

Section 6: EASEMENTS

Readings

A. Statutes:

Limitation Act, 1971

SS. 31 & 37

B. Case Law

- (i) Re Ellenborough Park (1955)
3 All ER 667 (Cf.: J & F p. 521)
- (ii) Tejpar v. Bhimji 1 F.L.R. 653
- (iii) Cordoll vs S. (Clawfield Property) (1968) 3
WLR 864
- (iv) Johnstone v. Holdway (1963) 1 QB 601;
(1963) LQR 182
- (v) Wheldon vs. Burrows (1879) Ch.D. 31
- (vi) Tejshi vs. AG Kenya (1959) E.A. 630
- (vii) Poldar vs. Bastarl (1965) L.R. 1 QB
- (viii) Hansford v. Jago 91921) Ch. 332
- (ix) (Ward v. Kirkland 91966) 1 WLR 601
- (x) In Re Freeman (1957) 1 WLR 56

C. Textbooks + Journals

- (i) Meggery, Chpt. 12 part 4 (4th Ed.)

(ii) Riddal, Chpt. 12

6.1 **Definition of Easements**

P.C. Mogha in his book the **INDIAN CONVEYANCER** 10th Edn. (E.A. Law House, 1987, Calcutta) defines Easements as follows:

“An Easement is a right which the owner or occupier of certain land possesses, as such, for the beneficial enjoyment of that land, to do and continue to do something, or to prevent and continue to prevent something being done, in or upon or in respect of certain other land not his own. The Essence of Easement is that it should be a right over property belonging not to the person claiming the Easement but to someone else” (p. 287).

Yet definition of Easements are problematic in that sometimes certain analogues rights are assumed to be easements when they are not (e.g. when rights are exercised by the owner of the land or the natural right of support). These exist as Quasi-Easements - according to Beggary (pp. 422). However, Beggary gives a brief definition as follows:

“An Easement may be defined as a right to use, or restrict the use of, the land of another person in some way” (pp. 417-418)

Standard Easements include **rights of way, rights of light** and **Rights of Water**.

It is of the essence of an Easement that:

- (a) There must be a dominant and a servient tenement.
Meggary explains this as follows:

If X owns Blackacre and Grants a right to use a path across Blackacre to the Owner for the time being of the neighbouring plot of Whiteacre, Blackacre is the **Servient Tenement** and Whiteacre the **Dominant Tenement**. Had X granted the right to A who owned no land at all, A would have acquired a license to walk over Blackacre, but his right could not exist as an Easement, for a Dominant tenement is lacking.

Put technically, an Easement cannot exist in **gross** (i.e. independent of the ownership of land) but only as **appurtenant** (i.e. attached) to a Dominant Tenement; and on a Transfer of the Dominant Tenement, the Easement will pass

with the land, so that the Tenant for the time being may enjoy it, even if he is a mere lessee.

Further, it of the essence of an Easement to:

- (b) The Easement must accommodate the Dominant Tenement. Hence an Easement cannot exist unless it confers a benefit on the Dominant Tenement as a Tenement, i.e. the test is whether the right makes the Dominant Tenement a better and more convenient Tenement.
- (c) The Dominant and Servient Tenements must not be both owned and occupied by the same person. The principle here is that a man cannot have an easement over his own land. However, where the same person owns both properties but does not occupy both of them it is possible to create an Easement. For example where X owns Blackacre and Whiteacre, but Whiteacre and Blackacre are occupied by Y and Z, lessees. Unity of Ownership without unity of possession is not fatal to an Easement.

Similarly, where each property is owned by Different persons the Easement is not destroyed if the plots are leased to the same

Tenant i.e. there is a Unity of possession without Unity of Ownership (i.e. during the currency of the lease the Easement is suspended but it will revive when the lease ends).

Hence it is possible to visualize what “Quasi Easements” are in that a such rights habitually exercised by an owner over his land which if owned and occupied by another person would create easements. It is important to recognize them for in certain instances they become Easements.

- (d) The Easement must be capable of forming the subject-matter of a Grant.

This element follows the normal rules of contract. There must be parties who are capable (Grantor & Grantee). The Right, the subject matter of the Easement, must be sufficiently definite. Not some amorphous right. Hence courts in England have refused Easements of Privacy, or of Prospect (i.e. the Right of a view), as they have said “the law does not give an action for such things of delight”. [Megarry p. 421]

- (e) And finally the Right must be within the general nature of rights capable of existing as Easements. The category of Easements is not a closed one. It alters and expands with the changing circumstances of Mankind. In England some novel Easements have been recognised as recent as 1950's where even the right to use a neighbour lavatory has been recognised as an Easement. [Cf.: Miller v. Emcer products Limited (1956) Ch. 304] Also see **Re Ellenborough** Part (1955) 3 All E.R. 667 - in James & Fimbo pp. 521-525)

There are Natural Rights (such as those of support) and Public Rights (e.g. the Public Right of Way) which are similar to Easements but are not. Natural Rights go with the land and cannot be subject to grants; and Public Rights are Created either by **Statute** or **Dedication** and they are open to the whole public, as such they are not exercisable through specific grants and hence not subject to private grant. [Cf: James & Fimbo, pp. 528-529: **Kimange Mwalimu vs. Kavuli Ngoma** (1968) HCD No. 348)

(a) **Classification of Easements** - According to their nature, easements may be classified into the following classes:

(i) **Positive and negative Easements:** - A positive easement confers a right to commit some act upon the servient tenement e.g. rights of way. A negative easement gives a right to prohibit the commission of certain acts upon the servient tenement which the servient owner would have been otherwise entitled to commit e.g. right of support to a building, the right to light.

(ii) **Continuous and non-continuous Easements:** - A continuous easement is a right to do some act of a continuous and constant nature. A continuous easement is one whose enjoyment is, or may be continued without the act of man. The enjoyment of a non-continued easement is intermittent and consists of the commission of some act or of a series of acts. A non-continuous easement is one that needs the act of man for its enjoyment.

(iii) **Apparent and non-apparent**

Easement: - An apparent easement is one the existence of which is shown by some permanent sign which, upon careful inspection by a competent person, would be visible to him. An apparent easement is evident by some apparent sign, whether that sign be patent to everyone or whether it can only be perceived on a careful inspection by a person ordinarily conversant with the subject. The non-apparent easement has no external sign points to its existence.

(iv) **Easement of necessity:** - An easement

of necessity is an easement which under particular circumstances the law creates by virtue of the doctrine of implied grant to meet the necessity of a particular case. It is an easement which is not merely necessary for the erasable enjoyment of the dominant tenement, but one without which that tenement cannot be used at all. Such an easement lasts only so long as the necessity exists, for a grant arising out of the implication of necessity cannot be carried further than the necessity of the case requires.

