Ancillary rights in servitude law

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Declaration

By submitting this dissertation electronically, I declare that the entirety of the work contained therein is my own, original work, that I am the authorship owner thereof (unless to the extent explicitly otherwise stated) and that I have not previously in its entirety or in part submitted it for obtaining any qualification.

Sonja van Staden, December 2015, Stellenbosch

Summary

Servitudes are regulated in South African law by the principles of the common law. One set of principles regulate servitudes *ex ante* – limiting and controlling the establishment of servitudes. Another set of principles regulate the continued relationship between the parties. They include the principle that a servitude, once granted, includes all that is necessary for the effective exercise of the servitude by the dominant proprietor and the principle that requires reasonable exercise of the servitude rights with due regard for the interests of the servient proprietor. The problem lies in determining the scope of a servitude and establishing whether "what is necessary for the effective exercise of the rights" is a flexible concept, especially when flexible interpretation of servitudes creates tension between the two principles mentioned above. The approach of South African courts is to maintain stability in the system of property law, thus emphasising the principle that servitudes are to be interpreted strictly.

A comparative and theoretical overview indicates that a recent shift has taken place in the regulation of servitudes from an *ex ante* approach focussing on security and stability of property rights, towards a flexible regulation of servitudes by way of *ex post* controls that allow amendment or termination of obsolete or undesirable burdens on land. This shift is underpinned by the reality of changed circumstances and the need for servitudes, as long-standing property arrangements, to adapt to changes so as to ensure the productive use of land as a resource. With reference to Dutch, Scots, English and Louisiana state law, this dissertation considers ways to incorporate flexibility in servitude law, usually by way of statutory intervention. However, in South African servitude law the possibility of statutory intervention is slim. Accordingly, innovative measures must be developed within the common law framework.

The need for flexibility in South African servitude law can be satisfied by development of the common law in the form of *ex post* application of the existing common law principles. If these principles are applied in a manner that takes account of the current context of the servitude, many of the problems created by the view that servitudes are static and unchangeable can be solved. If properly implemented, this can allow for the amendment of existing entitlements or acknowledgement of new ancillary entitlements, without compromising the security of property rights.

Opsomming

In die Suid Afrikaanse reg word serwitute gereguleer deur die beginsels van die gemenereg. Een stel beginsels reguleer serwitute *ex ante* deur geldigheidsvereistes wat hul vestiging beheer en beperk. 'n Tweede stel beginsels reguleer die verhouding tussen die partye. Hierdie beginsels behels onder andere dat 'n serwituut alles insluit wat noodsaaklik is vir die effektiewe uitoefening daarvan, asook dat serwitute redelik uitgeoefen moet word. Die omvang van serwitute is onduidelik en dit is onseker of "wat noodsaaklik is vir die effektiewe uitoefening van die regte" 'n buigsame begrip is, veral aangesien 'n buigsame interpretasie van serwitute spanning veroorsaak tussen die bogenoemde beginsels. Die uitgangspunt van Suid Afrikaanse howe is dat stabiliteit in die Sakereg noodsaaklik is en hulle beklemtoon dus die beginsel dat serwitute op die mins beswarende wyse vir die dienende erf uitgelê moet word.

'n Vergelykende en teoretiese perspektief toon aan dat 'n verskuiwing plaasgevind het vanaf die *ex ante* benadering, met sy sterk fokus op sekuriteit en stabiliteit in die Sakereg, na 'n buigbare regulering wat die wysiging of beëindiging van ongewensde of uitgediende regte moontlik maak. Een van die hoofredes vir hierdie verskuiwing is die realiteit van veranderende omstandighede en die noodsaaklikheid vir serwitute om aanpasbaar te wees ten einde die effektiewe gebruik van grond te verseker. Met verwysing na Engelse, Skotse Nederlandse en Louisiana-reg, oorweeg hierdie proefskrif verskillende wyses waarop buigsaamheid verseker kan word in die regulerende raamwerk wat op serwitutevan toepassing is, meestal deur statutêre ingryping. Aangesien statutêre ingryping in die Suid Afrikaanse stelsel onwaarskynlik is, sal innoverende maatreëls binne die gemeenregtelike raamwerk ontwikkel moet word.

Die behoefte aan buigsaamheid in die Suid Afrikaanse serwituutreg kan bevredig word deur die gemenereg sodanig te ontwikkel dat die bestaande beginsels *ex post* toegepas word, met klem op die huidige konteks en omstandighede. Hierdie ontwikkeling sal baie van die probleme oplos wat ontstaan as gevolg van die standpunt dat serwitute staties en onveranderbaar is. Indien dit behoorlik geïmplementeer word, kan hierdie ontwikkeling verseker dat bestaande bevoegdhede gewysig of nuwe bevoegdhede erken kan word, sonder om die sekuriteit van saaklike belange in gedrang te bring.

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Chapter 1

Introduction

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1 1 Introduction

In 2012, the South Gauteng High Court heard the case of *Jersey Lane Properties v Hodgson*.[1] The facts of the case illustrate an interesting problem in the South African law of servitudes that I aim to explore in this dissertation. The applicant in the case (Hodgson), the owner of a property subject to a servitude of right of way, applied for the removal of a structure built on his property by the servitude holder, who owned an adjoining lot. The servitude holder was the developer of a hotel situated on the dominant property. The servitude was registered as an exclusive right of way over a road referred to by the parties as "Jersey Lane" and provided access to the hotel premises from a public road. An electronically operated palisade gate was previously situated along this road, on the property of Hodgson. However, after a group of VIP's showed their interest in staying at the hotel, but expressed their discontent with the security and entrance to the premises, the respondent hastily effected a replacement of the entrance gate with a huge entrance portico described as "a security gate entrance, elaborately built with a flat roof and a guardhouse which is almost two storeys high".[2] The question the court considered was whether the portico was necessary for the effective exercise of the servitude. It was mentioned in the decision that various factors would influence the reasonableness of the exercise of rights by the servitude holder, including the general aesthetics of the surroundings, the security

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[1] *Jersey Lane Properties (Pty) Ltd t/a Fairlawn Boutique Hotel & Spa v Hodgson and Another* (A5030/11) [2012] ZAGPJHC 86 (7 May 2012).

[2] *Hodgson v Jersey Lane Properties (Pty) Ltd t/a Fairlawn Boutique Hotel & Spa* unreported case no 36702/10 (23 February 2011) para 1.

requirements of the property and the general tendency to erect portico's at the entries of upmarket properties in the area.

The effect of this decision was that the change effected by the servitude holder had a serious impact on the servient property. The burden on the servient land no longer consisted simply of vehicles passing over the property, but of extensively increased security measures (including floodlights and a guardhouse) that involved the construction of an elaborate building situated on the servient land.

The Scottish case of *Moncrieff v Jamieson*[3] provides another example that illustrates a similar problem. In this case the applicants asked for a declaratory order to the effect that the registered servitude of right of way also included an ancillary right to park vehicles on the servient land. The facts of the case and the unique geographical situation from which the dispute arose are of crucial importance to the decision. The dominant land was situated on a cliff so that it was bordered on one side by the sea and on the other by the cliff. The only access to and from the property by land was over a road on the servient land and then via a stairway that led to a gate at the top of the cliff. If the Moncrieffs were not allowed to park on the land, they would be required every time they (or anyone else) wanted access to their home, to stop and unload all baggage and passengers at the point closest to the house, and then turn around and park at a point that is no longer on the servient property. This would mean that they would have to cover a distance of about 140 metres on foot that involved "a significantly steep descent or climb", regardless of the time of day, the weather or other circumstances.[4]

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[3] *Moncrieff v Jamieson* [2007] UKHL 42.

[4] *Moncrieff v Jamieson* [2007] UKHL 42 para 34.

Both these cases concern a servitude holder who argues that he is entitled to exercise additional entitlements over the servient land that were not mentioned explicitly in the servitude creating documents. Furthermore, the entitlements claimed by the dominant proprietors had not been recognised before, since the need for them only arose as a result of recent developments, long after creation of the servitude. However, if these entitlements were allowed, there would be a significant increase in the burden on the servient property.

The question faced in both the *Jersey Lane Properties* and *Moncrieff* cases was whether the additional entitlements sought by the dominant proprietors could be seen as ancillary to the registered servitude of right of way, which in principle involved no more than the right to use a road over the servient land. In both cases, the servitude holders needed their servitude rights to fulfil additional functions, including using the servient land for new and additional purposes. A particularly relevant question that emerges from comparison of the two cases is whether it can be said that the supposed ancillary right, and the additional use of the servient land it involves (parking on the servient tenement, as opposed to building a permanent structure on it), is strictly necessary for effective use of the servitude. While it is arguably reasonable to use space on the servient land in *Moncrieff* to park, it is not immediately evident why it should be necessary or justified to build the entrance portico in *Jersey Lane Properties* on the servient (as opposed to the dominant) land. The question is whether servitude law can accommodate recognition of the new and additional requirements and if so, how this can be done.

There are a few ways to approach this question. In South African law, servitudes are regulated by common law and the first step is thus to consider whether the common law provides some solution to the problem. Secondly, insofar as the

applicable common law principles do not provide a solution, can a flexible interpretation of the servitude deed provide a satisfactory result? Depending on the formulation of the servitude in the deed, interpretation might provide some flexibility for the servitude rights to be exercised differently in different circumstances. However, where the parties failed to provide for the new situation that arises, can the law step in and do so on their behalf? Furthermore, insofar as a solution cannot be found in the rules of the common law, is it possible to solve the problem through statutory intervention? Finally, assuming that a way is identified to recognise the new and additional needs of the servitude holder, does that have any constitutional implications?

1 2 Research question

The point of departure is that servitudes are real rights. This has important implications. Security of title is a key element of real rights as stability is of vital importance in the system of property rights to encourage investment and continued development of land.[5] However, in principle servitudes are perpetual rights, which means that they exist for long periods of time, and therefore they might need to be flexible to adapt to changes in the modern world. The question is whether the stability required for the existence and proper functioning of real rights can accommodate the flexibility required for proper exercise of servitudes in changed circumstances. The basis for acceptance of the notion of ancillary rights is the principle that everything

[5] CG van der Merwe "Numerus clausus and the development of new real rights in South Africa" (2002) 119 *South African Law Journal* 802-815 814.

necessary for the effective exercise of a servitude is deemed to be granted along with it. However, determining the necessity of additional rights is problematic. The problem lies in determining the scope of a servitude and establishing whether "what is necessary for the effective exercise of the rights" is a flexible concept, especially when flexible and extensive interpretation of servitudes clashes with another basic principle, namely that the exercise of servitudal rights must place the least possible burden on the servient land.

South African servitude law is regulated almost exclusively by the common law.[6] For the most part, the common law principles focus on the establishment of servitudes, typically by limiting and controlling the creation of new servitudes.[7] The principle of *numerus clausus*[8] is intended to prevent excessive burdens on land. The principle is aimed at protecting potential acquirers of servient land from idiosyncratic or excessive burdens over their property that might be hard to ascertain. Another method to limit burdens on land is by way of strict requirements for the establishment of servitudes. The requirements of praediality, utility and passivity[9] are attempts to ensure that a

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6 The Deeds Registries Act 47 of 1947 contains a number of provisions pertaining to formal requirements and registration of servitudes, but the exercise and functioning of servitudes are regulated by established common law rules.

7 These measures, imposed at creation to regulate servitudes by limiting their creation, are an example of *ex ante* controls. See 1 4 where the terminology is explained and a distinction is drawn between *ex ante* and *ex post* regulatory control.

8 AJ van der Walt "The continued relevance of servitude" (2013) 3 *Property Law Review* 3-35 19 explains that although there is no strict *numerus clausus* of servitudes in modern South African law, the function of this principle is fulfilled by the registration requirement, coupled with the subtraction from the dominium test.

9 The exact requirements for valid establishment of a servitude are controversial, as there are different views on which principles constitute true requirements and which are simply consequences or characteristics of servitudes. This is discussed in more detail in Chapter 2. See also MJ de Waal "Die

servitude, once registered, will provide adequate benefit to the dominant land so that it may outweigh the burden imposed on the servient land and that this will remain the case even for future owners of the properties. Servitudes are sometimes described as odious[10] because they burden land and can detract from the unity of ownership, thus leading to a fragmentation of property rights.[11] Accordingly, the very rules that allow the creation of servitudes also limit them so as to ensure the stability of property rights and to encourage development of and investment in land.

However, there is also a measure of flexibility in the common law regulation of servitudes. The principles that govern the relationship between the parties to a servitude are aimed at regulating the continued efficacy of real rights. Both the dominant and the servient property owners enjoy a measure of protection under these principles. On the one hand, the principle requiring reasonable exercise of the servitude protects the servient property owner in that it ensures that the servitude holder does not abuse his rights by imposing a heavier burden on the servient land than is necessary to give effect to his rights. This same principle also maintains the stability of real rights. On the other hand, the principle that everything necessary for the effective exercise of a servitude is deemed to be granted along with it provides the dominant proprietor with a guarantee of the functionality of the servitude, thus ensuring a measure of flexibility in the enjoyment of the right.

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vereistes vir die vestiging van grondserwitute: 'n Herformulering" (1990) 1 *Stellenbosch Law Review* 171-185 183-184.

[10] Voet *Commentarius ad Pandectas* 8 2 2 (Gane's translation vol 2) 440.

[11] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* (unpublished LLD dissertation University of Stellenbosch 1989) 14. See further *Landman v Daverin* 1881 EDC 1 7; *Ferguson v Pretorius* 1892 4 SAR 246 250; *Smit v Russouw and Others* 1913 CPD 847 853; *Head v Du Toit* 1932 CPD 287 291.

Although these principles are powerful tools intended to strike a balance between the interests of the parties, they do not always solve the problems that arise when servitudes exist for a long time. Considering recent case law, with *Jersey Lane Properties* as one of the most striking examples, it seems as though courts have sometimes failed to find workable solutions to the problem when relying purely on the common law principles.[12]

Addressing the problem set out before requires an analysis of the common law principles that are applicable to the issue of ancillary rights. As this area of law is rather underexplored in the literature, it is necessary to unravel the case law to find the common law framework within which ancillary rights are understood. In Chapter 2, the common law principles that are relevant to ancillary rights are considered to determine their scope and their potential to solve the problem.

An overview of case law relating to ancillary rights indicates that courts tend to respond to the apparent failure of common law principles to provide an adequate solution by turning their focus to interpretation of the servitude deed to solve the problem. This tendency to focus on the words of the deed seems to be an attempt to provide a flexible solution by reconciling the desired outcome with a grammatical interpretation of the words used by the parties. However, since the point of departure is contractual interpretation, courts are bound to the principles of interpretation. This is problematic on a few counts. It might be difficult if not impossible to determine the original intention of the parties to the servitude agreement, and in case of servitudes created by operation of law, there is no grant or agreement to interpret. A more

[12] The decision of *Jersey Lane Properties (Pty) Ltd t/a Fairlawn Boutique Hotel & Spa v Hodgson and Another* (A5030/11) [2012] ZAGPJHC 86 (7 May 2012) is discussed in Chapter 2.

fundamental problem is that this approach shifts the focus away from property principles to contract.

Statutory regulation could offer a solution to the problem set out above. However, in South African law, there are no statutory instruments regulating the exercise of servitudes and this possibility must therefore be explored with reference to comparative law. A comparative overview suggests that legislative intervention is used in both common law and civilian systems as a method to simplify and provide certainty in the system of servitude law. In Chapter 3, I consider the interventions that have been undertaken in foreign jurisdictions. Systems that have recently implemented or considered some form of regulation aimed at rendering the law of servitudes more flexible include Dutch, English, Scots and Louisiana law. Dutch law is particularly relevant because the 1992 reform of the Dutch Civil Code provides interesting options for the variation and termination of servitudes. Furthermore, Dutch servitude law shares the Roman-Dutch heritage of South African law, but has the advantage of having considered and implemented reforms in the Code. English law is considered mainly because of the extensive research and discussion accompanying the proposed reform of English law relating to land burdens. The discussion paper on easements, covenants and *profits à prendre*[13] provides extensive information on the problems experienced with land burdens and explores a range of solutions to these problems, including the issue of flexibility set out above. Scots law provides an interesting comparison to South African law because it is also a mixed jurisdiction and the slow

[13] The Law Commission LAW COM No 327: *Making land work: Easements, covenants and profits à prendre* (2011) http://lawcommission.justice.gov.uk/docs/lc327_easements_report (accessed 13/03/2013).

and incremental development in the two systems is comparable up until the implementation of the Title Conditions (Scotland) Act 2003. The Act brought about only minor changes to the law of servitudes, but introduced some elements of certainty which were previously lacking. The state law of Louisiana compares well to South African and Scots law because it is also a mixed jurisdiction. The Civil Code introduces the same tension between legal certainty and flexibility that appears in the Dutch Civil Code. The sections relating to servitudes in the Louisiana Civil Code have also been amended, although this amendment is not as recent as that of the Dutch Civil Code. As a further comparative element, occasional reference is made to the American *Restatement (Third) of Property: Servitudes* ("Restatement").[14] Although this document is not regarded as law and is not even intended to inspire legislation, it is influential and the ideas suggested in the *Restatement* have provoked major debate in the area of servitude law, in particular on the shift from *ex ante* to *ex post* regulation of servitudes. The *Restatement* influenced reforms in both English and Scots law, and although American law is not included as a separate jurisdiction in the comparative part of this dissertation, the *Restatement* is referred to where relevant.

The aim of the comparative overview is to determine how different jurisdictions formulate the problems experienced in relation to ancillary rights and what solutions they have developed to solve these problems. Although there is not necessarily more certainty about the best approach in the jurisdictions considered, they do acknowledge the problems surrounding ancillary rights and attempts have been made to clarify the issues.

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[14] American Law Institute, *Restatement (Third) of Property: Servitudes: Volume 1* (2000) 202.

In South African law it does not seem plausible at this stage to attempt a large-scale codification of the law relating to servitudes. Accordingly, any solution to the problem of ancillary rights in South African servitude law will have to fit into the unique legal landscape in which it functions and the responsibility will fall on the judiciary to implement any development. However, the common law authority of the judiciary is limited: although the courts have the inherent power and responsibility to develop the common law, their authority remains subject to the Constitution[15] and the constraints of existing law.[16] The judiciary will accordingly be limited in the steps that it can take to implement new rules relating to servitudes. However, courts have, in limited instances, displayed a willingness to allow developments of the common law which would render the law of servitudes more flexible.[17] In the absence of the political and policy debates that would precede statutory reforms, reforms implemented by judicial force will necessarily provoke theoretical questions.

A relatively significant amendment to or development of the common law of servitude has to be theoretically justifiable. In Chapter 4, the possibilities for reform that emerged from the comparative analysis are considered in light of theoretical debates that emerged alongside the reforms across various jurisdictions. The theoretical issues relevant to the discussion focus on the character of servitudes as real rights and on the tension between stability and flexibility. I consider different views regarding the nature and security of real rights and the need to protect the stability of property rights. On the other hand, the *ex post* regulatory measures introduced in

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[15] The Constitution of the Republic of South Africa 1996 ("Constitution").

[16] S 165 of the Constitution.

[17] Refer to the discussion of *Linvestment CC v Hammersley and Another* 2008 (3) SA 283 (SCA) in section 2 4 below.

foreign jurisdictions incorporate flexibility into the servitude system, which might compromise the security of existing rights. Examples of these measures include the *ex lege* or judicial amendment or termination of servitudes or a general limitation on the lifespan of servitudes. These changes can be either supported or undermined in theoretical debates, and in Chapter 4 I consider the weight of various theoretical approaches.

In South African law a development of the common law must not only be theoretically justifiable, but also constitutionally, particularly if it has a constitutionally relevant impact on existing rights. An *ex post* unilateral (or judicial) amendment of a servitude, for instance, might amount to an expropriation of property in terms of section 25(2) of the Constitution.[18] If the action does not amount to an expropriation, it might constitute a deprivation of property. Section 25(1) of the Constitution states that a deprivation of property may only take place in terms of law of general application and further, that it may not be arbitrary. This means that there must be some legislative or common law authority for the deprivation, and the deprivation must satisfy the test for non-arbitrariness set out in *First National Bank of SA v Commissioner, South African Revenue Service.*[19] Chapter 6 addresses these constitutional questions.

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[18] S 25 (2) of The Constitution reads as follows:

25 (2) Property may be expropriated only in terms of law of general application

(a) for a public purpose or in the public interest; and

(b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court

[19] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC). See also AJ van der Walt *Constitutional property law* 3rd ed (2011) 194.

The main hypothesis of this dissertation is that the South African law relating to servitudes in general, and ancillary rights in particular, is overly rigid and that there are convincing doctrinal, economic and policy reasons to incorporate a measure of flexibility into this area of law. South African courts have shown a willingness to view servitudes more progressively,[20] but the general tendency is to favour the security of ownership and the stability of property rights in general above the flexibility that is required for property rights to function effectively in modern property law. The law of servitudes apparently needs to develop but, unlike foreign systems that have implemented developments in this area by way of statutory means, the South African legal landscape will require the development to be implemented by the judiciary, relying on the scope that common law principles allow. Courts will accordingly have to adopt an approach that takes account of the nature of servitudes as real rights when determining their content and the ancillary rights that might be added to them. Furthermore, when introducing flexibility into the law of servitudes the courts have to account for the constitutional validity of the changes brought about in the process.

1 3 Methodology

The first methodological step is an analysis of the common law position in South African servitude law, particularly of the interpretation and application of the common law principles in case law. The main sources used in this analysis are case law and

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[20] *Jersey Lane Properties (Pty) Ltd t/a Fairlawn Boutique Hotel & Spa v Hodgson and Another* (A5030/11) [2012] ZAGPJHC 86 (7 May 2012) para 9; *Linvestment CC v Hammersley* 2008 (3) SA 283 (SCA) para 32.

secondary literature. This does not include a first-hand overview or analysis of Roman or Roman-Dutch authorities, although some original sources are cited insofar as they are relevant.

