H.L.)]:

> *Prima facie* that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in the agreement, they would testily suppress him with a common "Oh, of course!"

This test—a sort of litmus paper of the law—cannot, of course, be stretched too far. The cases hold that the implication must be both obvious and necessary to give the transaction such efficacy as the parties must have intended: see *Luxor (Eastbourne) Ltd. v. Cooper*, [1941] A.C. 108 at 137, [1941] 1 All E.R. 33 (H.L.); and both parties must know of the matter to be implied at the time of the grant or the facts on which the implication is to be based: see *McCutcheon v. David MacBrayne Ltd.*, [1964] 1 W.L.R. 125 at 128, 134, [1964] 1 All E.R. 430, [1964] 1 Lloyd's Rep. 16 (H.L.).

[50] As it seems to me, all of the elements of the "officious bystander" criterion have been amply satisfied on the circumstances prevailing at the time of the conveyance in 1952. The parties to the deed—father, son and daughter-in-law—all clearly knew of the long, continuous use of the passageway at the time of the execution of the deed; they, in fact, had for several years exercised mutual or reciprocal rights of passage on it without let or hindrance between them. There can be no reasonable inference drawn from the facts as to some other explicable basis upon which these rights could be grounded such as "tacit permission or licence" as was open as an alternative to the sought-for implication in the case of *Re Webb's Lease*, *supra*, and which in that case resulted in the Court's refusal to find in favour of an implied reservation of an easement; nor is there, here, any possible ambiguity about the scope of the easement or the circumstances from which the necessary inference should be drawn. If a hypothetical officious stranger had intervened during the course of the negotiations between father and son, in 1952, and said: "What about the rights over this paved driveway or passageway area?" I submit that the parties would have said with common voice and somewhat testily: "Well, of course, they are there to stay!"

[51] One additional clarifying point should, perhaps, be made here. In dealing with the question of prescriptive rights I held that the interruption of user between the time of Fred Barton's stroke in 1967 and October 1970, when Greg Barton moved into 219 Egerton, effectively stopped the accrual of prescriptive user rights. This is because the somewhat rigid formula for the acquisition of a prescriptive easement demands that there be no substantial interruption in user. The general controlling maxim for prescriptive easements is still *"nec vi, nec clam, nec precario"* (without force, without stealth, without leave) but a subrule under the maxim is that the asserted user or possession must be "long, continual and peaceable": see Gale pp. 171-172. Even though the breach in continuity of user between 1967 and 1970 was fortuitous, I am satisfied it was of such a character as to foreclose upon the acquisition of a prescriptive easement.

[52] However, the easement I have isolated in this case vested in 1952, contemporaneously with the severance deed, and that easement could not be lost by that same interruption in user. All of the text-writers and case authorities make it abundantly clear that an easement once acquired, whether by prescription, deed or deed implication, may only be lost by non-user on evidence clearly establishing "an intention to abandon the right."

The point was made this way by Lord Chelmsford L.C. in the case of *Crossley & Sons Ltd. v. Lightowler* (1867), L.R. 2 Ch. 478 at 482:

> The authorities upon the subject of abandonment have decided that a mere suspension of the exercise of a right is not sufficient to prove an intention to abandon it. But a long continued suspension may render it necessary for the person claiming the right to shew that some indication was given during the period that he ceased to use the right of his intention to preserve it. The question of abandonment of a right is one of intention, to be decided on the facts of each particular case. Previous decisions are only so far useful as they furnish principles applicable to all cases of the kind. The case of *Reg. v. Chorley* [(1848), 12 Q.B. 515, 116 E.R. 960], shews that time is not a necessary element in a question of abandonment as it is in the case of the acquisition of a right.

Here, the circumstances of non-user arose from the illness and death of Fred Barton and, in my view, are completely inconsistent with any intention to abandon the right of way.

[53] In the result, the tests for an implied easement or easement by reservation, are satisfied and the plaintiff is entitled to judgment. The plaintiff will have a declaratory order that he is entitled to an easement or right of way for the passage and re-passage of motor vehicles over the paved area between the houses running from the street line of Egerton Street and westward to a point 20 feet west of the rear end of the houses. If any further dispute arises between the parties, or counsel, about the dimensions of the right of way validated I propose to retain jurisdiction to deal with such matter. I would hope that reason will prevail and good neighbourliness resume. I also issue a mandatory order requiring the defendants to remove, within 30 days, the fence and gate constructed by them in 1972 and to make the removal area whole.

Barton v Raine; Barton, Third Party
(1980), 29 OR (2d) 685, 15 RPR 287 (CA)

THORSON JA: …

[12] I agree that the outcome of this action turns on the question of what scope is to be given to the "other exceptions" referred to by Thesiger, L.J., since it is clear on the facts of this case that the plaintiff cannot claim an easement of necessity. It cannot, for example, be shown in this case that upon the grant of the servient tenement, the retained property of the grantor became "landlocked" or otherwise "inaccessible" except by means of the contended-for easement. At the most his inability to gain access to his garage resulted in an inconvenience to the grantor, albeit a serious inconvenience in this age of dependence on the automobile as a means of transportation, but this consideration does not satisfy the requirements that must be met in order to establish an easement of necessity. The question, then, is whether the 1952 conveyance falls within any of the other exceptions to the general rule that a grantor who wishes to reserve a right over the servient tenement upon a severance on his land must do so expressly in the grant.

[13] The second exception to the general rule which was recognized in *Wheeldon v. Burrows* [(1879), 12 Ch D 31] is that of "reciprocal and mutual easement." Expressly excluded were "continuous and apparent easements … necessary to the reasonable

enjoyment of the property conveyed," since these related to implied grants and thus the rights of the grantees, rather than to implied reservations and the rights of grantors.

[14] It is to be noted that Thesiger, L.J. expressly did not attempt to outline all possible exceptions to the general rule, and since 1879 there have been a number of cases which have sought to interpret *Wheeldon v. Burrows* and which are argued to have broadened its scope. *Gale on Easements*, 14 ed. (1972), suggests at p. 108 that, apart from the two exceptions already noted, there may be an implied reservation where

> … a grantee can be shown positively or, for instance, *by necessary inference from the effect on the property granted or some physical characteristic of the property retained*, to have recognised and acquiesced in an intention on the part of the grantor to use his retained property, or part of it, in some definite manner detracting from the natural rights incident to the ownership of the property granted.

(Emphasis added.) Gale goes on to say, however:

> Clearly it is not enough that the grantee knows the grantor retains adjoining land and would probably wish to use it in the same way as before.

[15] Cheshire's *Modern Law of Real Property*, 12th ed. (1976), appears now to adopt, at p. 534, a similar "third exception" to the general rule set out in *Wheeldon v. Burrows*, although with something short of total conviction:

> There are, perhaps, other cases in which easements will be implied in favour of a grantor without express reservation, but they defy exhaustive enumeration and all that can be said is that the scales are heavily weighed against him. The necessary inference from the circumstances must be that he was intended to retain the precise easement theft he claims.

[16] In support of these comments both Gale and Cheshire cite the decision in *Re Webb; Sandom v. Webb*, [1951] 2 All E.R. 131, and Gale also cites *Lyttelton Times Co., Ltd. v. Warners, Ltd.*, [1907] A.C. 476; *Jones v. Pritchard*, [1908] 1 Ch. 630, and *Pwllbach Colliery Co., Ltd. v. Woodman*, [1915] A.C. 634. All of these cases are discussed and analyzed in some detail by the learned trial Judge in his reasons for judgment in this case, so I shall content myself with only brief references to statements that appear in each of them.

[17] The decision in the *Lyttelton Times* case involved the interpretation of a lease of bedrooms from the appellants who operated printing machinery on the ground floor. The noise from the machinery was greater than had been anticipated but the lease contained no reference to the machinery or the printing operation. In holding that there was a duty binding on both parties not to act in frustration of the purpose for which the agreement was made, Lord Loreburn, L.C. stated at p. 481:

> When it is a question of what shall be implied from the contract, it is proper to ascertain what in fact was the purpose, or what were the purposes, to which both intended the land to be put, and, having found that, both should be held to all that was implied in this common intention.

[18] In the following case, *Jones v. Pritchard*, which involved a party wall between two adjoining houses, there is a similar statement by Parker, J., at p. 636:

> … the law will, I think, imply the grant and reservation in favour of the grantor and grantee respectively of such easements as may be necessary to carry out what was the common intention of the parties with regard to the user of the wall, the nature of those easements varying with the particular circumstances of each case.

[19] In the *Pwllbach Colliery* case the Court held that the grant of a lease to a colliery company did not include the right to cause a nuisance to adjoining tenants in the form of coal dust. Lord Parker of Waddington stated at pp. 646-7:

> The law will readily imply the grant or reservation of such easements as may be necessary to give effect to the common intention of the parties to a grant of real property, with reference to the manner or purposes in and for which the land granted or some land retained by the grantor is to be used … But it is essential for this purpose that the parties should intend that the subject of the grant or the land retained by the grantor should be used in some definite and particular manner. It is not enough that the subject of the grant or the land retained should be intended to be used in a manner which may or may not involve this definite and particular use.