6.2 Creation of Easements

6.2.1 By Grant

Accordingly one of the modes of acquiring an easement is by grant. The grant may be made orally or by a Deed. The Deed may be a separate document or it may be included in a Deed which relates to the Dominant Tenement, e.g. where X sells his land to Y he may grant by the same Deed a Right of Way to Y for such land over another land of his.

Where a Transferee of land grants an Easement to the Transferor, the Easement is often referred to as a “Reservation” or “Exception” from the Parcels transferred. The “Reservation” or “Exception” in the Deed operates as a kind of a re-grant from the Transferee to the Transferor.

It is imperative that a Deed of Grant the nature of the Easement and Purpose for which it is to be enjoyed should be expressed clearly unless an unlimited enjoyment is intended. E.g. Where the grant is for a Right of Way the termini and the position of the way should be clearly defined.

6.2.2 By Necessity

Easements are created by Necessity in the following circumstances where a person transfers or bequeaths immovable property to another:

- (a) if an easement in other immovable property of the transferor or testator is necessary for enjoying the subject of the transfer or bequest, the transferee or legatee shall be entitled to such easement;
- (b) if an easement in the subject of the transfer or bequest is necessary for enjoying other immovable property of the transferor or testator, the transferor or the legal representative for the testator shall be entitled to such easement;
- (c) Where a partition is made jointly of several persons and if an easement over the share of one of them is necessary for enjoying the share of another of them, the latter shall be entitled to such easement.

6.2.3 **By prescription:**

Statutes on prescriptive rights provide that when the access and use of light or air to and for any building

have been peaceably enjoyed therewith, as an Easement, without interruption, and for twenty years; and where support from one person's land or things affixed thereto has been peaceably received by another person's land subject to artificial pressure or by things affixed thereto, as an Easement, without interruption, and for twenty years; and where a right of way or any other easement has been peaceably and openly enjoyed by any person claiming title thereon, as an easement, and as of right, without interruption; and for twenty years; the right to such access and use of light or air, support or other Easement shall be absolute. See: **Limitation Act, 1971**

6.2.4 **By custom:-**

An Easement may be acquired in virtue of a local custom. Such Easements are called Customary Easements, e.g. right of privacy, burial or pasturage. See: James and Fimbo, pp. 518-528

6.2.5 **By having other rights in an immovable property:**

The Easement can be enjoyed by rights (not being a license) in an immovable property which the

Government, the public or any person may possess, irrespective of other immovable property. Hence an Easement includes rights to do the acts necessary to secure the full enjoyment of an easement.

6.3 **Extinguishing of Easements:-**

The easement is extinguished by the following methods:

- (i) **By dissolution of right of servient owner:** When, from a case which proceeded the imposition of an easement, the person by whom it was imposed ceases to have any right in the servient heritage, the easement is extinguished.
- (ii) **By release:** An easement is extinguished when the dominant owner releases it, expressly or impliedly to the servient owner. Such release can be made only in the circumstances and to the extent in and to which the dominant owner can alienate the dominant heritage. An easement may be released as to part only of the servient heritage.

An easement is impliedly released -

- (a) Where the dominant owner expressly authorises an act of a permanent nature to be done on the servient heritage, the necessary consequence of which is to prevent his future enjoyment of the easement, and such act is done in pursuance of such authority.
- (b) When any permanent alteration is made in the dominant heritage of such nature as to show that the dominant owner intended to cease to enjoy the easement in future. Mere non-user of an easement is not implied release.
- (iii) In exercise of a power reserved in this behalf, revokes the easement.
- (iv) **On expiration of limited period or happening of dissolving condition:-**

An easement is extinguished where it has been imposed for a limited period, or acquired on condition that it shall become void on the performance or non performance of specified act and the period expires or the condition is fulfilled.

- (v) **On termination of necessity:** An easement of necessity is extinguished, when the necessity comes to an end.
- (vi) **Buy useless easement:** An easement is extinguished when it becomes incapable of being at any time and under any circumstances beneficial to the dominant owner.
- (vii) **By permanent change in dominant heritage:** Whereby any permanent change in the dominant heritage, the burden on the servient heritage is materially increased and cannot be reduced by the servient owner without interfering with the lawful enjoyment of the easement, the easement is extinguished, unless:-
 - (a) it was intended for the beneficial enjoyment of the dominant heritage, to whatever extent the easement should be used; or
 - (b) the injury caused to the servient owner by the change is so slight that

no reasonable person would complain of it; or

(c) the easement is an easement of necessity.

(viii) **On permanent alteration of servient heritage by superior force:**

An easement is extinguished where the servient heritage is by superior force so permanently altered that the dominant owner can no longer enjoy such easement.

Provided that, where a way of necessity is destroyed by force, the dominant owner has a right to another way over the servient heritage.

(ix) **By destruction of either heritage:** An easement is extinguished when either the dominant or the servient heritage is completely destroyed.

(x) **By unity of ownership:** An easement is extinguished when the same person becomes entitled to the absolute

ownership of the whole of the dominant and servient heritage.

- (xi) **By non-enjoyment:** Statutory law provides that a continuous easement is extinguished when it totally ceases to be enjoyed as such for an unbroken period of twenty years; A discontinuous easement is extinguished, when for a like period it has not been enjoyed as such.

Such period shall be reckoned, in the case of a continuous easement from the day on which its enjoyment was obstructed by the servient owner, or rendered impossible by the dominant owner, and in the case of a discontinuous easement, from the day on which it was last enjoyed by any person as dominant owner.

Provided that, if, in the case of discontinuous easement, the dominant owner within such period, registers under the Indian Registration Act, III of 1877, a declaration of his intention to retain such easement, it shall not be extinguished until a period of twenty years has elapsed from the date of the registration.

Where an easement can be legally enjoyed only at a certain place, or at a certain time, or between certain house, or for a particular purpose, its enjoyment during the said period at another place, or at other time; or between other hours, or for another purpose, does not prevent its extinction under this section.

The circumstances that during the said period, no one was in possession of the servient heritage, or that the easement could not be enjoyed, or that a right accessory thereto was enjoyed, or that the dominant owner was not aware of its existence or that he enjoyed it in ignorance of his right to do so, does not prevent its extinction under this section.

An easement is not extinguished:-

- (a) where the cessation is in pursuance of a contract between the dominant and servient owners;
- (b) where the dominant heritage is held in co-ownership, and one of the co-owners enjoys the easement within the said period; or
- (c) where the easement is a necessary easement.

