Wall v Collins: a teaching aid to land law?

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Introduction

The decision in ***Wall v Collins*** [1] makes interesting and constructive reading for any student bored with the topic of easements in **land law**. As a legal case it has much to commend it, including bad neighbours, a litigant in person and an area of **land** in dispute of no great size but a costs award of many tens of thousands of pounds.[2] A case, in fact, whose context will come as no great surprise to any so-called "High Street" solicitor or trainee.

However, both the student and the solicitor will need to study the case with some care. As such therefore it is offered as a possible **aid** to **teaching** that part of **land law** dealing with easements. Unfortunately, in general **land law** is a subject that students would not opt to study if it were an elective subject rather than a necessary prerequisite for a Qualifying **Law** Degree. Consequently, this piece attempts to set out a sketch (from the author's own reading of the case) that it is hoped will assist with student understanding of the case. It is only intended to provide the reader with their "bearings" (and to help visual learners), and a deliberately truncated version of the various dealings with titles to the properties involved in the case. A very brief "revision note" on that part of easements dealing with capability and duration has also been included.

As a possible **teaching aid** ***Wall v Collins*** might be offered to students to demonstrate how easements arise, how they might become extinguished, the necessary requirements for them to exist at all, and their practical importance for certain types of housing. This last point is offered as a possible "bridge" to the Legal Practice Course module Property **Law** and Practice (again a compulsory module for anyone wishing to qualify as a solicitor).

**Cov. L.J. 13* The case of *Wall v Collins*

Wall v Collins (hereinafter ***Wall***) raises the issue of whether an easement can be said to expire when granted as part of a long lease that is itself subsequently merged into the freehold. In other words, can the easement be said to continue, or does it too come to an end upon extinguishment of the lease? The conventional view is that once the lease no longer subsists then all rights and obligations under it must likewise come to an end.

A little simple revision on easements might assist, and thus before examining the case it is as well to re-visit some basic issues:

• An easement is a right (such as a right of way on foot) over the (private) **land** of another that benefits the **land** of the holder of that right. Thus we get *dominant* and *servient* **land** (or tenement), where the dominant **land** has the benefit of the right of way.

• An easement can be granted expressly by deed or by implication. Where granted expressly, as in ***Wall,*** then its status is of a legal interest in the **land**,[3] and so its juridical nature will be proprietary. Case **law** has provided a number of requirements dealing with what makes such an interest *capable* of being an easement.[4]

• If the right claimed is so *capable,* then in determining whether it is legal or equitable in nature, it must, *inter alia,* be of an equivalent duration to one of the legal estates in **land**.[5] Famously this is either the freehold or the leasehold estate in **land**. It is therefore possible for an easement to be freehold in nature even where the estate out of which it is carved, so to speak, is itself a leasehold. When looking at ***Wall,*** it will be useful to bear these simple revision points in mind.

The facts in *Wall*

The appellant, Mr **Wall** (W), was the registered proprietor of No. 231 Leigh Road and Mr **Collins** and his wife (C) were the registered proprietors of No. 233 Leigh Road, directly to the south of No. 231. Their houses were semi-detached. At the rear and running parallel with Leigh Road is Back Street over which both W and C had access. Both Leigh Road and Back Street are public highways and therefore maintainable at the public expense.

W claimed a right of way (an easement) over a passageway (known as South Road) that runs along the south side of No. 233 and formed part of that property's title and connected Back Street to Leigh Road; in other words, providing a very convenient link that will be obvious to all who are familiar with this type of semi-detached ****Cov. L.J. 14*** housing. The sketch on

the next page (which is not to scale) might assist. In addition, below is a truncated version of devolution of the titles:
1) The **land** on which both houses were built was subject to a 999 year lease that had commenced in 1910.
2) The houses were subsequently erected on that **land** by 1911 and the tenant of No. 231 was granted an easement by his lease that permitted "…a right on foot…and [with] vehicles over, *inter alia,* South Road and thence to Back Street…"
3) Subsequently the titles fell to be compulsorily registered at H. M. **Land** Registry.
4) By 2004 the **Land** Registry had closed the leasehold title to No. 233, leaving just the freehold register in existence.
TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE
W= **Wall**; C= **Collins**' respective properties.
NB South Road is delineated by dotted lines and links Leigh Road to Back Street, and is part of the title to No 233.
The question for the court was whether the right of way (easement) granted by the lease in 1910 in favour of the leaseee at No. 231 over South Road (and being part of No. 233) become extinguished when the leasehold estate was merged with the freehold estate, thus entitling the owners of No. 233 to interfere with or terminate the exercise of the easement by erecting some gates? Additionally, did s.62 (2) of the **Law** of Property Act 1925 apply so that the easement granted by the lease becomes subsequently "attached" to the freehold estate? Section 62(2) provides as follows:
Cov. L.J. 15 "…all…rights and advantages whatsoever, appertaining or reputed to appertain to the **lands**, houses or other buildings conveyed." Every "conveyance" of **land** is therefore deemed by this subsection to include easements.