[20] In the still later case of *Re Webb*, each of the foregoing cases was considered by the Court, which then held that in the case before it there was no implied reservation in favour of the landlord to carry on an activity not dealt with in the lease. Commenting on the two established exceptions to the general rule set out in *Wheeldon v. Burrows*, Jenkins, L.J., stated at p. 141:

> It is, however, recognised in the authorities that these two specific exceptions do not exhaust the list, which is, indeed, incapable of exhaustive statement as the circumstances of any particular case may be such as to raise a necessary inference that the common intention of the parties must have been to reserve some easement to the grantor or such as to preclude the grantee from denying the right consistently with good faith, *and there appears to be no doubt that where circumstances such as these are clearly established the court will imply the appropriate reservation*.

(Emphasis added.) Jenkins, L.J., then referred to *Simpson v. Weber* (1925), 133 L.T. 46, which had held that because there was no evidence negating a common intention, the easement contended for in that case was reserved by implication. He expressed doubt about the correctness of this decision but indicated at p. 143 that it could be supported on the basis that:

> … the physical circumstances at the date of the severance may, perhaps, have sufficed to support an implication of an intention common to grantor and grantee that the easements in question should be reserved. …

However, he disagreed with the idea that a common intention should be inferred unless disputed. Rather, he stated, there must be a "necessary inference" of a common intention, and he expressed the view that the landlord had to establish "at least that the facts are not reasonably consistent with any other explanation": p. 145.

[21] In my opinion, the learned trial Judge was correct in the conclusion which he drew from the authorities referred to above, namely that the development of the case-law since *Wheeldon v. Burrows* has softened the rigour of the general rule set out in that case

or has enlarged the scope of the exceptions to the rule. On the facts of the case at bar, I am satisfied that, although the 1952 conveyance made no mention of a right of way over the driveway between the two properties, there was, by necessary inference from the circumstances in which the conveyance was made, a common intention on the part of both the father on the one hand and the son and daughter-in-law on the other hand that, after the conveyance, each of them would continue to use the driveway in the same manner as, in fact, it had been used without interruption since the late 1920's.

[22] In 1952 when the property next door was conveyed to them, the son and daughter-in-law of the grantor had been occupying the property for over a decade. The use of the driveway as a common passageway to and from the two garages was an accepted reality of their lives throughout the whole of their occupancy of the property, just as it had been an accepted reality for the owners of the two properties for many years before their occupancy of the property began. Were it not for the fact that the plaintiff's father became the owner of both properties in 1941, it is almost certain that the plaintiff's father would have acquired a right of way by prescription over the driveway well before the 1952 conveyance, since its use by him had been uninterrupted and had gone unchallenged throughout most of his lifetime as the owner of the originally-acquired property.

[23] Throughout the whole of this period the driveway was a tangible physical fact, there to be seen by all who chose to see it, and the manner of its use would have been obvious to even the most casual observer of the physical features of the two properties. There could be no doubt that it was there to provide access to and from both garages near the rear of the two properties.

[24] In my view, furthermore, it is not credible that when the son and daughter-in-law purchased the property which they had been occupying for over a decade with the father's permission, there could have been any misunderstanding by them about the basis on which the driveway was to be used thereafter by each of the parties to the conveyance, including of course, the father, with whom they had so long been sharing its use. That there was in fact no such misunderstanding seems evident. For example, it must be assumed that at the time they purchased the property next door, the son and daughter-in-law knew or were made aware of the location of the property line dividing the two properties; yet, it is apparent from the known facts that at no time did they see it to be or treat it as being a consequence of their purchase of the property next door, any more than did the father, that thereafter the father would be obliged to have their permission to use the driveway in order to get to and from his own garage. In my opinion, the only reasonable inference to be drawn from all of the facts and circumstances surrounding the 1952 conveyance is that each of the parties had a common intention that the father would continue to have the right to use the driveway after the 1952 conveyance as he had before.

[25] Quite possibly if, in 1952, the property next door had been purchased by some hypothetical third party who was a stranger to the father, the inference as to the intention of the parties would have been considerably less compelling, inasmuch as the property was then being severed from other property owned by the father, but in this case it is not necessary to indulge in speculation of this kind. Here the purchase was by the son and his wife from the father who, on all the evidence, borne out by the subsequent history of events, intended to and in fact continued to remain as owner and occupier of the retained property and to use it as he had used it before.

[26] It follows that I agree with Killeen, Co. Ct. J., that an easement in the nature of a right of way over the driveway in question, in favour of the grantor of the property next door was acquired by implied reservation from the 1952 grant. I also agree that the interruption in its use which occurred following the father's stroke did not impair that easement, which, once acquired, could only be lost by non-user on evidence clearly establishing an intention to abandon it. As pointed out by the trial Judge, the circumstances of the non-user in this case were not consistent in any way with an intention to abandon the right.

[27] In the result the defendants who purchased the property next door from the son and daughter-in-law in 1971 are, in my opinion, bound by the easement. It is well established (see, for example, *Israel v. Leith* (1890), 20 O.R. 361 at 366 (C.A.)) that the Registry Act [RSO 1970, c 409] does not interfere with legal rights, such as an implied grant of an easement, arising other than by a written instrument, and does not alter the priority of the grantee of the easement over a subsequent purchaser. In my view, there is no rational basis for distinguishing in this regard between an easement arising by implied grant and one arising by implied reservation. See, in support of this position, *Gale on Easements*, *supra*, at p. 113 and 9 C.E.D. (Ont. 3rd), title 51, p. 51-38, Section 74, and the authorities referred to therein.

[28] Counsel for the appellants, the defendants in this case, argued forcefully that this Court in the case at bar should feel bound to reach a decision consistent with what he termed the "definitive decision" circumscribing the exceptions to the general rule set out in *Wheeldon v. Burrows*, namely, *Re Webb; Sandom v. Webb*, *supra*, in which the Court is said to have declined to find in favour of an easement based on common intent in the absence of "affirmative evidence admitting of no alternative possibilities." He also argued that for this Court to adopt the reasoning of Killeen, Co. Ct. J., in this case would be to throw the practice of conveyancing in this Province into wild confusion.

[29] With great respect to counsel for the appellants and in spite of the very able presentation made to this Court by him, I am unable to agree with either proposition. With regard to the absence in this case of the kind of affirmative evidence argued on the basis of *Re Webb* to be needed, it seems to me that in the very nature of cases such as this, where the conveyance itself is silent on the question of the right sought to be established, the passage of time that not infrequently occurs between the making of the conveyance and the event giving rise to the dispute about the right necessarily militates against the likelihood of any such "affirmative evidence" being available, at least in the form of oral testimony by persons who might be expected to have some personal knowledge or recollection of the intention of the original parties. In my view, the existence of this kind of evidence ought not to be an absolute requirement when it is open to the Court, on a reconstruction of the surrounding facts and circumstances involving a particular grant, to conclude that a reservation from the grant has been established by necessary inference from those facts and circumstances.

[30] Nor am I persuaded that to adopt the reasoning of the learned trial judge in this case would lead to "wild confusion" among the ranks of conveyancers. It is trite to repeat that every case is to be decided on its own facts, yet the facts of this case surely bear little resemblance to the facts that can be expected to be encountered in most cases involving adjoining property owners who share facilities such as driveways with their neighbours.

> [31] Furthermore, on the facts of this case, this is not a case in which the defendants came to the position in which they now find themselves, without any notice of a user of their property contrary to what they now assert to be their right, title and interest in it. At the time they purchased the property, the driveway was no less a physical fact than it had been in 1952, and the manner of its use could have been no less apparent to them than to any other person who chose to observe the physical features of the two properties. If it were necessary to do so, I would conclude that the defendants in this case in fact had actual notice of the very user they later chose to dispute when they erected the fence which blocked through access to the plaintiff's garage. In this case the defendants, before they concluded the purchase of their property, had clear cause to suspect an adverse possessory interest, and could readily have called for a declaration of possession by the vendor. Yet there is no evidence that they did so; on the contrary, the evidence is that they accepted the situation as they came to it and continued to do so until the time of the incident, involving the parking of the defendant's car in the driveway, which seems to have triggered the dispute now before this Court.

Implied easements arise only where the use being made arises out of the common ownership. That is, the common owner uses the right over the servient lands not because he has a legal right to do so, but because he owns both the dominant and the servient lands and the use is a normal incidence of common ownership. The use of the servient lands must be continuous and apparent—that is, over a defined path or other manifest indication of use.

Where the lands while in common ownership were vacant lands and two industrial condominiums were constructed and the vacant lands were used for access, parking, and storage only after the lands were severed, no implied easement of apparent accommodation arises because the use did not arise during common ownership.

An easement of necessity is a form of implied consent. The courts imply that the grantor must have intended that the other party have access and therefore an easement of necessity is implied. An easement of necessity will not be implied if it is clear in the grant that the conveyed or retained parcel was intended to be landlocked.

The easement of necessity arises where, immediately prior to the grant, the dominant and the servient lands were commonly owned. The grantor then grants the dominant lands that are landlocked or the grantor retains the dominant lands that are landlocked. An easement of necessity is not strictly logical because it operates as a derogation from the grant, since the grant does not reference the easement. Accordingly, the courts restrict the derogation to only so much as is required to allow the dominant lands to be used for the purposes existing at the time of the grant but not for any future or expanded use. An easement of necessity arises by operation of law and therefore is independent of an easement implied into the deed in order to comply with the common intention of the parties.

