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Easements: ancillary rights and obligations to repair

by Practical Law Property

This practice note considers whether an easement includes any implied rights or obligations to repair. This note also considers the position where these rights are expressed in the grant of the easement itself.

Maintained
Resource Type
Practice notes

Scope of this note

Easements can be created in a number of different ways, including by **express** and implied grant and by prescription (see *Practice note, Easements: creation: How easements are created*). If an express covenant to repair is not included when an easement is created, a question that often arises is whether there is an ancillary right or an obligation on the dominant or servient owner to repair the subject matter of the easement, such as the way or pipe. This practice note considers this question (see *Implied rights and obligations to repair*).

Jurisdictions
England
Wales

This note also considers the position where rights or obligations to repair are expressed in the grant of the easement itself (see *Express rights and obligations to repair*).

This practice note does not cover:

- **So-called fencing "easements"**. These are binding obligations on landowners to maintain fences or hedges around land for the benefit of adjoining land. While described as easements in cases, these rights are not true easements because an easement cannot impose an obligation on the servient owner to spend money. For more information, see *Practice note, Easements: characteristics: Fencing "easements"*.
- **Easements of support**. For a discussion of the relevant issues, including developments in the law of nuisance in the context of easements of support, see *Gale on Easements (Sweet & Maxwell, 20th ed, 2016) paragraph 10-29 to paragraph 10-38*. For background information on:
 - *Holbeck Hall Hotel Ltd v Scarborough BC [2000] QB 836*, see *Legal update, Duty of care owed by neighbours when garden wall collapsed (Court of Appeal): Collapsing land*.
 - *Rees v Skerrett [2001] EWCA Civ 760*, see *Legal update, Rights of support and duties to weatherproof*.

See also *What if the servient owner does not repair?*.

- **Occupier's liability**. If a person using the subject matter of an easement, such as a right of way, is injured because of its bad repair, that person may look for someone to sue. This note does not consider whether the dominant or servient owner may owe a duty to such a person under the *Occupiers' Liability Act 1957* or the *Occupiers Liability Act 1984*. For more information on occupier's liability in the context of easements and repair, see *Gale on Easements (Sweet & Maxwell, 20th ed, 2016) paragraph 1-101 to 1-107*.

Additional practice notes on easements

This practice note forms part of a series of concise practice notes considering the various aspects of the law governing easements.

The other practice notes in the series are:

- Easements: characteristics.
- Easements: creation.
- Easements: scope and extent.
- Easements: interference and remedies.
- Easements: termination.
- Easements: land registration protection.
- Easements: rights of light.
- Easements: unity of seisin.

For information on the rules governing overriding easements, see *Practice note, Overriding interests and the Land Registration Act 2002*.

Implied rights and obligations to repair

Where an express covenant to repair is not included when an easement is created, it is important to distinguish between who has the **right** of repair and who has an **obligation** to repair. This distinction is summarised by the Court of Appeal in *Carter v Cole* [2006] EWCA Civ 398 in the context of the repair of an expressly granted right of way. Longmore LJ set out a number of general and uncontroversial propositions (at paragraph 8), all of which, in principle, are subject to contrary agreement. These include the propositions that:

- Once the way exists, the servient owner (who owns the land over which the way passes) is under no obligation to maintain or repair it.
- The dominant owner has no obligation to maintain or repair the way.
- The servient owner can maintain and repair the way, if he chooses.
- The dominant owner (in whose interest it is that the way be kept in good repair) is entitled to maintain and repair the way and, if he wants the way to be kept in repair, must himself bear the cost.
- The dominant owner has a right to enter the servient owner's land for the purpose but only to do necessary work in a reasonable manner.

So, if a dominant owner wants the way to be kept in repair, he must himself bear the cost and will generally have no right to a contribution from the servient owner in the absence of express agreement. The same rule applies where the servient owner carries out repairs.

However, it is also important to understand the possible consequences if the dominant and servient owners fail to repair the subject matter of an easement. For more information, see:

- *What if the dominant owner does not repair?*
- *What if the servient owner does not repair?*

Although a right to enter and repair may be implied as a right ancillary to an easement, it would be better to consider and include such rights in the express grant of an easement (see *Express rights and obligations to repair*).