Where several heritages are respectively subject to right of way for the benefit of a single heritage and the ways are continuous, such rights shall for the purposes of this section, be deemed to be a single easement.

6.4 Transfer of An Easement:

The easement runs with the servient tenement and where the dominant heritage is transferred or devolves by act of parties or by operation of law, the transfer or devolution shall, unless a contrary intention appears, be deemed to pass the easement to the person in whose favour the transfer or devolution takes place.

6.5 Drafting of grant of Easement: No express words are necessary for the grant of an easement, but the words should clearly show the intention to create an easement grantable at law. In the grant of an easement of way, the termini a quo and adquem should be clearly defined. If the position of the way is left to be determined in future at the election of either party, it should be provided in the deed that the election should be made within the period allowed by the rule against perpetuities.

The purposes of an easement to be enjoyed should be defined, unless an unlimited enjoyment is intended. If easement is for a limited period, the period for which the easement is granted should be specifically mentioned.

6.6 CHECKLIST

- (1) Check whether the deed granting easement shows the intention to create an easement grantable at law?
- (2) In case of grant of an easement of way, check whether the easement is clearly defined. If the position of the way is left to be determined in future at the election of either party, check whether it has been provided that the election should be made within the period allowed by the rule against perpetuities.
- (3) Check whether the purpose of easement to be enjoyed has been defined, unless an unlimited enjoyment is intended?
- (4) If the easement is for a limited period, check whether the period for which the easement is granted has been specifically mentioned?

- (5) Check whether the description of dominant and servient heritage has been given clearly in the deed?
- (6) Check whether the proper stamp duty has been paid under Article 23 of Schedule I (In case easement is gratuitous, stamp duty is paid under Article 23 read with Article 33), Indian Stamp Act?
- (7) Check whether the deed granting easement is required to be registered and if it is so, ensure that the deed is registered. In case of grant of easement of way and light, the deed is required to be registered?

Right to Light and to Air

At common law an owner of land has no right to light. A right to light may sometimes be established on the ground of prescription from time immemorial, where, by reason of interruption or other causes, a prescription under the Prescription Act 1832 cannot be made out (*Wheaton v. Maple* [1893] 3 Ch. 48). But ordinarily a claim of such right by immemorial prescription is liable to be negated by the known date of the buildings; and in such cases, where proof cannot be given of a prescriptive right under the statute, the right to light may sometimes be supported on the ground of the presumption of a lost grant from the owner of the servient tenement.

A right to light can also be acquired by a grant, express or implied, or by a reservation. By s. 62 of the Law of Property Act 1925, conveyances of land having houses or buildings thereon, made since December 31, 1881, operate to convey therewith all lights and easements appertaining, or reputed to appertain thereto, or enjoyed therewith, unless a contrary intention is expressed in the conveyance (*Godwin v. Schweppes* [1902] 1 Ch. 926).

It is the fact of user, not the title to use, which is to be considered (*International Tea Stores v. Hobbs*

[1903] 2 Ch. 165, explained in *Wright v. Macadam* [1949] 2 K.B. 744; see also *Gregg v. Richards* [1926] 2 Ch. 521). And a plaintiff, whether tenant or reversioner, may maintain repeated actions for damages so long as the obstruction continues (*Spurr v. Hall* (1887) 2 Q.B.D. 615).

Again, where a man grants a house in which there are windows, neither he nor anyone subsequently claiming under him can block up the windows or destroy the light, unless the right so to do is expressly reserved, or unless the circumstances of the grant are such as to render it manifest that the intention was to permit such blocking up or destruction; but if, having a house and land, he grants the land and retains the house without any reservation of the right to light, the grantee can block up the windows of the house (*Phillips v. Low* [1892] 1 Ch. 47, at 50; *Broomfield v. Williams* [1897] 1 Ch. 602).

The grant of a tenement ordinarily implies a grant of all those continuous and apparent easements (such as access of light) over the other part of the tenement retained by the grantor, which are necessary to the enjoyment of the part granted, and have been therefore used therewith (*Watts v. Kelson* (1871) L.R. 6 Ch. 166, applied in *Westwood v.*

Heywood [1921] 2 Ch. 130); and the fact that the part retained by the grantor is at the time of the grant in the possession of a lessee does not prevent the presumption of such implied grant of a right to the access of light (*Barnes v. Loach* (1879) 4 Q.B.D. 494; *Myers v. Catterson* (1889) 43 Ch. D. 470). But, except in the case of ways of necessity and in some few similar cases, there is no corresponding implication of a reservation in favour of the grantor of part of a tenement in respect of the part retained by him (*Wheeldon v. Burrows* (1879) 12 Ch. D. 31, applied in *Liddiard v. Waldron* [1934] 1 K.B. 435; see also *Aldridge v. Wright* [1929] 2 K.B. 117).

Prescription Act. A right to light under the Prescription Act 1832 can only be acquired under s.3, for s.2 does not apply to the easement of light (*Perry v. Eames* [1891] 1 Ch. 658; applied in *Wheaton v. Maple* [1893] 3 Ch. 48). Section 3 of the Prescription Act provides “when the access and use of light to or for any dwelling-house, workshop or other building shall have been actually enjoyed herewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, and local usage or custom to the contrary notwithstanding, unless it shall

appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing” (Aynsley v. Glover (1875) L.R. 10 Ch. 283 at 285; referred to in Hyman v. van den Bergh [1907] 1 Ch. 176). This period of 20 years must be without any adverse interruption submitted to or acquiesced in for one year after notice; a mere cessation of enjoyment is not sufficient (Smith v. Baxter [1900] 2 Ch. 138 at 138 at 143). It is not essential that there should have been a continuous user of the right (Cooper v. Straker (1889) 40 Ch.D.21). The access of light to a house may be “actually enjoyed” within section 3 although the house is unoccupied and not completed internally nor fit for habitation, if windows have been opened through which the light can and does in fact occasionally enter (Courtauld v. Legh (1869) L.R. 4 Ex. 126, followed in Collis v. Laughler [1894] 3 Ch.659).

A right to light may be acquired by one tenant as against another tenant of land under the same landlord (Morgan v. Fear [1907] A.C. 425, where the authorities are considered). Such rights will be commensurate with the term for which the dominant tenement is held, and will ensure not only as against the adjoining lessee, but also against the common landlord, and all succeeding owners of the servient

tenement (*Morgan v. Fear*, *supra*). But the acquisition of the right under the statute will be suspended during the continuance of a unity of possession of the two tenements (*ladyman v. Grave* (1871) L.R. 6 Ch. 763; *Ecclesiastical Commissioners v. Kino* (1880) 14.D. 213).