Toronto-Dominion Bank v Wise
2016 ONCA 629

HUSCROFT JA:

[1] Ben and Sheila Wise (the "Wises") owned lakefront property. They wanted to sever the land into two lots and gift one of the lots to their daughter and son-in-law, Jordanna and Earl Lipson (the "Lipsons"). The severance was eventually completed following the death of Ben Wise in 2002. The lot gifted to the Lipsons connected with a local road, but the lot the Wises retained for themselves did not have road access. The Wises did not reserve an easement over the Lipsons' lot when the gift was completed.

[2] The respondent bank, which holds a mortgage over the parcel of the land retained by the Wises (and now owned by Sheila Wise), brought an application for an order declaring that an easement exists for the benefit of the Wise property. Although there is access to the Wise property from the lake, the application judge found that water access was "impractical" and, as a result, recognized the bank's claim for an easement of necessity over the Lipson property. He directed a trial to determine the location of the easement in the event the parties were unable to agree. …

[5] The properties in question are lakefront properties on Lake Manitouwabing. The Wises owned a large parcel of land (the "combined parcel"). The combined parcel was adjacent to the Inn and Tennis Resort lands, which were owned by Ben Wise's company, MB Investments Limited, until 2011.

[6] The combined parcel was severed in 2003. This resulted in two lots, Part 1 and Part 2. Sheila Wise retained Part 2, where she has a cottage. Part 1 was gifted to the Lipsons.

[7] The gift was the culmination of a long process begun by Ben Wise some years earlier. Permission to sever the combined parcel was denied by planning officials because Part 2 would have become a water-access only lot. Although there were water-access only lots on the lake, no additional such lots were being approved.

[8] The combined parcel had access to a road, but the road connected to the proposed Part 1 rather than Part 2. However, Part 2 was accessible through the Inn and Tennis Resort lands. Ben Wise considered adding Part 2 to the Inn and Tennis Resort lands in order to take advantage of the road access they had. He chose not to pursue that plan because of adverse tax consequences. Instead, he decided to enter a restriction under s. 118 of the *Land Titles Act*, R.S.O. 1990, c. L.5, on Part 2, which would have prevented it from being sold separately from the Inn and Tennis Resort lands.

[9] That restriction was never registered. Following the death of Ben Wise, Part 1 was conveyed to the Lipsons and no easement was reserved in favour of Part 2. Part 2 had no legal entitlement to road access across the Inn and Tennis Resort lands and so became a water-access only lot, despite the absence of prior approval. However, Sheila Wise continued to obtain access to her home through the Inn and Tennis Resort lands. These lands were purchased by 2276552 Ontario Inc. ("227") in 2011 through power of sale. …

[13] The application judge considered that mere inconvenience was insufficient to allow the grant of an easement of necessity, but found that the common law requirement of absolute or strict necessity had developed into a rule of "practical necessity," citing *Hirtle v. Ernst* (1991), 110 N.S.R. (2d) 216, [1991] N.S.J. No. 531 (N.S. T.D.).

[14] The application judge concluded that water access to Part 2 did not preclude an easement of necessity. The test, he said, citing *Dobson v. Tulloch* (1994), 17 O.R. (3d) 533, [1994] O.J. No. 531 (Ont. Gen. Div.), aff'd (1997), 33 O.R. (3d) 800 (Ont. C.A.), is "whether water access is sufficient to make unnecessary an easement of necessity that is otherwise necessary for the reasonable enjoyment of the property" (para. 55).

[15] The application judge found no evidence that Part 2 had ever been accessed by water and accepted the uncontradicted evidence of the respondent's surveyor, Paul Forth, that water access to Part 2 was "impractical." He found, specifically, that water access "does not offer a viable, or practical, means of access to and egress from Part 2" (para. 62). He concluded that an easement of necessity over Part 1 arose in April 2003, when Part 2 became landlocked and the owners had no legal entitlement to cross any adjoining lands to get to their property. …

[19] I begin with a brief review of the principles governing easements of necessity, before applying the relevant principles to the facts of this case.

The Principles Governing Easements of Necessity

[20] The basic requirements of an easement of necessity were described by this court in *McClatchie v. Rideau Lakes (Township)*, 2015 ONCA 233, [2015] O.J. No. 1737 (Ont. C.A.). As Rouleau J.A. explained, easements of necessity are "presumed to have been granted when the land that is sold is inaccessible except by passing over adjoining land retained by the grantor. The concept arises from the premise that the easement is an implied grant allowing the purchaser to access the purchased lot" (para. 48).

[21] It is well established that the necessity of an easement of necessity is determined at the time of the grant (para. 49). Moreover, an easement of necessity "must be necessary to use or access the property; if access without it is merely inconvenient, the easement will not be implied" (para. 53).

[22] As the application judge noted, *McClatchie* addresses the implication of easements of necessity only from the perspective of a grantee of land—the person who obtains the land in favour of which an easement is required. It is well established, however, that an easement of necessity is also available to a grantor of land—the original owner who retains part of the land: see *Gale on Easements*, 19th ed. (London: Sweet & Maxwell, 2012), at p. 178; *Depew v. Wilkes* (2002), 60 O.R. (3d) 499 (Ont. C.A.), at para. 21.

[23] Although English authority holds that the test for an easement of necessity is more difficult to meet when the easement is sought by the grantor rather than the grantee (see *Gale on Easements*, p. 179), it is not necessary to consider the matter for the purposes of this case. This case involves a grantor and there is no doubt that the test involving grantors is strict necessity.

[24] The strong test of strict necessity ensures that grantors are not permitted to derogate from the terms of their grant of land. If they want to reserve an easement, they should do so explicitly at the time they make the grant. An easement of necessity will be found only if it was necessary in order for the grantor to be able to use his or her property at the time of the grant. Water access to property defeats a claim of necessity, regardless of convenience.

[25] This court's decision in *Barbour v. Bailey*, 2016 ONCA 98, [2016] O.J. No. 3261 (Ont. C.A.), illustrates these points, albeit in the context of a claim by a grantee rather

than a grantor. The court held that an easement of necessity was not available because the property for which the easement was sought—an island sometimes joined to the beach isthmus during periods of low water levels—was not inaccessible and hence unusable. Access to the island was certainly not convenient: previous owners of the island had used a rowboat, either by rowing it to the island or pulling as they waded across the water, or they had walked along the shoreline. Nevertheless, water access was possible, and that was enough to defeat an easement of necessity. The applicant's preference for a quicker and more convenient means of access by way of an easement was irrelevant.

[26] See also *Fitchett v. Mellow* (1897), 29 O.R. 6 (Ont. C.P.); *Hardy v. Herr* (1964), 1 O.R. 102 (Ont. H.C.), aff'd [1965] 2 O.R. 801 (Ont. C.A.); and *Manjang v. Drammeh* (1990), 61 P & CR 194 (England P.C.), at p. 4. Although the trial judge in *Dobson* considered that water access could defeat an easement of necessity, the case was decided on its own facts—in particular, a finding that the river in question was not navigable at the time of the grant.

Applying the Governing Principles

[27] At the time of the grant, in 2003, there was no legal entitlement to access to Part 2 across the Inn and Tennis Resort lands, and the Wises did not reserve an easement through Part 1, which was gifted to the Lipsons.

[28] Sheila Wise's evidence suggests that she expected to continue to enjoy access to Part 2 across the Inn and Tennis Resort lands. Evidence from Ms. Wise and Earl Lipson also suggests that it was Ben Wise's intention to make Part 2 a water-access only property. The matter is not free from doubt, however, and the application judge made no decision concerning the parties' intentions.

[29] Be that as it may, there is no dispute that there was water access to Part 2 at the time of the grant, and this is sufficient to defeat the respondent's application for an easement of necessity. The fact that Part 2 had never been accessed by water is irrelevant. So too is the fact that water access was, and probably remains, inconvenient or impractical. Water access was available, so Part 2 was not rendered unusable when the grant to the Lipsons was made.

[30] The application judge erred in holding that water access had to be sufficient for reasonable enjoyment of the property in order to render an easement of necessity unnecessary. Although *Barbour* was not available for the application judge to consider, it is now the authority on this question in Ontario. It was enough that water access to Part 2 existed.

[31] There was no evidence that water access was not possible at the time of the grant. At its highest, the evidence established that water access "does not offer a viable, or practical, means of access to and egress from Part 2," as the application judge put it, and this is not sufficient to establish an easement of necessity.

[32] The application judge's error flows from his conclusion that the necessity test had moved from strict necessity to "practical necessity." This is not correct. The necessity test has not been reduced to a requirement of "practical necessity," as the Nova Scotia Supreme Court held in *Hirtle*. The recent decisions of this court in *McClatchie* and *Barbour* reaffirm that the test for easements of necessity in Ontario is "strict necessity."

[33] In my view, *Hirtle* is not sound authority for the proposition that easements of necessity are creatures of public policy. Although there is no doubt that easements of necessity

have the salutary effect of allowing land to be used, rather than rendered useless, easements of necessity flow from the intentions of the parties to a grant, not from public policy. Put another way, public policy does not provide an independent basis for a court to recognize an easement of necessity regardless of the parties' intentions in particular circumstances.

