

## Property and Law Practice

(21 marks) – Title investigation + CPSE replies + LLC1 extract

### Issues

#### **A) THE RIGHT OF WAY NOT BEING ADEQUATE FOR THE BUYER'S PROPOSALS**

- Spotting the right of way on the Property Register (entry 2 generally)
- Discussing all four aspects of the right of way (adequacy, maintenance obligations, adoption by the local authority, checking the registration of the right on the neighbouring land) with specific reference to the detail of the right given in the title and the buyer's plans (e.g. the fact it was on foot and bicycles but the buyer wanted vehicular access meant it was not adequate for the buyer and so the owner of the burdened land needed to be found and approached with a view to entering into a Deed of Variation).

#### **1.1 Consider entry 2 of the Property Register. Why is the right of way over Beaufort Lane particularly significant for Elton Hall?**

The property has the benefit of a right of way to and from Elton Hall over Beaufort Lane - the land which is shown hatched black on the filed plan. This allows access to the property from Phoenix Road via Beaufort Lane. Beaufort Lane is the ONLY means of access to Elton Hall, so it is essential that you are satisfied that the right of way on the Property Register is sufficient for RPL's needs so that RPL can fully enjoy its ownership of the property. If the owners of Elton Hall did not have the benefit of a right of way over Beaufort Lane, or if the right was defective, the property would run the risk of being landlocked.

#### **1.2 (Public Highway) Why would you not find a right of way in the Property Register for most properties?**

Most properties abut the public highway. Therefore, the owners of such properties are able to access their properties without having to cross anyone else's land. That being the case, for such properties there is no need for a private right of way.

#### **1.3 (Private/Public Road) Read reply 1.6 to the CPSE's (Document 51 – page 108) and enquiries 2.1(a) to (d) of the CON 29 search (Documents 52/53 – page 125 (for Boxes B and C) and page 131 (for 2.1(a) to (d))).**

What type of roads are the following: (a) Phoenix Road and (b) Beaufort Lane? Why is this information significant to RPL?

The Seller states in reply to CPSE 1.6 (Document 51) that Beaufort Lane is a private road, but this needs to be verified by the local authority. Enquiry 2.1(a) of the CON 29 search (which is one of the 'local authority searches') seeks to clarify whether the roads, footways and footpaths named in boxes B and C of the CON 29 (Document 52) (Phoenix Road and Beaufort Lane) are public highways – i.e. roads maintainable by the local authority at the public's

expense. The reply to 2.1(a) is “Phoenix Road” meaning that Phoenix Road is a public highway. You are now able to conclude that because Beaufort Lane was omitted from this reply, Beaufort Lane is, indeed, a private road as the seller had represented in reply to CPSE 1.6.

Enquiries 2.1(b) to (d) of the CON 29 search seek to clarify whether any private road named in boxes B and C of the CON 29 is due to be adopted by the local authority, and if so:

- ☐ who will be responsible for making up the private road to the standard of public highway; and
- ☐ who, ultimately, will pay for such works (e.g. kerbing, tarmacking, street lighting etc).

Note: You would also always undertake a **Highways Search** to identify the exact boundary between the public highway (Phoenix Road) and private land. If, as in the case of Elton Hall, the road used to access the property is not a public highway, then a right of way over the privately owned access road will be required, which is why we see the right of way in the Property Register.

### **Adequacy**

RPL still needs to establish that the terms of the right of way are adequate for its needs: i.e. that it can access Elton Hall via Beaufort Lane:

- at the times it wants (day and night, hours of use - i.e. 9am to 6pm);
- by all means of access it requires (e.g. by motor vehicle as well as on foot);
- free from any other unacceptable restrictions or conditions; and
- physically adequate in terms of its size, location and construction.

The right of way in the Elton Hall Property Register is, fortunately, free of restrictions both in terms of when it can be used (‘day or night’) and the means of access (‘with or without vehicles’)\*.

Its physical adequacy must also be considered: is Beaufort Lane wide enough and strong enough to support the types of vehicles which will be driving to and from Elton Hall? It is likely that RPL’s staff would travel to Elton Hall by large vehicles such as coaches, buses and people carriers, so RPL should consider taking advice from its surveyor as to the suitability of Beaufort Lane in its current state for such traffic.

If the right of way is inadequate for its purposes you will need to negotiate a deed of variation with the owner of the land burdened by the right of way (e.g. if Beaufort Lane needs to be widened), RPL would need to negotiate a deed of variation of the easement with the owner of Beaufort Lane. RPL is likely to have to pay the owner of the burdened land consideration for any such deed of variation as well as their legal costs. In addition, there is no guarantee that the owner of Beaufort Lane would agree to a deed of variation on terms that are acceptable to RPL. Therefore, if from RPL’s perspective, the need for a deed of variation is a ‘deal-breaker’, RPL would need to secure a binding commitment from the owner of Beaufort Lane to grant any deed of variation before RPL exchanges contracts with the seller of Elton Hall.