The alteration of a building entitled under the statute to the access of light, or the windows in it through which such light has been enjoyed, does not extinguish the right to the light, unless the alteration is such as to manifest an intention of absolutely abandoning such right (*Greenwood v. Hornsey* (1886) 33 Ch.D. 471; *News of the World v. Allen Fairhead* [1931] 2 Ch.402). But an abstraction of light coming over adjoining property, acquiesced in or consented to by the owner of the dominant house, does not necessarily negative his right to an easement over other adjacent property (*Bailey v. Holborn Frascati* [1914] 1 Ch. 598, following and applying *Ankerson v. Connelly* [1907] 1 Ch. 678). And it has been held that pulling down and setting back, or putting forward, such a building does not extinguish the right, where the new windows are so placed as to receive the same, or a substantial portion of the same, light which previously passed into the original building through the ancient windows (*Barnes v. Loach* (1879) 4 Q.B.D. 494,

referred to in *Sctoff v. Pape* (1886) 31 Ch.D. 554), and so as to correspond with some defined parts of the ancient windows (*Pendarves v. Monro* [1892] 1 Ch.611). There can, however, be no prescriptive right to light passing through an ordinary doorway when it is opened, s.3 of the Prescription Act applying only to windows or apertures in the nature of windows (*Levet v. Gas Light & Coke Co.* [1919] 1 Ch.24), though it probably would apply to a fan-light over a door poses of business of occupation. The question to be determined in every case of obstruction to ancient lights is not merely how such light has been obstructed, but rather how much light is left, and in considering the application of suitable and adequate relief the court is not estopped from entertaining *quia timet* actions in certain case of obstruction of ancient lights (*Litchfield-Speer v. Queen Anne's Gate Syndicate (No. 2) Ltd.* [1919] 1 Ch. 407; but the onus is upon the plaintiff to prove an actionable nuisance (*Semon v. Bradford Corporation* [1922] 2 Ch. 737); and in such actions damages may be granted in lieu of an injunction (*Leeds Industrial co-operative Society v. Slack* [1924] A.C. 581). It must be a substantial deprivation of light; the obstruction must, in other words, amount to a nuisance (*Colls v. Home and Colonial Stores* [1904] A.C. 179, applied in *Joly v. Kine* [1907] A.C. 1 and discussed in *Smith v.*

Evangelization Society [1933] 1 Ch. 515). Whether interference amounts to a nuisance does not depend exclusively on the use to which the dominant tenement has been put in the past. There is to be taken into account not only the existing use but also other potential uses to which the dominant owner might reasonably be expected to put the premises in the future, e.g. subdivision of floor space into more rooms (Carr-Saunders v. Dick McNeil Associates Ltd. [1986] 1 W.L.R. 922). As to the standard of light required to survive in order to eliminate the existence of a nuisance, see Fishenden v. Higgs (1935) L.T. 128, which qualifies the dictum of Russel J. that it seems to be of necessity an absolute standard (Horton's Estate v. Beattie [1927] 1 Ch. 75; see also Price v. Hilditch [1930] 1 Ch. 500; Sheffield Masonic Hall v. Sheffield Corporation [1932] 2 Ch. 17). Provided that the owner of the servient tenement is aware that the use being made of the dominant tenement requires an extraordinary amount of light, a right to such amount of light may be established by prescription (Allen v. Greenwood [1980] Ch. 119), but not where the servient owner is unaware of such use (Ambler v. Gordon [1905] 1 K.B. 417).

Pleading. The allegation that the windows are "ancient lights" appears sufficiently to import that

the plaintiff is entitled to the right by prescription, but it may frequently be proper and advisable to insert an allegation to that effect (see *Harris v. Jenkins* (1883) 22 Ch.D. 481; *Spedding v. Fitzpatrick* (1889) 38 L.J. Ch. 410); and where the claim to the right is based upon express or implied grant, or upon a lost grant, the mode in which it arises should be distinctly stated. A lost grant if relied upon should be pleaded (*Smith v. Baxter* [1900] 2 Ch. 147). It is not necessary to allege that the enjoyment was “as of right” (*Truscott v. Merchant Taylors’ Co.* (1856) 11 Ex. 855; *Frewen v. Phillips* (1861) 11 C.B. (N.S.) 449).

In particular, where light is claimed under the Prescription act enjoyment as of right need not be alleged or proved (*Colls v. Home & Colonial Stores* [1904] A.C. 179 at 205).

Relief claimed. If the obstruction continues during the action the plaintiff can have his damage assessed down to the time of assessment (R.S.C. Ord. 37. R. 6). If it continues after the damages are assessed, he may bring a second action (*Battishill v. Reed* (1856) 18 C.B. 696).

An injunction may be claimed, either alone or with a claim for damages, and either in lieu of damages or

additional relief (*Martin v. Price* [1894] 1 Ch. 276; *Colls v. Home & colonial Stores Ltd.* [1904] A.C. 179 at 188); see also *Mallam v. Rose* [1915] 2 Ch. 222 at 232).

Where the damages resulting from diminished light are anticipatory, and not existent, the court has jurisdiction to award damages in lieu of an injunction (*Leeds Co-operative Society v. Slack* [1924] A.C. 851).

As to the diminution in the amount of light, in the case of dwelling-houses, which will entitle a plaintiff to an injunction, see *Fishenden v. Higgs & Hill* (1935) 153 L.T. 128, where the authorities are reviewed, and, in the case of business premises, see *Semon v. Bradford Corporation* [1922] 2 Ch. 737.

Where the plaintiff also owned the house adjoining the subject of the claim damages were recoverable for diminution in the combined site value although it was not ripe for immediate development (*Wills v. May* [1923] 1 Ch.317).

Where the defendant attempted to anticipate an injunction by his speed in building a wall an interlocutory mandatory injunction was granted (*Daniel v. Ferguson* [1891] 2 Ch.27, followed in *Von*

Joel v. Hornsey [1895] 2 Ch. 774). Where there was a fair question of right to be tried at the hearing an interlocutory injunction was granted on the ground that the balance of convenience favoured that course rather than letting the defendants build a wall with an undertaking to remove it if required (Newson v. Pender (1884) 27 Ch.D. 43).

