VARYING THE ROUTE OF AN EASEMENT

To what extent can the route of an easement be varied? This is a point partially considered in the recent High Court case of Heslop v Bishton [2009] EWHC 607 (Ch).

The general position is that there is an established common law rule that prevents the unilateral realignment of the route of an easement such as a right of way by the owner of land affected (the servient land). Clearly, the owner of the servient land cannot simply realign the route of the way. Such a move would operate in derogation from the grant itself. The same principle must also apply to other easements such as those for drainage and services. A landowner wishing to develop upon his land cannot just move the route of existing pipes.

In order to vary the route of an easement, the servient owner would need an express right to “lift-and-shift” the route. A landowner may, for example, take an easement to run pipes from point A to point B, but include a right to vary the route of the pipes at any time within a stated period (normally limited to 80 years so as not to infringe rules against perpetuities). One technical legal question is whether the express right to vary the route of the easement is simply an ancillary part of the expressly granted legal easement, or an entirely separate right. This is relevant in practice since, if the land over which the rights are granted is ever sub-divided, the landowner with the benefit of the rights will want to be certain that his right to vary the route to any part of the servient land remains binding on the whole of that land.

To guard against the possibility of the Land Registry overlooking the need to record the lift-and-shift element of the easement on the new part title, it might be considered prudent to register the A to B easement in the normal way, but to apply to register an additional unilateral notice against the servient title so as to specifically protect the lift-and-shift element.

Where such a lift-and-shift right is included in an easement, the parties to the grant should consider what is to happen to the original route if the route is ever varied. Requirements for certainty will normally dictate that the easement over the original route is extinguished, and replaced by an easement over the new route. The parties may provide for this in the deed, and should attend to the registration implications of the release and re-grant.

Without an express right, is there ever an implied right to deviate? The starting point is that where the servient owner obstructs or interferes with an easement, if the obstruction or interference is unreasonable, the dominant owner may seek an injunction, or claim damages. By way of self-help, he can also exercise a right of deviation, if a deviation is available onto other land of the servient owner. However, a right of deviation is not something that can be forced upon the dominant owner in substitution for the original easement.
route. Whilst its availability may impact upon the availability of remedies or assessment of damages for obstruction of the original route, its provision does not operate as a unilateral replacement of the first route.

In Heslop v Bishton, the appellant, Heslop, owned land that was subject to a right of way in favour of various respondents for access to the rear of residential properties. Heslop obstructed the right of way by constructing a wall and pillars which protruded onto the route and which reduced its width, in places, to approximately 16 inches. The District Judge found this to be an actionable interference with the right of way. However, Heslop contended on appeal that users of the way were not in practice obstructed by the interference since they could side-step the obstruction onto other land he owned. This deviation would allow as much access as previously.

His legal argument was that the right of way carried with it a right of deviation so that where the owner of land obstructed the route of the way with an obstruction that could not easily be moved, the user could deviate around the obstruction to another convenient route, arguing in support of his point the case of Selby v Nettlefold (1873) LR Ch App 111. The right of deviation, argued Heslop, operated to extinguish the original right. The court disagreed. It determined that where a right of way had been obstructed, the existence of an equally convenient alternative route might affect the remedy available to the holder of the obstructed right, who, depending on the circumstances, might be denied an injunction and/or damages. However, it did not extinguish the original right.

Surely the dominant owner has lost something: he has lost the right to force the developer to buy out the original right?

Could such a potential restriction on the available remedies persuade a servient owner to attempt a unilateral variation, safe in the knowledge that an award of an injunction or damages was unlikely? Consider a case where the servient owner is able to provide an equally convenient route for a drainage easement. For example, without the knowledge of the dominant owner, a developer unilaterally realigns drains, replacing decaying Victorian drains with modern drains of greater capacity, albeit in a different place. This is done in order to facilitate development. In Greenwich Healthcare NHS Trust v London and Quadrant Housing Trust [1998] 1 WLR 1749, Lightman J. considered (in obiter) whether a realignment of the route of an easement would constitute an actionable interference with the easement if the realigned route is equally convenient. He said: “There is something to be said for the approach that the test should be whether the dominant owner has really lost anything” by the alteration.” However, such an approach is not to be encouraged. Surely the dominant owner has lost something: he has lost the right to force the developer to buy out the original right? Such action may, after the event, offer a defence to an action for interference, but might be frowned upon by the courts if carried out in wilful disregard of the original rights.

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