[34] This is reflected in *McClatchie*, which describes easements of necessity as arising as a matter of presumption and as an implied aspect of the grant. As the English Court of Appeal explained in *Nickerson v. Barraclough*, [1981] Ch. 426 (Eng. C.A.), at p. 447:

> [T]he law relating to ways of necessity rests not upon a basis of public policy but upon the implication to be drawn from the fact that unless some way is implied, a parcel of land will be inaccessible. From that fact the implication arises that the parties must have intended that some way giving access to the land should have been granted. … Public policy may inhibit the parties from carrying their intention into effect, but I cannot see how public policy can have a bearing upon what their intention was. In my judgment, that must be ascertained in accordance with the ordinary principles of construction, the language used and relevant admissible evidence of surrounding circumstances.

See also *Adealon International Corp. Proprietary Ltd. v. Merton LBC*, [2007] EWCA Civ 362, [2007] 1 W.L.R. 1898 (Eng. C.A.), at para. 11; *North Sydney Printing Pty Ltd. v. Sabemo Investment Corporation Pty Ltd.*, [1971] 2 N.S.W.L.R. 150; and *Russell v. Pennings*, [2001] WASCA 115 (Australia S.C.).

[35] In summary, the application judge erred by failing to apply the test of strict necessity. Even assuming that the evidence of the surveyor was admissible, it did not satisfy that test. The availability of water access means that the test of necessity at the time of the grant is not met. Finally, the application judge also erred in law in holding that easements of necessity are creatures of public policy. Accordingly, an easement of necessity cannot be implied for the benefit of Part 2.

An easement of necessity will not be available for access between two non-contiguous properties since an easement of necessity is only available for access to a public highway.

It is possible that, on a proper construction of an express grant, the grant should be interpreted as implying an easement. In most cases, this will occur under the doctrines of an easement of accommodation, easement of necessity, or an easement implied in the grant so that the grantor does not derogate from his grant. However, it is possible that in the right circumstances an implied easement will be found either on the construction of the express grant or by reason of surrounding circumstances.

In determining whether the parties intended to grant an easement, the court will look at all the circumstances, including the wording of the grant, the nature of the property, and the relationship of the parties. Affirmative evidence of intention is not necessary if on an objective basis the court can infer the parties' intentions.

This principle of an implied easement based on the common intention of the parties requires: (1) the court to ascertain the common intention of the parties; (2) the easement to be based on the manner and purpose for which the land granted was intended by the parties to be used; and (3) the purpose not to be a general use but a specific and definite use.

D. Easements by Estoppel

Easement by estoppel is also known as equitable easement because estoppel is an equitable concept. To establish an equitable easement, there must be a detriment to the dominant owner, made in the expectation of receiving an easement and encouraged by the servient owner. The expenditure of funds is sufficient to establish the detriment or reliance.

In the case of encouragement, the courts take an expansive approach. The tests are: (1) active encouragement by way of a specific request or assurance; (2) passive encouragement; and (3) silence in circumstances when it would be unfair to be silent.

Schwark v Cutting
2010 ONCA 61, 88 RPR (4th) 1

MacFARLAND JA: …

[15] The trial judge then considered the alternate claim based on proprietary estoppel. In his consideration of the law, he relied heavily on a decision of the British Columbia Court of Appeal in *Zelmer v. Victor Projects Ltd.*, [1997] B.C.J. No. 1044 (B.C.C.A.). However, the trial judge failed to apply the law to the facts as he found them and failed to consider whether the requirements for promissory estoppel were met on the evidence before him.

[16] The law with respect to proprietary estoppel is well-settled. This court has accepted that Snell's Equity properly discloses the elements necessary to establish proprietary estoppel as:

1. encouragement of the plaintiffs by the defendant owner,
2. detrimental reliance by the plaintiffs to the knowledge of the defendant owner, and
3. the defendant owner now seeks to take unconscionable advantage of the plaintiff by reneging on an earlier promise.

[17] The seminal case on proprietary estoppel is the decision of the English Court of Appeal in *Crabb v. Arun District Council*, [[1976] 1 Ch 183]. The plaintiff, Crabb, and the defendant, District Council (DC) were adjoining landowners. The two properties had previously been owned by the same party. Under the conveyance by which he acquired title to his two-acre parcel, Crabb was also granted a right of access at a point described as "A" to a proposed new road and a right along it to the public road. When DC acquired the adjoining three and one-half acre parcel, the grantors expressly reserved the right (which they had already granted to Mr. Crabb) for the owner of the two-acre parcel to have access at point A to the proposed new road and a right of way along it to the public road. DC agreed to erect a fence along the boundary line between the two properties save for the access gap at point A.

[18] Sometime later Mr. Crabb decided to divide his property in two portions and sell them separately for separate use. The access point he already enjoyed at A would serve the front half of his property. He required a second point of access at point B to serve the back half of his property, together with a right of way along the proposed new road to the public road.

[19] On July 26, 1967 Mr. Crabb and his architect met with a representative of DC. At that meeting it was agreed that Mr. Crabb should have an additional access at point B so as to give access from the back portion of his land over the new proposed road. During the winter of 1967 DC erected the fence along the agreed boundary leaving gaps at points A and B. In February/March 1968, DC had gates constructed at points A and B, the posts for the gates were set in concrete and were clearly intended to be permanent.

[20] Later in 1968 Mr. Crabb sold the front portion of his land to a purchaser and assigned to him the right of access at point A. In so doing, Mr. Crabb did not reserve any right for himself (as owner of the back portion) to go over the front portion so as to get out at Point A. He thought he already had a right to exit at point B (where gates had already been erected) and so had no need to reserve for himself any right to get to point A.

[21] In January 1969, Mr. Crabb put a padlock on the inside of the gate at point B. This action on his part evidently incensed the DC who went upon Mr. Crabb's land, took down the gates at point B, pulled the posts out of the concrete and filled the gap with fence to match the rest of the fence along the boundary and effectively shut the access at point B, leaving Crabb's remaining property landlocked.

[22] The DC then agreed that Crabb could have access at point B but only at an exorbitant cost. Crabb brought an action claiming a right of access at point B together with a right of way along the new proposed road to the public road.

[23] By strict letter of the law Mr. Crabb had no right by deed, conveyance or written agreement. The DC was entitled to its land subject only to an easement at point A, but none at point B. The plaintiff advanced his case on the basis of proprietary estoppel.

[24] In his reasons for judgment at p. 187 Lord Denning explained the basis for the claim as follows:

> The basis of this proprietary estoppel—as indeed of promissory estoppels—is the interposition of equity. Equity comes in, true to form, to mitigate the rigours of strict law. The early cases did not speak of it as "estoppels." They spoke of it as "raising an equity." If I may expand what Lord Cairns L.C. said in *Hughes v. Metropolitan Railway Co.* (1877) 2 App. Cas. 439, 448:
>
> > [I]t is the first principle upon which all courts of equity proceed,
>
> that it will prevent a person from insisting on his strict legal rights—whether arising under a contract, or on his title deeds, or by statute—when it would be inequitable for him to do so having regard to the dealings which have taken place between the parties.
>
> What then are the dealings which will preclude him from insisting on his strict legal rights? If he makes a binding contract that he will not insist on the strict legal position, a court of equity will hold him to his promise. Short of a binding contract, if he makes a promise that he will not insist on his strict legal rights—then, even though that promise may be unenforceable in point of law for want of consideration or want of writing—then if he makes the promise knowing or intending that the other will act upon it, and he does act upon it, then again a court of equity will not allow him to go back on that promise (citations omitted). Short of an actual promise, if he, by his words or conduct, so behaves as to lead another to believe that he will not insist on his strict legal rights—knowing or intending that the other will act on that belief—and he does so act—that again will raise an equity in favour of the other.

[25] The trial judge dismissed the action essentially having found there was only an "agreement in principle" following the July 16, 1967 meeting and no "definite assurance." The Court of Appeal saw it differently. The fact that DC had put up a gate at point B at "considerable expense" led the plaintiff to believe that there was an agreement giving him the right to access at point B. As Lord Denning M.R. explains at page 189:

> The defendants knew that the plaintiff *intended* to sell the two portions separately and that he would need an access at point B as well as point A. Seeing that they knew of his intention—and they did nothing to disabuse him but rather confirmed it by erecting gates at point B—it was their conduct which led him to act as he did: and this raises an equity in his favour against him [emphasis in original].

[26] The appeal was allowed and Mr. Crabb granted the right of access at point B as well as a right of way over the new road to the public road.

[27] In his separate reasons Scarman L.J. considered the judgment of Fry J. in *Willmott v. Barber* (1880), 15 Ch. D. 96 which he considered "a valuable guide as to the matters of fact which have to be established in order that a plaintiff may establish this particular equity." It is worthwhile to repeat what Fry J. said at pages 105-6 of his judgment:

> It has been said that the acquiescence which will deprive a man of his legal rights must amount to fraud, and in my view that is an abbreviated statement of a very true proposition. A man is not to be deprived of his legal rights unless he has acted in such a way as would make it fraudulent for him to set up those rights. What, then, are the elements or requisites necessary to constitute fraud of that description? In the first place the plaintiff must have made a mistake as to his legal rights. Secondly, the plaintiff must have expanded some money or must have done some act (not necessarily upon the defendant's land) on the faith of his mistaken belief. Thirdly, the defendant, the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff. If he does not know of it he is in the same position as the plaintiff, and the doctrine of acquiescence is founded upon conduct with a knowledge of your legal rights. Fourthly, the defendant, the possessor of the legal right, must know of the plaintiff's mistaken belief of his rights. If he does not, there is nothing which calls upon him to assert his own rights. Lastly, … the defendant, the possessor of the legal rights, must have encouraged the plaintiff in his expenditure of money or in the other acts which he has done, either directly or by abstaining from asserting his legal right.