Ancillary rights

The grant of an easement will impliedly include those ancillary rights that are reasonably necessary for its use and enjoyment (*Jones v Pritchard* [1908] 1 Ch 630, at 638). This principle can be traced back to *Liford's Case* (1614) 11 Co Rep 46b. For more information on ancillary rights, including examples of such rights, see *Practice note, Easements: scope and extent: Ancillary rights*.

Ancillary rights can arise where an easement has been granted expressly or impliedly or under the doctrine of prescription (see for example, *Newcomen v Coulson* (1877) 5 Ch D 133, *Duke of Westminster v Guild* [1985] Q.B. 688 and *Mills v Silver* [1991] Ch 271 respectively).

Right of repair

Whether an easement includes ancillary rights often arises in the context of the right of repair. The following example was given in *Jones v Pritchard* at page 638:

"the grantee of an easement for a watercourse through his neighbour's land may, when reasonably necessary, enter his neighbour's land for the purpose of repairing, and may repair, such watercourse."

In other words, the dominant owner is **entitled**, though not obliged, as a right ancillary to the easement to enter the servient land and to do such repairs to the subject matter of the easement as are reasonably necessary.

However, an ancillary right to enter the servient tenement to repair it will not be implied where such a right is not necessary (*Edwards v Kumarasamy* [2016] UKSC 40).

Whether an easement includes an ancillary right to repair is not limited to cases where the easement itself has been expressly created. See, for example:

- *Duke of Westminster v Guild* [1985] QB 688, which involved the implied grant of an easement of drainage.
- *Mills v Silver* [1991] Ch 271, which involved the prescriptive acquisition of a right of way.

However, the extent of the ancillary right to repair differs according to the method by which the easement has been created. For more information, see *Can the ancillary right of repair include improving an expressly granted right of way or a right of way acquired by prescription?*.

It is not just the dominant owner who has the right of repair:

"The common law has contemplated with equanimity the prospect that both the servient owner and the dominant owner have the right of repair." (*Carter v Cole, Longmore LJ at para 19.*)

Obligation to repair

In the absence of any special local custom, express contract, or statute, there is no obligation either on the dominant or the servient owner to repair the subject matter of an easement. However, despite the lack of a specific obligation, the dominant and servient owners may have common law rights of action against each other for failing to repair. For more information, see:

- *What if the dominant owner does not repair?*.
- *What if the servient owner does not repair?*.

Easements are essentially negative in character in the way that they relate to the servient land and they only impose or imply positive obligations on servient owners in very limited circumstances. The servient owner's obligation is to refrain from doing anything that impedes enjoyment of the easement by the dominant owner. This is because an "easement requires no more than sufferance on the part of the occupier of the servient tenement" (*Jones v Price* [1965] 2 QB 618 at 631).

In *William Old International Ltd v Arya* [2009] EWHC 599 the High Court held that a developer's right to lay service media across neighbouring land did not positively oblige the owners of the neighbouring land to enter into a deed of grant with a statutory undertaker. In addition, there was no implied ancillary obligation of that kind which burdened the servient owner. For more information, see *Legal update, Easements and non-derogation from grant* and *Ask, Is it correct that any right ancillary to an easement must itself be capable of being an easement?*.

No right to a contribution

If the dominant owner chooses to carry out repairs to the subject matter of the easement, the dominant owner will have to bear the cost and, in the absence of express agreement, will generally have no right to a contribution

from the servient owner (*Konstantinidis v Townsend (No1) [2003] EWCA Civ 537 at paragraph 19* and *Carter v Cole at paragraph 8*).

The same principle applies where the servient owner carries out repairs to the subject matter of the easement.

What if the dominant owner does not repair?

Although an easement will not include an ancillary right which obliges the dominant owner to keep the subject of the easement in repair, the dominant owner may in practical terms be required to do so to avoid committing a trespass or a nuisance.