Right of access to air. A claim to have the benefit of all the air which floats over the whole surface of a neighbour's property is too vague and indefinite to be either the subject of prescription under the Prescription Act 1832, or from time immemorial, or to found the presumption of a lost grant. (See Chastey v. Ackland [1895] 2 Ch. 389; [1897] A.C. 155, and the cases next cited.) Accordingly, such claims were held not maintainable where they were made for the access of air to the sails of a windmill (Webby v. Bird (1862) 10 C.B. (N.S.) 268; 13 C.B. (N.S.) 841); or to the plaintiff's chimneys (Bryant v. Lefever (1879) 4 C.P.D. 172; but see Chastey v. Ackland, *supra*); or to a skeleton timber shed (Harris v. De Pinna (1887) 33 Ch.D. 238). Nor does the law recognize any easement of prospect or privacy (Browe v. Flower [1911] 2 Ch. 219).

A right to the access and passage of air through channels over adjoining property into buildings of

the person claiming the right may, however, be claimed where there has been long enjoyment, by lost grant or covenant, or, it seems, by prescription under section 2 of the Prescription Act 1832, or at common law (*Cable v. Bryant* [1908] 1 Ch. 259). It seems also that an obstruction which stopped the access of salubrious air to the doors and windows of a house, and thereby rendered it unwholesome, would be actionable as a nuisance (see *Aldred's Case* (1610) 9 Co. Rep. 58b; *Dent v. Auction Mart Co.* (1866) 7 L.R. 2 Eq. 258; *Hall v. Lichfield Brewery Co.* (1880) 43 L.T. 380); and might in some cases of danger to health, etc., be ground for an injunction. (See *Gale v. Abbott* (1862) 10 W.R. 748 and *City of London Brewery Co. V. Tennant* (1873) L.R. 9 Ch. 212 a 222).

Easements and Analogous Rights

Sub-Part 1

General

Application of this Part

- (1) This Part shall apply to all Easements made or coming into force on or after the commencement of this Act.
- (2) Subsection (1) shall not, unless stated specifically otherwise, apply to Easements, profits, restrictive agreements and all other like restrictions on the use of land having effect in customary law only.
- (3) In this Part, reference to “analogous rights” means an entry order made under section 198 and an access order made under section 199.

Nature of Easement

- (1) Subject to the provisions of this Act or any otherwise written law applicable to the use of land, the rights capable of being created by an Easement are:-
 - (a) any right to do something over, under or upon the servient land; or

- (b) any right that something should not be so done;
or
 - (c) any right to require the occupier of servient land to do something over under or upon that land;
 - (d) any right to graze stock on the servient land.
- (2) The rights capable of being created by an Easement do not include:-
- (a) any right to take and carry away anything from the servient land;
 - (b) any right to the exclusive possession of any land or any part thereof.
- (3) Except where an easement has been created for specific period of time which will terminate at a fixed date in the future or on the happening of a specific event in the future or on the death of the grantor, the grantee or some other person named in the grant, an Easement burdens the servient land and runs with the land for the same period of time as the right of occupancy or lease held by the grantor who created that Easement.

Terminology

- (1) The land for the benefit of which any Easement is created is in this Act referred to as “the dominant land” and the land of the person by whom an Easement is created is referred to as “the servient land.”
- (2) An Easement is, in this Act, in relation to the dominant land, referred to as “benefiting” that land and is, in relation to the servient land, referred to as “burdening” that land.
- (3) The person creating an Easement is, in this Act, referred to as “the grantor” and the person whose land is benefited by an Easement or in accordance with section 196, benefits by an Easement in gross, referred to as “the grantee.”

Sub-Part 2

Creation etc. of Easements and Analogous Rights

Creation of Easement

- (1) An occupier of land under a right of occupancy or a lessor may, by an instrument in the prescribed form, grant an Easement over the land comprised in the

right of occupancy or lease or a part of any such land to the occupier under a right of occupancy or a lessee of other land for the benefit of that other land.

(2) Any occupier as aforesaid or any lessor transferring, assigning or leasing land or a lease may in the transfer, assignment or lease grant an Easement for the benefit of the land transferred, assigned or leased over land retained by him or reserve an easement for the benefit of land retained by him.

(3) An instrument creating an Easement shall specify clearly:-

(a) the nature of the Easement and any conditions, limitations, and restrictions subject to which it is granted;

(b) the period of time for which it is granted;

(c) the land, or the particular part thereof burdened by the Easement;

(d) the land benefited by the Easement;

and shall, if so required by the Registrar, include a plan sufficient to define the Easement.

- (4) Where a co-occupier, by any disposition, severs any building or part thereof or any land separated by a wall or other structure is a party wall or other structure, of support of the dividing wall or other structure in respect of the severed buildings or land and the occupiers of the severed buildings or land and their successors in title shall be entitled to the benefit and subject to the burdens of such cross-easements.
- (5) There shall be implied in every grant of an Easement the grant of all such ancillary rights as may be reasonably necessary for the full and effective enjoyment thereof.
- (6) Any such grant may contain an agreement between the occupiers of the dominant and servient lands binding either or both of them to pay for or contribute towards the cost of constructing, maintaining or repairing any way, wall, drain, or other installation or work forming the subject matter of the Easement.
- (7) No Easement and no right in the nature of an Easement shall be capable of being acquired by any presumption of a grant from long and uninterrupted user.

- (8) Nothing in this section shall be taken to prevent the lawful use of a right of way for persons and for stock acquired and held under customary law by reason of long user and any such right of way shall be deemed to be property for purposes of section 24 of the Constitution.

Entry on neighbouring land where Easement refused

- (a) An occupier of any land (the dominant land) may apply to a court on the prescribed form for an order, hereinafter referred to as an “entry order” authorizing entry on or over any neighbouring land (the servient land) for the purpose of erecting, repairing, adding to, painting or demolishing the whole or any part of any structure on the dominant land or doing any part of any structure on the dominant land or doing any other necessary or desirable thing on that land.
- (2) The applicant shall give not less than fourteen days notice in writing to:-
- (a) the occupier of the servient land; and

- (b) the local authority having jurisdiction in the area where the dominant and servient land are located,

of the intention to apply for an entry order under this section.

- (3) On an application under subsection (1), the court may, after hearing the applicant and the persons to whom notice was given under subsection (2), make an entry order authorizing the applicant to do all or any of the following:-

- (a) to enter on or over the servient land, either personally or through the applicant's employees, agents or contractors, for any purpose specified in the entry order;
- (b) to use that purpose on or over the servient land such vehicles and other means of transport and such plant, machinery, cranes or other equipment as are specified in the entry order;
- (c) to store on the servient land such materials required for the purposes of the work and in such quantities as are specified in the entry order.