[28] After quoting from *Willmott v. Barber*, *supra* Scarman L.J. went on to observe:

> But it is clear that whether one uses the word "fraud" or not, the plaintiff has to establish as a fact that the defendant, by setting up his right, is taking advantage of him in a way which is unconscionable, inequitable or unjust …
>
> This court therefore cannot find an equity established unless it is prepared to go as far as to say that it would be unconscionable and unjust to allow the defendants to set up their undoubted rights against the claim being made by the plaintiff. In order to reach a conclusion upon that matter the court does have to consider the history of the negotiations under the five headings to which Fry J. referred.

[29] I take from this that in order to establish unconscionability one must meet the five-part test laid out by Fry J. in *Willmott*.

[30] In the British Columbia Court of Appeal's decision in *Zelmer v. Victor Projects Ltd.* [(1997), 147 DLR (4th) 216 (BCCA)], upon which the trial judge relied, the facts are set out in the headnote as follows:

> The plaintiff developers contacted the defendant owner of the adjoining parcel of land and requested permission to build a reservoir on the defendant's property to serve their subdivisions. After an initial meeting, the plaintiff's engineer met with the defendant's principal and engineer at the site and pointed out the desired location for construction of the reservoir. The plaintiffs understood from that meeting that the defendant could grant, gratuitously, the easement for the area occupied by the reservoir and its ancillary works. The plaintiffs had the site surveyed and provided the defendant with the plan, asking if there were any concerns with the site. Without speaking to his principal, the defendant's engineer acknowledged receipt of the plan and said he had no concerns with the proposed location but that formal approval from the principal would be necessary. The defendant did not review the plan and was unaware that the reservoir was built in its actual location until after its completion. He refused to provide an easement alleging that he told the plaintiffs' engineer that the reservoir would only be acceptable in a gully north of the spot he had indicated. The plaintiff commenced proceedings and applied for a declaration as to the existence of an equitable easement. The application was granted at trial. The plaintiff was entitled to the declaration sought even though the defendant clearly had a different location in mind for the reservoir than where it was actually built. The defendant had led all those present at the site meeting to believe that he was agreeable to the reservoir being constructed at its present location. When the defendants' engineer was asked if he had any concerns about the location of the reservoir, the plaintiff's engineer was established to assume that he was speaking on behalf of the defendant and the plaintiff's engineer was entitled to proceed in the manner he did.

[31] In his reasons, Hinds J.A. noted:

> 50 I now turn to consider whether, on the facts of this case, the plaintiffs established their claim against the defendant on the basis of proprietary estoppel.
>
> 51 I shall consider the question on the basis of the third alternative expressed by Lord Denning in *Crabb*: *i.e.*
>
> > … if he, by his words or conduct, so behaves as to lead another to believe that he will not insist on his strict legal rights—knowing or intending that the other will act upon that belief—and he does so act …
>
> 52 At the meeting on site on 6 August 1992 Mr. Bennett agreed that the plaintiffs could construct the water reservoir on his land at a location which the plaintiffs' witnesses testified was the location at which it was in fact installed. On 11 August 1992 Mr. Pilling faxed to Mr. Bennett the particulars of the easement to which Mr. Bennett did not respond. The fax of his agent, Mr. Tomlinson, to Mr. Pilling on 13 August confirmed the location. The statement by Mr. Bennett to Mr. Gossett to the effect that he would be a good neighbor and would not require compensation for the land which would be subject to the easement, confirmed that the easement would be given on a gratuitous basis. In my view the words or conduct of Mr. Bennett, including those of his agent, Mr. Tomlinson, taken as a whole, led the plaintiffs to believe that they had the approval of Mr. Bennett to construct the reservoir and would be granted an easement. I find that the equitable doctrine of proprietary estoppel has been established.

[32] Here, in considering the respondents' claim based on proprietary estoppel the trial judge in his analysis of the evidence merely reiterated the use the respondents and their families had historically made of the water lots owned by the appellants. At paragraph 103 of his reasons he concluded:

> Bill Cutting and Brenda Cutting and Bill Cutting's grandfather, William Owen Cutting, who preceded Bill and Brenda in owning the waterfront lots, have acquiesced in the Bell and Schwark extended families using the beach and gaining access to the beach over the berm, at least since 1971 for the Bells, which is 37 years, and at least since 1976 for the Schwarks, which is 32 years. The Bell and Schwark extended families have developed a lifestyle and have established family traditions rooted in the use of the beach. In doing so, they have relied upon the facet or explicit consent of the owners of the waterfront lots to their use of the beach and their being able to access the beach across the berm. In my view, it would be unconscionable for the Court now to permit Bill Cutting and Brenda Cutting to enforce their legal property rights by excluding the Bell and Schwark extended families from the beach.

[33] The statement is conclusory. Nowhere in the trial judge's reasons is there any analysis of the evidence which led him to conclude that the appellants' conduct was "unconscionable" within the meaning of *Crabb* and *Willmott*. Mere acquiescence or being a good neighbor is not enough to establish a claim in proprietary estoppel.

[34] The test for proprietary estoppel is set out in this court's decision in *Eberts v. Carleton Condominium Corp. No. 396*, [2000] O.J. No. 3773 (Ont. C.A.) at para. 23:

> Proprietary estoppel is a form of promissory estoppel. It is commonly supposed that estoppel cannot give rise to a cause of action, but proprietary estoppel appears to be an exception to that rule: see Lord Denning in *Crabb v. Arun District Council* (1975), 1 Ch. 179 (Eng. C.A.) at 187-188. But there must be an estoppel. The basic tenets of proprietary estoppel are described in McGee, *Snell's Equity*, 13 ed (2000) at pp. 727-28:
>
> > Without attempting to provide a precise or comprehensive definition, it is possible to summarize the essential elements of proprietary estoppel as follows:
> >
> > (i) An equity arises where:
> > (a) the owner of land (O) induces, encourages or allows the claimant (C) to believe that he has or will enjoy some right or benefit over O's property;
> > (b) in reliance upon this belief, C acts to his detriment to the knowledge of O; and
> > (c) O then seeks to take unconscionable advantage of C by denying him the right or benefit which he expected to receive.

[35] The facts established in this case fall far short of what is required to establish proprietary estoppel.

[36] In the first place the respondents knew they had no legal right to use the water lots. The trial judge explicitly found in paragraph 94 of his reasons, that the respondents knew they could only cross the berm and use the beach with the permission of the Cuttings.

[37] There was no evidence of any holding out or inducement on the part of the Cuttings which could be said to have caused the respondents to believe they had some right or benefit over the Cuttings' water lots. They were merely granted permission to use it for

a time. There is no evidence that they acted to their detriment in any way by relying on a belief that they had such a right. The construction of the berm in the 70's was objected to by the appellants' predecessor in title at the time. There was no evidence that any money was expended in the construction of the berm. The only evidence is that it was constructed from the rubble left after the demolition of a building(s) close by.

[38] Lastly, there is nothing unconscionable about a property owner, who, having permitted his neighbor to use his property for a time, withdraws that permission.

[39] In short, in my view, none of the elements necessary to establish a proprietary estoppel are made out in this case.

III. ANCILLARY RIGHTS

Once an easement is established, the law will read into the easement such ancillary rights as are necessary for the easement to operate as intended. In effect, the courts step in to fix the bad drafting of the parties.

In *Kasch v Goyan* (1993), 32 RPR (2d) 297, 1993 CanLII 2291 (BCCA), the court stated:

> [9] We were referred again to the principal authority relied on by the chambers judge, namely, the judgment of Mr. Justice Parker in *Jones v. Pritchard*, [1908] 1 Ch. 630. In that case Mr. Justice Parker said this [at 638]:
>
> > … Once again, the grant of an easement is *prima facie* also the grant of such ancillary rights as are reasonably necessary to its exercise or enjoyment.
>
> That passage was relied on by the chambers judge and is the key to the issues in this appeal.
>
> [10] The question truly becomes: what are the precise "ancillary rights" which are "reasonably necessary" to the exercise or enjoyment of the easement.
>
> [11] In my opinion, the question of what rights are reasonably necessary incorporates into it the usual factors that accompany any question of reasonableness, namely, a consideration of all of the circumstances which are in any way relevant. That consideration should be followed by a decision whether in all of those circumstances what is done or what is proposed is "reasonably necessary" to the exercise or enjoyment of the easement.