As is explained in section 1 2 above, there is no example of statutory interventions in South African servitude law. Accordingly, statutory intervention can only be considered with reference to foreign law. The comparative overview in Chapter 3 is by no means a complete or extensive analysis of servitude law in the respective systems, but aims to consider relevant examples of intervention in four foreign jurisdictions. Each of the jurisdictions discussed either has some form of statutory regulation of servitude law, or is in the process of introducing or considering statutory measures to overcome the static nature of this area of law. The comparative analysis is aimed only at considering these converging points of interest insofar as they relate to the research problem.

The third methodology, theoretical analysis, is similarly limited in scope. The analysis of property theory in Chapter 4 only relates to the questions that emerge in response to the reforms discussed above. As was mentioned before, the relevant theoretical debates in this regard turn on the value of stability and security versus flexibility in property law; property theory is referred to and discussed only to the extent that specific theories touch on this narrow issue more or less directly.

The final methodology is constitutional analysis, considering the possible constitutional implications of the reforms considered in previous chapters. In the South African legal context, any significant amendment of the common law position will have an impact on existing rights and it is therefore necessary to determine the constitutional validity of the change in view of the Constitution as the supreme law.

The constitutional analysis is undertaken against the backdrop of the section 25 methodology set out in the *FNB* decision.[21]

1 4 Terminology

The terminology used in relation to ancillary rights is inconsistent. In South African case law, courts use the terms “ancillary”, “accessory” and “auxiliary” to describe rights that are supplementary to independent servitudal rights. Furthermore, the term “implied rights” is also used to describe rights that are not clearly expressed in the servitude-creating deed. This creates some confusion. In this dissertation, supplementary rights are consistently described as “ancillary”, and a distinction is further made between implied and explicit ancillary rights. A deed of servitude may sometimes include an explicit description of the ancillary rights that accompany the servitude. This practice improves legal certainty and can eliminate problems when circumstances change. However, where a deed does not make explicit provision for particular ancillary rights, they may be implied if they are necessary for the effective exercise of the servitude.[22]

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[21] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC).

[22] A deed may also contain a general clause that simply states that all necessary ancillary rights are granted along with the servitude. For example, in *Eskom Holdings Ltd v Dorfling NO and Others* (10487/2008) [2008] ZAWCHC 262 (8 September 2008) the servitude deed held that the servitude included “every ancillary right necessary or convenient for the proper exercise of the servitude to convey electricity across the property and for telecommunication purposes”.

In foreign law, the terminology differs from one jurisdiction to the next.[23] However, unlike in South African law, implied rights (sometimes called implied servitudes) are something quite distinct form ancillary or implied ancillary rights. Some foreign jurisdictions accept the implied creation of independent servitudes upon subdivision of a property, based on the argument that the servitude is necessary for the effective use of one of the subdivided parcels of land. This becomes clearer in the comparative discussion in Chapter 3, but for purposes of simplicity, it is important to distinguish clearly between the notion of "implied terms" as terms read into an existing servitude relationship, and implied servitudes in this sense.

Another important qualification should be made in relation to the terms "changed circumstances" or "changed conditions". The idea that the physical context within which a servitude is exercised changes (both physically and circumstantially) over time is an important element in the research relating to the topic at hand. There are different ways in which change can affect a servitude. It is possible that the physical features of the land or the elements relevant to the servitude change so that the functionality of the servitude is affected. For now, I will refer to this occurrence as "changed conditions". Examples of changed conditions would be where floods or heavy rains cause erosion of the land subject to the servitude, or where droughts or other changes occur slowly and incrementally over time that leave the servient (or dominant) land in a different state than when the servitude was created. Furthermore, changes in society, the economy, technology or the political sphere that are relevant to the use of property might fall under this category.

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[23] Scots and English law mostly refer to "ancillary" rights, while Louisiana uses the term "accessory".

It is also possible that more subjective changes occur over time. For now, I refer to these as "changed circumstances". Where one of the property owners feels the subjective need to develop his land or use it in a different way, it could have an effect on the manner in which an existing servitude is utilised. According to the common law principles of servitude law a dominant proprietor may not change the use of his property to the extent that it would create a significant increase in the burden on the servient land. However, if the changed use has a minor effect on the servient land, such a changed use might be possible.

In this dissertation, I often refer to changed circumstances in a general sense. This includes both categories set out above (in other words, both "changed conditions" and "changed circumstances"), unless there is an indication of the particular conditions or circumstances referred to.

The *ex ante* and *ex post* regulation of servitudes is also referred to repeatedly throughout the following chapters. These terms refer to the two approaches followed in the regulation of servitudes to avoid the effects of inefficient or undesirable burdens upon land.[24] *Ex ante* regulation is aimed at limiting the creation of new servitudes by restricting the kinds and contents of servitudes before they come into being.[25] *Ex post* regulation is aimed at limiting and controlling servitudes after their creation by allowing

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[24] S French "The American Restatement of servitude law: Reforming doctrine by shifting from *ex ante* to *ex post* controls on the risks posed by servitudes" in S van Erp & B Akkermans (eds) *Towards a unified system of land burdens* (2006) 109-118; KGC Reid "Modernising land burdens: The new law in Scotland" in S van Erp & B Akkermans (eds) *Towards a unified system of land burdens* (2006) 63-108; JA Lovett "Creating and controlling private land use restrictions in Scotland and Louisiana: A comparative mixed jurisdiction analysis" (2008) 19 *Stellenbosch Law Review* 231-257.

[25] *Ex ante* can be translated as meaning "before the fact". Likewise, *ex post* would translate as "after the fact".

remedies for the effective modification and termination of existing servitudes. The theoretical debates discussed in Chapter 4 consider what is seen as a shift from the traditional *ex ante* regulation of servitudes towards an *ex post* remedial approach.

Finally, the very nature of the topic of ancillary rights lends itself to an almost exclusive consideration of praedial servitudes in the chapters that follow. Furthermore, the nature of the topic has the effect that most of the examples discussed are rights of way or similar servitudes that only allow a very specific, singular act on the servient property. Anything else that might not fall within that specific description, but adds something to the main servitudal rights will necessarily be the kind of additional entitlements considered to be ancillary rights for purposes of this dissertation.

Chapter 2

Servitudes and ancillary rights in South African law

Contents

2 1 Introduction

The aim of this chapter is to explore South African servitude law for signs of established legal principle relating to implied or ancillary rights to servitudes. Since servitude law is not an area regulated by legislation, a survey of the common law will be the principal means to this end. A basic explanation of the methods of creation and the requirements for the establishment of a valid praedial servitude will provide some context to the discussion that follows later in the chapter. De Waal states that these principles or requirements are meant to guard against the uncontrolled increase of burdens on land, but that they should at the same time be flexible enough to allow for the creation of praedial servitudes for which need has arisen as a result of agricultural, economic, social and technological progress and development.[1]

Since the topic of servitudes has not enjoyed much academic attention in recent years,[2] the task of unravelling the true common law position relating to any servitude issue is considerably harder. Currently there seems to be general uncertainty, even in the courts, regarding the common law of servitude. One of the areas where this uncertainty becomes most apparent is in the determination of the content and scope of servitudes, and by association, the recognition of implied terms or ancillary rights to servitudes.

Case law on this topic is inconsistent and often does not provide sufficient explanation of the law and reasons underlying the decisions made. In order to

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[1] MJ de Waal "Servitudes" in R Zimmermann & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 785-817 804.

[2] AJ van der Walt "Development of the common law of servitude" (2013) 130 *South African Law Journal* 722-756 723.

effectively settle any dispute regarding a servitude it is necessary to *interpret* the servitude or to delineate its contents. To do this, one may have regard to the agreement concluded to create the servitude, while also keeping in mind the unique nature of the property rights that are being dealt with. An overview of case law shows how these principles have been applied by South African courts since the early 19th century and how there has more recently been a shift towards the implementation of principles borrowed from contract law in order to interpret servitudes.

According to Van der Merwe[3] there are three factors that should be considered when giving content to a servitude, namely the wording used in the servitude grant, the manner in which the servitude was established and surrounding circumstances. However, the impression created in recent case law is that courts attach considerable weight to the exact wording used in the original agreement between the parties. The problems arising from this approach are three-fold: it treats the property rights created at registration of a servitude as contractual rights; it does not take into consideration the fact that servitudes are not always created by way of agreement; and it assumes that the context of the originating agreement is easily ascertainable. These problems will be discussed in more detail to provide perspective on the current common law position. However, another obstacle in determining the scope of a servitude is tied to the last problem. The perpetual nature of servitudes means that not only the parties to a servitude, but also the surrounding circumstances might change during its existence. Viewing servitude relationships as contractual creations when determining the content and scope of the rights involved introduces a rigidity into the approach toward

[3] CG van der Merwe *Sakereg* 2 ed (1989) 465 fn 39.

servitudes that does not accord with their function of ensuring the continued efficient use of land.

From the discussion that follows it will become apparent that there are signs in South African servitude law that point toward the acceptance of implied terms or ancillary rights to servitudes. However, there seems to be a deviation from these signs in the current approach toward the interpretation of servitudes in general and the acceptance of implied terms and ancillary rights in particular. The aim of this chapter is to examine the occurrence of these rights and to consider whether they hold any promise in introducing a measure of flexibility into the current rigid approach followed to determine the scope of servitude rights.

2 2 Creation of servitudes

A servitude was defined in *Lorentz v Melle and Others*[4] as a right of one person in the property of another, either entitling the former to exercise some right or benefit in the property or to prohibit the latter from exercising one or other of his normal incidents of ownership. There are two broad categories of servitudes, namely praedial and personal servitudes. Personal servitudes are constituted to benefit a specific person, while praedial servitudes confer a benefit on a specific parcel of land. In the latter case, the benefit will be enjoyed by the owner of the benefitted land in his capacity as owner and it will *run with the land*, which means that subsequent owners will enjoy the benefit

[4] *Lorentz v Melle and Others* 1978 (3) SA 1044 (T) 1050, following JTR Gibson *Wille's Principles of South African law* 7 ed (1977) 221 (currently F du Bois (ed) *Wille's Principles of South African law* 9 ed (2007)). See also MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* (unpublished LLD dissertation University of Stellenbosch 1989) 4.

connected to the land once it is transferred. For purposes of this dissertation, the focus is on praedial servitudes.

Praedial servitudes are constituted in various ways. A statutory provision can provide for the establishment of servitudes in particular instances. Section 28 of the Sectional Titles Act 95 of 1986 creates an implied servitude of subjacent and lateral support and of passage and provision of water and electricity, which are deemed to be incorporated into the title deeds of all sectional title owners. Servitudes may be created by court order[5] or by state grant when the state grants land subject to a servitude or with the benefit of a servitude or by granting a servitude over state land.[6] A servitude can be established through acquisitive prescription if a person has, openly and as though he were entitled to it, exercised the rights and powers which someone with a servitude would be entitled to exercise, for an uninterrupted period of thirty years.[7] Finally, most praedial servitudes are created by way of agreement between

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[5] A right of way of necessity is created by court order as a result of the necessity arising when a property is landlocked and has no access to a public road other than by using a road over neighbouring land. See *Van Rensburg v Coetzee* 1979 (4) SA 655 (A). Van Leeuwen (*Rooms-Hollands regt* 2 21 12) was of the opinion that where a property was landlocked as a result of subdivision, the servitude right of way would necessarily be created over the part of the subdivided land that does have access to a public road. The reason for this, according to Van Leeuwen, was that a neighbour could not be burdened as a result of a subdivision. The basis for the creation of the servitude is accordingly the implied consent of the owner of the other subdivided parcel of land.

[6] CG van der Merwe & MJ De Waal "Servitudes" in WA Joubert (ed) *The law of South Africa* vol 24 (1993) (now CG van der Merwe & MJ de Waal "Servitudes" in WA Joubert (founding ed) & JA Faris (planning ed) *The law of South Africa* vol 24 2 ed updated by CG van der Merwe (2010)), republished as the second part of CG van der Merwe & MJ de Waal *The law of things and servitudes* (1993). For purposes of this dissertation the publication is cited as CG van der Merwe & MJ de Waal "Servitudes" in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 2 ed (2010) para 612.

[7] Section 6 of the Prescription Act 68 of 1969.

the owners of two neighbouring properties, followed by registration.[8] Such an agreement may be recorded in a notarial deed executed by the owners of the relevant properties,[9] or in a transfer of land upon subdivision of a property that results in each of the current parties now owning part of the previous single parcel of land.[10]

In the first instance, the owners of the servient and dominant properties will draw up the servitude-creating agreement in the form of a notarial deed and have it registered against the title deed of the servient property.[11] A servitude agreement usually contains basic terms and conditions related to the servitude, such as the extent of the servitudal rights and the consideration offered in return.[12] In the second instance, the landowner wishing to subdivide his property can, in the deed of transport, grant or reserve certain rights in the form of a servitude over one of the subdivided portions. In each situation the original contract containing the terms simply creates personal rights between the parties. These rights are converted to limited real rights upon registration, which is effected once the Registrar of Deeds endorses the servitude against the title deeds of the properties.[13] This conversion from personal

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[8] *Jackson NO and Others v Aventura Ltd and Others* [2005] 2 All SA 518 (C) 527; *Lorentz v Melle and Others* 1978 (3) SA 1044 (T) 1050; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's The law of property* 5 ed (2006) 332 334; P Van Warmelo "Die reg betreffende servitute in Suid Afrika" 1960 *Acta Juridica* 106-115 112-114.

[9] S 75 of the Deeds Registries Act 47 of 1937.

[10] S 76 of the Deeds Registries Act 47 of 1937.

[11] It is also common practice to register a servitude against the title deed of the dominant property although this is not required.

[12] PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's The law of property* 5 ed (2006) 332.

[13] S 3(o), 75, and 76 of the Deeds Registries Act 47 of 1937; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's The law of property* 5 ed (2006) 332.

(contractual) rights into real (property) rights has important implications for the way in which these rights are interpreted.

The purpose of registration is to create publicity in order to protect third parties who buy burdened properties. The fact that the servitude is endorsed on the title deed means that a purchaser is reasonably expected to be aware of the burden at the time of purchase and this knowledge is rightly attributed to him in cases where disputes arise.

Section 63(1) of the Deeds Registries Act 47 of 1937 states that:

> "No deed, or condition in a deed, purporting to create or embodying any personal right, and no condition which does not restrict the exercise of any right of ownership in respect of immovable property, shall be capable of registration: Provided that a deed containing such a condition as aforesaid may be registered if, in the opinion of the registrar, such condition is *complementary or otherwise ancillary* to a registrable condition or right contained or conferred in such deed."[14]

This section was amended by the General Law Amendment Act 62 of 1973 to include the proviso that allows registration of (personal) rights if they are ancillary to the main right or condition. Although this proviso pertains to the registration of personal rights, it serves as an indication that the legislature envisaged the inclusion of ancillary rights. Nevertheless, the registration of any servitude is subject to compliance with various requirements for the valid establishment of these particular limited real rights.

[14] Emphasis my own.

2 3 Nature and requirements of servitudes

The establishment of servitudes is regulated extensively by a number of common law principles. The *numerus clausus* principle is one of the most well-known regulatory controls imposed on servitudes. According to this principle there is a closed list of recognised real rights, and as it applies to servitudes, it means that there are only a limited number of rights that can be established as servitudes.[15] Although this principle does not form part of modern South African property law,[16] its function of preventing a proliferation of burdens on land is fulfilled by the requirement of registration and the subtraction from the dominium test.[17]

To determine whether a right is real and registrable, it must pass the *subtraction from the dominium* test. According to the test, a right will qualify as a limited real right if its correlative obligation is a burden upon the land and accordingly subtracts from

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[15] The principle is of Roman origin, but De Waal mentions that it was already abandoned to some extent in classical and post-classical Roman law. According to Voet *Commentarius* 8 3 12, there was no numerus clausus of servitudes in Roman-Dutch law: MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* (unpublished LLD dissertation University of Stellenbosch 1989) 14. See PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's The law of property* 5 ed (2006) 321 for a different view. Merrill and Smith argue that the principle of *numerus clausus* "appears to be a universal feature of all modern property systems" – whether it is expressly acknowledged as such (as in most civillian jurisdictions) or simply enforced under the guise of some other principle of standardisation (as is seen in common-law countries): TW Merrill & HE Smith "Optimal standardization in the law of property: The numerus clausus principle" (2000) 110 *Yale Law Journal* 1-70 3-4. See also BWF Depoorter & F Parisi "Fragmentation of property rights: A functional interpretation of the law of servitudes" (2003) 3 *Global Jurist Frontiers* 1-41 13-14.

[16] CG van der Merwe "Numerus clausus and the development of new real rights in South Africa" (2002) 119 *South African Law Journal* 802-815 802; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's The law of property* 5 ed (2006) 321.

[17] AJ van der Walt "The continued relevance of servitude" (2013) 3 *Property Law Review* 3-35 19; CG van der Merwe "Numerus clausus and the development of new real rights in South Africa" (2002) 119 *South African Law Journal* 802-815; CG van der Merwe *Sakereg* 2 ed (1989) 460.

the *dominium.*[18] This means that it must diminish the ownership of the land in that it either provides the servitude holder with certain entitlements inherent to the owner's right of ownership or prevents the owner from exercising certain of the entitlements inherent to his ownership.[19] This test merely determines whether a particular right is real. To determine whether a right can be established as a valid praedial servitude, it must comply with more specific requirements.

The literature regarding the establishment requirements in South African law seems to be inconsistent, since writers have different ideas about and lists of the real requirements that should be met. De Waal[20] states that notwithstanding the impression to the contrary created in legal literature, there is no certainty as to what exactly the requirements are for the establishment of a valid servitude in South African law. After considering the views of a few authoritative sources in South African servitude law,[21] he composes a list of common denominators which most of these sources recognise as relevant or necessary elements to consider in a discussion of

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[18] *Nel v Commissioner for Inland Revenue* 1960 (1) SA 227 (A) 233A; *Schwedhelm v Hauman* 1947 (1) SA 127 (E) 135; *Ex Parte Geldenhuys* 1926 OPD 155 162; B Akkermans *The principle of* numerus clausus *in European property law* (2008) 473-482; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's The law of property* 5 ed (2006) 55-57.

[19] CG van der Merwe *Sakereg* 2 ed (1989) 458, in accordance with the view that ownership is not a bundle of rights, states that an owner granting a servitude does not relinquish some of his property rights, but merely agrees to the limitation or suspension of some of the entitlements inherent to his right of ownership.

[20] MJ de Waal "Die vereistes vir die vestiging van grondserwitute: 'n Herformulering" (1990) 1 *Stellenbosch Law Review* 171-185 176.

[21] CG van der Merwe "Servitudes and other real rights" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 591-629 593-601; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's The law of property* 5 ed (2006) 321-342; JC Sonnekus & JL Neels *Sakereg vonnisbundel* 2 ed (1994) 584-614; CG van der Merwe *Sakereg* 2 ed (1989) 467-479; CG Hall & EA Kellaway *Servitude*s 3 ed (1973) 1-5.

validity requirements. The requirements include the presence of two tenements belonging to different owners;[22] the vicinity of the properties;[23] utility provided to the

[22] PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's The law of property* 5 ed (2006) 323; MJ de Waal "Servitudes" in R Zimmermann & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 785-817 798-799; MJ de Waal "Servitudes" in R Feenstra & R Zimmermann (eds) *Das römisch-holländische Recht. Fortschritte des Zivilrechts im 17. und 18. Jahrhundert* (1992) 567-595 574; CG van der Merwe *Sakereg* 2 ed (1989) 468-469; CG Hall & EA Kellaway *Servitude*s 3 ed (1973) 3-4.

[23] PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's The law of property* 5 ed (2006) 323; MJ de Waal "Servitudes" in R Zimmermann & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 785-817 790-792; JC Sonnekus & JL Neels *Sakereg vonnisbundel* 2 ed (1994) 604-610; MJ de Waal "Servitudes" in R Feenstra & R Zimmermann (eds) *Das römisch-holländische Recht. Fortschritte des Zivilrechts im 17. und 18. Jahrhundert* (1992) 567-595 574-577; MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* (unpublished LLD dissertation University of Stellenbosch 1989) 66-98; CG van der Merwe *Sakereg* 2 ed (1989) 470.

dominant tenement; [24] an objective of permanence;[25] and passivity on the part of the servient property owner. [26]

Praedial servitudes always involve two tenements belonging to different owners.[27] The dominant tenement derives some benefit from the servient tenement. If

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[24] PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's The law of property* 5 ed (2006) 323; MJ de Waal "Servitudes" in R Zimmermann & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 785-817 795-799; JC Sonnekus & JL Neels *Sakereg vonnisbundel* 2 ed (1994) 585-603; MJ de Waal "Servitudes" in R Feenstra & R Zimmermann (eds) *Das römisch-holländische Recht. Fortschritte des Zivilrechts im 17. und 18. Jahrhundert* (1992) 567-595 580-582; MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* (unpublished LLD dissertation University of Stellenbosch 1989) 99-209 ; CG van der Merwe *Sakereg* 2 ed (1989) 469-471; CG Hall & EA Kellaway *Servitude*s 3 ed (1973) 2.

[25] Voet *Commentarius* 8 6 4 and 8 4 17; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's The law of property* 5 ed (2006) 323; MJ de Waal "Servitudes" in R Zimmermann & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 785-817 793-795; JC Sonnekus & JL Neels *Sakereg vonnisbundel* 2 ed (1994) 611-613; MJ de Waal "Servitudes" in R Feenstra & R Zimmermann (eds) *Das römisch-holländische Recht. Fortschritte des Zivilrechts im 17. und 18. Jahrhundert* (1992) 567-595 577-580; MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* (unpublished LLD dissertation University of Stellenbosch 1989) 30-65; CG van der Merwe *Sakereg* 2 ed (1989) 471; CG Hall & EA Kellaway *Servitude*s 3 ed (1973) 11.