- (4) In determining whether to make an entry order under subsection (3), the court shall have regard to:
- (a) the nature and conduct of the negotiations, if any, between the occupiers of the dominant and servient land with respect to any attempt by the occupier of the dominant land to obtain an Easement for the purposes for which the entry order is applied for from the occupier of the servient land;
 - (b) the urgency, importance and desirability of the work for which the entry order is being applied for;
 - (c) the scope of the work and the length of the time for which the entry order is being applied for;
 - (d) whether the applicant has applied for or obtained all such permissions, licenses and consents required from all relevant public authorities to execute the works;
 - (e) such other matters as shall appear to the court to be relevant.
- (5) An order made under subsection (3) may be made on such conditions as the court shall think fit and

without prejudice to the generality of this provision, such conditions may include:

- (a) the period of time during which the entry on or over the servient land is authorized;
- (b) the hours of the day or night during which the work may be done;
- (c) the preservation of the safety of persons or property on the servient land;
- (d) the preservation, so far as is consistent with the work to be executed, of the natural features and condition of the servient land;
- (e) the restoration of the servient land to its former state at the conclusion of the work;
- (f) the maintenance of adequate access to the servient land;
- (g) the provision of security or indemnity to secure:-
 - (i) the performance of any conditions of the entry order; or

- (ii) the making good of any damage caused by entry on or over the servient land, or work on or over the land; or
 - (iii) the reimbursement of the occupier of the servient land for any costs, expenses or loss arising from the entry;
 - (h) any other relevant matter.
- (6) Where, as a result of fire, civil commotion or natural disaster, a structure on the dominant land has become a threat to public safety or public health, so that there is an urgent need to effect repairs to or demolish that structure and such action may only be executed by entry on or over the servient land, the occupier of the dominant land may, on giving not less than twenty-four hours notice in writing to the occupier of the servient land, enter the servient land and effect the repairs or demolition but such entry and execution of works shall not prevent the occupier of the servient land from applying to court for an order requiring the occupier of the dominant land to make good any damage caused by such entry and works and to reimburse the occupier of the servient land for any costs, expenses or loss arising from such entry and works.

(7) In this section:-

- (a) an occupier of land shall be taken to include an occupier under a right of occupancy, a lessor and a lessee; and
- (b) neighbouring land means any land in respect of which an order is sought under this section, whether or not adjoins the land occupied by the applicant for an entry order.

Access to landlocked land

- (1) An occupier of landlocked land may apply in the prescribed form to a court for an order, hereinafter referred to as an “access order” granting reasonable access to that land.
- (2) A copy of the application shall be served on:
 - (a) the occupiers of each piece of land adjoining the landlocked land;
 - (b) any person claiming an interest in any such piece of land of whom the applicant has actual notice;

- (c) the local authority having jurisdiction in the area where the landlocked land is located;
 - (d) such other persons occupying or having an interest in land which in the opinion of the court may be affected by the granting of the application.
- (3) The court may, after hearing the applicant and any person served with an application under subsection (2) make an access order in respect of any other piece of land, the occupier of which was served with a copy of the application under subsection (2), for the benefit of the landlocked land.
- (4) In considering whether to grant an access order, the court shall have regard to:-
 - (a) the nature and quality of the access, if any, to the landlocked land when the applicant first occupied the land;
 - (b) the circumstances in which the land became landlocked;
 - (c) the nature and conduct of the negotiations, if any, between the occupiers of the landlocked land and any adjoining or other land with

respect to any attempt by the occupier of the landlocked land to obtain an Easement from one or more occupiers of the adjoining or other land;

- (d) the hardship that may be caused to the applicant by the refusal of the access order, in comparison to the hardship that may be caused to any other person by the making of the order;
 - (e) the purposes for which access is or may be required;
 - (f) such other matters as appear to the court to be relevant.
- (5) An access order may be made subject to such conditions as the court may think fit and without prejudice to the generality of this provision, such conditions may include:-
- (a) the period for which the access order is to be made;
 - (b) the payment of reasonable compensation by the applicant to any other person;

- (c) the allocation of the costs of any work necessary to give effect to the order between the applicant and any other person;
 - (d) the fencing of any land and the upkeep and maintenance of any such fence;
 - (e) the upkeep and maintenance of any land over which the access order has been granted;
 - (f) the execution of any instrument or the completion of any prescribed form or the doing of any other thing necessary to give effect to the order;
 - (g) any conditions set out in subsection (5) of sub-heading of Entry of neighbouring land which in the opinion of the court are applicable to an access order;
 - (h) any other relevant matter.
- (6) An access order made under this section shall be deemed to have all the characteristics and incidents of an easement and the land over which it has been granted shall be deemed to be the servient land and landlocked land shall be deemed to be the dominant land in respect of that easement.

Enjoyment of Easements and Analogous Rights

- (1) The benefit of an easement, and an analogous right granted under this Part shall, during the term of the existence thereof, be enjoyed by the occupier of the dominant land and his successors in title and by:-
 - (a) any lessee of the dominant land, or so far as the nature of the easement, or analogous right permit, any part thereof; and
 - (b) any lender on the security of a mortgage for the time being in possession of the dominant land, or so far as the nature of easement or analogous right permit, any part thereof.
- (2) Any person referred to in paragraphs (a) and (b) who is by this section entitled to the benefit of an easement or analogous right may take in his own name any proceedings necessary to enforce that easement or those analogous rights.

Cancellation and Extinguishment of Easements and Analogous Rights

- (1) Subject to subsection (3), any easement granted under this Part or any analogous right created under this Part may be canceled by the person occupying the dominant land under a right of occupancy.
- (2) Any such cancellation shall be effected by the prescribed form and the easement, or analogous right shall be extinguished on the date that form is recorded in the register.
- (3) On the application of any person occupying servient land under a right of occupancy, the Registrar may cancel an easement or an analogous right where he is satisfied that:-
 - (a) the period of time for which the easement or analogous right was intended to subsist had expired; or
 - (b) the event upon which the easement or analogous right was intended to terminate has occurred.
- (4) The consent of any lessee or lender for the time being entitled to the benefit of any easement or

analogous right shall be necessary for any cancellation of any such easements or rights and such consent shall be signified in the prescribed form.