### **Maintenance of the right of way**

Consider the seller's replies to CPSE 3.2 (c) and (f) (Document 51 – page 109) as part of your answer

The enjoyment of the benefit of the right of way in the Property Register is subject to the owner of Elton Hall paying a fair proportion of the cost of repair and maintenance of Beaufort Lane. There is no indication as to what a 'fair proportion' of the cost actually is, so you will need to raise a query with the seller about how much historically has been paid – it is common to ask the seller for details of payments made for the last three years, but if there is no such recent history, you will need to ask the seller to go back further, if records are available.

In reply to CPSE 3.2(f) (Document 51), the seller states that, in fact, it has not been required to make any contribution to the maintenance of Beaufort Lane. So, it may be appropriate to ask the seller to follow this up with the owner of Beaufort Lane and ask how (if at all) 'a fair proportion' was calculated prior to the seller's ownership, how it would now be calculated, whether any maintenance works are planned in the future and the likely cost of any such works. In terms of the proportions, because the seller has stated in reply to CPSE 3.2 (c) (Document 51) that no one uses the right of way apart from the seller and the owner of the road, it is very likely that RPL will be liable for most (if not all) of the maintenance costs. You should also ensure that RPL's surveyor has checked the condition of the lane, to establish whether or not any maintenance is currently required. If it is in a poor state and works are required, RPL will want to know its likely contribution before committing to the purchase of Elton Hall.

Note: If there is a right of way in any Property Register you should always ask the seller about its maintenance obligations even if the right of way itself is silent on the subject. This is because the law makes it clear that if someone is taking the benefit of a right, they have the obligation to pay towards its upkeep.

### **Adoption**

Privately owned roads or lanes can be 'adopted' by the council and made into public highways. This normally requires works to be carried out to improve the quality of the road. RPL should be warned that the costs of such works can be very expensive and may be borne by the 'frontagers' (the owners of the properties fronting onto the private road) – so this would include RPL once it has purchased Elton Hall. The reply to enquiry 2.1(c) confirms that there are no current plans by the council to adopt Beaufort Lane in circumstances where the cost of making up the road to a public highway will be paid by the frontagers. However, although nothing is currently proposed, your report on title should advise RPL of the risk of being obliged to pay for the 'making up' costs of the road in the event that the council resolves to adopt Beaufort Lane in the future.

### **Registration**

It is important to check to see if the burden of the right of way has been registered against the burdened land. What is revealed by:

- the result of the search of the index map (Document 62 – page 157); and
- the official copies of the title which includes Beaufort Lane (Document 62a – page 159)?

The search of the index map ('SIM') in the Elton Hall file is a search not only of Elton Hall but also its neighbouring properties. It is done in order to determine which land is registered at the Land Registry and which land is currently unregistered. As well as confirming Elton Hall is registered (title number BM 302735), the SIM result reveals the land to the north west of Elton Hall is registered with title number BM 171900 and that Beaufort Lane forms part of title number BM 561374. The other land bordering Elton Hall remains unregistered.

Registration of the burden of the right of way- The official copies of BM 561374 (Document 62a) reveal that the burden of the right of way over Beaufort Lane is registered against that title in the Charges Register. This is good news for RPL, because in order for the right of way to be enforceable by RPL, the burdened land needs to be incumbered in this way.

Note to students: If the burdened land (Beaufort Lane) had been unregistered, you would check to see if a caution against first registration had been entered against it and if not, you would need to ask the seller's solicitor to register a caution against first registration (see SGS 6 for further details).

- a) a future breach of the positive covenant
- b) the local authority consents needed for the internal building works, the painting and the electrical outlet installation.
- c) a possible future breach of the restrictive covenant
- d) past breach of the positive covenant by the seller's non-maintenance of the boundary wall which the seller was going to rectify and which the buyer was going to be bound by in the future
- e) the seller's mortgage needed discharging
- f) the local authority consents needed for the internal building works and the change of use.
- g) Over-riding interest (someone in actual occupation at the property)

## **B) POSITIVE COVENANTS ON THE CHARGES REGISTER**

Using your answers to pre-SGS prep item 4, Questions 2, 3 and 4 consider:

- entry 1 of the Charges Register (Document 40 – page 60);
- the schedule of covenants at the end of the Charges Register (Document 40 – page 61);
- entry 2 of the Proprietorship Register (Document 40 – page 60); and
- the seller's replies to CPSE 4.2(c) and 4.2(f) (Document 51 – page 110)

### **I) Future Breach of the Positive Covenant**

**Positive covenant:** students should have read the positive covenant in the Charges Register and the reply to enquiry confirming the seller had not breached it and appreciated the buyer's plans would lead to a breach.

- Spotting the covenant and explaining it was a positive one.