The first instance decision

At first instance the Judge, H.H Judge Pelling Q C, held that upon merger of the freehold and leasehold estates of No. 233 the easement granted under the 1910 lease in favour of No. 231 had also become extinguished, since the easement was attached to the leasehold estate and to no other interest in the **land**. Neither did s.62(2) LPA attach the easement to the freehold.

The decision in the Court of Appeal

The Court of Appeal reversed the first instance judge. This was somewhat surprising because the judge had only stated the position as most **land** lawyers would have understood it. The judge had in fact relied on academic opinion for this view,[6] but the Court of Appeal felt that he had misinterpreted it, Carnwath LJ stating:
"An easement must be appurtenant to a dominant tenement, but not necessarily to any particular interest for the time being…the **Law** of Property Act 1925 provides that a legal easement may be created for the equivalent of a freehold interest, or of an interest "equivalent to …a term of years" (s1(2)(a)). In the latter case, there is nothing to suggest that an easement for a term of years has to be attached to a leasehold interest of equivalent duration. All that matters is that the grantee has an interest at least co-extensive with the period of the easement."[7]
He then went on to justify this view on grounds of "common sense":
"…, as a matter of common sense, it is difficult to see why a lessee should be worse off, so far as concerns an easement annexed to the **land**, merely because he has acquired a larger interest in the dominant tenement."[8]
Carnwath LJ then went on to deal with the s 62(2) point, notwithstanding this was rendered unnecessary by virtue of the judgment on the merger aspect (above). Again the Court of Appeal disagreed with the first instance judge, finding support in *International Tea Stores* ***v*** *Hobbs:* [9]
"The real truth is that you do not consider the question of title to use, but the question of fact of user; you have to inquire whether the way was in fact used, not under what title it has been used, although you must of course take into consideration all the circumstances of the case…"

Cov. L.J. 16 Commentary

Lord Justice Carnwath's judgment) with which both Hooper and Mummery LJJ agreed, relied on *International Tea Stores* ***v*** *Hobbs* (above) and *Kent* ***v*** *Kavanagh,* [10] but even so, this is a

very unusual decision that overturns previously accepted wisdom. Part of the reasoning *(obiter*) seems to have been that without this approach many semi-detached property owners would find themselves in possibly unworkable situations. Thus, pragmatism seems to be part of their Lordship's rationale. However, even this is not without impact, notably at H.M. **Land** Registry which found itself having to issue a new Practice Guide (*Addendum to practice Guide 26*) confirming that easements granted by a lease were not lost on merger with the freehold, and would subsist for the benefit of the dominant landowner for the period for which they were originally granted; in other words the remaining term of the lease, even though the lease itself had come to an end.

Many practitioners and academics had thought that upon merger easements are lost. That position seems to have become the so-called conventional view, and even though there is little or no authority to support it, it at least has some logic to it, and it is certainly the view of Sara,[11] and likewise H.M. **Land** Registry. That is especially so given that it was also thought that an easement must attach to an *estate* in **land**, because that is what s.1 (2) **Law** of Property Act 1925 would appear to be saying. Following ***Wall,*** it seems we were all wrong and that the easement need only attach to a dominant tenement, rather than the actual estate in the **land**. As Dixon asserts "…there was a respectable argument that this was so."[12]

Criticism of ***Wall*** has not just been left to the legal academy either. The **Law** Commission has asked for a statutory appeal of this decision:[13]

"We consider that the position is in acute need of clarification. Our current view is that as a matter of principle an easement is attached to an estate in the **land** (either freehold or leasehold), and that it follows as a matter of logic that termination of that estate must extinguish the easement."[14]

However, before we all rush to agree with that sentiment, it must be remembered that there is some force behind the pragmatic *obiter* part of the ***Wall*** judgment. Our vast swathes of terraced and semi-detached houses rely heavily on easements over countless paths and driveways. Without such facilities those types of properties will become much less viable. The question is, is that a sound basis upon which to rest an appeal decision? Perhaps the final comment should belong to Dixon[15]

Cov. L.J. 17 "This novel doctrine [***Wall v Collins***] was important to the result in that case…, but it is not at all clear that it is correct outside of the special facts of that case."

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Cov. L.J. 2010, 15(1), 12-17

1.
[2007] Ch. 390 (CA (Civ Div))

2.
Apparently a £35,000 "down payment" by the successful appellant **Wall** (the litigant in person) in favour of the Respondents, is noted by Dixon at [2009] 6 Conv 437.

3.
LPA 1925 s 1(2)

4.
As set out in *Re Ellenborough Park* [1956] Ch 131.

5.
s 1(2) (1) (a) LPA 1925

6.
Sara, C. *Boundaries and Easements* Sweet & Maxwell (2002)

7.
[2007] Ch. 390 (CA (Civ Div))

8.
ibid. s

9.
[1903] 2 Ch. 165

10.
[2006] 2 All ER 645

11.
Note 6, above.

12.
[2009] 6 Conv. 437

13.
Law Comm. Consultation Paper No 136 (2008) at para 5.86

14.
ibid. at para 5.84

15.
M Dixon Modern **Land Law** (2010) 17th ed, at p 276