Sub-Part 3

Public Rights of Way

Power of Minister to Create Public Rights of Way

- (1) The Minister may, subject to and in accordance with sections 216 and 217 create rights of way which shall be known as public rights of way.
- (2) A public right of way may be:
 - (a) a right of way created for the benefit of the Government, a local authority, a public authority or any corporate body to enable all such organizations, authorities and bodies to carry out its functions, referred to in this Act as a wayleave; or

- (b) a right of way created for the benefit of the public, referred to in this Act as a communal right of way.
- (3) A public right of way shall attach to and run with the servient land in respect of which it has been created and shall be binding on all occupiers from time to time of the servient land, howsoever they are occupying the land and whether they are occupying the land under a right of occupancy or a derivative right thereof, or under customary law or as a successor in title to any such occupier or as a trespasser.
- (4) A wayleave shall authorize persons in the employment of or who are acting as agents of or contractors for any of the organizations, authorities or bodies referred to in subsection (1) or who have the express or implied consent of the aforesaid organisations, authorities and bodies to enter on the servient land for the purpose of executing works, building and maintaining installations and structures and inspecting all such works, installations and structures on the servient land and to pass and repass along that wayleave in connection with purposes of those organizations, authorities or bodies.

- (5) A communal right of way created for the benefit of the public shall entitle the public to pass and repass along that right of way and in areas designated for that purpose, to undertake recreational activities of the kind permitted in that designated area.

Application for wayleave

- (1) Except where the Commissioner is proposing of his own motion to create a wayleave, an application from any Ministry or Department of Government, or local authority or public authority or corporate body shall be made to the Commissioner.
- (2) An application shall be made on the prescribed form and shall be accompanied by such plans, maps and other information as may be prescribed or as the Commissioner may, in writing require the applicant to supply and the Commissioner shall not begin the process of creating a wayleave until all such information as is prescribed or required is submitted to him.
- (3) In order to enable a proposed wayleave to be created by the Commissioner of his own motion to comply with the provisions of this section, the Commissioner shall complete an application form as if he were applying to create a wayleave and

references to “the applicant” in this Sub-Part in relation to an application to create a wayleave shall be taken to apply as well to the Commissioner.

- (4) The applicant shall serve a notice on:-
- (a) all persons occupying land under a right of occupancy over which the proposed wayleave is to be created, including persons occupying land in accordance with customary pastoral rights;
 - (b) all local government authorities in whose area of jurisdiction land over which the proposed wayleave is to be created is located;
 - (c) all persons in actual occupation of land in an urban and peri-urban area over which the proposed wayleave is to be created;
 - (d) such other persons as may be specified.
- (5) The Commissioner shall give such publicity to the application along the route of the proposed wayleave as is calculated to bring the application clearly and in a comprehensible manner to the notice of all persons using land over which the proposed wayleave is likely to be created.

Application for communal right of way

- (1) A local government authority, an association, or any group of persons with an interest in the environment or land may apply to the Commissioner for the creation of a communal right of way.
- (2) An application made under subsection (1) may include an application to recognize and convert a right of way under customary law to which subsection (7) of section 210 applies to a communal right of way created under this section.
- (3) The provisions of subsections (2), (4) and (5) of section 216 shall apply to an application by a local government authority for the creation of a communal right of way as they apply to an application to create a wayleave under that section.
- (4) The Commissioner may of his own motion where he is of the opinion that it is expedient or desirable that a communal right of way be created initiate the procedures referred to in subsection (2).

Determination on Creation of Public Right of Way

(1) The Commissioner shall:

- (a) on receipt of all information prescribed or required under sections 216 and 217; and
- (b) after not less than sixty days from the date of the serving of notices under subsection (3) of section 216 or subsection (2) of section 217

consider all the information so received and all representations and objections made by any person served with a notice under the aforesaid subsections and recommend to the Minister whether to:

- (c) appoint an inquiry under section 19 to give further consideration to the representations and objections; or
- (d) refer the application to the Council for its opinion on whether to approve the application; or
- (e) initiate and facilitate negotiations between those persons who have made representations on the application and the applicant with a view to reaching a consensus on the application; or

- (f) authorize, by order, the creation of the public right of way, with or without such amendments, limitations and conditions as the Commissioner may recommend.
- (2) Where the Commissioner has of his own motion proposed the creation of a public right of way and presentations have been made on that proposal which are concerned with the matters other than the compensation payable for the use of the land for that public right of way, the Commissioner shall recommend to the Minister only that the Minister exercise powers under paragraphs (c) or (d) of subsection (1).
- (3) The Minister shall, after taking account, as the case may be, of:
 - (a) the recommendations of the Commissioner; or
 - (b) the report of an inquiry appointed under section 19; or
 - (c) the advice of the Council;
 - (d) the outcome of any negotiations initiated under paragraph (e) of subsection (1);

determine whether to create or refuse to create a public right of way.

- (4) The Minister may, by order, create a public right of way under this section subject to such amendments, limitations and conditions, including conditions as to the costs of constructing and maintaining a public right of way as he shall think fit. Provided that where an agreement has been reached between the parties to any negotiations initiated under paragraph (e) of subsection (1) the Minister shall, if he is minded to create a public right of way but not to accept any amendment, limitation or condition of that agreement, refer the matter back to the parties for their reconsideration and take no decision on the creation of that right of way until not less than thirty days have elapsed from the date of the referral of the matter back to the parties or the parties have resubmitted their agreement, with or without amendments, to the Minister whichever is the shorter period.
- (5) The order of the Minister to create a public right of way shall:
 - (a) delineate the route of that public right of way;
and

- (b) be published in the Gazette; and
 - (c) be notified to all local government authorities having jurisdiction along the route of the public of way;
 - (d) be publicized in such manner as is calculated to bring it to the attention of people occupying and using land along the route of the public right of way;
 - (e) come into force thirty days after it has been published in the Gazette.
- (6) Any person who made any representations or objections to an application to create a public right of way may, within six weeks of the order being made, appeal to the High Court on a point of law against an order made by the Minister under this section, but apart from such an appeal, an order of the Minister shall not be questioned by way of judicial review or otherwise in any court.

Powers of Registrar with Respect to Public Right of Way

- (1) Where the Minister has made an order to create a public right of way, the Commissioner shall cause to be delivered to the Registrar all the necessary documents, plans, demarcations and surveys of the route of that public right of way to enable the Registrar to exercise his powers under this section.
- (2) On receipt of the information referred to in subsection (1), the Registrar shall, after the expiry of the time allowed in subsection (6) of section 218 to appeal against the order of the Minister, take all such action as he shall consider necessary and desirable or as may be prescribed:-
 - (a) to cause to be recorded, using such forms as may be prescribed, the route of the public right of way on any certificate of occupancy or other document of title held in any office of the land registry having reference to land over which the public right of way has been created; and
 - (b) to cause to be delivered to him all certificates of occupancy having reference to land over which the public right of way has been created held by:-
 - (i) persons occupying such land under such right of occupancy; or

- (ii) by any lender of money secured by a mortgage or lien who is holding that certificate of occupancy as part of the securing for that loan;

so as to amend any such certificate of occupancy by recording the route of the public right of way on that certificate of occupancy.