Ancillary rights include the right to maintain, repair, and clear a roadway or driveway, sometimes the right to park temporarily, the right to stop to unload goods, the right to remove obstructions placed on the right of way by the servient owner, the right to install a fence for security purposes if there is a gate and the servient owner is given a key, the right by way of licence to allow others to use the easement so long as the easement does not contain an express reservation, the right to attach a dock if the dominant lands are an island and the right of way is over a driveway on the mainland, the right to grade a road, the right to remove snow, the right to install culverts, and the right to pave a driveway. You cannot use ancillary rights to increase the lands over which the easement burdens. Ancillary rights are also determined by the actual use or purpose of the easement. The broader the easement, the more ancillary rights are possible. For instance, an easement for access will not include a right to install hydro lines, but an easement for all purposes might.

IV. INCREASING THE BURDEN

There are two ways the use or burden of an easement can be increased, and they are prohibited by law. The first is that the nature, or intensity, of the use can increase. The second is that the dominant owner can acquire more lands and try to use the easement to benefit the new lands.

In the first case, the right to use the servient lands cannot be unilaterally changed by the dominant owner. Although some increase in use is permitted if the nature of the use of the easement changes, the use becomes a trespass because it is not permitted by the easement. Accordingly, the extent of the user granted in the easement becomes critical. This a matter of contract interpretation. A broadly drafted right of user is "the free and uninterrupted use of [the servient lands] for all purposes." A narrowly drafted right of user is "for ingress and egress" or "to take up to 100 gallons of water per day from the well on the servient lands and by means of underground pipes, deliver such water to the dominant lands."

In *Granfield v Cowichan Valley Regional District* (1996), 1 RPR (3d) 211, 1996 CanLII 356 (BCCA), the court stated (at para 37):

> The grantee of an easement has the right granted to him and no more. Thus, if on the servient tenement he does an act beyond his grant, he becomes, to the extent of that act, commonly called "excessive user," a trespasser.

A nice statement setting out this rule is found in *Halsbury's*, 4th ed, vol 14, at 26:

> The nature and extent of an easement created by express grant primarily depend upon the wording of the instrument. In construing a grant of an easement regard must be had to the circumstances existing at the time of its execution; for the extent of the easement is ascertainable by the circumstances existing at the time of the grant and known to the parties or within the reasonable contemplation of the parties at the time of the grant, and is limited to those circumstances. Consequently, if those circumstances are subsequently altered so that there is a radical change in the character or identity of the user or of the Dominant Tenement, the altered user cannot be justified. However, a mere increase in user is unobjectionable, unless the Dominant owner will not necessarily be limited to the precise circumstances actually in existence at the time of the grant. The distinction is between a mere increase in user and a user of a different kind or for a different purpose, evolution or mutation. Where the terms of the grant are wide enough to permit user for a new and different purpose, the extent of the user must not exceed what was contemplated at the time of the grant, and must not interfere with the right of others.

In the second case, the easement benefits certain dominant lands. The dominant owner cannot add additional dominant lands benefiting from the easement. So if the dominant owner buys additional lands, those lands cannot be accessed by the easement. The test is whether the easement is being used in a colourable attempt to benefit other lands.

Jengle v Keetch
(1992), 7 OR (3d) 187, 22 RPR (2d) 53 (CA)

THE COURT:

[1] The appellants appeal against the dismissal of their action in the Supreme Court of Ontario wherein they sought, *inter alia*, to prevent the respondents Purdy from continuing to trespass over their property through the improper use of a right of way: *Jengle*

v. Keetch (1989), 68 O.R. (2d) 238, 5 R.P.R. (2d) 184. They also sought to restrain the respondent Keetch from permitting the improper use of her right of way and of her property. The appellants had claimed the necessary declaration and an injunction, as well as damages for nuisance and trespass.

[2] The following facts are admitted subject to the exceptions mentioned. The appellants, Helen and Stanley Jengle, are beneficial owners of a cottage property on the Lake of Bays. Their deed, dated August 23, 1965, is subject to a right of way from time to time in favour of the owners of Part 13. Part 13 is the cottage property directly to the east of the Jengles' property, and is owned by the respondent Mary Keetch.

[3] The properties referred to are shown in the plan filed as an exhibit, here reproduced.

[Graphic not reproduced.]

[4] The appellants gain access to their property along a private right of way which commences at a public highway and crosses over approximately four other cottage properties to the west. The private right of way crosses the appellants' property and ends at the property owned by the respondent Mary Keetch. A fact in dispute is that Mary Keetch is the sole property owner who has a prescribed legal right of way over the Jengle property.

[5] The respondents Purdy own a cottage property, which they purchased in 1980, immediately to the east of the Keetch property. The Purdy property had water access only, and the Purdys obtained access to their property by water from 1980 to 1986 by boat from a nearby marina.

[6] The previous owner of the Purdy property, who had occasionally trespassed on the appellants' property by using the right of way to gain access to his property, signed an acknowledgment in September 1971 in which he undertook not to trespass, and he limited himself to water access thereafter. The Jengles had threatened legal action to prevent the trespass.

[7] Following the purchase of their property in 1980, the respondents Purdy made numerous attempts to obtain land access to their property through negotiations with the appellants and other landowners, and by attempting to obtain municipal consent to a severance in order to purchase a portion of the Keetch property. All these attempts were unsuccessful.

[8] In 1984, the respondent Smith Purdy obtained a written opinion from their solicitor, Blake, Cassels & Graydon, which competently reviewed the authorities and made it clear that a private right of way—such as the one enjoyed by the respondent Keetch—can be used only by the owners and occupiers of the dominant tenement for purposes exclusively connected to the dominant tenement. The legal researcher concluded as follows:

> The authorities which I have reviewed establish that a private right-of-way, no matter how general it may be, can be used only by the owners or occupiers of the dominant tenement for some purpose exclusively connected with the dominant tenement. It cannot be used for any purpose unconnected with the bona fide enjoyment of the dominant tenement.
>
> More specifically, a right-of-way appurtenant to a dominant tenement can be used only for the purpose of passing to or from that tenement. A dominant owner is not entitled to

use his right-of-way for going to the dominant tenement and thence to some other place beyond, if going to the latter spot is in reality the purpose of his journey, for he would then in effect be using the way for passing to some other place than the dominant tenement, and he would be imposing a greater burden on the servient estate than was intended by the grantor of the right-of-way.

The principles stated above have been applied to cases dealing with colourable attempts to extend a right-of-way granted as appurtenant to the use and enjoyment of parcel A to an adjoining parcel B. These cases clearly hold that one who obtains an interest by lease or conveyance in lands to which a right-of-way is appurtenant for the colourable purpose of gaining access to an adjoining property will not be entitled to the benefit of the right-of-way.

[9] Notwithstanding this clear legal opinion, the respondent Purdy instructed his solicitors to prepare an agreement whereby he would lease a triangular portion of Mary Keetch's property for $500 per year, upon which he would park. The agreement, dated September 1, 1986, provided that the lease was for three years, with renewal periods totalling approximately 18 additional years. The lease further provided that the respondent could park up to three cars, construct a garage or shelter, and would maintain the leased lands without interfering with the lessor's continued reasonable use of the property.

[10] Thereafter the Purdys commenced travelling across the appellant's property, utilizing the right of way on a regular basis. The appellants then instituted the present action.

[11] The learned trial judge correctly recognized that the first issue to be resolved by him was whether the lease was a colourable attempt by the respondents Purdy to gain access to their property. He referred to *Skull v. Glenister* (1864), 16 C.B.N.S. 81, 143 E.R. 1055, and *Friedman v. Murray*, [1952] O.W.N. 295, [1952] 3 D.L.R. 159 (H.C.J.) [affd [1953] O.W.N. 486, [1953] 3 D.L.R. 313 (C.A.)], and quoted extensively from the decision of Griffiths J. in *Gordon v. Regan* (1985), 49 O.R. (2d) 521, 15 D.L.R. (4th) 641 (H.C.J.), affd (1989), 71 O.R. (2d) 736, 66 D.L.R. (4th) 384 (C.A.), which reviewed the earlier case law.

[12] However, the learned trial judge attempted to distinguish these authorities on the basis of an inference which, in our view, does not find support in the undisputed facts. The learned trial judge concluded, at p. 246 O.R., p. 192 R.P.R., that "the use of the dominant tenement, including that part which is leased, is not as a thoroughfare to the Purdy property." He further found that the lease was "not a colourable attempt to gain access," but merely provided the Purdys with parking space on the Keetch property.

[13] We are all of the view that the undisputed facts are incapable of supporting this conclusion. The authorities collected by Griffiths J. in *Gordon v. Regan*, *supra*, particularly at pp. 526-27 O.R., pp. 646-47 D.L.R. (H.C.J.), make it abundantly clear that a right of way appurtenant to a particular dominant tenement cannot be used colourably to reach other lands which do not enjoy the benefit of this right of way. Assuming without deciding that the respondents Purdy enjoyed a proper lease of a portion of the dominant tenement, and not merely a licence which would not qualify them as "owners" for the purpose of the right of way, their use of the right of way over the appellants' servient tenement would be restricted to a means of access to and egress from their leased portion of the dominant tenement for some purpose connected with the enjoyment of their portion of the

dominant tenement: See *Halsbury's Laws of England*, 4th ed., vol. 14 (London: Butterworths, 1975), at p. 68, para. 144 referred to in *Gordon v. Regan*, *supra*, at p. 523 O.R., p. 643 D.L.R. (H.C.J.).