So, for example, if the dominant owner installs a pipe, fails to repair it and water escapes from the pipe, that will amount to a trespass to the servient land (*Jones v Pritchard* and *Simmons v Midford [1969] 2 Ch 415*).

Parker J explained this situation in *Jones v Pritchard* at page 638 as follows:

"... there is undoubtedly a class of cases in which the nature of the easement is such that the owner of the dominant tenement not only has the right to repair the subject of the easement, but may be liable to the owner of the servient tenement for damages due to want of repair. Thus, if the easement be to take water in pipes across another man's land and pipes are laid by the owner of the dominant tenement and fall into disrepair, so that water escapes on to the servient tenement, the owner of the dominant tenement will be liable for damage done by such water. Strictly speaking, I do not think that even in this case the dominant owner can be said to be under any duty to repair. I think the true position is that he cannot, under the circumstances mentioned, plead the easement as justifying what would otherwise be a trespass, because the easement is not, in fact, being fairly or properly exercised."

What if the servient owner does not repair?

In the absence of statute, any special local custom or express contract, the servient owner is not usually required to carry out any repairs necessary to ensure the enjoyment of the easement by the dominant owner. However, the servient owner may incur an obligation to repair if there is disturbance of the easement by the servient owner.

In *Saint v Jenner [1973] Ch 275*, the servient owner installed ramps to slow down the traffic using a right of way over a metalled lane. This, in itself, did not amount to a substantial interference with the right of way. However, substantial interference was caused when the lane's surface deteriorated and potholes appeared at the ends of the ramps.

The servient owner gave undertakings to repair and maintain the surface of the lane. However, the dominant owner was concerned that if a successor in title to the servient land failed to maintain the surface of the lane and did not remove the ramps, the successor could not be made liable to the dominant owner for disturbance of the easement.

The Court of Appeal applied *Sedleigh-Denfield v O'Callagan [1940] AC 880* and found that such a successor would be liable because they would be adopting a nuisance. The court held that:

- There was no distinction as to the nature of the remedies between an ordinary case of nuisance and the disturbance of an easement.
- A decline in the surface of the lane would turn something (that is, the ramps) that had not been a disturbance, into a disturbance of the easement.
- The successor in title to the servient land would be bound to repair the surface of the lane if they retained the ramps.

However, it is not every interference with the enjoyment of an easement that amounts in law to a disturbance: the interference with the easement must be of a substantial nature. For more information, see *Practice note, Easements: interference and remedies*.

There have also been a number of developments in the law of nuisance in the context of easements of support. For example, in *Holbeck Hall Hotel Ltd v Scarborough BC*, the Court of Appeal held that the owner of supporting land has a duty which extends, in some circumstances, to a duty to take positive steps to maintain and to continue support. For more information on easements of support, see *Scope of this note*.

Extent of implied rights ancillary to an easement: some cases considered

The grant of an easement will include those ancillary rights that are reasonably necessary for its use and enjoyment (see *Ancillary rights*). As a result, the extent of the ancillary rights will be determined in each case in the light of the particular circumstances of the grant. This section of the note considers some case law on the construction of implied rights which are ancillary to an easement. The following issues are considered:

- Can ancillary rights include constructing a way which is suitable for the expressly granted right?.
- Can the ancillary right of repair include improving an expressly granted right of way or a right of way acquired by prescription?.
- Is the ancillary right to construct a road limited to the minimum standard to make the grant effective?.
- Can the ancillary right of repair include replacement?.
- What if there is interference with the dominant owner's ancillary right to enter and repair?.

Can ancillary rights include constructing a way which is suitable for the expressly granted right?

In the absence of express agreement as to the scope of ancillary rights, where a right of way has been expressly granted both of the following apply:

- The grantor of a right of way (the servient owner) is under no obligation to construct the way.
- The dominant owner may enter the servient land for the purpose of making the grant of the right of way effective, namely to construct a way which is suitable for the right granted to the dominant owner.

(*Carter v Cole*.)