[26] *D* 8 1 15 1 (also see Voet *Commentarius* 7 1 1, 8 4 17); PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's The law of property* 5 ed (2006) 324-325; MJ de Waal "Servitudes" in R Zimmermann & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 785-817 799-803; JC Sonnekus & JL Neels *Sakereg vonnisbundel* 2 ed (1994) 550-551; MJ de Waal "Servitudes" in R Feenstra & R Zimmermann (eds) *Das römisch-holländische Recht. Fortschritte des Zivilrechts im 17. und 18. Jahrhundert* (1992) 567-595 583-586; MJ de Waal "Die passiwiteitsvereiste by grondserwitute en die skepping van positiewe serwituutverpligtinge" 1991 *Tydskrif vir die Suid Afrikaanse Reg* 233-249; MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* (unpublished LLD dissertation University of Stellenbosch 1989) 210-293; CG van der Merwe *Sakereg* 2 ed (1989) 471-477; CG Hall & EA Kellaway *Servitude*s 3 ed (1973) 1.

[27] *Van der Vlugt v Salvation Army Property Co* 1932 CPD 56; included in this requirement is the principle that no one can have a servitude over his own property (*nulli res sua servit*; Voet *Commentarius* 7 4 3).

there is no dominant tenement, only a personal servitude can be established.[28] This requirement seems to be the least controversial and has not caused many problems.[29]

The requirement of *vicinitas* provides that the two tenements must be sufficiently close to one another or in the same vicinity. This is one of the more disputed elements of servitudes, since it is the subject of quite a few different interpretations. Some writers see it simply as an element of the utility requirement[30] discussed below, while others, who categorise it as an independent requirement for establishment, do not always agree on the closeness of the vicinity that is required. According to Voet the dominant and servient tenement ought to be neighbouring,[31] but he further explains that this *neighbourhood* should be assessed not so much on contiguity as upon the affording of benefit and the aptitude for serving.[32] Hall and Kellaway[33] agree with this view, stating that vicinity is indeed a requirement for the establishment of a valid servitude but that it does not entail contiguity.

The requirement of perpetuity (*perpetua causa*) implies that a servitude should be created with a long-term vision. It holds that the dominant tenement must on a continuous basis have a need for the benefit provided by the servient tenement, which must again be able to fulfil this need perpetually. This idea of permanence affirms the

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[28] CG van der Merwe *Sakereg* 2 ed (1989) 468.

[29] MJ de Waal *Die vereistes vir die vestiging van grondserwitute in die Suid-Afrikaanse reg* (unpublished LLD dissertation University of Stellenbosch 1989) 32.

[30] JC Sonnekus & JL Neels *Sakereg vonnisbundel* 2 ed (1994) 605; MJ de Waal "Servitudes" in R Feenstra & R Zimmermann (eds) *Das römisch-holländische Recht. Fortschritte des Zivilrechts im 17. und 18. Jahrhundert* (1992) 567-595 577; CG van der Merwe *Sakereg* 2 ed (1989) 468.

[31] Voet *Commentarius* 8 4 19.

[32] Voet *Commentarius* 8 4 19. See CG van der Merwe *Sakereg* 2 ed (1989) 468 for examples of how this applies to different servitudes.

[33] CG Hall & EA Kellaway *Servitude*s 3 ed (1973) 3.

real nature of the servitudal rights. However, as is the case with the *vicinitas* requirement, many writers see perpetuity as part of the utility of a servitude.[34] It seems that the requirement for *perpetua causa* was not strictly adhered to in Roman-Dutch law or by the pandectists[35] and no South African court has considered it in much detail either.[36]

Utility (*utilitas*) is one of the most prominent elements required for the establishment of praedial servitudes.[37] This requirement entails that the servitude offers a permanent increase in usefulness to the dominant tenement. [38] It is important that the benefit accrues to the dominant land and does not simply benefit the person who happens to be the owner of the tenement at a particular time.[39] As mentioned above, the requirements of vicinity and perpetuity are often seen as elements of

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[34] JC Sonnekus & JL Neels *Sakereg vonnisbundel* 2 ed (1994) 613; MJ de Waal "Servitudes" in R Feenstra & R Zimmermann (eds) *Das römisch-holländische Recht. Fortschritte des Zivilrechts im 17. und 18. Jahrhundert* (1992) 567-595 577-580.

[35] JC Sonnekus & JL Neels *Sakereg vonnisbundel* 2 ed (1994) 612; MJ de Waal "Servitudes" in R Feenstra & R Zimmermann (eds) *Das römisch-holländische Recht. Fortschritte des Zivilrechts im 17. und 18. Jahrhundert* (1992) 567-595 613; CG van der Merwe *Sakereg* 2 ed (1989) 471.

[36] MJ de Waal "Servitudes" in R Zimmermann & D Visser (eds) *Southern cross: Civil law and common law in South Africa* (1996) 785-817 793-794. See also JL Neels *Onderskeidende kenmerke by diensbaarhede: Die vereistes van praedio utilitas, perpetua causa en vicinitas vir erfdiensbaarhede* (1989) unpublished LLM thesis University of Johannesburg 62-63.

[37] PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's The law of property* 5 ed (2006) 323.

[38] *De Kock v Hänel* 1999 (1) SA 994 (C) 998; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's The law of property* 5 ed (2006) 323; CG van der Merwe *Sakereg* 2 ed (1989) 470.

[39] CG van der Merwe *Sakereg* 2 ed (1989) 470.

utility.[40] De Waal[41] states that the formulation of these two elements as separate and independent requirements has no convincing historical or legal-comparative basis and is, from a practical point of view, meaningless. Thus, he only recognises three requirements for the valid establishment of a servitude, namely the existence of two tenements, utility and passivity.

The passivity requirement prohibits the imposition of positive duties on the servient property. This requirement forms an important part of South African servitude law. It is sometimes controversial and in some foreign jurisdictions, the imposition of positive obligations has been accepted. This requirement holds that an owner of a servient tenement can be obliged either to endure some or other act performed on his property or to refrain from performing some act himself, but could not be compelled to perform any positive duty in terms of a servitude[42] or to maintain the works necessary for the effective exercise of a servitude by the owner of the dominant tenement.[43]

Apart from the validity requirements there are also other important principles[44] regulating the creation and content of servitudes. These include the principles of

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[40] JC Sonnekus & JL Neels *Sakereg vonnisbundel* 2 ed (1994) 613; MJ de Waal "Servitudes" in R Feenstra & R Zimmermann (eds) *Das römisch-holländische Recht. Fortschritte des Zivilrechts im 17. und 18. Jahrhundert* (1992) 567-595 577-580; CG van der Merwe *Sakereg* 2 ed (1989) 470-471.

[41] MJ de Waal "Die vereistes vir die vestiging van grondserwitute: 'n Herformulering" (1990) 1 *Stellenbosch Law Review* 171-185 183-184.

[42] CG van der Merwe "Die nutsvereiste by erfdiensbaarhede" in DJ Joubert (ed) *Petere fontes: LC Steyn gedenkbundel* (1980) 163-176 165. See also *Lorentz v Melle* 1978 3 SA 1044 (T) 1049.

[43] CG van der Merwe Sakereg 2 ed (1989) 472. See e g *Roeloffze NO and Another v Bothma NO and Others* 2007 (2) SA 257 (C) para 37. There is one exception to the passivity rule: the *servitus oneris ferendi*, a servitude of support, which placed a positive obligation on the owner of the servient tenement to maintain the building providing support to the building on the dominant tenement.

[44] There is some controversy about the categorisation of these "principles". CG van der Merwe *Sakereg* 2 ed (1989) 461-467 and JC Sonnekus & JL Neels *Sakereg vonnisbundel* 2 ed (1994) 548-583 identify

servitus in servitutis esse non potest (there can be no servitude over an existing servitude),[45] *nemini res sua servit* (no one can have a servitude over his own property),[46] and the indivisible nature of servitudes.[47]

If a right meets all the requirements set out above, it is registrable as a praedial servitude. It is generally accepted that the role of the validity requirements is to prevent ownership of land from becoming excessively encumbered by a proliferation of praedial servitudes. Sonnekus and Neels[48] emphasise that the requirements for establishment are compulsory and not merely regulatory law and that parties should not be able to thwart the policy considerations behind the requirements by way of agreement.

Regulating servitudes by requiring compliance with certain rules to restrict their establishment, is described as *ex ante* control[49] because the measures are used to regulate servitudes *before the event* or before their creation. These measures are

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them as characteristics while other writers see them as requirements. MJ de Waal "Die vereistes vir die vestiging van grondserwitute: 'n Herformulering" (1990) 1 *Stellenbosch Law Review* 171-185 182 explains the importance of distinguishing between requirements and characteristics.

[45] There can be no servitude of a servitude (Voet *Commentarius* 8 4 7).

[46] D 8 2 26; Voet *Commentarius* 8 4 14; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's The law of property* 5 ed (2006) 323.

[47] CG van der Merwe *Sakereg* 2 ed (1989) 460.

[48] JC Sonnekus & JL Neels *Sakereg vonnisbundel* 2 ed (1994) 597. See also MJ de Waal "Die vereistes vir die vestiging van grondserwitute: 'n Herformulering" (1990) 1 *Stellenbosch Law Review* 171-185 181.

[49] JA Lovett "Creating and controlling private land use restrictions in Scotland and Louisiana: A comparative mixed jurisdiction analysis" (2008) 19 *Stellenbosch Law Review* 231-257; S French "The American Restatement of servitude law: Reforming doctrine by shifting from *ex ante* to *ex post* controls on the risks posed by servitudes" in S van Erp & B Akkermans (eds) *Towards a unified system of land burdens* (2006) 109-118; KGC Reid "Modernising land burdens: The new law in Scotland" in S van Erp & B Akkermans (eds) *Towards a unified system of land burdens* (2006) 63-108.

aimed at maintaining stability in the property system in order to encourage investment in land and ensure continued development of property. They prevent the fragmentation of property rights by placing limits on the kinds of real rights that may be created.[50] Another way of preventing fragmentation is through *ex post* control measures, which are aimed not at preventing the establishment of servitudes but rather at providing certain remedies to prevent or reduce the negative effects of inefficient and undesirable servitudes already established.[51] This is done by providing for remedies to interpret, modify and terminate existing servitudes that have become inefficient or undesirable.[52]

2 4 Effective use and reasonableness

The granting of servitude rights to a dominant proprietor necessarily limits the ownership entitlements of the servient proprietor. Nevertheless, the servient proprietor maintains the residual rights to use and enjoy her property as far as this does not

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[50] AJ van der Walt "The continued relevance of servitude" (2013) 3 *Property Law Review* 3-35 2.

[51] This was introduced by the *Restatement (Third) of Property: Servitudes* (2000) in American law; S French "The American Restatement of servitude law: Reforming doctrine by shifting from *ex ante* to *ex post* controls on the risks posed by servitudes" in S van Erp & B Akkermans (eds) *Towards a unified system of land burdens* (2006) 109-118 110.

[52] In South African law servitudes are terminated by prescription (after 30 years of non-use); through statutory provision; by agreement; by a clear intention of the dominant proprietor to abandon his rights; where the dominant and servient properties are owned by the same person; or when of the properties is destroyed. However, these measures of termination are all determined *ex ante*. The value of *ex post* measures for termination (or modification) is that they are a result of circumstances that arise at some time after establishment of the rights.

interfere with the exercise of the servitude.[53] The result is that the two parties simultaneously have rights to use and enjoy the same property. This causes an inherent tension in their relationship, and since servitude relationships are created to exist in perpetuity, it is necessary to address this tension.[54] Accordingly, clear principles are necessary to regulate the relationship between the parties and ensure a fair balancing of interests between them.[55]

The approach of South African courts to the relationship between the parties was summarised by the Supreme Court of Appeal in the case of *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd*[56] ("*Anglo Operations*"):

> "In accordance with the principles applicable to servitudes, the owner of a servient property is bound to allow the holder to do whatever is reasonably necessary for the proper exercise of his rights. The holder of the servitude is in turn bound to exercise his rights *civiliter modo*, that is, reasonably viewed, with as much possible consideration and with the least possible inconvenience to the servient property and its owner."[57]

There are a number of common law principles that aim to regulate the relationship between the parties and ensure a fair balancing of interests between them.[58] The first principle holds that the servitude holder enjoys preference in exercising the entitlements of use and enjoyment that form part of the servitude.[59] The servient

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[53] CG van der Merwe *Sakereg* 2 ed (1989) 465; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's The law of property* 5 ed (2006) 330-331.

[54] AJ van der Walt "The relationship between the servitude holder and the owner" in *The law of servitudes* (2016) (forthcoming) 1.

[55] CG van der Merwe *Sakereg* 2 ed (1989) 464.

[56] *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2007 2 SA 363 (SCA).

[57] *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2007 2 SA 363 (SCA) 373A–B.

[58] CG van der Merwe *Sakereg* 2 ed (1989) 464.

[59] *Cillie v Geldenhuys* 2009 (2) SA 325 (SCA) para 15; CG van der Merwe *Sakereg* 2 ed (1989) 464.

property owner is accordingly obliged to allow the enjoyment of the servitude and to use his property in a way that does not restrict its exercise.[60] This provides protection to the dominant proprietor and ties in with the principle that he may do all that is necessary for the effective exercise of his servitudal rights.[61] These protective measures aim to ensure that the servitude holder can achieve the full functionality of the rights he was granted. He may erect necessary structures such as steps or bridges, lay pipes and access the servitude works for maintenance purposes.[62]

Of course, the servient proprietor is protected against abuse of these rights. She may exercise all entitlements of ownership which are not inconsistent with the servitude and is free to establish such other servitudes as she wishes, as long as the servitude right of the dominant owner is not negatively affected.[63] More significantly, the servient proprietor is protected against an undue increase in the burden imposed on her property by the servitude. This is ensured by the principle that requires *civiliter modo* exercise of the servitude.[64] According to this principle, the dominant proprietor

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[60] *Texas Co (SA) Ltd v Cape Town Municipality* 1926 AD 467 474; *Rabie v De Wit* 1946 CPD 346 351; *Kakamas Bestuursraad v Louw* 1960 (2) SA 202 (A) 226B; *Stuttaford v Kruger* 1967 (2) SA 166 (C) 172F*; Brink v Van Niekerk en 'n Ander* 1986 (3) 428 (T) 434; *Johl and Another v Nobre and Others* (23841/2010) [2012] ZAWCHC 20 (20 March 2012) para 15.

[61] *Johl and Another v Nobre and Others* (23841/2010) [2012] ZAWCHC 20 (20 March 2012) para 14; *Rubidge v McCabe & Sons* 1913 AD 433 441; CG van der Merwe & MJ de Waal "Servitudes" in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 2 ed (2010) para 544.

[62] This is discussed in more detail in section 2 6 below.

[63] CG van der Merwe *Sakereg* 2 ed (1989) 464-467; CG van der Merwe & MJ de Waal "Servitudes" in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 2 ed (2010) para 544.

[64] *Johl and Another v Nobre and Others* (23841/2010) [2012] ZAWCHC 20 (20 March 2012) para 13; *Kakamas Bestuursraad v Louw* 1960 (2) SA 202 (A) 226B; J Scott "A growing trend in source application by our courts illustrated by a recent judgment on right of way" (2013) 76 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 239-251 242-244; JC Sonnekus "Erfdiensbaarhede en die uitoefening

must exercise his servitude reasonably,[65] in a manner that will cause the least damage or inconvenience to the servient property.[66] He may not bring about changes in the condition of the dominant property that would have a more burdensome effect on the servient property than could reasonably have been foreseen at the creation of the servitude.[67] According to Van der Merwe, this means that the servitude holder might be able to erect a factory on his land, but the servient property cannot be expected to tolerate the use of an existing agricultural servitude of right of way for the transport of materials and factory goods for this new purpose.[68]It is not entirely clear where the line is drawn between allowing the dominant property full effective use of his servitude and limiting his exercise on the basis that it is *inciviliter*; the balance must be determined on the grounds of reasonableness.

These principles are aimed at regulating the continued (*ex post*) existence of servitudes after establishment by ensuring the reasonable conduct of both parties over time. This suggests a measure of flexibility in servitude controls. However, the balancing exercise necessary to address the inherent tension in the relationship

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daarvan *civiliter modo*" (2007) 70 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 351-370 360-362; CG van der Merwe *Sakereg* 2 ed (1989) 466.

[65] *Johl and Another v Nobre and Others* (23841/2010) [2012] ZAWCHC 20 (20 March 2012) para 13.

[66] Or with due consideration to the interests of the servient proprietor. See in this regard *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2007 2 SA 363 (SCA) 373A–B; *Rabie v De Wit* 1946 CPD 346 351; J Scott "A growing trend in source application by our courts illustrated by a recent judgment on right of way" (2013) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 239-251 242-244; JC Sonnekus "Erfdiensbaarhede en die uitoefening daarvan *civiliter modo*" (2007) 70 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 351-370 360-362; CG van der Merwe *Sakereg* 2 ed (1989) 466.

[67] CG van der Merwe *Sakereg* 2 ed (1989) 467. This includes burdens that are neither required for proper exercise of the servitude nor clearly specified in the servitude grant.

[68] CG van der Merwe *Sakereg* 2 ed (1989) 467.

between the parties has proved challenging to courts.[69] The first step to determine whether an infringement of rights has occurred in a specific dispute is to know the exact scope of the servitude rights.[70] In determining the scope of the rights, these *ex post* considerations must be taken into account in the weighing of interests of the parties

In *Kakamas Bestuursraad v L*ouw[71] ("*Kakamas Bestuursraad*") the court stated the following:

> "The more precise the description in the grant of the ways in which the servitude is to be exercised, the less room there is for complaint on the ground that it has not been exercised *civiliter modo*. By their agreement the parties may fix or indicate what is to be deemed to be a proper use of the servitude."[72]

This statement highlights a crucial intersection in the process of determining the scope of a servitude. It is true that the parties to a servitude conclude an agreement that sets out the terms and particulars of their relationship. However, because servitudes are real rights, their contents need to conform, first and foremost, to the principles of property law. Even though the content of the servitude is determined to a large extent by the particular terms of the contract between the parties, this can only be done within the framework that the principles of property law allow. Examples in case law show that courts sometimes fail to find workable solutions to solve disputes by relying on the common law rules at hand.

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[69] *Roeloffze NO v Bothma NO* 2007 2 SA 257 (C).

[70] JC Sonnekus "Erfdiensbaarhede en die uitoefening daarvan *civiliter modo*" (2007) 70 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 351-370 360-362.

[71] *Kakamas Bestuursraad v Louw* 1960 (2) SA 202 (A).

[72] *Kakamas Bestuursraad v Louw* 1960 (2) SA 202 (A) 218C.

In *Linvestment CC v Hammersley*[73] the court decided to develop the applicable common law rules in order to bring about a result that was better aligned with "the interests of justice". The case involved a plea for the unilateral relocation of a servitude of right of way. According to the principles of the common law, a servitude could only be altered by mutual consent of the parties.[74] However, the Supreme Court of Appeal decided that:

> "[A] modification of our existing law may better serve the interests of justice when the existing law is uncertain or does not adequately serve modern demands on it."[75]

The court accordingly declared that a servient proprietor is permitted to apply for unilateral relocation of a servitude of right of way, provided the relocation will not prejudice the owner of the dominant tenement.[76] This marks a significant shift in the direction of *ex post* regulation. However, the flexibility allowed here is limited in scope and application, as it only applies to the specific instances of relocation of a servitude right of way and only in favour of the servient proprietor. As for dominant proprietors, there is no indication that courts will allow flexibility in the interpretation of their rights or even in the consideration of the extent of their interests in light of changed circumstances that result in a diminution of their rights.

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[73] *Linvestment CC v Hammersley and Another* 2008 (3) SA 283 (SCA).

[74] *Linvestment CC v Hammersley and Another* 2008 (3) SA 283 (SCA) para 11; *Gardens Estate Ltd v Lewis* 1920 AD 144 at 150; LA Kiewitz *Relocation of a specified servitude of right of way* (unpublished LLM thesis, Stellenbosch University, 2010) 20.

[75] *Linvestment CC v Hammersley and Another* 2008 (3) SA 283 (SCA) para 25.

[76] *Linvestment CC v Hammersley and Another* 2008 (3) SA 283 (SCA) para 35. For a more detailed discussion of the case see sections 5 2 and 5 4 below.

In other cases, courts try to achieve flexibility in the scope of the servitude by focussing on the words used in the servitude deed or originating agreement to find an interpretation that can be reconciled with the desired outcome.

2 5 Interpretation of servitude grants

Van der Merwe states that the content of a servitude relationship and a contractual relationship is often identical.[77] However, they should not be confused.

The case of *Fourie v Marandellas Town Council*[78] ("*Fourie*") is a good example to illustrate the tendency of courts to focus to a large extent on the interpretation of the servitude grant to determine the contents and scope of a servitude. The servitude in this case was phrased as follows:

> "A servitude of storage as defined in section 94 (1) of the Water Act, Chapter 251... for the purpose of storing water in connection with the dam constructed by the Board... and the grantor agrees that the Board shall be entitled to make further use of the area covered by the servitude of storage *as it may desire*." [79]

The court, in interpreting the servitude, said that because the servitude grant was worded unambiguously, its duty was not to find the least burdensome interpretation of the servitude, but simply to give effect to the words used in the grant "unless this would lead to an absurdity or to something which, from the instrument as a whole, it can clearly be gathered the parties could not have intended". The court eventually

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[77] CG van der Merwe *Sakereg* 2 ed (1989) 462.

[78] *Fourie v Marandellas Town Council* 1972 (2) SA 698 (R).

[79] *Fourie v Marandellas Town Council* 1972 (2) SA 698 (R) 699 *(emphasis my own).* Footnotes omitted. The Act referred to is the Water Act 54 of 1956.

concluded that the wording used in this grant was explicit (and precise)[80] in granting the right to do anything "it may desire" to the servitude holder, even to the extent that this included the lease of a part of the servient property to a third party and the construction of buildings by that third party for purposes totally unrelated to the servitude itself. In doing so, the court focussed on the words of the originating document to the extent of ignoring the applicable property law principles. If the court had considered the servitude agreement in the light of the relevant property law principles, the use of the servitude of water storage for the further and unrelated purposes contended would not be in line with the principle of *civiliter modo* exercise of the rights.[81]

The approach followed in this case highlights the propensity of courts to refer to the deed or contract, not simply as an aid to establish the original terms of the servitude, but to the extent that it is the main source to determine the content and scope of the relevant rights.