Compensation in Respect of Public Right of Way

- (1) Subject to the provisions of this section, compensation shall be payable to any person for the use of land, of which he is in lawful or actual occupation, as a communal right of way and, with respect to a wayleave, in addition to such compensation for the use of land for any damage suffered in respect of trees, crops and buildings as a result of the creation of such a wayleave.
- (2) References to damage caused as a result of the creation of a wayleave shall include any damage caused as a result of any preliminary work

undertaken in connection with surveying or determining the route of that wayleave, whether the trees, crops or buildings so damaged were included in the route of the wayleave as delineated in the order of the Minister.

- (3) The duty to pay compensation payable under this section shall lie with Government Department or Ministry local or public authority or corporate body which applied for the public right of way and such duty shall be complied with promptly.
- (4) Where the person entitled to compensation under this section and the body under a duty to pay that compensation are unable to agree on the amount or method of payment of that compensation or where the person entitled to compensation is dissatisfied with the time taken by the body under a duty to pay that compensation to make, negotiate or process an offer of compensation, that person may apply to the High Court to determine the amount and method of payment of compensation, and the High Court may, in making any award of compensation, make an additional award to compensate the additional costs and inconvenience incurred by the person entitled to compensation through the dilatory or other unsatisfactory procedures of that public authority.

Sub-Part 4

Powers of Court

Power of Court to Enforce Easements and Analogous Rights

A court may, in determining any question or dispute concerning the existence or effect of an easement or any analogous right or a public right of way make an order on such conditions, if any, as it thinks fit on all or any of the following matters:-

- (a) the existence of an easement or an analogous right or a public right of way;
- (b) the enforceability of an easement, whether the easement is created under this Act or otherwise, or an analogous right or a public right of way by or against any persons;
- (c) the extent of the use of the easement, analogous right or public right of way and whether that use exceeds what is reasonable or is permitted under the terms of the grant of the easement or the terms of the order creating the analogous right or public right of way;

- (d) the question whether any work is required to be done under the terms of any easement, analogous right or public right of way' and, if so, the nature and extend of the work required to be undertaken;
- (e) the reasonable and proper cost of any such work as is required to be undertaken;
- (f) the person or persons by whom the costs of any such work is to be borne and if the cost is to be shared between two or more persons, the shares to be borne by each such person;
- (g) the date by which and the manner in which any such work is to be undertaken;
- (h) the entry on to any land, whether or not it is land over which an easement, analogous right or public right of way has been created, for the purpose of doing the work and the use over or on that land of any vehicles, plant, machinery and installations for the purpose of carrying out that work;
- (i) any other matter arising in relation to a question or dispute about an easement, analogous right or public right of way.

Power of Court to modify or extinguish Easements and analogous rights

- (1) This section applied to every easement, analogous right, restrictive covenant or agreement whensoever and howsoever created including easements, profits, restrictive agreements and other similar rights created under customary law.
- (2) The court may, by order, on the application of:
 - (a) the Commissioner; or
 - (b) the person having an interest in land benefited or burdened by one or more of the rights or restrictions referred to in subsection (1), make an order modifying or extinguishing in whole or in part the right or restriction in respect of which the application has been made on any of the grounds set out in subsection (3).
- (3) The grounds on which the court may make such order as its referred to in subsection (2) are that:
 - (a) by reasons of any change since the creation of the right or restriction referred to in subsection (1) in:

(i) the nature or the extent of the use being made of the benefited to burdened land; or

(ii) the character of the neighbourhood or of the benefited or burdened land; or

(iii) any other circumstances that the court considers relevant,

the aforesaid right or restriction ought to be modified or wholly or partly extinguished; or

(b) the continuation of the right or restriction in its existing form impedes or would impede the reasonable user of the land for public or private purposes and does not secure to those persons entitled to the benefit of that right or restriction any practical benefits of substantial value or advantage to them; or

(c) the development and use of land in accordance with:-

(i) any development conditions contained in the certificate of occupancy; or

(ii) any proposals for or restrictions on development contained in any general planning scheme, detailed scheme, or general development order made or approved under and in accordance with the provisions of the Town and Country Planning Ordinance, Cap. 378, or any development plan made and approved under any law replacing that written law; or

(iii) any land use plan made by a village under section 58;

(iv) the general pattern of the development and use of land in the area of the benefited and burdened land,

makes it necessary and desirable that the aforesaid right or restriction be modified or wholly or partly extinguished; or

(d) every person entitled to the benefit of the right or restriction:-

(i) has agreed that the right or restriction should be modified or wholly or partly extinguished; or

- (ii) may reasonably be considered by his acts or omissions to have abandoned or waived the right to the aforesaid right or restriction; or
 - (e) the proposed modification or Extinguishment in whole or in part will not substantially disadvantage any person entitled to the benefit of the right or restriction; or
 - (f) insofar as any person is disadvantaged by a proposed modification or extinguishment in whole or in part, the payment of compensation will be an adequate substitute for the modification or loss in whole or in part of that right or restriction.
- (4) An application under this section shall be served on:
- (a) the local government authority having jurisdiction in the area where the land the subject of the application is situate; and
 - (b) such other persons as the court may direct.
- (5) The Court may award such compensation to such persons referred to in paragraph (f) of subsection (3)

as it considers just and reasonable and that compensation shall be payable by the person applying to the court for the modification or extinguishment in whole or in part of that right or restriction.

- (6) The court may exercise any of the powers conferred upon a court by section 221 in order to arrive at a decision under and in accordance with this section.
- (7) Where any proceedings are commenced in any court under section 221 to enforce an easement or analogous right or public right of way, the party against whom the proceedings have been taken may in such proceedings apply to the court for an order giving leave to apply to the court under this section and staying those proceedings in the meantime, and the court may grant such application.
- (8) An order made under this section shall be binding on all persons entitled or thereafter becoming entitled to benefit from the right or restriction thereby modified or extinguished in whole or in part, whether such persons were parties to the proceedings or not or were served with a notice or the proceedings or not.

- (9) The court shall cause to be delivered to the Registrar a copy of the order made under this section and the Registrar shall have in relation to that order all the powers that are conferred on him by subsection (2) of section 218 in relation to an order creating a public right of way, modified in such way as the Registrar shall consider necessary to enable him to record the modification or as the case may be the extinguishment in whole or in part of any right or restriction recorded on the certificate of occupancy or other document of title held by the land registry or by any person holding the land the subject of the application under a right of occupancy.