For example, in *Newcomen v Coulson* (1877) 5 Ch D 133:

- By an award under an Inclosure Act, allottees were given a right of way on foot and on horseback and with their carts and carriages and with horses, oxen and cattle.
- The award expressly provided that the allottees might "street out" the way, and in such event a particular width was specified.
- A road of the specified width was made when the land having the benefit of the right of way was used only for agricultural purposes.
- Over a century later, the owner of the dominant land built 26 dwellings on the dominant land and created a metalled road in place of the previous cart road.

The court reasoned that it was unlikely that it was contemplated at the time of the inclosure, that at no time thereafter would any house or dwelling of any kind be erected on any part of the large allotments. As a result, the court interpreted the right as a general right of way, in the form of a right of way to all the homes which may be built on the land in question.

The court held that the extent of the express grant entitled the dominant owner to build a metalled road over the right of way, for the following reasons:

- It was a principle of law that the dominant owner of a right of way has a right to enter on the servient land for the purpose of making the grant effective, that is, to enable the dominant owner to exercise the right granted to them.
- This right includes not only keeping the road in repair but the right of making a road such that it could be used for the purposes for which it was granted.

- The word "repair" was not limited to making good the defects in the original soil by subsidence or washing away. Jessel MR gave the following example at page 143:

"If you grant to me over a field a right of carriage-way to my house, I may enter upon your field and make over it a carriage-way sufficient to support the ordinary traffic of a carriage-way, otherwise the grant is of no use to me, because my carriage would sink up to the naves of the wheels in a week or two of wet weather."

See also *Can the ancillary right of repair include improving an expressly granted right of way or a right of way acquired by prescription?*.

Can the ancillary right of repair include improving an expressly granted right of way or a right of way acquired by prescription?

An important distinction is drawn between rights acquired by prescription and those acquired by express grant.

Newcomen v Coulson illustrates that the express grant of a right of way, may permit the dominant owner to carry out work (even if it is work of improvement) to the route of a right of way, to make the road suitable for the intended purposes of the grant (see *Can ancillary rights include constructing a way which is suitable for the expressly granted right?*). However, in certain circumstances it is possible that improving the right of way as a result of a change to the dominant land may result in a claim that the use of the right of way constitutes excessive user. For more information, see *Practice note, Easements: scope and extent: Excessive user*.

Although the dominant owner may improve a right of way which has been expressly granted for all purposes, a prescriptive right is limited by the nature of the use from which it has arisen. This means that for a prescriptive right of way, the dominant owner will have acquired the right to enter the servient land to undertake repairs, but not to carry out improvements so as to increase the burden upon the servient land (*Mills v Silver at 286H-287C*).

So, for example, in *Mills v Silver*, the court held that the dominant owner had committed trespass by laying a stone road along a farm track over which a prescriptive right of way had been acquired. Making the stone road involved putting down between 600 and 700 tons of stone along the track. Dillon LJ concluded that this was an improvement which went far beyond mere repair. The prescriptive right to which the dominant owner was entitled did not enable them to do that to the detriment of the servient owner.

Is the ancillary right to construct a road limited to the minimum standard to make the grant effective?

In *Nationwide Building Society v James Beauchamp (A Firm) [2001] EWCA Civ 275*, the Court of Appeal held that the express grant of a right of way included an ancillary right to construct a road, and in that case, the right was not limited to the minimum standard to make the grant effective. However, *Nationwide* is an unusual case in the sense that:

- The servient owner had expressly covenanted to construct the road to adoption standard, but failed to perform its obligations before it went into insolvent liquidation.
- Ten plots of land were expressly granted a right of way. Each of these dominant owners (Borrowers) defaulted on their loans and it was their lender who wished to rely on the Borrowers' ancillary rights.

In the *Nationwide* case, the lender was the mortgagee of plots in a self-build scheme. Under the scheme, each of the ten Borrowers intended to purchase one plot using a sub-sale arrangement and build a house on that plot. AM created the ten plots from part of its property and retained the other part (retained land). The Borrowers formed a company (W) to hold the land over which the estate road leading to the plots and the retained land was to be built (road land).