The most prominent principle dictating the interpretation of servitudes holds that they must be interpreted strictly, so as to impose the least possible burden on the servient tenement.[82] This principle follows from the assumption that all property is in

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[80] *Fourie v Marandellas Town Council* 1972 (2) SA 698 (R).

[81] Both the renting of the servitude to a third party (who is in no way using the dominant land) and the construction of buildings on the servient property create abnormal and weighty burdens on the servient land. According to the principles of servitude law, it will be very hard to include these uses as implied ancillary rights to an existing servitude. These rights will most likely require separate negotiation and establishment as servitudes in their own right.

[82] *Johl and Another v Nobre and Others* (23841/2010) [2012] ZAWCHC 20 (20 March 2012) para 16; *Kruger v Joles Eiendomme (Pty) Ltd and Another* 2009 (3) SA 5 (SCA) 10; *Cillie v Geldenhuys* 2009 (2) SA 325 (SCA) para 20; *Eskom Holdings Ltd v Dorfling NO and Others* (10487/2008) [2008] ZAWCHC 262 (8 September 2008); *Nach Investments (Pty) Ltd v Yaldai Investments (Pty) Ltd and*

principle unburdened and free from servitudes.[83] According to Van der Merwe,[84] a servitude holder may exploit a servitude generously, to the boundaries of his needs, and according to its content. He clarifies that the content of a servitude will depend on the wording used in the servitude grant, the way of establishment of the servitude and the surrounding circumstances. In order to apply the principle of *strict* interpretation, courts seem to focus on the wording of servitude grants[85] to give content to servitudes. In *Cillie v Geldenhuys*[86] ("*Cillie*") the court confirmed a statement made in the much earlier case of *Snijman v Boshoff*[87] that the scope of a servitude created by agreement[88] will depend on the interpretation of the terms used in the servitude grant and "has nothing to do with common law rights".[89]

Another 1987 (2) SA 820 (A) 820; *Pieterse v Du Plessis* 1972 (2) SA 597 (A) 599; CG van der Merwe & MJ de Waal "Servitudes" in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 2 ed (2010) para 543; CG van der Merwe *Sakereg* 2 ed (1989) 464.

[83] *Kruger v Joles Eiendomme (Pty) Ltd and Another* 2009 (3) SA 5 (SCA) 10; *Willoughby's Consolidated Co Ltd v Copthall Stores Ltd* 1918 AD 1 16; CG van der Merwe & MJ de Waal "Servitudes" in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 2 ed (2010) para 543; CG van der Merwe *Sakereg* 2 ed (1989) 464.

[84] CG van der Merwe *Sakereg* 2 ed (1989) 465.

[85] See the following cases for examples where courts have confirmed the importance of interpreting the words used in the servitude grant: *Johl and Another v Nobre and Others* (23841/2010) [2012] ZAWCHC 20 (20 March 2012) para 16; *Cillie v Geldenhuys* 2009 (2) SA 325 (SCA) para 16; *De Kock v Hänel* 1999 (1) SA 994 (C) 997; *Kruger v Downer* 1976 (3) SA 172 (W) 175; *Van Rensburg en Andere v Taute en Andere* 1975 (1) SA 279 (A) 302-303*; Fourie v Marandellas Town Council* 1972 (2) SA 698 (R) 700; *Murray v Schneider* 1958 (1) SA 587 (A) 592; *Delmas Milling Co v Du Plessis* 1955 (3) SA 447 (A) 453-455; *Cliffside Flats v Bantry Rocks* 1944 AD 106 117-118; *Snijman v Boshoff* 1905 ORC 1 9.

[86] *Cillie v Geldenhuys* 2009 (2) SA 325 (SCA) para 16.

[87] *Snijman v Boshoff* 1905 ORC 1 9.

[88] As opposed to servitudes created by prescription, in which case the scope will depend on the exact nature of the right acquired by prescription.

[89] CG van der Merwe & MJ de Waal "Servitudes" in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 2 ed (2010) para 544 fn 1.

In the case of *Le Roux NO and others v Burger and others*[90] (*"Le Roux*") the court confirmed the statement made in various previous cases that it had no discretion to derogate from the words used in the agreement between the parties if the meaning thereof is unambiguous;[91] even though the term might have unreasonable consequences. [92] Moreover, a number of judgements reiterate the application of basic contractual principles of interpretation in servitude cases. The *Le Roux* case refers to the framework set out in *Van Rensburg en Andere v Taute*[93] for the interpretation of servitudes.

The central ground of dispute in *Le Roux* was the determination of the content and scope of the servitude.[94] The court stated that the point of departure in this inquiry is the principle that a servitude must be interpreted strictly. Furthermore, it was held that where there is any doubt regarding the content of the servitude, the ordinary rules that apply to the interpretation of contracts are equally applicable to the interpretation

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[90] *Le Roux NO & Others v Burger & Others* (21020/2008) [2010] ZAWCHC 127 (10 June 2010). See also *Le Roux v Burger* (249/2011) [2011] ZASCA 194 (15 November 2011), confirming the decision of the Western Cape High Court.

[91] *Eskom Holdings Ltd v Dorfling NO and Others* (10487/2008) [2008] ZAWCHC 262 (8 September 2008); *Berdur Properties (Pty) Ltd v 76 Commercial Road (Pty) Ltd* 1998 (4) SA 62 (D) 68; *Kruger v Downer* 1976 (3) SA 172 (W) 178H; *Van Rensburg en Andere vs Taute en Andere* 1975 (1), S.A. 279, (AD) 301-302; *Haviland Estates (Ptv) Ltd and Another v McMaster* 1969 (2) SA 312 (A) 336B-C; *Stephens v De Wet* 1920 OPD 78 81.

[92] *Le Roux NO & Others v Burger & Others* (21020/2008) [2010] ZAWCHC 127 (10 June 2010) para 22. As authority for this statement, the court referred to a statement made in the case of *Sun Packaging (Ptv) Ltd v Vreulink* 1996 (4) SA 176 (A) relating to a contract of employment: **"***It may be regarded as anomalous that a party breaching a contract be in a better position than if he had performed it. But such a result is no warrant for not giving effect to the plain meaning of the clause. The sanctity of contract behoves us to do so".* [92]

[93] *Van Rensburg en Andere v Taut*e 1975 (1) SA 279 (A) 302.

[94] *Le Roux NO & Others v Burger & Others* (21020/2008) [2010] ZAWCHC 127 (10 June 2010) para 5.

of servitudes created by agreement.[95] The starting point is thus the golden rule of interpretation that requires that the words in the document be afforded their grammatical meaning.[96] Once the grammatical meaning has been determined, other considerations must also be taken into account, namely, the context in which the words are used in the contract as a whole and the background circumstances relating to the contract (such as matters probably present in the minds of the parties). If the language of the document is ambiguous, a court may consider extrinsic evidence regarding the surrounding circumstances by looking at previous negotiations between the parties, or other factors that may indicate their intentions relating to the contract.[97]

It seems from all these instances that case law on the topic of interpretation has consistently affirmed the idea of a narrow, literal interpretation of the words used in servitude contracts, often including reference to the intention of the parties at creation of the servitude. What is significant about this approach is the strong resemblance to (if not adoption of) contract law principles. In several instances, courts have directly applied contractual principles of interpretation to give content to the servitudal rights of parties, discounting the fact that the rights they are dealing with are property rights

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[95] *Le Roux NO & Others v Burger & Others* (21020/2008) [2010] ZAWCHC 127 (10 June 2010) para 12.

[96] *Le Roux NO & Others v Burger & Others* (21020/2008) [2010] ZAWCHC 127 (10 June 2010) para 13.

[97] In *Glaffer Investments (Pty) Ltd and others v Minister of Water Affairs and Forestry and Another* 2000 (4) SA 822 (T) 828 consideration of the physical features surrounding the servitude were taken into account to determine the intentions of the parties at the time the servitude was granted. However, the court insisted that only the circumstances existing at the time of creation of the rights should be considered. The court held that: "It is clear that the [dominant proprietor] seeks to impose present-day departmental policy upon the servitude and to interpret it in the light thereof. This is incorrect. The servitude has to be interpreted according to its wording and in the light of the surrounding circumstances prevailing when it was granted."

and should be interpreted as such, with reliance on property principles. Applying a contractual methodology to determine the contents of limited real rights is fundamentally problematic.

As explained in section 2 2 above, not all servitudes are created by agreement. The contractual approach does not provide at all for servitudes created by way of state grant, statute or through acquisitive prescription. In these cases, there is no agreement or wording to interpret. In the *Cillie* case the court said that the extent of a servitude created by prescription was to be determined by the true nature and scope of the rights actually acquired.[98] It is not clear how the exact "nature and scope" of the servitude can be established practically in such a case. The assumption can be made that only the exact rights exercised by the dominant owner, or subsequent owners, over the prescription period will be granted as part of the servitude.[99] However, this approach leaves no room for any change in circumstances and seems quite inflexible. It also raises the questions of how important the words of the grant should be where a servitude is created by agreement and whether other factors might sometimes carry more weight in the process of interpretation to ensure effective use of all servitudes, regardless of their manner of creation.

Another shortcoming of the contractual approach is that it denies the real nature of servitudes. As discussed before, servitudes are established as limited real rights

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[98] *Cillie v Geldenhuys* 2009 (2) SA 325 (SCA) para15.

[99] Voet (*Commentarius* 8 2 2), referring to a servitude of letting in beams and anchors into a neighbour's wall, says no more can be prescribed as was possessed or held in *quasi* possession.

upon registration.[100] At this stage, the originating agreement concluded between the parties obtains a secondary role. The registered servitude serves as proof (publicity) of the limited real right created and any rights or additional terms of the agreement that are not registered along with the servitude will be enforceable between the current parties, but should not enjoy third party effect and do not, strictly speaking, form part of the servitude.

The approach followed by courts seems to be an attempt to reach a flexible solution by reconciling the wording of the agreement or grant with the desired outcome in a particular dispute, but even a liberal interpretation of the contract does not result in an effective solution as it is still a contractual solution.

The perpetual nature of servitudes provides another obstacle to the contractual approach as changes over time are inevitably going to have an effect on the context within which the rights are exercised. This means that an interpretation of the servitude agreement that is focussed on the intention of the original parties and the circumstances existing at the time of creation will be ill-suited to determine how the servitude should be exercised at a later stage. Apart from a change in ownership or use of the relevant properties, changes in society, the economy, technology or the political sphere relevant to the use of property can all influence the manner in which the servitude is exercised.

In South African law the need for and general use of servitudes originated mainly from agriculture and servitude law in general saw little change since the original

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[100] Note that servitudes created *ex lege* are an exception to the rule. Furthermore, servitudes acquired by acquisitive prescription, state grant or statute are not required to be registered, although registration is advisable.

incorporation of Roman-Dutch law. It can be supposed that many servitudes that were originally constituted to serve some kind of agricultural or other rural purpose that has undergone drastic development might have become wholly irrelevant in recent times. An example of this would be a right of way that is said to be exercisable by horse-drawn vehicles or carriages. This issue was addressed by a Scottish court.[101] In the case of *Crawford v Lumsden,*[102] the court had to interpret a servitude created in 1917 said to reserve a "right of access by horse and cart".[103] In 1950, when motor vehicles had largely replaced horses and carts, the dominant proprietor was allowed by the court to exercise his right by motor vehicle. The court stated that "when a grant like this is asked and obtained, the parties are contemplating a privilege which is to endure for a long stretch of time, and that what we are really purporting to define is a user of some specified kind, expressed in the language of the day". The exercise of the right by means of a motor vehicle was not seen by the court as really being a different kind of use. However, on appeal, the Court of Session reversed the decision[104] and held that in the specific circumstances of this case, the steady increase in the use of motor vehicles was known to or could reasonably have been foreseen by the original parties to the deed.[105] Lord Jamieson, delivering the decision on appeal made an *obiter* remark to the effect that a servitude granted with a specific limitation relating to its

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[101] See Chapter 3 for a discussion of the Scottish position on servitudes.

[102] *Crawford v Lumsden* 1951 SLT 64 revised 1951 SLT (Notes) 62.

[103] RRM Paisley "The demon drink and the straight and narrow way: The expansion and limitation of praedial servitudes" in H Mostert & MJ de Waal (eds) *Essays in honour of CG van der Merwe* (2011) 193-237 230-231.

[104] *Crawford v Lumsden* 1951 SLT 64 revised 1951 SLT (Notes) 62.

[105] Support for this conclusion was also found in the fact that the owner of the servient tenement was shown in the deed to be a motor hirer and the attached plan of the properties showed a garage on his land.

exercise may be exercised in a new way if the new method was not foreseen by the parties but becomes a generally accepted substitute for the old method of exercise.[106] I would argue that South African courts should likewise be flexible to adapt to changing circumstances in this way.

A recent South African example of the impact of technological development on a servitude is the case of *Zeeman v De Wet,*[107] where the servient tenement was part of an award-winning wine estate. In keeping with the latest research on optimal use of weather conditions, the owner needed to change the direction in which the vineyards were planted over the area subject to the servitude of *aqueduct*. Consequently, this had an impact on the dominant owner's right of access to inspect and maintain the servitude works and led to the dispute.

The case of *Jersey Lane Properties*[108] seemed to hold some promise to bring about a tipping point on the inflexibility apparent in the application of the contractual approach to servitudes. The *a quo* decision[109] concerned a servitude of right of way in favour of a property that was being used for the purpose of running a boutique hotel and spa. The servitude was exercised by the owners of the hotel ("*Jersey Lane*") for thirteen years before the problem arose. According to the case, it was only when a

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[106] RRM Paisley "The demon drink and the straight and narrow way: The expansion and limitation of praedial servitudes" in H Mostert & MJ de Waal (eds) *Essays in honour of CG van der Merwe* (2011) 193-237 231.

[107] *Zeeman v De Wet NO and Others* (325/2011) [2012] ZASCA 22; 2012 (6) SA 1 (SCA) (23 March 2012).

[108] *Jersey Lane Properties (Pty) Ltd t/a Fairlawn Boutique Hotel & Spa v Hodgson and Another* (A5030/11) [2012] ZAGPJHC 86 (7 May 2012) paras 7-9.

[109] *Hodgson v Jersey Lane Properties (Pty) Ltd t/a Fairlawn Boutique Hotel & Spa* unreported case no 36702/10 (23 February 2011) (copy on file with author).

certain group of VIP's[110] decided to lodge in their hotel that *Jersey Lane* was advised by their agents to enhance the access to the hotel. Upon this request, they immediately commenced with the upgrading of the entrance and built a portico, or "what is commonly known as a security gate entrance, elaborately built, with a flat roof and what seems to be a stoep on top, with gates and a guardhouse which is almost two storeys high immediately adjacent to the neighbouring property".[111] The servient owners only became aware of the construction after it had commenced, since they had been abroad during the initial stages of planning and construction, and their attempts to put a stop to the building at that time failed. The question that the court focussed on in this case was whether the construction of the portico was necessary for the proper utilisation of the right of way by *Jersey Lane.*[112] The court remarked that the servitude was unambiguous and required no further interpretation. It eventually decided that *Jersey Lane* had exceeded the bounds of what was regarded as necessary for adequate utilisation and that it had accordingly built the portico unlawfully and in contravention of the right of way.[113] However, in the decision on leave to appeal, Van Joosten J stated that "a progressive interpretation of the servitude was

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[110] The important guests were described as "some eminent group of elders which included ex-president Jimmy Carter of the USA"; *Hodgson v Jersey Lane Properties (Pty) Ltd t/a Fairlawn Boutique Hotel & Spa* unreported case no 36702/10 (23 February 2011) par 8 (copy on file with author).

[111] *Hodgson v Jersey Lane Properties (Pty) Ltd t/a Fairlawn Boutique Hotel & Spa* unreported case no 36702/10 (23 February 2011) (copy on file with author) par 1.

[112] One question that the court should have paid more attention to was the unlawful construction of a building on another's property, or in the very least, the absence of the necessary municipal building approval.

[113] *Hodgson v Jersey Lane Properties (Pty) Ltd t/a Fairlawn Boutique Hotel & Spa* unreported case no 36702/10 (23 February 2011) (copy on file with author) par 9.

called for, having regard to modern day urban developments".[114] The judge contended that the single consideration relied upon by the court *a quo* was insufficient to properly interpret the servitude and that there were *a number of other factors affecting the reasonableness of the appellant's exercise of his rights* that ought to have been considered. To illustrate this point he referred to certain specific features of the property.[115] The court concluded that a wide interpretation of the servitude grant, if properly applied, would not have violated the applicable common law principles. These comments simply formed part of the High Court's judgement on application for leave to appeal. After leave was granted by Van Joosten J in the High court,[116] the Supreme Court of Appeal refused the application without giving reasons.[117] Since the applicant did not take the matter further, the decision of Van Joosten J, contending for a progressive interpretation of the grant is the final say on this case. It is unfortunate that there is no indication of how the proposed progressive interpretation should be approached.

What is noteworthy about this case, from a servitude perspective, is that the court *a quo* did not spend much time on an in-depth analysis of the wording of the servitude

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[114] *Jersey Lane Properties (Pty) Ltd t/a Fairlawn Boutique Hotel & Spa v Hodgson and Another* (A5030/11) [2012] ZAGPJHC 86 (7 May 2012) para 9.

[115] Van Joosten J mentioned "the general aesthetics of the surroundings, the security requirements of the property and the general tendency to erect porticos at entrances to upmarket […] properties in that area" as factors which could be relevant to consider in deciding the reasonableness of the dominant owner's actions. See *Jersey Lane Properties (Pty) Ltd t/a Fairlawn Boutique Hotel & Spa v Hodgson and Another* (A5030/11) [2012] ZAGPJHC 86 (7 May 2012) para 10.

[116] *Jersey Lane Properties (Pty) Ltd t/a Fairlawn Boutique Hotel & Spa v Hodgson and Another* (A5030/11) [2012] ZAGPJHC 86 (7 May 2012) para 13.

[117] *Hodgson v Jersey Lane Properties (Pty) Ltd t/a Fairlawn Boutique Hotel & Spa* unreported case no 375/2012 (28 August 2012) (SCA) (copy on file with author).

grant.[118] Since the grant stated in very simple terms that the servient tenement was subject to a right of way along a certain route, the court said that the servitude was unambiguous and did not need further interpretation. The appeal court, on the other hand, had more to say on the matter of interpretation of the rights and proceeded to mention the applicable property law principles that could help provide content to the servitude. It explained that the singular focus of the court *a quo* to establish the boundaries of the servitude rights and determine whether the construction of the portico fell within these boundaries, was insufficient to properly interpret the servitude.[119] The court held that the principle of *civiliter modo* ought to be considered "more fully". This meant, firstly, that the servitude had to be exercised reasonably, with due regard to the interests of the servient proprietor.[120] However, the particular nature and context of the current servitude also required consideration and could affect the reasonableness of the exercise of the rights under the servitude. On these grounds, the court expressed the view that a wide interpretation of the servitude is called for, "and if properly will not violate the common law principles […] referred to".[121] However, because the appeal application never reached the trial court, this approach was never elaborated on and we are yet to see whether courts will actively engage with the question of *civiliter modo* exercise in this manner.

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[118] *Hodgson v Jersey Lane Properties (Pty) Ltd t/a Fairlawn Boutique Hotel & Spa* unreported case no 36702/10 (23 February 2011) (copy on file with author) par 9.

[119] *Jersey Lane Properties (Pty) Ltd t/a Fairlawn Boutique Hotel & Spa v Hodgson and Another* (A5030/11) [2012] ZAGPJHC 86 (7 May 2012) para 9; *Hodgson v Jersey Lane Properties (Pty) Ltd t/a Fairlawn Boutique Hotel & Spa* unreported case no 36702/10 (23 February 2011) para 5.

[120] *Jersey Lane Properties (Pty) Ltd t/a Fairlawn Boutique Hotel & Spa v Hodgson and Another* (A5030/11) [2012] ZAGPJHC 86 (7 May 2012) para 8.

[121] *Jersey Lane Properties (Pty) Ltd t/a Fairlawn Boutique Hotel & Spa v Hodgson and Another* (A5030/11) [2012] ZAGPJHC 86 (7 May 2012) para 10.

This case is a good example of a court failing to apply the available common law tools to solve problems relating to ancillary rights that regularly arise during the existence of servitudes (*ex post*). In a small number of cases, such as *Linvestment CC v Hammersley,*[122] the courts have indicated a willingness to develop the common law to render it more flexible so as to cope with changed circumstances that render the use of an existing servitude inefficient.

2 6 Implied terms and ancillary rights in South African law

Although the practice of describing the exact scope of a servitude along with all related rights in the servitude grant has developed in South African law in recent years,[123] this has not always been the case. Existing servitudes are often still described in simple terms, containing only the key terms of the agreement between the parties. This vagueness creates the potential for ambiguity and makes it hard to determine what rights can be implied in the servitude.

The foundation upon which the notion of implied and ancillary rights in South African servitude law can be developed lies in the notion that a servitude includes everything that is necessary for its effective exercise.[124] This notion originated in

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[122] *Linvestment CC v Hammersley and Another* 2008 (3) SA 283 (SCA). Refer to the discussion of the case in section 2 4 above, as well as in sections 5 2 and 5 4 below.

[123] RRM Paisley "The demon drink and the straight and narrow way: The expansion and limitation of praedial servitudes" in H Mostert & MJ de Waal (eds) *Essays in honour of CG van der Merwe* (2011) 193-237 234.