[14] If, therefore, Purdy's object and purpose in entering into the lease was to park vehicles on the Keetch property in order to reach his own property, it would constitute an unlawful user of the right of way: *Miller v. Tipling* (1918), 43 O.L.R. 88, 43 D.L.R. 469 (C.A.), at p. 95 O.L.R., p. 475 D.L.R. In our view, the respondents' purpose in entering into the impugned lease or licence was clearly a colourable attempt to gain access to and egress from their own property. There could be no other purpose in parking vehicles on the Keetch property, and certainly none connected with the enjoyment of the leased portion.

[15] The respondents contend that the learned trial judge's conclusion constitutes a finding of fact which precludes this court from interfering, in the absence of palpable and overriding error. We disagree. The learned trial judge's conclusion is merely an inference on facts which are basically undisputed. This court is free to interfere, and has a duty to do so where the inference is unsupported, improperly drawn and unreasonable.

[16] The impugned lease would unlawfully result in the enlargement of the private right of way beyond the dominant tenement to which it was appurtenant. In view of our conclusion on this aspect of the case, it will not be necessary to resolve the issue whether the provision for parking under the lease contravened the applicable zoning by-law.

[17] The appellants at trial sought general damages, punitive damages, as well as damages for nuisance and trespass. The trial court, by reason of its dismissal of the plaintiff's action, did not assess damages. In our opinion, having regard to the findings of fact, it does not appear that any damages were proved, other than nominal damages for trespass. The appellants' real purpose was to protect their privacy, which can be achieved without any award of damages. Accordingly, this is not a proper case for damages.

[18] In the result, the appeal is allowed and the judgment of March 1, 1989, is set aside. In place thereof there will be a declaration that the respondent Purdy, their invitees, licensees, tenants, successors, assigns and any persons seeking access to the Purdy property are not entitled to use the right of way over the appellants' property. There will also be an injunction restraining such persons from using the right of way over the appellants' property.

V. OBSTRUCTING THE EASEMENT

The servient owner has the right to use the servient lands in any way he or she wants, provided that the dominant owner's easement rights are not substantially interfered with.

In *Siple v Blow*, 1904 CarswellOnt 475, 3 OWR 855 (CA), the court stated:

> This left the ownership of the soil in plaintiff, who might lawfully use it for any purpose not inconsistent with the right of way over it. He might, for instance, use it for pasture, or he might cut for his own use the grass growing upon the strip, although he probably could not plough or otherwise cultivate it, because such cultivation would or might prejudicially affect the use of the way as a way.

An action lies by the dominant owner for obstruction of an easement by the servient owner. For obstruction to be actionable, it must be a substantial interference with the

dominant owner's use of the easement. Slight projections or temporary obstructions are not sufficient. However, permanent or semi-permanent obstructions such as trees, brush, wrecked cars, and cars under repair left on the easement are actionable and can give rise to a claim in damages or an injunction. Temporary obstructions done repeatedly will be enjoined. Substantial obstructions can be caused by the servient owner or other grantors of the easement.

Substantial obstructions can be actual in terms of an actual physical obstruction or can be perceptual in terms of threats, intimidation, physical harm, and bullying leading to obstruction by fear or threat.

Weidelich v de Koning
2014 ONCA 736, 122 OR (3d) 545

DOHERTY JA:

[1] This litigation arises out of a dispute between neighbours over a right-of-way that runs behind a block of six row houses on the south side of Cottingham Street in Toronto. Cottingham Street runs east to west. The respondents own the easternmost house in the block (No. 69). The appellants own four of the other houses (Nos. 71, 73, 77 and 79). The owners of the sixth home (No. 75) are not parties to the litigation.

[2] Each of the six properties backs onto a private laneway. Six garages (one for each home) stand on the south side of the laneway. Entrance to the laneway runs south from Cottingham Street directly to the east of the respondents' home. The laneway traverses lands owned by each of the six homeowners, and those lands are subject to a right-of-way described in each property's title documents. For example, the respondents' deed provides that their ownership is:

> SUBJECT to a right-of-way in favour of the owners and occupants from time to time of [the other five properties] … over, along and upon … Part 19 … for the purpose of vehicular ingress and egress.

[3] The part of the laneway that passes over the respondents' property, identified as Part 19 in the deed, is 3.6 metres at its narrowest point. The laneway continues west onto the appellants' properties where its narrowest point is 3.5 meters.

[4] In 2012, the respondents began a home renovation (the "Addition"). They intended to add a three-story structure, an outdoor balcony on the second floor of the new structure, a ground floor patio, and an outdoor planter. The Addition was largely complete when this application was heard in November 2013.

[5] The Addition encroaches upon Part 19. However, the right-of-way remains at least 4.4 metres wide wherever the Addition encroaches on it. Schedule B of the application judge's reasons depicts the right-of-way and the encroachment (the cross-hatched section). I have appended a copy of that Schedule to these reasons.

[6] The appellants applied for a declaration that the respondents not obstruct the right-of-way and sought an order requiring the respondents to remove all structures built on the right-of-way. They also sought a declaration that they had certain ancillary rights—for example, the right to use the right-of-way for snow removal.

[7] The application judge found, at para. 11:

> *[T]he Encroachments caused by the Addition do not create a real or substantial interference with the use of the laneway for vehicular access: it remains as accessible and passable now as it was before the construction, subject to the obvious result that the portion of Part 19 on which the Addition has been constructed can no longer be driven over.* Despite that limitation, however, it is still possible for vehicles (including delivery trucks) to traverse across the remainder of Part 19 unimpeded for purposes of accessing the remainder of the laneway. [Emphasis added.]

[8] The appellants do not challenge the finding that the respondents' Addition does not affect the appellants' ability to drive to and from their garages along the laneway. Counsel contends, however, that the encroachment is actionable even if it does not interfere with the appellants' ability to use the right-of-way for the purpose identified in the deed. Counsel submits that the appellants have a right to use the right-of-way's entire width for the purpose of vehicular ingress and egress. He maintains that the erection of a permanent structure on any part of the right-of-way necessarily compromises the right granted because the appellants cannot pass over that part of the right-of-way. In counsel's submission, the encroachment's practical effect on the appellants' ability to use the right-of-way for its granted purpose is irrelevant.

A: Is There An Actionable Encroachment?

[9] The application judge, referring to Canadian and English authority, found that there was not an actionable encroachment. He held that an encroachment on a right-of-way is actionable only if there is a substantial interference with the use of the right-of-way as granted. Quoting from *West v. Sharp* (1999), 79 P. & C.R. 32 (C.A.), the application judge said, at para. 24:

> There is no actionable interference with a right of way if it can be substantially and practically exercised as conveniently after as before the occurrence of the alleged obstruction.

[10] I agree with the reasons of the motion judge. The authorities he cites and others fully support the conclusion that an encroachment on a private right-of-way is actionable only where the encroachment substantially interferes with the dominant owner's ability to use the right-of-way for a purpose identified in the grant. *Gale on Easements*, 19th ed. (London: Sweet & Maxwell, 2012), the leading English text on the topic, puts it this way, at para. 13-06:

> As regards the disturbance of private rights of way, it has been laid down that whereas in a public highway any obstruction is a wrong if appreciable, *in the case of a private right of way the obstruction is not actionable unless it is substantial.* Again, it has been said that for the obstruction of a private way the dominant owner cannot complain unless he can prove injury; unlike the case of trespass, which gives a right of action though no damage be proved. *In Hutton v Hamboro, where the obstruction of a private way was alleged, Cockburn C.J. laid down that the question was whether practically and substantially the right of way could be exercised as conveniently as before.* [Emphasis added.]

[11] Lord Cockburn's language echoes through the English and Canadian case law: see, e.g., *Clifford v. Hoare* (1874), L.R. 9 C.P. 362; *Pettey v. Parsons*, [1914] 2 Ch. 653 (C.A.), at 662, 665-6, 667-8; *Keefe v. Amor*, [1965] 1 Q.B. 334 (C.A.), at 347; *Celsteel Ltd. v. Alton*

House Holdings Ltd., [1985] 1 W.L.R. 204 (Ch.), at 216-18, rev'd on other grounds, [1986] 1 W.L.R. 512 (C.A.); *B & Q Plc. v. Liverpool and Lancashire Properties Limited*, [2000] E.W.H.C. 463, 81 P. & C.R. 20 (Ch.); *Devaney v. McNab* (1921), 69 D.L.R. 231 (Ont. C.A.); *Voye v. Hartley*, 2002 NBCA 14, 247 N.B.R. (2d) 128, at para. 25; *Donohue v. Robins*, 2012 ONSC 2851, [2012] O.J. No. 2133, at para. 58; *Lester v. Bond*, 2013 ONSC 7888, [2013] O.J. No. 6006, at paras. 30-33.

[12] The requirement that the dominant owner prove substantial interference to maintain a claim reflects the nature of the dominant owner's right. He or she does not own the right-of-way or the land upon which the right-of-way runs, but only enjoys the reasonable use of that property for its granted purpose. The dominant owner may only sustain a claim predicated on substantial interference with that reasonable use. The distinction is between the rights of ownership and the right of reasonable use for an identified purpose.