W entered into a contract with AM to purchase the ten plots and the road land. The road land was transferred to W and a right of way was expressly reserved over the road land to benefit the retained land. The plots were sold by way of sub-sale to each of the ten Borrowers and each of the ten plots was expressly granted a right of way over the road land.

W covenanted with AM for the benefit of the retained land to construct the estate road and procure its adoption as a highway. However, the estate road was built to base course standard only and was not adopted. The

Borrowers then defaulted on their loans, W went into insolvent liquidation and AM into administrative receivership.

It was not in dispute that if the Borrowers had the right to complete the road to adoption standard, the lender had the same right on taking possession of the plots.

The court held that the Borrowers had an immediate grant of a right of way over the road land, which was not contingent on the construction of the road. As established in prior case law, the grant of a right of way carried with it such ancillary rights as were necessary to make it effective.

Peter Gibson LJ commented that it:

- Did not assist to refer to a common law right as though the common law recognised some independent right regardless of the particular circumstances of the grant of right of way.
- Was determinative in this case that the parties themselves had specified the standard to which the road should be constructed.
- Was impossible to see why W or AM would object to the road being completed to adoption standard.

There was therefore no good reason why the ancillary right to construct the road should be limited to a standard lower than that to which everyone contemplated the road would be completed, that is, to adoption standard.

For more information, see *Legal update, Common law right to make right of way fully effective*.

Can the ancillary right of repair include replacement?

In *Hoare v Metropolitan Board of Works (1873-74) LR 9 QB 296* the court considered whether a new sign post could be erected to replace a sign post which had been blown down by the wind.

Blackheath common (heath) was a common within the meaning of the Metropolitan Commons Act 1866 (MCA 1866). The heath was placed under the management of the Metropolitan Board of Works (MBW) by a scheme, which was confirmed by the Metropolitan Commons Supplemental Act 1871. Paragraph 13 of the scheme secured to all persons such estates, interest or right as they had before the confirmation of the scheme. MBW made a bye-law forbidding the erecting on the heath of any posts or poles, or any building of any kind, without the consent in writing of MBW.

The court found that for more than 40 years, a sign post with the sign or name of a public house had stood on the heath opposite the public house. As a result, an easement had been obtained in favour of the public house. The sign post had been blown down by the wind and replaced by another. The question for the court was whether the appellant had the right to erect the new sign post without the consent of MBW in writing. Although it was not a fully reasoned judgment, the court held that the appellant had such a right on the grounds that:

- The easement was a beneficial right preserved by the MCA 1866 and paragraph 13 of the scheme.
- The right existed of repairing the sign post whenever it was broken, as a right incident to the easement.

What if there is interference with the dominant owner's ancillary right to enter and repair?

The servient owner may be required to remove an obstruction which substantially interferes with the dominant owner's ancillary right to enter and repair.

In *Goodhart v Hyett (1883) 25 Ch D 182*, the dominant land benefited from an easement in the form of a right to the flow of water through pipes which passed through the adjoining land. The adjoining servient owner planned to build a house over part of the line of the pipes. The court granted an injunction to restrain the building of the house, holding that:

- The easement carried with it the right to enter on the servient land to repair the pipes when necessary.
- If the house was built on the servient land, the dominant owner would not have reasonable means of access for the purpose of repairing the pipes. The fact that the dominant owner would continue to have the right to enter and repair was not enough; they must have the opportunity and means of doing it.
- The question was not whether repair could be done as a matter of engineering skill, but whether practically the dominant owner would have the same opportunity of enjoying the right as before. There would not be the

same opportunity as before, as there would be a greater difficulty and greater expense in repairing the pipes, if the house was built.

- The servient owner was therefore doing something which interfered with the ancillary right of repair.

Goodhart was applied in *Abingdon BC v James [1940] Ch 287*. Abingdon Corporation had the benefit of a statutory easement and it was also under a statutory duty to maintain water mains which were laid in the servient land. Two houses were built over the line of the main. The court concluded on the facts of this case, that Abingdon Corporation's right of access for the purposes of repair had been infringed and as a result, Abingdon Corporation were entitled to a mandatory order for the removal of the houses.