[124] *Fourie v Marandellas Town Council* 1972 (2) SA 698 (R) 700; *Du Plessis Estates Ltd v South African Railways and Harbours* 1933 EDL 140 154; *Van Heerden v Coetzee* 1914 AD 167 171; *Steyn v Zeeman* (1903) 20 SC 221 224; *Retief v Louw* (1874) 4 Buch 165 192; *Hawkins v Munnik* (1830) 1 Menz 465.

classical Roman law[125] and has its roots firmly set in Roman-Dutch law where Voet,[126] Grotius,[127] Huber[128] and others confirmed and applied it as a principle of servitude law. In this regard it was accepted that where a right to draw water has been granted, a right of foot-passage to the well is also understood to have been granted. The *Digest*[129] refers to the statement of Neratius[130] that where a man is granted the right to draw water and the right of access for the purpose, he will have both; if he is granted only the right to draw water, the right of access will be presumed and, in the same sense, if he is granted only the right of access to a spring, the right to draw water from it will be presumed.[131] Furthermore, where there is a right to lead water, a person who has been granted this right could lay pipes in the channel or do *anything else as he pleases* whereby he may take the water more freely, provided that he does not worsen the passage of water for the owner or other users of the channel. Other examples explained by Voet[132] include the right to build steps or ramps in order to reach your property from a road or path over which you have a right of way, as well as the right to build a bridge or other structure in order to make a foot passage properly accessible. Another example from the *Digest* refers to servitudes of pasturage or watering of

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[125] RRM Paisley "The demon drink and the straight and narrow way: The expansion and limitation of praedial servitudes" in H Mostert & MJ de Waal (eds) *Essays in honour of CG van der Merwe* (2011) 193-237 234.

[126] Voet *Commentarius* 8 4 16.

[127] D 8 3 3 3.

[128] Huber *Hedendaegse rechtsgeleertheyt* 2 43 16.

[129] D 8 3 3 3.

[130] In the third book of his *Parchments.*

[131] This does not apply in the same way to a public river.

[132] Voet *Commentarius* 8 4 16.

cattle, which could include the ancillary right for the dominant proprietor to erect a hut on the servient tenement so that he might take refuge there in times of storm.[133]

This principle that a servitude includes all rights necessary for its effective use was incorporated into early South African law.[134] One of the earliest cases confirming this Roman law principle is that of *Hawkins v Munnik*[135] ("*Hawkins*"). In *Retief v Louw* the court referred to:

> "[T]he principle of law that when a servitude has been conceded everything necessary to give effect to the enjoyment of that right must also be held to have been granted."[136]

In *Steyn v Zeeman* it was phrased as follows:

> "All the authorities lay down clearly that where a servitude has been created the owner of the dominant tenement has all those rights without which it is impossible for him to enjoy his servitude, and the illustrations given by the authorities show what is meant."[137]

However, the classification and scope of the rights that arise as a result of this principle remain unclear. In the *Hawkins* case[138] the court referred to an *implied* right of way to describe a right which was supplementary to a servitude to take drinking water from a

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[133] D 8 3 6 Paul refers to this opinion of Maecianus; RRM Paisley "The demon drink and the straight and narrow way: The expansion and limitation of praedial servitudes" in H Mostert & MJ de Waal (eds) *Essays in honour of CG van der Merwe* (2011) 193-237 234.

[134] *Johl and Another v Nobre and Others* (23841/2010) [2012] ZAWCHC 20 (20 March 2012) para 14; *Fourie v Marandellas Town Council* 1972 (2) SA 698 (R) 700*; Lategan v Union Government* 1937 CPD 197 202; *Van Heerden v Coetzee* 1914 AD 167 171; *Steyn v Zeeman* (1903) 20 SC 221 224*; London and SA Exploration Company v Rouliot* (1890-1891) 8 SC 74 96*; Retief v Louw* (1874) 4 Buch 165 192.

[135] *Hawkins v Munnik* (1828-1849) 1 Menz 465.

[136] *Retief v Louw* (1874) 4 Buch 165 192.

[137] *Steyn v Zeeman* (1903) 20 SC 221 224.

[138] *Hawkins v Munnik* (1828-1849) 1 Menz 465 466.

fountain. In the case of *West Witwatersrand Areas Ltd v Roos*[139] the court accepted an *implied term* to be read into the servitude agreement between the parties. In this case, the appellant contended for the acceptance of an *implied right* as *ancillary* to the main servitudal rights, but the court chose not to use that terminology in its judgement and decided the case on the grounds of an implied term in the contract between the servitude parties.[140] In *Bloemfontein Town Council v Richter*[141] a right was "conferred by necessary implication", with no reference to its ancillary or supplementary nature, but based on the passage in Voet[142] mentioned before.[143] Other cases refer readily to ancillary[144] or accesory[145] rights, often with specific reference to Voet's principle.

From the wording it is expected that there would be some kind of distinction between *implied* and *ancillary* rights to servitudes. If this wording is compared to the distinction between tacit and implied terms in contract law, it might prove to be a very important distinction. As mentioned above, there is an important distinction between tacit and implied terms in contracts.[146] Implied terms in contract law are terms implied *ex lege* as supplementary to the explicit contractual terms. The two varieties of implied terms include terms which are implied by law into all contracts and terms which are

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[139] *West Witwatersrand Areas Ltd v Roos* 1936 AD 62.

[140] *West Witwatersrand Areas Ltd v Roos* 1936 AD 62 75.

[141] *Bloemfontein Town Council v Richter* 1938 AD 195 227.

[142] Voet *Commentarius* 8 4 16.

[143] The case of *Du Plessis Estates Ltd v SA Railways and Harbours* (1933) EDL 140 167, likewise uses the term "by necessary implication" without reference to the ancillary or accessory nature of the rights.

[144] *Low Water Properties (Pty) Ltd and Another v Wahloo Sand CC* 1999 (1) SA 655 (SE) 656; *Beckenstrater v Sand River Irrigation Board* 1964 (4) SA 510 (T) 511-512; *Brink v Stadler* 1963 (2) SA 427 (C) 429; *Molotlegi v Brummerhoff and Another* 1955 (1) SA 592 (T) 594.

[145] *Fourie v Marandellas Town Council* 1972 (2) SA 698 (R) 700*; Retief v Louw* (1874) 4 Buch 165 190.

[146] S van der Merwe *et al Contract: General principles* 4 ed (2012) 241-245; RH Christie *The law of contract in South Africa* 6 ed (2011) 167-168.

implicit to a specific kind of contract and that form part of the *naturalia* of the said contract due to its nature. Tacit terms, on the other hand, are terms that have been actually, though tacitly, declared or indicated by the party or parties whose declared will constitutes the contract.[147] Tacit terms must be found in the unexpressed intention of the parties;[148] this includes not only those terms that the parties must actually have had in mind but did not trouble to express, but also terms that the parties, whether or not they actually had them in mind, would have expressed if the question, or the situation requiring the term, had been drawn to their attention.[149] The test that is usually applied to determine the nature of these kinds of terms in a contract, the "officious bystander" test, was formulated in the case of *Reigate v Union Manufacturing Co* ("*Reigate*")[150] as follows:

> "You must only imply a term if it is necessary in the business sense to give efficacy to the contract; that is, if it is such a term that you can be confident that if at the time the contract was being negotiated someone had said to the parties: 'What will happen in such a case?' they would have both replied: 'Of course, so-and-so. We did not trouble to say that; it is too clear.'"

The second test used to shed light on the issue is that of business efficacy, which forms part of the bystander test to the degree set out in the first line of the above quotation. However, courts will not read into a contract a tacit term simply on the

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[147] *Alfred McAlpine & Son (P) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) 526; *Minister van Landbou-Tegniese Dienste v Scholtz* 1971 (3) SA 188 (A) 197.

[148] *Alfred McAlpine & Son (P) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) 532F-G.

[149] *Alfred McAlpine & Son (P) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) 532A.

[150] *Reigate v Union Manufacturing Co* 118 LT 479 483. The officious bystander test has been confirmed and applied in *Consol Ltd t/a Consol Glass v Twee Jonge Gezellen (Pty) Ltd and Another* 2005 (6) SA 1 (SCA); *Botha v Coopers & Lybrand* 2002 (5) SA 347 (SCA); and *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A).

ground that it would lend business efficacy to the contract. According to Van der Merwe *et al*[151] courts seem to be stuck on the intention of the contracting parties as the foundation for a tacit term insofar as the alleged unexpressed term must be compatible with the actual expressed intention of the parties.

Another important case dealing with the reading of tacit terms into written contracts is that of *Wilkens v Voges*,[152] where the court said that it was reluctant to read a tacit term into the contract because the party relying on it had trouble formulating the exact term. The court stated in this regard that "a term so obvious as to occur as a matter of course would most likely be uncomplicated and capable of ready definition".[153] Furthermore, the court confirmed the notion that courts are generally "slow to import a tacit term into a written contract". It stated that parties who choose to commit themselves to paper can be expected to cover all the aspects that matter.[154]

In the case of *Minister van Landbou-Tegniese Dienste v Scholtz*[155] ("*Scholtz*") the court referred to a well-known contract law textbook,[156] which stated that "the word 'implied' is ambiguous and is frequently applied not only to terms implied in law but also to terms implied in fact, in other words, tacit terms".

From a property law point of view there are a few valuable points to be taken from the contractual principles set out above. Firstly, the use of terminology applied to

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[151] S van der Merwe *et al Kontraktereg: Algemene beginsels* 3 ed (2007) 301.

[152] *Wilkins NO v Voge*s 1994 (3) SA 130 (A).

[153] *Wilkins NO v Voge*s 1994 (3) SA 130 (A) 143D-F.

[154] *Wilkins NO v Voge*s 1994 (3) SA 130 (A) 143G-H.

[155] *Minister van Landbou-Tegniese Dienste v Scholtz* 1971 (3) SA 188 (A) 197.

[156] JW Salmond *Principles of the law of contracts* 2 ed (1945) 36.

rights that arise as a result of the principle that a servitude includes all the rights necessary for its effective exercise, is unclear and inconsistent. However, unlike the confusion in contract law between the terms “tacit” and “implied”, there does not seem to be any difference between the rights that have been labelled “implied” in some cases and “ancillary” or accessory (or even auxillary) in other cases. In all instances, these terms applied to the rights accepted in terms of Voet’s maxim. From the cases considered above, the reference to “implied terms” suggests that the rights are accepted based not on their ancillary nature, but on the grounds that they are a result of the a term that was omitted from the agreement and that such term should be “read in” to the servitude deed. Although this reasoning is based on Voet’s principle, it does not give effect to it, as the foundation for the existence of the rights is supposed to be an implied term of a contract, in other words, a creation of contract law and not of property.

Secondly, it is important to consider that the creation of a servitude, whether by agreement or otherwise, does not always include an extensive and precise description of the rights that are meant to be conveyed. The agreement between the parties is not always available to be interpreted and the words used in the endorsement on the title deed are simplistic and contain no detailed terms of the servitude.[157] Parties seem to rely on the assumption that the servitude, as it is described in a few sentences, automatically carries with it a certain set of rights. Accordingly, they do not necessarily apply the same level of care as they would with any other contract where the contract

[157] *Kruger v Downer* 1976 (3) SA 172 (W) 175F.

alone determines the extent of their relationship. In this sense, they rely to a certain degree on the principles of property law to regulate their relationship.

By way of summary, it appears that the rigidity that apparently makes it difficult for courts to find suitable solutions in cases where the holders of servitudes require new or additional entitlements for the efficient enjoyment of their servitudal rights results, at least as far as reliance on the common law is concerned, from two related causes. On the one hand, the common law principle that a servitudes includes all entitlements that are reasonably necessary for its effective use remains largely undeveloped, particularly insofar as there is little or no clarity regarding the nature and scope of these additional or ancillary entitlements. On the other hand, continued reliance on and reference to consensual considerations, such as the wording of the originating document and the supposed or actual intention of the parties, prevents the courts from developing the property principles that arguably should frame the issue, and apparently also restricts the scope for greater flexibility in interpreting or determining the contents and scope of a particular servitude. Consequently, when the courts do strive for more flexibility as was the case in the *Jersey Lane Properties* decision, the common law principles are not considered and applied to their full potential. In *Jersey Lane Properties*, this was arguably the reason why the court failed to balance the flexibility it was looking for in ensuring efficient use of the servitude with the reasonable use requirement, which might have weighed against allowing the building of permanent structures on the servient land without the consent or permission of the servient property owner.

2 7 Conclusion

Servitudes are regulated in South African law by the principles of common law. These principles regulate servitudes mainly in an *ex ante* manner by limiting the creation of limited real rights that burden land to ensure the security and stability of property rights to encourage investment in land. The strict enforcement of the requirements for the valid establishment and registration of servitudes and the subtraction from the dominium test guide the system of servitude law in the direction of rigidity.

However, there are also signs of flexibility within the common law principles that govern servitudes. The relationship between the parties to a servitude is regulated by two main principles that protect the interests of the servient and dominant proprietors respectively - the principle of *civiliter modo* exercise of the rights, and Voet's principle that a dominant owner can do all that is necessary for the effective exercise of his servitudal rights. Because servitudes exist for long periods of time, these principles are aimed at regulating the exercise of the servitude *ex post*, to ensure their value as tools for the effective use of land. However, the discussion of case law in this chapter suggests that courts have trouble solving the problems that arise during the existence of servitudes by applying these principles.

As a result, there is a tendency to scrutinise the grant or originating agreement between the parties in order to reconcile the desired outcome with the content and scope of the rights, based on an interpretation of the terms used by the parties at the time of creation of the servitude. In doing so, courts apply the rules of contractual interpretation which are ill-suited when applied to real rights. The rule holds that servitudes are to be interpreted strictly, but with reference to what will this strict

interpretation be determined? If only the interests of the servient proprietor is considered in determining the contents of the rights, changed circumstances could have the effect that the dominant proprietor is left with very little protection. Moreover, the protection that he does enjoy is diminished further by the current approach of looking to the contract and original intentions of the parties.

Servitudes are not always created by agreement, and even if they are, this agreement is not always available after a long period of time has passed. The contractual approach involves determining the intention of the original parties at creation of the servitude. Applied to longstanding real rights as servitudes, this is impractical as the parties and the circumstances surrounding the servitude might have changed in ways that the original contracting parties were not able to foresee.

When courts state that they have no discretion to derogate from the wording in the agreement between the original parties, even if this may have an unreasonable outcome, they are deliberately denying the principle of *civiliter modo* in favour of the parties' freedom of contract, despite all the obstacles to the interpretation of the contract. An analysis of case law suggests that parties actually rely on the protection provided by the principles of property law when they conclude servitude agreements.

Accordingly, I argue in this chapter that "interpreting" or rather *determining the content of* a servitude is not the same as interpreting or giving content to the servitude agreement from which the rights originated. The servitude deed and originating agreement are valuable factors to take into account when determining the rights of the parties to the servitude, but apart from the interpretation of the intention held and the words used at creation, there are various other factors that should also be taken into account.

Courts have, in limited instances, shown their willingness to view the exercise of a servitude more flexibly. The statement by Van Joosten J in *Jersey Lane Properties,*[158] that "a progressive interpretation of the servitude is called for, having regard to modern day urban developments" is a good example of this. Although this suggestion was never applied in the case, it indicates a possible departure from the rigid traditional approach towards servitudes. *Linvestment*[159] is another example where the court engaged with the issue and determined that servitude rights should not be enforced strictly based on the original terms of the grant where the circumstances prevailing at the time of the original agreement have changed.[160] This case is a good example of how courts can incorporate flexibility into servitude law by way of an *ex post* consideration of servitudes when disputes arise.

It is an established principle of South African law that a servitude holder also enjoys all the rights necessary for the effective exercise of his servitude.[161] However, inconsistent terminology is used to refer to rights which are not registered but are due to a servitude holder on the basis of this principle. The reasoning that their existence

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[158] *Jersey Lane Properties (Pty) Ltd t/a Fairlawn Boutique Hotel & Spa v Hodgson and Another* (A5030/11) [2012] ZAGPJHC 86 (7 May 2012) para 9.

[159] *Linvestment CC v Hammersley and Another* 2008 (3) SA 283 (SCA).

[160] *Linvestment CC v Hammersley and Another* 2008 (3) SA 283 (SCA) para 32.

[161] *D* 8 3 3 3; Voet *Commentarius* 8 2 18, 8 4 16; Huber *HR* 2 43 16; *Retief v Louw* (1874) 4 Buch 165 190; *Johl and Another v Nobre and Others* (23841/2010) [2012] ZAWCHC 20 (20 March 2012) para 14; *Low Water Properties (Pty) Ltd and Another v Wahloo Sand CC* 1999 (1) SA 655 (SE); *Fourie v Marandellas Town Council* 1972 (2) SA 698 (R) 700*; Brink v Stadler* 1963 (2) SA 427 (C) 429; *Molotlegi v Brummerhoff and another* 1955 (1) SA 592 (T) 594; *Lategan v Union Government* 1937 CPD 197 202; *Van Tonder v S.A.Railways* 1936 OPD 9 18; *Du Plessis Estates Ltd v SA Railways & Harbours* 1933 EDL 140 154; *Van Heerden Appellant v Coetzee and Others Respondents* 1914 AD 167 171; *Rubidge v McCabe & Sons* 1913 AD 433 441; *Steyn v Zeeman* (1903) 20 SC 221 224; CG van der Merwe & MJ de Waal "Servitudes" in WA Joubert & JA Faris (eds) *The law of South Africa* vol 24 2 ed (2010) para 544.

is a result of an implied term of the servitude agreement is a result of the contractual approach that is followed to determine the scope of servitudes. In reality, these rights are obtained based on their ancillary or accessory nature and they should be viewed as ancillary rights. Their existence is supplementary to and thus dependent on the existence of the main servitudal rights.[162] The acceptance of ancillary rights that are due to a servitude holder should also allow for the recognition of entitlements that become necessary at some later point during the existence of the servitude, where the circumstances relating to it has changed. Because the principle that a servitude includes all necessary entitlements is weighed against the principle that requires reasonable or *civiliter* exercise of servitudes, additional entitlements should be allowed only to the extent that they do not conflict with the principle of reasonable use.

Currently, it seems as though the available common law principles of servitude law do not always provide sufficient solutions to the problems that arise during the existence of servitudes. If a strict interpretation of the available principles leads to unsatisfactory outcomes, it might be necessary for courts to follow a different approach. The incorporation of some flexibility into the rigid application of common law principles might provide better outcomes in servitude disputes.

Considering the lack of legal certainty and the inconsistencies apparent in case law, statutory intervention might be a plausible manner of introducing effective regulatory controls and clarifying this area of law.[163] However, in South African law,

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[162] *Molotlegi v Brummerhoff and another* 1955 (1) SA 592 (T) 594F-G.

[163] Although there is no legislative instrument regulating servitudes is general, there are certain provisions that provide for specific situations. See S 133 of the National Water Act 36 of 1998 for an example of *ex post* intervention by way of application to court to cancel a servitude of aqueduct, abutement or submersion in certain instances.

there are no statutory instruments regulating the exercise of servitudes and it is not likely that statutory measures will be implemented in this area in future. Accordingly, a consideration of statutory and other interventions in foreign jurisdictions might shed some light on possible solutions to the problems that arise during the existence of servitudes and especially in situations of changed circumstances.

Chapter 3

Comparative overview

Contents

3 1 Introduction

This chapter contains a comparative overview of instances of implied and ancillary rights to servitudes recognised in different jurisdictions. The jurisdictions considered in this regard are Dutch, English and Scots law as well as the law of the State of Louisiana. These jurisdictions were chosen specifically because of the occurrence of recent reforms to the law of servitudes,[1] mostly by introducing some form of *ex post* regulatory measures that render the law of servitudes somewhat more flexible. Because of the wide-ranging differences between these jurisdictions, the classification and broad terminology applicable to the same basic notions is a complicated matter. For this reason, and for ease of reference, I simplify the terminology by providing a general frame of reference. Collectively, the notions used to refer to rights are comparable to servitudes in the South African sense[2] are classified, for purposes of this introduction, under the broad concept of land burdens, although this is not a technically precise term.

Each jurisdiction considered here is relevant to the discussion in its own way. Dutch law, for instance, is considered because of the close correlation between Dutch and South African property law as a result of their shared Roman-Dutch heritage. However, the codified nature of Dutch servitude law lends it a dimension of certainty

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[1] Not all reforms are equally recent. In Louisiana, the amendment of the Civil Code took place in 1977; the Dutch Civil Code was reformed in 1992; in Scots law the Title Conditions (Scotland) Act 2003 came into force in November of 2004, while English law is currently considering a reform of the law pertaining to easements, covenants and *profits à prendre*.

[2] This includes easements, covenants and *profits à prendre* in English law, servitudes (or *erfdienstbaarhede*) in Dutch law, servitudes and some forms of land burdens in Scots law and servitudes in the law of Louisiana.

that is not present in the current South African system, and this difference is a valuable attribute in the comparative process. Servitude law in the Netherlands is regulated in Book V of the Dutch Civil Code, which contains some of the most recent European civil code provisions relating to servitudes and provides a relatively flexible approach towards the *ex post* amendment and termination of existing servitudes.[3]

The relevance of English law is based on the fact that there has recently been much research and discussion surrounding the reform of English law relating to land burdens. The discussion paper on easements, covenants and *profits à prendre*, published by the English Law Commission,[4] provides extensive information on the problems experienced with land burdens and also explores a wide range of solutions to these problems before making particular recommendations for the most efficient means of reform. This in itself offers valuable insights into what may be effective and less effective means of dealing with land burdens, both in general and also specifically in regard to implied and ancillary rights.

Scots law provides an interesting comparison with South African law, partly because it is also a mixed jurisdiction and the process of development in the two systems over the decades is comparable. However, the implementation of the Title Conditions (Scotland) Act 2003 brought about valuable changes to the common law pertaining to servitudes. Although the Act only had limited impact on the law of servitudes, it introduced some elements of certainty which were previously lacking.

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[3] Book V of the Dutch *Burgerlijk Wetboek* (*"BW"*) entered into force in the early 1990s. Compare other more recent codes

[4] The Law Commission LAW COM No 327: *Making land work: Easements, covenants and profits à prendre* (2011) http://lawcommission.justice.gov.uk/docs/lc327_easements_report (accessed 13/03/2013).