[13] Lord Brett, in *Clifford v. Hoare*, focused on the distinction between the rights of ownership and the right of reasonable use for an identified purpose in explaining why a dominant owner had no claim even though a building encroached some two feet onto the 40-foot right-of-way:

> [T]hat which is granted to the plaintiff by the conveyance of the 2nd of August, 1872, was, not a forty-foot road, nor the exclusive use of a forty-foot road; but a right to use it in common with others. He was to have an easement in the nature of an access or right of way over the road, by himself and his friends and servants, and nothing but an easement. If this were a grant of the road itself, any interference with the plaintiff's enjoyment of it would, no doubt, give a right of action. But all that is granted here is a right to a reasonable use of the road by the plaintiff in common with others, who have equal rights with him; and I am of opinion that no substantial interference with his exercise of that easement has been made out.

[14] A court, when deciding whether an encroachment results in a substantial interference with the claimant's use of the right-of-way, will have regard to the terms of the grant and the nature of the encroachment. The determination is a factual one and will turn on the specific circumstances of each case.

[15] The significance of an encroachment depends on its impact on reasonable use. The dominant owner is entitled to every reasonable use of the right-of-way for its granted purpose. I would adopt as correct the inquiry captured in the following passage in *B & Q Plc.*, at 257:

> In short, the test … is one of convenience and not necessity or reasonable necessity. Provided that what the grantee is insisting on is not unreasonable, the question is: can the right of way be substantially and practically exercised as conveniently as before?

[16] The facts of *Celsteel Ltd.* provide an excellent example of the proper application of the substantial interference test. In *Celsteel Ltd.*, the defendant lessee of the property decided to build a car wash that encroached on a right-of-way the plaintiffs used to access their parking garages. The defendant argued that the encroachment was not substantial as it related to one of the plaintiffs because, although the plaintiff would have to drive into and reverse out of the garage, contrary to his habit of reversing into and driving out of the garage, the plaintiff could still access his garage.

[17] Scott J. acknowledged that either approach to garage entry and exit was reasonable. He went on, however, to hold that the encroachment was actionable. He said, at p. 217:

> In the present case the test is not, in my view, whether the means of access still possible is a reasonable means of access. The correct test is whether insistence by the third plaintiff [the holder of the right-of-way] on being able to continue to use the other means of access is reasonable. In my opinion, it is. I do not think it is open to the defendants to deprive the third plaintiff of his preferred means of entry to garage 52 and then to justify themselves by arguing that most other people would prefer some other still available means of entry. Such an argument might avail the defendants if the third plaintiff's preference was unreasonable or perverse. But, in my view, it is neither of these things.

[18] The application judge's unchallenged finding that the laneway "remains as accessible and passable now as it was before the construction" compels dismissal of the appellants' claim. Counsel for the appellants, however, makes three valiant attempts to escape the substantial interference requirement.

[19] First, counsel submits that an encroachment by a permanent structure is a substantial interference whether or not the encroachment actually interferes with the dominant owner's reasonable use. The case law does not support that proposition. Several of the cases that have set down and refined the substantial interference requirement involve encroachments by permanent structures: see, e.g., *Clifford*; *Celsteel Ltd.*; *B & Q Plc.*; *Devaney*. Moreover, the authors of the current edition of *Gale on Easements* do not distinguish between encroachments by permanent structures and other forms of encroachment onto private rights-of-way.

[20] The appellants rely on *Albiston v. Liu*, [2013] O.J. No. 3685 (S.C.), which does draw the appellants' desired distinction. In that case, the trial judge held a trivial interference by a permanent structure may not be substantial if the defendant inherited the encroaching structure, but a trivial interference by a permanent structure is substantial if the defendant deliberately built on the right-of-way. This decision stands alone in relying on the deliberateness of the defendant's conduct, rather than on the degree of actual interference, to define substantial interference. I think *Albiston* was wrongly decided.

[21] The appellants also rely on *Chester v. Roch* (1975), 20 N.S.R. (2d) 536 (S.C.), at para. 8, and, in particular, the trial judge's reference on an extract from the text *Anger & Honsberger Law of Real Property*. The quoted reference supports the appellants' contention that an encroachment by a permanent building is *per se* actionable.

[22] Counsel has, however, fairly included the latest version of the same text in his materials: Anne La Forest, *Anger & Honsberger Law of Real Property*, loose-leaf, vol. 2, 3d ed. (Aurora: Canada Law Book, 2006), at 17:20.30(b). In the latest edition, the author accepts that interference with a private right-of-way is actionable only if substantial. She notes that if an obstruction is permanent, it may substantially interfere with the use of the right-of-way even if the actual interference is not great. I have no quarrel with this observation, insofar as it identifies the nature of the obstruction as relevant to the "substantial interference" inquiry. However, given the application judge's finding that the addition does not interfere with the appellant's use of the right-of-way for its granted purpose, the commentary does not assist the appellants.

[23] Counsel's second argument rests on Middleton J.'s reasoning, at p. 237 in *Devaney v. McNab*. His Lordship commented:

> Where the thing that is complained of is the erection of a substantial and permanent structure upon the land over which the grantor has already given a right of way, it appears to me to be almost impossible to say that there is not a real and substantial interference with the right conveyed.

[24] Anything said by Middleton J. deserves careful attention. In the sentences immediately before the appellants' cited passage, he writes:

> It is well settled that the rights of the parties must be determined according to the true construction of the grant; and it is to be observed that the grant here is in the widest possible terms. It follows, I think, that the grantor must not derogate in any way from his grant. [Citation omitted.]

[25] The right-of-way in *Devaney* was granted "at all times and for all purposes." Middleton J. had to measure the effect of the encroachment on the right-of-way in the light of that very broad grant. Given the broad purpose of the grant, he could not say that the obstruction (a fire escape projecting some three feet four inches into a 20 foot right-of-way) did not substantially interfere with any potential reasonable use of the right-of-way.

[26] In my view, the analysis of Middleton J. is consistent with the substantial interference test described in the authorities cited above. Indeed, Middleton J. (and Latchford J. in a concurring judgment) relied on *Clifford v. Hoare*, one of the seminal cases in the "significant interference" line of authorities.

[27] The third argument advanced by counsel relies on this court's judgment in *Spencer v. Salo*, 2013 ONCA 98, 114 O.R. (3d) 226, leave to appeal refused, [2013] S.C.C.A. No. 174. *Spencer* involved a motion brought by a land surveyor to rectify a mis-description of a right-of-way contained in a reference plan registered on title under the *Land Titles Act*, R.S.O. 1990, c. L-5. The appeal turned on the appellant's right to a rectification order.

[28] At para. 50 of his reasons, the Chief Justice observed that the territorial limits of easements, including rights-of-way, are boundaries in every sense of that word. Counsel relies on this passage to support the contention that the encroachment in this case was actionable.

[29] I have no difficulty accepting the Chief Justice's observation about the nature of a right-of-way's boundaries. However, this case is not about defining the boundaries of the right-of-way. They are clearly delineated in the deed and are not in dispute. Nor is there any dispute that the respondents' Addition encroaches over the boundary line onto the right-of-way. The sole issue here is whether that encroachment is actionable. Nothing in *Spencer* assists in that determination.

[30] The appellants have not persuaded me that encroachment by a permanent structure is actionable absent actual, substantial interference with the granted right. On the trial judge's factual findings, the appellants cannot meet that burden.

VI. ABANDONMENT

An express, implied, prescriptive, or equitable easement can be extinguished by mutual consent, by operation of law, and by abandonment. The servient owner has no power to unilaterally extinguish an easement.

An easement being an interest in land cannot be destroyed as a matter of law. If the means to use the easement is destroyed by an act of God such as a flood, forest fire, earthquake, or violent storm that washes out or destroys all or part of the servient lands so that the easement can no longer be used, this act does not result in the easement being extinguished or destroyed, unless the destruction is permanent. If the servient lands are restored, the easement is restored and the dominant owner has the right to go on the servient lands to restore the servient lands in order to restore the easement.

An easement can contractually provide for termination. If the easement is for a term that is certain and not perpetual, it will end. If the easement is given for a specific purpose and the purpose ends, then the easement will end.

If the dominant owner wishes to give up an easement or terminate it, the dominant owner can do so by express release. The dominant owner does not require the servient owner's consent. If the dominant owner does not execute an express release, she can still terminate an easement for her benefit by way of an implied release known as abandonment. The implied release of abandonment is based on conduct such as non-use, blocking the easement, or acquiescing in the servient owner blocking the easement.

Non-use of an easement alone is not conclusive of abandonment but has to be accompanied by evidence of an intention to abandon. The onus is on the party alleging abandonment to show abandonment on a balance of probability.

It is difficult to show abandonment of an express easement. In order to show abandonment, there must be circumstances from which a court can presume a release of the easement by the dominant owner. Non-use for a lengthy period of time must be explained by the dominant owner in order to avoid an argument of acquiescence.

Acts of the servient owner consistent with abandonment by the dominant owner are not alone sufficient to evidence abandonment by the dominant owner. The dominant owner must do something evidencing an intention to abandon. The servient owner's acts consistent with abandonment will then add weight to the dominant owner's intention to abandon.

Acquiescence by the dominant owner in acts by the servient owner blocking the easement, or use inconsistent with the easement, evidences an intention to abandon. The dominant owner must object to the servient owner's acts blocking use of the easement or risk being found to have acquiesced in the easement's abandonment.