Express rights and obligations to repair

Although the grant of an easement will impliedly include those ancillary rights that are reasonably necessary for its use and enjoyment (see *Ancillary rights*), when expressly granting an easement, it would be better to consider and expressly include such rights in the easement.

For example, when granting a right of way, particularly where there is more than one user of the right of way, it is usual to include both of the following:

- A covenant by the grantor (the servient owner) to repair.
- A covenant by the grantee (the dominant owner) to pay a reasonable proportion of the costs of repair and maintenance carried out by the servient owner.

For more information including a discussion of other options, see *Standard document, Deed of easement (right of way): paragraphs 5 and 6, Schedule 2 and paragraph 2, Schedule 3*, and the integrated drafting notes to these clauses.

Enforceability of positive covenants against successors

A freehold covenant to repair or contribute to the cost of repair is a **positive covenant** and will not run with the land (for more detail, see integrated drafting notes to *Standard document, Deed of easement (right of way)*). Unless various workarounds are adopted, it will not be enforceable once the original covenantor transfers its interest. However, it is possible that a successor in title of the original grantee of the easement (that is, the dominant owner) could be held liable to make the prescribed contribution under the principle set out in *Halsall v Brizell [1957] Ch 169*. This provides that a party may not take a benefit without accepting the burden that goes with it.

Halsall concerned a covenant, by the beneficiary of a right to use a road, to pay a contribution towards the cost of maintaining it. The High Court held that the covenant was unenforceable because it was a positive covenant that did not run with the land. However, the court also held that the covenantor's successor in title was not entitled to the benefit of the right without also undertaking the burden of the obligations in the deed. There are limits to this principle though. For example:

- The decision in *Halsall* is of little use when the successor in title to the original dominant owner chooses to stop using the right of way and stops paying its contributions towards repair.
- *Gale on Easements* comments that although it seems reasonable to suppose that the dominant owner for the time being could be restrained from using the way while the stipulated obligation remained unperformed, it is unclear whether the right determines on default once occurring, or is merely suspended until the default is made good (see *Gale on Easements (Sweet & Maxwell, 20th ed, 2016) paragraph 1-100*).

The situation relating to the enforceability of positive covenants is far from satisfactory. For more information on the issues surrounding positive covenants and the problems ensuring successors in title are bound by the burden of them, see *Practice note, Positive covenants in transfers: what to consider: How can you make the burden of positive covenants bind successors in title?*.

Extent of expressly granted rights ancillary to an easement: some cases considered

Where rights or obligations that are reasonably necessary for the use and enjoyment of an easement are expressly included in the grant of the easement itself, the extent of those rights is a matter of construction. A court will construe the language of the deed in the context of the grant having regard to the circumstances existing at the time of conveyance and known to the parties or within their reasonable contemplation.

Martin v Childs [2002] EWCA Civ 283 and *Dixon v Hodgson* [2007] 1 EGLR 8 both considered whether a new pipe could be laid in the servient land and provide a good example of how cases can lead to different results, depending on the construction of the words used and the particular facts of each case. For more information, see:

- *Does a dominant owner have a right to install a new pipe over a route different from that taken by existing pipes on the servient land?*.
- *Does a right to use and connect entitle the dominant owner to lay a new pipe to connect to an existing drain on the servient land?*.

For a discussion of other case law that considers the right to lay pipes in the context of ancillary rights expressly included in the grant of the easement itself, see *Gale on Easements* (Sweet & Maxwell, 20th ed, 2016) paragraphs 6-90 to 6-93.

This section of the note also considers ancillary rights and covenants to contribute a proportion of the cost of:

- Maintaining, repairing and re-surfacing a road in *Crane Road Properties LLP v Hundalani* [2006] EWHC 2066 (see *What if the road is completely reconstructed rather than repaired in accordance with the covenant?*).
- Cleansing, maintaining and repairing a driveway in *Beech v Kennerley* (20 October 2010) (see *Do repair costs have to be fair and reasonable?*).