There is often confusion regarding the overlap between the English law of easements and the Scots law of servitudes. Although the two systems differ substantially in regard to the structure, classification, contents and origin of the different rights, the legal rules relating to specific issues are often similar and are accepted and applied by courts as precedent.[5]

In the State of Louisiana, servitude law is regulated entirely by the provisions of the Civil Code. As Reid explains, the law relating to servitudes arrived ready-made from the French *Code Civil*, and was accordingly already well-established and well tested law, albeit in a different jurisdiction.[6] Although some reforms took place in 1977, the foundation had been firmly laid and the effect is evident in the clear and confident manner in which servitudes are approached by Louisiana courts.

When comparing these four jurisdictions, it is important to keep in mind that they have very different roots and doctrinal backdrops. Servitude law in the Dutch system and in Louisiana is firmly based in civil law. Both these jurisdictions have civil codes prescribing the rules that regulate the creation, functioning and possible termination of servitudes. The benefit of a codified servitude system is that courts are provided with more or less clear guidelines by which to approach servitudes, determine their contents and adjudicate cases. On the other side of the coin, the servitude system in Scotland, much like in South Africa, has developed slowly on a case-by-case basis, leaving many gaps and uncertainties. Scots servitude law is based on civil law foundations, but has been influenced and developed by a predominantly common law

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[5] *Moncrieff v Jamieson* [2007] UKHL 42 para 45 per Lord Scott of Foscote, para 111 per Lord Neuberger of Abbotsbury; *Ewart v Cochrane* (1861) 23 D (HL) 3 4 per Lord Chancellor Campbell.

[6] KGC Reid “Praedial servitudes” in EC Reid & VV Palmer (eds) *Mixed jurisdictions compared: Private law in Louisiana and Scotland* (2009) 1-29 29.

methodology under the influence of English law.[7] The English common law system has its own methodology for treating servitudes. English servitude law is ancient and although there has been some reform over the centuries, there are still large areas that remain largely outdated and irrelevant.[8] The effects of judge-made law, without a codified source of rules to draw on, are visible here in the slow development and lack of clarity regarding easements and covenants.

Apart from evaluating the scope of implied or ancillary servitudal rights in the abovementioned jurisdictions, consideration will also be lent to the different methods of determining the contents and scope of servitudes more generally. The aim of this assessment will be to ascertain how servitudal rights are determined and what the effect of changed circumstances would be on such determination. Are there circumstances in which servitudes are capable of variation after the rights have been determined and after a certain length of time? These questions are relevant to the main issue of implied and ancillary rights to servitudes in that the implication or addition of rights may be a productive means of variation where a change in circumstances may necessitate an adjustment in the legal rules regulating the use of a landowner's property. For purposes of this discussion servitudes created by way of acquisitive prescription are considered to a limited degree. These servitudes provide an additional dimension to the general view of the practice of interpretation of servitudes, since they are not created by terms in documents that can be interpreted literally.

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[7] KGC Reid "Praedial servitudes" in EC Reid & VV Palmer (eds) *Mixed jurisdictions compared: Private law in Louisiana and Scotland* (2009) 1-29 29.

[8] The Law Commission LAW COM No 327: *Making land work: Easements, covenants and profits à prendre* (2011) http://lawcommission.justice.gov.uk/docs/lc327_easements_report.pdf 2 para 1.5.

The considerations that form the centre of the analysis of the different jurisdictions are the different manners of creation of servitudes; how they are given content; how flexible that content is once determined; and what the effects would be if surrounding circumstances change.

The basic principle in most jurisdictions, as in South African law, is that all rights that are necessary for the effective utilisation of a servitude are granted along with it at creation. However, what if "what is necessary" changes over time? In Louisiana it does not seem as if there is scope for any alteration of servitudal rights or additions of ancillary rights in such circumstances, while in Dutch law the parties have the option to apply for the amendment of a servitude where there has been unforeseen circumstances effecting a change in the use of the servitude.[9] Other jurisdictions adopt a variety of solutions to the same problem.

Furthermore, the aim of this chapter is to determine the meaning and scope of the notions of "implied terms" and "ancillary rights" as they are used in South African law, through considering the different approaches advanced by each jurisdiction.

[9] The application for amendment is subject to certain requirements. Refer to the discussion in section 3 2 3 below.

3 2 Dutch servitude law

3 2 1 Nature and establishment of servitudes[10]

In Dutch law a servitude can be created in two ways – either by agreement or through prescription.[11] Servitudes established through prescription may be officially recorded in the public registers,[12] but an omission to do so would not influence the third party effect of the servitude. A distinction is drawn between *bona fide* and *mala fide* possession in order to determine the prescriptive period. If a dominant owner has *bona fide* possession of a servitude, the period for prescriptive acquisition is 10 years, while *mala fide* possession requires 20 years uninterrupted possession. In Dutch law, servitudes cannot be created by implied means.[13]

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[10] Dutch servitude law, which is thought to be quite similar – in origin at least – to South African law, is one of the many European systems that have undergone a certain degree of reform in the area of land burdens in recent years. In 1992 the new Dutch Civil Code or *Nieuw Burgerlijk Wetboek* entered into force and brought about a substantial reform of Dutch private law in general. Book 5 of the *BW* now provides extensively for the regulation of servitudes.

[11] Under the old Civil Code, the creation of servitudes was also possible through revival or destination (better known as the doctrine of *destination du père de famille,* imported into Dutch law by way of the French *Code Civil)*. Destination is based on a relationship between two properties that would have been seen as a servitude, if the two properties were not owned by the same person. The doctrine provides for the automatic creation of a servitude upon severance of the two properties to allow the previous benefit provided by one property to another to continue. The 1992 Civil Code no longer allows these ways of creating servitudes, following German and Swiss law. However, the servitudes created under the 1838 Civil Code remain valid. The reason for the removal of the article allowing the creation of servitudes by way of destination was that the reform commission preferred to have legal certainty above reasonableness. See CJ Van Zeben, JW Du Pon & MM Olthof *Parlementaire geschiedenis van het Nieuwe Burgerlijk Wetboek Boek 5: Zakelijke rechten* (1981) 262.

[12] *BW* 3:17(1)(a).

[13] The prior exercise of rights of a servitudal nature will not at subdivision of the two relevant parts of the property be deemed to create a servitude over one part in favour of the other through destination.

There is a *numerus clausus* of property rights in Dutch law. Accordingly, servitudal rights are confined within the boundaries of the list of accepted property rights.[14] Servitudes are defined rather widely in the *BW* and are distinguished from other rights of enjoyment[15] in that the parties themselves determine the contents and manner of exercise of these rights.[16]

The requirements for the valid establishment of servitudes are set out very simply.[17] Firstly, the burden on the servient tenement must be for the benefit of the dominant property. Secondly, the servient and dominant properties may not be owned by the same person, and thirdly, the servitude must, in principle, involve an obligation to tolerate or not to do something.[18] In the new *BW* the utility requirement has been relaxed to the extent that the servitude is now simply required to provide *benefit to*[19] the dominant tenement, and this requirement is satisfied if it can be shown that the dominant proprietor regards the servitude as an advantage because of the increase in

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Furthermore, the fact that a servient proprietor allows a certain manner of exercise of a servitude does not in itself bring about an amendment of the servitude. See fn 11, above.

[14] B Akkermans "The new Dutch Civil Code: the borderline between property and contract" in Van Erp S & Akkermans B (eds) *Towards a unified system of land burdens* (2006) 163-183 167.

[15] These rights of enjoyment include servitudes, quitrent and superficies.

[16] *BW* 5:73.

[17] It is important to note that Dutch law only knows praedial servitudes, and does not recognise personal servitudes as in South African law. Usufruct is seen as a separate category of limited real rights and thus does not fall under the heading of servitudes.

[18] CC van Dam, FHJ Mijnssen & AA van Velten *Mr C Asser's Handleiding tot de beoefening van het Nederlands burgerlijk recht* Vol 3 *Goederenrecht: Deel II Zakelijke rechten* 14 ed (2002) 198. The previous *Burgerlijk Wetboek*[18] included the requirement of utility, which held that the servitude must be of utility to the dominant tenement. This had the effect of the further requirement of vicinity.

[19] *Een erfdienstbaarheid is een last, waarmede een onroerende zaak - het dienende erf - ten behoeve van een andere onroerende zaak - het heersende erf - is bezwaard.*

personal enjoyment that it provides for his property.[20] The contents of a servitude are further required to have a factual nature.[21] This means that a servitude may not consist of the tolerance or prohibition of an act by the servient proprietor (such as a prohibition on lease or alienation of the property). Furthermore, a servitude may not consist of an obligation on the servient proprietor to perform a positive act.[22] However, there are some exceptions to this rule.[23]

The first exception to the rule prohibiting positive duties to be the subject of a servitude holds that the parties may, in the deed of creation, provide for the burden to include an obligation to erect buildings, works or vegetation that are necessary for the exercise of the servitude, provided that the building, work or vegetation is situated entirely on the servient tenement.[24] Such a provision will only be possible where the structure is necessary for the exercise of the servitude. It is important to note the wording, namely that this obligation may be provided for *also* or *in addition to*

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[20] CC van Dam, FHJ Mijnssen & AA van Velten *Mr C Asser's Handleiding tot de beoefening van het Nederlands burgerlijk recht* Vol 3 *Goederenrecht: Deel II Zakelijke rechten* 14 ed (2002) 199.

[21] CC van Dam, FHJ Mijnssen & AA van Velten *Mr C Asser's Handleiding tot de beoefening van het Nederlands burgerlijk recht* Vol 3 *Goederenrecht: Deel II Zakelijke rechten* 14 ed (2002) 200-201 state: "*De inhoud van de erfdienstbaarheid dient steeds iets feitelijks te zijn"*.

[22] These prohibitive rules regulating the contents of servitudes are a result of the rule of the numerus clausus.

[23] CC van Dam, FHJ Mijnssen & AA van Velten *Mr C Asser's Handleiding tot de beoefening van het Nederlands burgerlijk recht* Vol 3 *Goederenrecht: Deel II Zakelijke rechten* 14 ed (2002) 201.

[24] *BW* 5:71; FHJ Mijnssen, AA van Velten & SE Bartels *Mr C Asser's handleiding tot de beoefening van het Nederlands burgerlijk recht* 5 *Zakenrecht: eigendom en beperkte rechten* 15 ed (2008) 228-229. ; B Akkermans "The new Dutch Civil Code: the borderline between property and contract" in S Van Erp & B Akkermans (eds) *Towards a unified system of land burdens* (2006) 163-183,167; JAJ Peter "Erfdienstbaarheden" (Titel 6) in WM Kleijn & AA Velten (eds) *Zakelijke rechten* (supplement 25, 2002) 71-11. The default position (if there is no express provision in terms of *BW* 5:71) is that the owner of the dominant property will do everything possible to exercise his rights, including erecting the necessary structures on the servient property.

("*bovendien*"),[25] indicating that it cannot be the main burden, but will simply be a supplementary obligation ("*nevenverplichting*").[26] This ties in with the notion that the servient owner is obliged (without the deed stating anything in this regard) to do everything that is necessary for the unobstructed exercise of the servitude by the dominant owner. In other words, he must ensure that the exercise of the servitude is possible.[27] This includes the duty to remove (or prevent the placement of) any obstacles that could hinder the exercise of the servitudal rights by the dominant owner. The second exception to the prohibition of positive duties holds that the burden on the servient tenement may consist of a duty to maintain buildings, works and vegetation if these are situated partly or completely on the servient tenement. This part of the section was included to satisfy a specific need that has arisen in practice.[28] According to this section it is possible for a servitude to consist exclusively of an obligation (on the servient land owner) to do something.[29] However, the section limits the obligations that can be imposed on the servient owner to maintenance obligations – whether of the servient land itself or of buildings, works or vegetation on the land.[30]

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[25] *BW* 5:71.

[26] CC van Dam, FHJ Mijnssen & AA van Velten *Mr C Asser's Handleiding tot de beoefening van het Nederlands burgerlijk recht* Vol 3 *Goederenrecht: Deel II Zakelijke rechten* 14 ed (2002) 201.

[27] JAJ Peter "Erfdienstbaarheden" (Titel 6) in WM Kleijn & AA Velten (eds) *Zakelijke rechten* (supplement 27, 2003) 71-2-10.

[28] *BW* 5:71(2). An example which often arises in practice, is where a municipality, as owner of a public road, wants to oblige the owners of neighbouring houses to 'properly' maintain their gardens: FHJ Mijnssen, AA van Velten & SE Bartels *Mr C Asser's handleiding tot de beoefening van het Nederlands burgerlijk recht* 5 *Zakenrecht: eigendom en beperkte rechten* 15 ed (2008) 228.

[29] JAJ Peter "Erfdienstbaarheden" (Titel 6) in WM Kleijn & AA Velten (eds) *Zakelijke rechten* (supplement 25, 2002) 71-11. Subsection (2) reads: "*De last die een erfdienstbaarheid op het dienende erf legt, kan ook bestaan in een verplichting…"* compare the wording of *BW* 5:78(1) discussed above.

[30] FHJ Mijnssen, AA van Velten & SE Bartels *Mr C Asser's handleiding tot de beoefening van het Nederlands burgerlijk recht* 5 *Zakenrecht: eigendom en beperkte rechten* 15 ed (2008) 228; JAJ Peter

Another mechanism used in Dutch law to achieve the goal of allowing for positive duties (with third party effect) on land-owners, is chain clauses. Chain clauses ("*kettingbedingen*") are a creation of contract law.[31] These clauses are inserted in a contract to impose positive duties on a contracting party and in addition, require the party to impose the same positive duty on his successor in title, also obliging him to once more carry over his duties to all subsequent successors.[32] This obligation is made subject to a penalty clause to pay a large amount of damages if the duty of carrying over the rights is not performed. In this way, it is ensured that all subsequent owners will be "bound" by the agreement, although a real right is not actually created.[33]

"Erfdienstbaarheden" (Titel 6) in WM Kleijn & AA Velten (eds) *Zakelijke rechten* (supplement 25, 2002) 71-11).

[31] JAJ Peter "Erfdienstbaarheden" (Titel 6) in WM Kleijn & AA Velten (eds) *Zakelijke rechten* (supplement 27, 2003) states that the question whether to use a servitude or a chain clause in a certain situation will be determined by the question of whether the parties want to assign the rights to the right holder personally or qualitatively.

[32] EB Berenschot, HM Hoekstra & JB Vegter *Eigendom en beperkte rechten naar BW en NBW* (1986) 9; CC van Dam, FHJ Mijnssen & AA van Velten *Mr C Asser's Handleiding tot de beoefening van het Nederlands burgerlijk recht* Vol 3 *Goederenrecht: Deel II Zakelijke rechten* 14 ed (2002) 197; B Akkermans "The new Dutch Civil Code: The borderline between property and contract" in S Van Erp & B Akkermans (eds) *Towards a unified system of land burdens* (2006) 163-183 168.

[33] The weakness of chain clauses is illustrated in situations where a servient owner is declared insolvent and the land is sold in execution, or where expropriation of the land takes place. In these instances, the "obligation" is terminated automatically.

3 2 2 Content and interpretation of servitudes

As mentioned above, the legislature deliberately defined servitudes widely so as to allow parties themselves to give content to the rights they aim to convey.[34] In this regard *BW* 5:73 states the following:

> "The content of the servitude and the manner of exercise are determined by the deed and insofar as the deed does not regulate matters, by local custom. If a servitude is exercised in a certain manner for a reasonable period without objection then, in case of doubt, this manner of exercise will be decisive."[35]

According to this section, a servitude is interpreted with reference to the wording of the deed,[36] local custom and the manner of exercise established over time,[37] carrying weight in this order. If the wording of the deed is clear and unambiguous, the other measures mentioned in the section will not carry any weight.[38] If the wording of

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[34] WHM Reehuis & AHT Heisterkamp with GE van Maanen & GT de Jong *Pitlo Het Nederlands burgerlijk recht* Vol 3 *Goederenrecht* 13 ed (2012); B Akkermans "The new Dutch Civil Code: The borderline between property and contract" in S Van Erp & B Akkermans (eds) *Towards a unified system of land burdens* (2006) 163-183 169.

[35] My translation. (*De inhoud van de erfdienstbaarheid en de wijze van uitoefening worden bepaald door de akte van vestiging en, voor zover in die akte regelen daaromtrent ontbreken, door de plaatselijke gewoonte. Is een erfdienstbaarheid te goeder trouw geruime tijd zonder tegenspraak op een bepaalde wijze uitgeoefend, dan is in geval van twijfel deze wijze van uitoefening beslissend*).

[36] In the case of HR 24 Mei 2002 ECLI:NL:HR:2002:AD9593 it was confirmed that the deed of servitude is the primary source determining the contents and manner of exercise of a servitude and that the court will only make reference to other factors where the wording of the deed leaves room for uncertainty.

[37] JAJ Peter "Erfdienstbaarheden" (Titel 6) in WM Kleijn & AA Velten (eds) *Zakelijke rechten* (supplement 30, 2004) explains that where the parties to the dispute before a court are the parties to the original servitude (i.e. the creators of the deed of servitude) a court will allow more subjective factors relating to the manner of exercise of the servitude to influence its interpretation of the servitude. However, if the parties to a certain dispute were not original parties to the servitude agreement and process of creation, this measure will be observed more objectively. See in this regard HR 24 Mei 2002 ECLI:NL:HR:2002:AD9593.

[38] JAJ Peter "Erfdienstbaarheden" (Titel 6) in WM Kleijn & AA Velten (eds) *Zakelijke rechten* (supplement 25, 2002) 73-1.

the deed is unclear, the content and manner of exercise is determined by the custom of the local community, and only where there is uncertainty regarding the local custom, will the manner in which the servitude has been exercised in good faith for a considerable time without objection, be decisive. For servitudes created by prescription, the manner of exercise during the prescriptive period is the first resort in determining the content of the rights, and subsidiary to this, local custom is consulted.[39] The principle of reasonableness and fairness always plays an important role in determining the contents of a servitude and establishing what the fair and effective exercise of the rights would entail.[40]

3 2 3 Effective exercise and variation of servitudes

Governing the relationship between the parties to a servitude, the general principle applies that the servitude must be exercised in the manner that proves least burdensome to the servient owner.[41] The principle that the dominant proprietor may do all that is necessary for the exercise of his servitude is also embodied in the *BW*.[42]

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[39] HR 25 November 2005, *LJN* AU2403 para 29; FHJ Mijnssen, AA van Velten & SE Bartels *Mr C Asser's handleiding tot de beoefening van het Nederlands burgerlijk recht* 5 *Zakenrecht: eigendom en beperkte rechten* 15 ed (2008) 233; JAJ Peter "Erfdienstbaarheden" (Titel 6) in WM Kleijn & AA Velten (eds) *Zakelijke rechten* (supplement 25, 2002) 73-2-10.

[40] HR 2 December 2005, *LJN* AU2397, NJ 2007 5; JAJ Peter "Erfdienstbaarheden" (Titel 6) in WM Kleijn & AA Velten (eds) *Zakelijke rechten* (supplement 27, 2003) 70-27.

[41] *BW* 5:74; FHJ Mijnssen, AA van Velten & SE Bartels *Mr C Asser's handleiding tot de beoefening van het Nederlands burgerlijk recht* 5 *Zakenrecht: eigendom en beperkte rechten* 15 ed (2008) 233; JAJ Peter "Erfdienstbaarheden" (Titel 6) in WM Kleijn & AA Velten (eds) *Zakelijke rechten* (supplement 22, 2001) 74-2.

[42] *BW* 5:75(1); compare with the obligation of maintenance in *BW* 5:71(2) which holds that the servient owner must do all that is necessary to enable the effective (unobstructed) exercise of the servitude by the dominant owner. The Belgian *BW* contains more or less the same provision in art. 696. According

The owner of a dominant property is permitted to construct the necessary buildings, vegetation or works on the servient tenement. The construction of these necessary elements carries with it the obligation to maintain the structure insofar as it is necessary in the interest of the servient tenement.[43] However, as discussed above, it is possible for the parties to agree to a deviation from these terms.[44]

In the drafting of the new *BW* it was acknowledged that the need often arises in practice to amend existing servitudes.[45] One reason for this is that the purpose for which the property is used may change, be it under the control of the current owner or his successor. Furthermore, one of the parties to the servitude may choose to use his property in a different way or the area surrounding the properties may change over time.[46] Under the current *BW* specific mechanisms provide effective relief in situations of changed circumstances.

The first of these mechanisms allocates to the servient proprietor the right to relocate a servitude on the condition that the relocation does not infringe on the

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to V Sagaert *Beginselen van Belgisch privaatrecht 5: Goederenrecht* (2014) 486-487 this includes the condition that necessity may not have been caused by the owner of the dominant tenement himself.

[43] The dominant owner is permitted to remove the structure *BW 5:75(3)*, on the condition that the servient land is restored to its previous condition.

[44] *BW* 5:71(1) & 5:75(5). Under the old *BW (1838 BW* 738(2)) there was a rule to the effect that the servient proprietor may not effect a change in the condition of his property that would bring about a change in the exercise of the servitude. However, this rule no longer exists.

[45] AC Van Schaick "Erfdienstbaarheden: Het verleggingsrecht van die eigenaar van het dienende erf" (1999) 10 *Nederlands Tijdschrift voor Burgerlijk Recht* 347-350 348; FHJ Mijnssen, AA van Velten & SE Bartels *Mr C Asser's handleiding tot de beoefening van het Nederlands burgerlijk recht* 5 *Zakenrecht: eigendom en beperkte rechten* 15 ed (2008) 234-235.

[46] AC Van Schaick "Erfdienstbaarheden: Het verleggingsrecht van die eigenaar van het dienende erf" (1999) 10 *Nederlands Tijdschrift voor Burgerlijk Recht* 347-350 348.

dominant proprietor's right of enjoyment of his property.[47] In terms of this section, the servient proprietor is not required to obtain the consent of either the dominant proprietor or a court in this matter, but may simply give notice to the dominant proprietor regarding the new location for the exercise of his rights.[48] The onus is on the servient owner to prove that the relocation will not cause any loss of enjoyment for the dominant owner.[49] He will also be responsible for the costs of such relocation.[50] The measure to determine the "loss of enjoyment" is not set out clearly. The *Hoge Raad*[51] stated that not every loss of enjoyment will necessarily prevent the relocation

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[47] *BW* 5:73(2); JAJ Peter "Erfdienstbaarheden" (Titel 6) in WM Kleijn & AA Velten (eds) *Zakelijke rechten* (supplement 27, 2003) 73-2-10 points out the important distinction between two situations in regard to the relocation right. Where there is no indication in the deed of the area in which the servitude is to be exercised (such as a right of way for which the route was not determined), the servient owner may allocate the area (or the route) and may relocate it at any time after such initial allocation. As long as the new route still satisfies the requirements of the servitude, as interpreted from the deed according to *BW* 5:73(1), subsection (2) will not be applicable and the servient owner may relocate the servitude even if it does have an adverse effect on the enjoyment of the servitude by the dominant owner.