Does a dominant owner have a right to install a new pipe over a route different from that taken by existing pipes on the servient land?

In *Martin v Childs* the dominant owners wished to enter the servient land to install new water pipes along a new route due to problems experienced with the supply from the existing system. The Court of Appeal held that the installation of a new water pipe along a new route was not covered. In reaching this conclusion, the court considered the meaning of the word "installing" in the context of the grant and having regard to the circumstances existing at the time of the conveyance and known to the parties or within their reasonable contemplation.

In this instance, a right had been granted:

"... to run water electricity and other services through any pipes cables wires or other channels or conductors ('the Conduits') which may at any time during the period of Eighty years from the date hereof be in or under or over the Retained Land and a right to enter onto so much as shall be reasonably necessary of the Retained Land for the purpose of installing repairing renewing maintaining cleansing and inspecting the Conduits..." (emphasis added)

A distinction was drawn between "the principal right", being the right to run water and other services through the conduits on the retained land, and the activities set out in the second half of the clause (see emphasised wording), which were designed to ensure the enjoyment of the principal right.

Mummery LJ explained that:

- So far as water was concerned, there were pipes already in position in the land and water was running through them. The easement was clearly in respect of running water through those pipes and not through any other pipes.
- The second part of the clause dealt with the right to enter into the retained land. The specific purposes were for installing, repairing, renewing, maintaining, cleansing and inspecting the conduits.
- In this context, the word "installing":
 - more appropriately referred to the provision of other services where there was not, at the date of the conveyance, an existing pipe, cable, wire or other channel; and

- did not confer the right to alter the position or size of the existing pipes for the running of water.

The dominant owners therefore had no right to install a completely new system over a route different from that taken by the existing pipes on the servient land. For more information, see *Legal update, Construction of rights ancillary to an easement*.

However, this decision has been distinguished in *Dixon v Hodgson [2007] 1 EGLR 8* (see *Does a right to use and connect entitle the dominant owner to lay a new pipe to connect to an existing drain on the servient land?*).

Does a right to use and connect entitle the dominant owner to lay a new pipe to connect to an existing drain on the servient land?

In *Dixon v Hodgson*, H purchased a property (The Arches) from B. Five days later, D purchased an adjacent property, which was a partially built bungalow (bungalow site) from B. A third property (Green Farm) was adjacent to The Arches.

The conveyance of The Arches to H reserved "The right to use and connect to the Service Conducting Installations in on under or over the [The Arches]."

At the date of the conveyance, the Arches had the benefit of two drains which led to the main sewer: the old drain and the alternative drain. The old drain ran from the bungalow site through the land on which The Arches and Green Farm had been built, to the main sewer. D stated that he bought the bungalow site from B on the understanding that it was served by the old drain. The alternative drain ran from a point on The Arches remote from the bungalow site to the main sewer without crossing Green Farm.

The court was required to determine whether a right to use and connect to existing drains entitled the dominant owner to lay a new pipe or drain from the bungalow site to connect to an existing drain on the servient land (The Arches).

D argued that the right to use and connect entitled them to lay a pipe across The Arches to the alternative drain. D said that the ordinary and natural meaning of a right to use and connect is that the dominant owner may construct such "connecting media" as are necessary to enable a connection to be made between a drain on the servient land and the dominant land. If the right to use and connect did not extend to the construction of "connecting media" such as a pipe, the right to use and connect would be ineffective. H argued that the right to use and connect permitted D to use and connect to the old drain, as that was what was intended at the date of the conveyance.

The court distinguished the terms of the rights reserved in this case from the terms of the rights granted in *Martin v Childs* (see *Does a dominant owner have a right to install a new pipe over a route different from that taken by existing pipes on the servient land?*). The right to connect was one of the principal rights here, whereas in *Martin v Childs*, the right to connect was not one of the principal rights.

Both of the drains were within the definition of Service Conducting Installations and both were in existence at the date of the conveyance to H. The ordinary and natural meaning of a right to use and connect to Service Conducting Installations was that D could do what was necessary to connect the drains on their site to the drains on The Arches that connected to the main sewer. D was therefore entitled to connect the drains on the dominant land to the alternative drain on the servient land.

What if the road is completely reconstructed rather than repaired in accordance with the covenant?

In *Crane Road Properties LLP v Hundalani [2006] EWHC 2066*, H owned land at the rear of an industrial estate which benefitted from a right of way over the estate road. The right was granted in 1979 and was made subject to a duty to contribute one half of the cost of maintaining, repairing and resurfacing the road. C owned the servient land. The servient owner upgraded the road with a new construction to adoptable standard with a pavement.

H argued that before the works, the road was a basic tarmac road and the works carried out by C were a complete reconstruction, which was not necessary or advisable to put the road into a good state of repair. The court held that:

- The works went far beyond that which was reasonably necessary to remedy such lack of repair as existed.
- The terms of the particular covenant presupposed that repair and maintenance costs had actually been incurred. It was this to which there was a liability to contribute. If nothing had been incurred for repair,

maintenance and resurfacing within the terms of the covenant, then the obligation did not arise. In other words, the liability did not arise just because work had been done which avoided the need to repair the road.

- "Repair" like "maintenance" is an ordinary English word. It is distinct from improvements. In determining whether work was repair or maintenance, regard was to be had to the general character and condition of the road in 1979 and its then anticipated use, to show what the parties intended as the sort of work towards which H were liable to contribute. Maintenance in the context of this covenant involved anticipatory (and likely less costly) work to prevent the roadway falling into disrepair. The inclusion of the word "resurfacing" made it clear that the estate road had been surfaced and that maintenance and repair might require the road to be resurfaced from time to time.
- The test of how much work was necessary to repair the road was one of what a prudent landowner would fairly and reasonably undertake, if that landowner had to bear the costs themselves.
- C could only charge for those elements of the work actually undertaken which would have been incurred if the road had been repaired in accordance with the covenant. C could not charge for work which would have had to be done had the road been repaired in accordance with the covenant, but was avoided by its upgrading.

In this instance, there was no absolute requirement for concrete. Those parts which should have been resurfaced could equally well have been repaired by a layer of bitumen and asphalt, slightly less thick than the top layers applied to the road as part of the works, but sufficient for its continued use by heavy vehicles. The court therefore concluded that as the works in fact included resurfacing with asphalt and bitumen, C was entitled to recover 50% of the cost of that element of the works, allowing for a slightly thinner layer.

Do repair costs have to be fair and reasonable?

The County Court decision of *Beech v Kennerley* (20 October 2010) involved various issues concerning land owned by B and land owned by K, including a dispute over contributions for the maintenance of a driveway which served B and K's properties. B's predecessor in title covenanted to pay "one third of the cost of cleansing, maintaining and repairing" the driveway. It was accepted that although this amounted to a positive covenant, B could not have the benefit of the user of the driveway without accepting the burden of contributing to its maintenance under the principle in *Halsall v Brizell* [1957] Ch 169. For more information on *Halsall*, see *Express rights and obligations to repair*.

K sought to have the cleansing of the driveway carried out to an extremely high standard. B argued that the sums claimed were excessive. The court held that *Finchbourne Ltd v Rodrigues* [1976] 3 All ER 581 applied and accordingly there was an implication that the costs claimed were to be fair and reasonable. For more information on *Finchbourne*, see *Practice note, Service charges in commercial leases: Limitations on what the landlord may be able to recover*.

The court concluded that in this instance, the works done were excessive. As a result, K was not entitled to recover the **full amount** claimed. However, some part of the works would properly be regarded as cleansing to a fair and reasonable standard and K was therefore entitled to a **reasonable proportion** of the amount claimed. The County Court decision was subsequently appealed. However, only issues relating to the boundary and the right of way were raised on appeal and the costs of cleaning the driveway were not considered (see *Beech v Kennerley* [2012] EWCA Civ 158; *Legal update, Right of way to the end of a path and back was not a valid easement (Court of Appeal)*).