[48] AC Van Schaick "Erfdienstbaarheden: Het verleggingsrecht van die eigenaar van het dienende erf" (1999) 10 *Nederlands Tijdschrift voor Burgerlijk Recht* 347-350 348; JAJ Peter "Erfdienstbaarheden" (Titel 6) in WM Kleijn & AA Velten (eds) *Zakelijke rechten* (supplement 25, 2002) 73-2-10; FHJ Mijnssen, AA van Velten & SE Bartels *Mr C Asser's handleiding tot de beoefening van het Nederlands burgerlijk recht* 5 *Zakenrecht: eigendom en beperkte rechten* 15 ed (2008) 235. There is a similar provision in Belgian law, although it only requires that the new location must be equally convenient for the dominant owner: *BW* art 701.

[49] Where there is no indication of the area in which the servitude is to be exercised (such as a right of way for which the route was not determined in the deed), the servient owner may allocate the area (or the route) and may relocate it after such initial allocation. As long as the new route still satisfies the requirements of the servitude as interpreted from the deed according to *BW* 5:73(1), subsection (2) will not be applicable. The servient owner may relocate the servitude even if it does have an adverse effect on the enjoyment of the servitude by the dominant owner.

[50] JAJ Peter "Erfdienstbaarheden" (Titel 6) in WM Kleijn & AA Velten (eds) *Zakelijke rechten* (supplement 27, 2003) 73-11.

[51] HR 24 September 1999, NJ 1999, 754.

of a servitude.[52] According to Van Schaick,[53] the court in this decision followed the opinion of expressed in *Pitlo Het Nederlands burgerlijk recht,*[54] that the enjoyment of the dominant party may not be *significantly* reduced.[55]

The new *BW* also introduced a more general possibility for the amendment of servitudes. Where circumstances surrounding a servitude change, causing an increase in the burden on the servient property, it can in principle be expected of the servient landowner to tolerate such increase in the burden.[56] However, both the dominant[57] and servient[58] landowners may apply for judicial amendment of a servitude. Amendment will always be subject to compliance with the conditions imposed by the Code,[59] of which the most important is the occurrence of unforeseen

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[52] In this case, a right of way which was initially 345m long was increased by 20m as a result of a relocation. It was decided that this could not reasonably be said to constitute a loss of enjoyment as envisaged in *BW* 5:73(2).

[53] AC Van Schaick "Erfdienstbaarheden: Het verleggingsrecht van die eigenaar van het dienende erf" (1999) 10 *Nederlands Tijdschrift voor Burgerlijk Recht* 347-350 349.

[54] WHM Reehuis "Goederenrecht" in AHT Heisterkamp, WHM Reehuis, GE van Maanen & GT de Jong (eds) *Pitlo Het Nederlands burgerlijk recht* Vol 3 (1994) nr 625 435–564.

[55] The Dutch wording is '*wezenlijk afnemen*'. In the most recent edition of the Pitlo book (WHM Reehuis & AHT Heisterkamp with GE van Maanen & GT de Jong *Pitlo Het Nederlands burgerlijk recht* Vol 3 *Goederenrecht* 13 ed (2012) 460-461) it is simply stated that the servient owner must choose the alternative route in such a manner that the enjoyment of the dominant owner is not reduced, but that any loss of enjoyment will not necessarily prevent relocation.

[56] CC van Dam, FHJ Mijnssen & AA van Velten *Mr C Asser's Handleiding tot de beoefening van het Nederlands burgerlijk recht* Vol 3 *Goederenrecht: Deel II Zakelijke rechten* 14 ed (2002) para 185 206; EB Berenschot, HM Hoekstra & JB Vegter *Eigendom en beperkte rechten naar BW en NBW* (1986) 97-98.

[57] *BW* 5:80.

[58] *BW* 5:78.

[59] FHJ Mijnssen, AA van Velten & SE Bartels *Mr C Asser's handleiding tot de beoefening van het Nederlands burgerlijk recht* 5 *Zakenrecht: eigendom en beperkte rechten* 15 ed (2008) 243-245; EB Berenschot, HM Hoekstra & JB Vegter *Eigendom en beperkte rechten naar BW en NBW* (1986) 97-98;

circumstances.[60] A judge is authorised to grant the relevant application under any conditions he sees fit,[61] including the payment of monetary compensation or an instruction to amend the factual circumstances relating to the servitude.[62]

The servient proprietor can lodge an application for amendment or termination of a servitude.[63] There are two instances in which a judge can exercise his discretion to grant either amendment or termination of the rights: firstly, where unforeseen circumstances have arisen which are of such a nature that continued maintenance of

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JAJ Peter "Erfdienstbaarheden" (Titel 6) in WM Kleijn & AA Velten (eds) *Zakelijke rechten* (supplement 27, 2003) 78-1.

[60] See JAJ Peter "Erfdienstbaarheden" (Titel 6) in WM Kleijn & AA Velten (eds) *Zakelijke rechten* (supplement 27, 2003) 78-2 where it is explained that "unforeseen circumstances" refers to circumstances that were not actually foreseen by the parties to the servitude at creation. It is irrelevant whether the circumstances were objectively foreseeable. Furthermore, parties are able to influence the judicial discretion by clarifying in the deed the circumstances that were in fact considered by them at creation of the rights, whereby these circumstances can no longer be categorised as unforeseen. Examples of changed circumstances would include an increase in the burden on the servient property by subdivision of the dominant property; a change in the nature of the dominant property or changed use or increased activity on the dominant property. Regarding the possibility of unforeseen circumstances in cases of servitudes created by acquisitive prescription, it would depend firstly on whether the parties had drawn up a deed of servitude at the time the rights were actually created, and secondly, on the measure to which they had considered the relevant circumstances.

[61] *BW* 5:81; FHJ Mijnssen, AA van Velten & SE Bartels *Mr C Asser's handleiding tot de beoefening van het Nederlands burgerlijk recht* 5 *Zakenrecht: eigendom en beperkte rechten* 15 ed (2008) 244.

[62] Another possible remedy would be an order to effect a change in the factual situation surrounding the servitude such as the mandatory erection of a gate and access to a new or different road.

[63] *BW* 5:78. In Belgian law, the only option for amendment of a servitude is the provision in *BW* art. 684 which applies only to rights of way of necessity and enables a judge to terminate or amend the servitude by changing the location (and the servient property) over which it is to be exercised. According to this section, if it is possible that the right of way can be exercised over a different roadway, which causes less damage than the current location. Furthermore, if a servitude is terminated, a judge will have the authority to order payment of the full or partial compensation for the "damage" caused by the right of way, taking into account the duration and damage caused thereby.

the servitude cannot reasonably[64] be expected of the owner of the servient tenement;[65] or where the continued existence of the servitude is against the general (public) interest.[66] However, to maintain the stability that is desired in property law relationships, no judicial intervention is permitted within the first 20 years[67] after creation of the servitude, unless an increase in the burden on the servient property was created by the actions of the dominant proprietor or by subdivision of the land.[68] These requirements suggest that changed circumstances play a crucial role in the granting of an amendment.

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[64] The wording used in the *BW* is: "naar maatstaven van redelijkheid en billikheid".

[65] The question in deciding to allow the amendment or termination will not be whether prejudice to the servient tenement was foreseen, but rather whether the unforeseen circumstances that occurred, placed a too heavy burden on the servient property. If the change in circumstances was in fact foreseen and accordingly discredited in the conditions to the servitude at creation, the amendment or termination cannot be granted. The mere fact that the circumstances were (objectively) foreseeable does not preclude the application of section 78.

[66] The reason for this ground, according to the *Parlementaire geschiedenis* (CJ Van Zeben, JW Du Pon & MM Olthof *Parlementaire geschiedenis van het Nieuwe Burgerlijk Wetboek Boek 5: Zakelijke rechten* (1981) 278), relates especially to the increased urbanisation of previous agricultural areas. An example of a relevant servitude would be a right of way allocated to be used by a horse and cart, which should be widened to allow cars to use the road as well. The continued existence of the mentioned servitude is said to contravene the general interest.

[67] The reason for the required existence of 20 years is said to be a result of the important objective of stability in legal relationships pertaining to real rights. According to JAJ Peter "Erfdienstbaarheden" (Titel 6) in WM Kleijn & AA Velten (eds) *Zakelijke rechten* (supplement 27, 2003) 78-1, one of the ways in which variation of the rules in *BW* 5:78-80 can be effected in the deed, is by shortening this period.

[68] *BW* 5:78; CJ Van Zeben, JW Du Pon & MM Olthof *Parlementaire geschiedenis van het Nieuwe Burgerlijk Wetboek Boek 5: Zakelijke rechten* (1981) 275; FHJ Mijnssen, AA van Velten & SE Bartels *Mr C Asser's handleiding tot de beoefening van het Nederlands burgerlijk recht* 5 *Zakenrecht: eigendom en beperkte rechten* 15 ed (2008) 243-244; JAJ Peter "Erfdienstbaarheden" (Titel 6) in WM Kleijn & AA Velten (eds) *Zakelijke rechten* (supplement 27, 2003) 78-1 – 78-2-10.

A servient proprietor may apply directly for *termination* of a servitude[69] where exercise of the servitude has become impossible[70] or the owner of the dominant property no longer has a reasonable interest[71] in the exercise of the rights and it is not likely that the possibility of exercise or the reasonable interest of the dominant proprietor will be restored.[72]

The owner of a dominant tenement may also apply for amendment of a servitude. Where unforeseen circumstances have rendered a servitude permanently or temporarily impossible, or have diminished the interest of the dominant owner in such servitude, an order may be granted to amend the servitude in such a manner that the possibility of exercise or the initial interest of the dominant owner is restored.[73] The

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[69] *BW* 5:79. The Belgian *Burgerlijk Wetboe*k contains a provision with the same effect: *BW* art. 710. The wording of the provision is different in that it states that an application will be possible only where a servitude no longer has any value for the dominant proprietor. Impossibility or the loss of any reasonable interest would of course amount to exactly such a loss of value. See further V Sagaert "The fragmented system of land burdens in French and Belgian law" in S Van Erp & B Akkermans (eds) *Towards a unified system of land burdens* (2006) 31-52 50-51.

[70] An example of impossibility of exercise would be where the servient land over which a right of way exists, is permanently flooded with water.

[71] According to FHJ Mijnssen, AA van Velten & SE Bartels *Mr C Asser's handleiding tot de beoefening van het Nederlands burgerlijk recht* 5 *Zakenrecht: eigendom en beperkte rechten* 15 ed (2008) 246 the question whether a reasonable interest exists will be determined by a weighing up of the interests of the dominant property against that of the servient property. The possibility of a reasonable alternative for the dominant property will also be relevant. An example of a loss of interest would be where a public road was built subsequent to the creation of a servitude of right of way, with the result that the dominant owner no longer needs to use the servitude.

[72] FHJ Mijnssen, AA van Velten & SE Bartels *Mr C Asser's handleiding tot de beoefening van het Nederlands burgerlijk recht* 5 *Zakenrecht: eigendom en beperkte rechten* 15 ed (2008) 247.

[73] *BW* 5:80. Where the owner of the servient property applied for termination of the servitude in terms of *BW* 5:79, and the owner of the dominant property responds with an application for amendment in terms of *BW* 5:80, the judge must first decide on the last mentioned matter. If the amendment is granted in terms of *BW* 5:80, there will be no grounds of impossibility on which the servient proprietor can base his application in terms of *BW* 5:79; FHJ Mijnssen, AA van Velten & SE Bartels *Mr C Asser's handleiding*

proviso to the section holds that the amendment must be one that can reasonably be expected of the owner of the servient tenement.[74] Although it is not apparent from the wording of the article, the authority of a court to grant an amendment in terms of this article is rather limited and only minor expansions of the entitlements of the servitude holder are allowed. [75] The amendments can take the form of a different (wider) content of the existing rights, or the adding of a particular entitlement to the existing servitudal rights.[76] However, amendment is only possible in cases where it can be assumed that the parties, if they had envisaged the future change in circumstances, would have agreed to the wider scope of the servitude.[77]

As mentioned above, the parties to a servitude can extend the provisions of these articles dealing with amendment and termination in the deed of registration, but it is not possible for them to limit these rules or exclude them altogether. They could agree to limit the provisions factually by including in the deed certain circumstances that were foreseen at creation and thus excluding these as unforeseen circumstances.[78]

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tot de beoefening van het Nederlands burgerlijk recht 5 *Zakenrecht: eigendom en beperkte rechten* 15 ed (2008) 247.

[74] Once again, a judge granting the amendment may attach to it conditions as he sees fit, including the payment of compensation to the servient tenement: *BW* 5:81.

[75] CJ Van Zeben, JW Du Pon & MM Olthof *Parlementaire geschiedenis van het Nieuwe Burgerlijk Wetboek Boek 5: Zakelijke rechten* (1981) 285. See also JAJ Peter "Erfdienstbaarheden" (Titel 6) in WM Kleijn & AA Velten (eds) *Zakelijke rechten* (supplement 11, 1997) 80-1.

[76] CJ Van Zeben, JW Du Pon & MM Olthof *Parlementaire geschiedenis van het Nieuwe Burgerlijk Wetboek Boek 5: Zakelijke rechten* (1981) 285; JAJ Peter "Erfdienstbaarheden" (Titel 6) in WM Kleijn & AA Velten (eds) *Zakelijke rechten* (supplement 11, 1997) 80-1.

[77] CJ Van Zeben, JW Du Pon & MM Olthof *Parlementaire geschiedenis van het Nieuwe Burgerlijk Wetboek Boek 5: Zakelijke rechten* (1981) 285; JAJ Peter "Erfdienstbaarheden" (Titel 6) in WM Kleijn & AA Velten (eds) *Zakelijke rechten* (supplement 11, 1997) 80-1.

[78] FHJ Mijnssen, AA van Velten & SE Bartels *Mr C Asser's handleiding tot de beoefening van het Nederlands burgerlijk recht* 5 *Zakenrecht: eigendom en beperkte rechten* 15 ed (2008) 244. See also

However, in principle, if unforeseen circumstances cannot be shown, and there were no specific determinations made in the deed, amendment or termination of a servitude will not be possible.

From the wide range of options provided in the *BW* for amendment of servitudes and for termination in a more limited capacity, the balance between the *ex post* and *ex ante* regulation of servitudes in Dutch law becomes apparent. *BW* 5:78-80 was specifically introduced to eliminate (or provide relief for) the unfair outcomes often resulting from the strict enforcement of longstanding legal relationships.[79] Although servitudes are required to fall within the strict *numerus clausus* of permissible property rights, the content of any specific servitude is to a large extent up to the parties to determine. The *ex post* control measures available to regulate servitudes after creation are extensively formulated to ensure that the rights remain effective or are otherwise terminated. These *ex post* controls introduce a measure of flexibility into the regulation of servitudes. However, the strict rules regulating the allowable amendments to existing rights suggest that the stability of property law remains a high priority. Moreover, the discretion given to a judge in determining the most suitable remedy in a certain situation is an extremely valuable tool to ensure the fair outcome of applications for amendment or termination. Providing a judge with the discretion to

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JTH Smalbraak "Die erfdienstbaarheden in het gewijzigd ontwerp boek 5 NBW" (1975) 106 *Weekblad voor Privaatrecht Notariaat en Registratie* 721-726 724-725 stating that the parties can provide in the deed of creation, for the possibility of amendment or termination of the servitude not only in instances of unforeseen circumstances, but also where the circumstances were actually foreseen.

[79] CJ Van Zeben, JW Du Pon & MM Olthof *Parlementaire geschiedenis van het Nieuwe Burgerlijk Wetboek Boek 5: Zakelijke rechten* (1981) 274-275; AC Van Schaick "Erfdienstbaarheden: Het verleggingsrecht van die eigenaar van het dienende erf" (1999) 10 *Nederlands Tijdschrift voor Burgerlijk Recht* 347-350 348.

create a remedy suitable to the specific facts of each case is a perfect example of the interest-outcome model in property disputes which will be discussed in further detail in Chapter 4. In conclusion, the flexibility provided in the Dutch servitude system not only advances the effective use of property, but also provides realistically for the needs of property owners to regulate their ownership entitlements according to their needs.

3 3 English law

3 3 1 Nature and establishment of rights

The English system has three kinds of third party rights in land, being easements, covenants and *profits à prendre*.[80] Easements are rights of a dominant landowner to make use of or derive benefit from another's land by either doing something on the servient land or preventing the servient owner from doing something on his own land.[81] *Profits à prendre* ("profits") are rights to take natural produce (like minerals or turf that are capable of being owned at the time of removal) from the servient land.[82] The most

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[80] The Law Commission LAW COM No 327: *Making land work: Easements, covenants and profits à prendre* (2011) http://lawcommission.justice.gov.uk/docs/lc327_easements_report para 2.16.

[81] It is important to note that easements are not defined in any source of English law. The description given here is thought to be the best functional description of what easements entail: The Law Commission LAW COM No 327: *Making land work: Easements, covenants and profits à prendre* (2011) http://lawcommission.justice.gov.uk/docs/lc327_easements_report.pdf 13 para 2.18; EH Burn & J Cartwright *Cheshire & Burn's Modern law of real property* 18 ed (2011) 634-635.

[82] Like easements, profits are not clearly defined in any source of English law. This is a general definition as it has developed through case law and literature and is often applied in different forms. S van Erp & B Akkermans (eds) *Cases, materials and text on property law* (2012) 319-329; K Gray & SF Gray *Elements of land law* 5 ed (2009) 596 para 5.1.4; C Harpum, S Bridge & M Dixon *Megarry & Wade The law of real property* 8 ed (2012) 1269-1270; The Law Commission LAW COM No 327: *Making land work: Easements, covenants and profits à prendre* (2011) http://lawcommission.justice.gov.uk/docs/lc327_easements_report.pdf 17 para 2.31.

general examples include hunting, fishing and grazing rights. These rights are not required to be connected to a dominant tenement. Covenants are contractual obligations relating to the use of land and can be either positive or negative. Because of their contractual nature covenants do not naturally run with the land.[83] The focus of this chapter will be on easements because they are comparable to the South African praedial servitudes considered in light of the topic of implied terms and ancillary rights.

In English law, easements can be created by statute, by deed (with an agreement in the form of a grant or reservation as its source), by implication or through prescription.[84] The most general means of creation is by way of express terms in a deed (or contract). An easement or profit created in a deed will be formulated either as a grant or a reservation. A grant will entail a situation where the servient tenement grants certain rights in favour of the dominant owner (most probably on request from him). The reservation of an easement or profit occurs when a property owner

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[83] Negative covenants, preventing some kind of act on the servient land, are known as restrictive covenants and may acquire proprietary effect and be enforceable against subsequent owners if they meet the requirements laid down in *Tulk v Moxhay* (1848) 2 Ph 774; 41 ER 1143. Positive covenants, requiring something to be done on the servient land, are simply contractual rights and cannot be binding on subsequent property owners to oblige them to perform some positive act on their property. Restrictive covenants are something similar to restrictive conditions in South African planning law (and are not considered in this sense as servitudes).The focus in the discussion of English law will be on easements, as they are most similar to the South African concept of servitudes.

[84] The Law Commission has proposed that in future, profits should not be allowed to be created by implication or prescription, but only through express grant or reservation or by operation of statute. The reason for this reform is that the creation of profits through implication or prescription is seen as being particularly oppressive to servient owners because these rights are of a more commercial nature, since they involve something being taken from the land. Furthermore, it was stated in the Law Commission report that it is difficult to imagine circumstances in which a profit will be essential to make land usable. See The Law Commission LAW COM No 327: *Making land work: Easements, covenants and profits à prendre* (2011) http://lawcommission.justice.gov.uk/docs/lc327_easements_report.pdf 28 paras 3.7-3.9.

subdivides and sells off a part of his property, but reserves for himself some rights in the deed of sale upon transfer of the property. Ultimately, the difference between grant and reservation "turns on the identity of the party in whose favour the easement or profit is created".[85] In English law the "means of creation" are classified differently. English texts describing the creation of easements and profits divide them into the categories of expressly created easements and those created by implication or prescription.[86] The discussion that follows also considers easements in these categories.

Gray and Gray state that:

> "In view of the proprietary character of the easement, the courts have severely circumscribed the class of rights which may be asserted [as easements]."[87]

This statement is interesting for two reasons. Firstly, it indicates the strict manner in which the content of easements is regulated in the English legal system, and secondly because it provides some insight into the source of this regulation. In contrast to the Dutch law discussed above, the rules stipulating the acceptable criteria for establishment of easements are not codified, but are a result of English case law. The *locus classicus* on the topic is the case of *Re Ellenborough Park*.[88] In this case Danckwerts J established the four essential characteristics of easements: (1) there must be a dominant and a servient tenement;[89] (2) the easement must accommodate

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[85] K Gray & SF Gray *Elements of land law* 5 ed (2009) 628.

[86] K Gray & SF Gray *Elements of land law* 5 ed (2009) 643-686.

[87] K Gray & SF Gray Elements of land law 5 ed (2009 613.

[88] *Re Ellenborough Park* [1956] Ch 131 140.

[89] An easement can thus not belong to a person without being appurtenant to land. The Law Commission LAW COM No 327: *Making land work: Easements, covenants and profits à prendre* (2011) http://lawcommission.justice.gov.uk/docs/lc327_easements_report.pdf 15 paras 2.23 - 2.24.

the dominant tenement;[90] (3) the dominant and servient owners must be different persons; and (4) the right claimed must be capable of forming the subject-matter of a grant.[91]

Apart from statutory easements, all easements are seen as originating in some way from a grant – be it express, implied or presumed.[92] Accordingly, the fourth characteristic has a few sub-elements, including: (a) that the right must be sufficiently definite;[93] (b) there must be a capable grantor and a capable grantee (in other words, the parties must be lawfully entitled to grant or be subject to the rigths granted); (c) the right must be within the general nature of the rights traditionally recognised as

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See K Gray & SF Gray *Elements of land law* 5 ed 2009 606, where it is said that this rule is currently subject to dispute due to the conflicts between commercial efficiency and ecological value. Gray & Gray explain that the rule against easements in gross (that is easements appurtenant to a person or persons, rather than a property) is already relaxed in case of statutory easements that confer rights of use and inspection upon public bodies in relation to electricity, gas and water services. See further MF Sturley "The land obligation: An English proposal for reform" (1982) 55 *Southern California Law Review* 1417-1448. Compare C Sweet "The 'easement' of tunnelling" (1916) 32 *Law Quarterly Review* 70 79-82.

[90] This is explained to mean that the easement must be connected with the enjoyment of the dominant land and provide it with some kind of benefit (also as opposed to the benefit simply befalling the right-holder as an individual). The Law Commission LAW COM No 327: *Making land work: Easements, covenants and profits à prendre* (2011) http://lawcommission.justice.gov.uk/docs/lc327_easements_report.pdf 15 para 2.25.

[91] K Gray & SF Gray *Elements of land law* 5 ed (2009 613-627; EH Burn & J Cartwright *Cheshire & Burn's Modern law of real property* 18 ed (2011) 639. For clarity of the grant see *Pwllbach Colliery Co. Ltd. v Woodman* (1915) AC 634; *Mulvaney v Jackson* (2002) EWCA Civ 1078.

[92] K Gray & SF Gray *Elements of land law* 5 ed (2009 613-627; EH Burn & J Cartwright *Cheshire & Burn's Modern law of real property* 18 ed (2011) 640-641.

[93] EH Burn & J Cartwright use the terminology "certainty of description". See EH Burn & J Cartwright *Cheshire & Burn's Modern law of real property* 18 ed (2011) 640.

easements; (d) it may not deprive the servient owner of all beneficial proprietorship;[94] and (e) it must not impose a positive duty on the servient owner.[95]

There seems to be some confusion in English law regarding the notion of a closed list of easements.[96] However, there is no limitation on the kind of rights which can constitute an easement.[97] The principle holds that a new type of land burden

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[94] The general principle in relation to easements (and to some extent also applicable to profits) holds that these rights can never provide exclusive possession of the land over which they are to be exercised. This principle has been subject to a number of different interpretations and has created some confusion in this regard. The question is whether the use is "exclusive to" the holder of the rights or "exclusive of" all others (including the grantor). The English Law Commission clarified this in its 2011 report on easements covenants and *profits à prendre* by stating that the correct interpretation of the principle is that easements or profits can never enable the right-holder to exclude all others from the land at all times para 2.3 fn 3). However, in part 3 of the report the Law Commission reconsiders this principle and proposes that a right to use another's land in a way that prevents that other from making any reasonable use of it should not, in itself, preclude the right from being an easement (para 3.209). See The Law Commission LAW COM No 327: *Making land work: Easements, covenants and profits à prendre* (2011) http://lawcommission.justice.gov.uk/docs/lc327_easements_report.pdf 10 para 2.3 and 3.188-3.211; EH Burn & J Cartwright *Cheshire & Burn's Modern law of real property* 18 ed (2011) 635; K Gray & SF Gray *Elements of land law* 5 ed (2009 621.

[95] The prohibition of positive duties as the subject of easements extends also to maintenance duties. The owner of a servient tenement is under no obligation to maintain a right of way or a building in respect of which an easement of support exists: C Sara *Boundaries and easements* 5 ed (2011) 206-207. This element of easements has created particular problems in the area of fencing, since the rules regulating the fencing of property have all the necessary characteristics of easements, but place a positive obligation on the servient property. They have previously been described as spurious easements or quasi-easements because they did not actually qualify as easements: C Sara *Boundaries and easements* 5 ed (2011) 457-458. The Law Commission recommended the abolition of fencing easements in their 2011 report (Law Commission LAW COM No 327: *Making land work: Easements, covenants and profits à prendre* (2011) http://lawcommission.justice.gov.uk/docs/lc327_easements_report.pdf 13 para 2.18) in favour of land obligations

[96] EH Burn & J Cartwright *Cheshire & Burn's Modern law of real property* 18 ed (2011) 635; K Gray & SF Gray *Elements of land law* 5 ed (2009 602; *Keppel v Bailey* (1834) 2 My & K 517; *Riley v Penttila* (1974) VR 547 560.

[97] EH Burn & J Cartwright *Cheshire & Burn's Modern law of real property* 18 ed (2011) 641.

cannot be created and awarded the same status and legal (third party) effect as easements.[98] But, if there is compliance with the requirements set out in *Re Ellenborough Park*, any right or combination of rights may constitute an easement and will accordingly enjoy third party effect after creation.[99] It is generally accepted in English law that new types of easements are created as a result of the dynamic nature of property law.[100]

3 3 2 Content and interpretation

Expressly created easements arise by way of express grant or reservation in a deed.[101] An express grant in this sense includes not only the use of express words in a deed, but also express creation by perfection of an equity of estoppel or by virtue of statute. Grants comprising of express words in deeds are by far the most general way of creation of easements and profits. The scope of these easements depends on the construction of the words used in the relevant grant in light of the circumstances existing at the time and known to the parties or within their reasonable

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[98] EH Burn & J Cartwright *Cheshire & Burn's Modern law of real property* 18 ed (2011) 641

[99] The recognition and creation of new easements are still subject to the discretion of the Land Registry or a judge.

[100] In *Commonwealth v Registrar of Titles* (1918) HCA 17; (1918) 24 CLR 348, Chief Justice Griffith referred to the statement of Lord St. Leonards in *Dyce v Hay* (1852) 1 Macq HL 312 that "The category of servitudes and easements must alter and expand with the changes that take place in the circumstances of mankind".

[101] These easements must be registered in order to operate as legal interests in land: section 27(1) and 27(2)(d) of the Land Registration Act 2002, in conjunction with section 1(2)(a) of the Law of Property Act 1925. See also C Harpum, S Bridge & M Dixon *Megarry & Wade The law of real property* 8 ed (2012) 1279 where it is explained that the registration requirement does not apply to easements created by implied grant or reservation, prescription or by operation of section 62 of the Law of Property Act 1925.

contemplation.[102] The express reservation of an easement works in much the same way. The transferor of land who wishes (upon subdivision of his land) to retain an easement or profit in respect of the land being transferred, may do so expressly in the transfer deed. Once again the scope of the easement will depend on the words used in the reservation, in line with the general principle that in cases of doubt or ambiguity, the terms of a grant are to be construed against the grantor.[103]

Furthermore, if there is nothing pointing towards a contrary intention, it is accepted that an easement also includes certain incidental rights.[104] All rights which are reasonably necessary for the enjoyment of the principal easement are deemed to have been granted along with the easement and thus form part of it because of their ancillary nature.[105] The principles laid down in the Scottish case of *Moncrieff v Jamieson* also form part of English law.[106] The main asset of ancillary rights is the

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[102] *Todrick v Western National Omnibus Co Ltd* [1934] Ch 190 at 206 per Farwell J; K Gray & SF Gray *Elements of land law* 5 ed (2009 679.

[103] This rule has proven problematic and has undergone a few shifts in interpretation since the early 1900s, but K Gray & SF Gray *Elements of land law* 5 ed (2009 679 point out that case law strangely still seems to favour the proposition that an express reservation of an easement or profit is construed against the servient owner and in favour of the dominant owner.

[104] *Jones v Pritchard* (1908) Ch 630 638; *Moncrieff v Jamieson* (2007) UKHL 42 29, 52, 110; K Gray & SF Gray *Elements of land law* 5 ed (2009 602.

[105] Rights which are merely convenient would thus not be seen as ancillary. The English Law Commission also refers to ancillary rights (rights that are necessary in order to exercise an easement itself) as "ancillary easements". This might create the idea of a separate (and individual) easement being created, but this is not the case. Ancillary easements are accessory in nature and can thus not exist as anything separate from the principal easement it was created to support. See The Law Commission LAW COM No 327: *Making land work: Easements, covenants and profits à prendre* (2011) http://lawcommission.justice.gov.uk/docs/lc327_easements_report.pdf 37 para 3.51

[106] C Sara *Boundaries and easements* 5 ed (2011) 205; *Moncrieff v Jamieson* [2007] UKHL 42. In paragraph 45 Lord Scott states the following "[T]here seems to me no difference relevant to any issue

manner in which they are able to overcome some of the restrictions of easements.[107] Because ancillary rights arise from the construction of the grant, they cannot be expressly excluded.[108] Moreover, these rights do not survive the extinguishment of the main easement and are best analysed as a matter of interpreting the scope of the easement itself.[109]

In contrast with the position in South Africa, English law provides explicitly (and in much detail) for the possibility of creating easements[110] by implication. Where one part of a property is transferred and the full extent of the rights benefitting or burdening the property are not set out in the agreement to transfer or lease the property, certain

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that arises in this case between the common law in England and Wales relating to easements and the common law in Scotland relating to servitudes.

[107] C Sara *Boundaries and easements* 5 ed (2011) 205. The right to park, for instance, was a controversial issue in that it was not certain whether a parking right could qualify as an easement on its own (this is also debated in the case of *Moncrieff v Jamieson* [2007] UKHL 42); including it as an ancillary right as in the *Moncrieff* case where it was necessary in the specific circumstances, provided an efficient solution that met the needs of the parties without having to fit the mould of the requirements for establishment of a valid easement.

[108] An example of an attempt to express exclusion would be where parties include a term in a grant to the effect that no ancillary rights are granted along with the easement. According to the Law Commission the best mechanism to exclude the possibility of ancillary rights emerging, is through tighter drafting of easements. An example would be a right of way with, expressly, no right to park. See The Law Commission LAW COM No 327: *Making land work: Easements, covenants and profits à prendre* (2011) http://lawcommission.justice.gov.uk/docs/lc327_easements_report.pdf 37 fn 49.

[109] The Law Commission LAW COM No 327: *Making land work: Easements, covenants and profits à prendre* (2011) http://lawcommission.justice.gov.uk/docs/lc327_easements_report.pdf 37 para 3.51.

[110] It is important to note the wording here. The implication discussed in the following paragraphs is of a distinct nature in that it relates to the implication of wholly independent easements. In other words, it is not the implication of limited rights which might be incidental to an existing easement, but in fact the creation of a completely new easement.

rights or easements may be implied.[111] There are a few instances in which easements or profits may be implied. Again, a distinction must be drawn between grants and reservations.

Implied grants are inferred in favour of the purchaser of land in a number of specific instances. The four forms of implied grant are discussed below and are all said to be aimed at giving expression, in different ways, to the principle of *non-derogation from grant*.[112]

Easements of necessity arise by implication, upon subdivision of land, where the rights are essential for the use of the land. It requires absolute necessity and therefore an easement will only be implied where it would be totally impossible to use the land without the desired easement. It is also essential that the necessity existed at the time of transfer of the land (subject to the exception where, at the time of the grant, the owner of the servient land knew that a necessity would arise at a later date).[113] The best example of this kind of easement is a right of way of necessity which arises when subdivided property is landlocked and in need of access to a public road.

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[111] The Law Commission LAW COM No 327: *Making land work: Easements, covenants and profits à prendre* (2011) http://lawcommission.justice.gov.uk/docs/lc327_easements_report.pdf 29 para 3.11.

[112] The rule states that in absence of contrary intention, a grantor may not derogate from his grant by including terms that effectively counteracts the operation thereof. In *Birmingham, Dudley and District Banking Co v Ross* (1888) LR 38 Ch D 295 313 it was said that the one who grants the right to do something with one hand cannot take away the means of exercising the right with the other. See also K Gray & SF Gray *Elements of land law* 5 ed (2009 648; The Law Commission LAW COM No 327: *Making land work:*)*Easements, covenants and profits à prendre* (2011) http://lawcommission.justice.gov.uk/docs/lc327_easements_report.pdf 32 paras 3.22-3.23.

[113] K Gray & SF Gray *Elements of land law* 5 ed (2009 650; The Law Commission LAW COM No 327: *Making land work: Easements, covenants and profits à prendre* (2011) http://lawcommission.justice.gov.uk/docs/lc327_easements_report.pdf 29-30 paras 3.12-3.14.

Easements of common intention arise where they are necessary to give effect to the manner in which both parties intended the property to be used at the time of the grant.[114] It is crucial that the parties had a shared intention, either express or implied, regarding the use of the transferred land. Courts, in deciding to find an easement implied by common intention, will consider a range of factors, including the terms of the conveyance, the position on the ground and the comments passing between the parties before execution of the conveyance. These easements may overlap with the category mentioned above, since a common intention to grant an easement will be found mostly in cases where there is necessity.[115] An easement of common intention can arise (or the common intention becomes apparent) because the right is necessary for the enjoyment of some other right that has been expressly granted – thus, where the right is of an ancillary nature; or from the circumstances under which the grant was made.[116] According to Lord Parker in *Pwllbach Colliery v Woodman*[117] the law will imply such easements as may be necessary to give effect to the common intention of the parties, with reference to the manner or purpose in and for which the land is to be used.[118] However, it is essential to the success of a claim in this class that "the parties should intend that the subject of the grant or the land retained by the grantor should be used in some definite and particular manner".

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[114] These easements are also called easements of intended use.

[115] K Gray & SF Gray *Elements of land law* 5 ed (2009 653.

[116] *Pwllbach Colliery v Woodman* (1915) AC 634 646 per Lord Parker.

[117] *Pwllbach Colliery v Woodman* (1915) AC 634 646.

[118] The Law Commission LAW COM No 327: *Making land work: Easements, covenants and profits à prendre* (2011) http://lawcommission.justice.gov.uk/docs/lc327_easements_report.pdf 30 paras 3.15-3.17.

Quasi-easements are granted in terms of the *Wheeldon v Burrows* principle.[119] In terms of this principle, when part of a property, owned by S, is transferred to P, all quasi-easements used by S at the time of transfer for the benefit of the transferred land are converted into easements in favour of P. The term "quasi-easement" is used to describe the situation where the owner of land uses one part of his land for the benefit of another part, as in the case of an easement, but the use cannot be recognised as an easement because both properties are owned by a single owner. In his capacity as owner of the transferred land, P will enjoy such rights over the land retained by S as was previously necessary for the proper enjoyment and use of the transferred land. The requirements for the application of the *Wheeldon v Burrows* principle include that the rights exercised must be continuous and apparent; necessary for the reasonable enjoyment of the property transferred; and used at the time of transfer by the common owner for the benefit of the part transferred.[120] If S does not retain part of the property for himself but transfers both parts to P and R respectively, the same effect will occur, giving them both the rights that would have entered into effect in the situation above where S retained part of the land.

Easements can also arise under section 62 of the Law of Property Act 1925,[121] which is known as a "word-saving" provision. It contains general words that, in the

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[119] *Wheeldon v Burrows* (1879) 12 Ch D 31. The principle is applied in most common law countries and forms part of American law (see in this regard *United States v Thompson* 272 F Supp 774 785-785 (1967)).

[120] The Law Commission LAW COM No 327: *Making land work: Easements, covenants and profits à prendre* (2011) http://lawcommission.justice.gov.uk/docs/lc327_easements_report.pdf 31 para 321.

[121] It seems that this form of easement is seen by some authors as an implied easement (K Gray & SF Gray *Elements of land law* 5 ed (2009) 659) and by others as an easement created by express means (The Law Commission LAW COM No 327: *Making land work: Easements, covenants and profits à prendre* (2011) para 3.11.

absence of any contrary intention expressed in the conveyance, imply into any conveyance of a legal estate in land a number of rights subsequently to be enjoyed by the transferee of the estate.[122]

Apart from the four instances set out above, implied easements may be created by way of implied reservation. Since a reservation involves the retention of rights by the dominant proprietor (or transferor of land) upon transfer, there is a general rule that such rights can and must be reserved expressly in clear and unambiguous terms.[123] For this reason, the law is much more inclined to imply easements or profits in favour of the transferee of land than in favour of the transferor.[124] There are two exceptions to this rule. It is possible in rare circumstances that both an easement of necessity and an easement of common intention may be implied in a reservation. Firstly, an easement of necessity may be implied where a transferor disposes of all the property adjacent to or surrounding the land he retains, with the consequence that the only possible access to his landlocked property lies across the transferred land. The easement of way is then implied in the reservation, since without it the land will be completely useless. Necessity is determined strictly, and there must be no other

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[122] K Gray & SF Gray *Elements of land law* 5 ed (2009 659. Section 62(1) reads as follows: "A conveyance of land shall be deemed to include and shall […] convey, with the land, all buildings […] easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, or any part thereof, or, at the time of conveyance, demised, occupied, or enjoyed with or reputed or known as part or parcel of or appurtenant to the land or any part thereof." This provision overlaps to a certain extent with the *Wheeldon v Burrows* principle discussed above. The most obvious difference is that section 62 only operates in the case of a conveyance of a *legal* estate in land, while the rule in *Wheeldon v Burrows* will operate where there is only a contract, or where the quasi-easement was being enjoyed at the time of the contract but not of the conveyance.

[123] K Gray & SF Gray *Elements of land law* 5 ed (2009) 679.

[124] *Wheeldon v Burrows* (1897) 12 Ch D 31. See section 3 3 4 below for a discussion on the proposed reforms of this matter.

means of access[125] to the property.[126] In unusual circumstances an easement of common intention may also be implied in a reservation to give effect to a common intention that was not expressed in the agreement to transfer land. The onus of proof will be on the transferor who alleges that the reservation was mutually intended and he must be able to show the precise nature and extent of the right. The implied easement will only be accepted if the facts are not reasonably consistent with any explanation other than that of an implied reservation.[127] It would not suffice to contend that the transferee of land knew that the transferor retains the adjoining land and would probably wish to use it in the same way as before.[128]

In English law, as in South Africa, easements may be created by way of prescription. However, the law relating to prescriptive acquisition has become extremely complex; according to Gray and Gray[129] it is marked by much unnecessary complication and confusion. The English Law Reform Committee has recommended the abolition of the current system of prescription since 1966.[130] However, in the most recent Law Commission Report[131] the Commission proposed that, although the complete abolition of prescription might not be necessary, simplification will be

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[125] This includes access by water.

[126] K Gray & SF Gray *Elements of land law* 5 ed (2009 680; The Law Commission LAW COM No 327: *Making land work: Easements, covenants and profits à prendre* (2011) http://lawcommission.justice.gov.uk/docs/lc327_easements_report.pdf 29-30 paras 3.12-3.14.

[127] K Gray & SF Gray *Elements of land law* 5 ed (2009 680.

[128] *Peckham v Ellison* (2000) 79 P&CR 276 291.

[129] K Gray & SF Gray *Elements of land law* 5 ed (2009) 665.

[130] *14th report of the English Law Reform Committee* (Cmnd 3100, 1966) para 32.

[131] The Law Commission LAW COM No 327: *Making land work: Easements, covenants and profits à prendre* (2011) http://lawcommission.justice.gov.uk/docs/lc327_easements_report.pdf 41-63.

required in order to retain it.[132] For this reason I will not discuss this area in much detail, but simply point out the elements that I find helpful.

Easements created by way of prescription, like implied easements, originate from deemed grants of which the nature and scope depend on the circumstances existing at the date of grant.[133] The prescriptive rights are based on a "deemed acquiescence" of a right of a certain and uniform kind.[134] For a claim of prescriptive acquisition to succeed, a claimant must prove continuous use, as if he had possessed a right, while the servient owner had the necessary degree of knowledge but failed to object to the exercise of rights by the dominant owner.[135]

3 3 3 Effective exercise and variation

Gray and Gray[136] state that:

> "In view of the tight definitional characteristics of a valid easement in English law, difficult questions are raised by changes which, some time after the creation of an easement, affect the use or extent of the dominant tenement or the nature or the intensity of the activity authorised by the easement."

The circumstances surrounding an easement affect the exercise and enjoyment of the rights, and changes in these circumstances thus play an important role in determining

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[132] A statutory scheme for prescription is set out in the draft Law of Property Bill that forms part of the 2011 report. See section 3 3 4 below where the reform recommended by the Commission is discussed in further detail.

[133] K Gray & SF Gray *Elements of land law* 5 ed (2009) 628.

[134] K Gray & SF Gray *Elements of land law* 5 ed (2009) 628 fn 1; *Scott-Whitehead v National Coal Board* (1987) 53 P & CR 263 273.

[135] K Gray & SF Gray *Elements of land law* 5 ed (2009) 667.

[136] K Gray & SF Gray *Elements of land law* 5 ed (2009) 627.

the continued effective exercise of an easement. English courts tend to scrutinise changes in purpose or "quantum" of easements more carefully than changes that only affect the form of exercise of the rights.[137] The principle in English law is that the servient tenement should be protected from the risk of a significantly heavier burden being imposed on it than was foreseen at the time of creation of a particular easement.[138] In the following discussion of the effects of changes to the exercise of easements, a distinction is once again drawn between expressly created easements and those created by implication or prescription.

With regard to expressly created easements, the general principle is that an easement may not be used subsequent to its creation for a purpose "wholly different from that originally envisaged by the grantor or grantee".[139] Gray and Gray mention a few examples from case law to illustrate the effect of this principle. Firstly, a right of way granted in respect of an open space could not be invoked when that open space was later built upon.[140] On the other hand, a right of way granted for general purposes in respect of a house could survive the conversion of that house into a hotel, subject to the possibility that excessive use of the easement could qualify as a situation actionable by tort. Another example is that of *Jelbert v Davis*,[141] where a right of way was granted "for access and egress at all times and for all purposes" in favour of a dominant tenement that at the time was used for agricultural purposes. Subsequent to the grant of the easement, the land was converted into a holiday resort and the Court

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[137] K Gray & SF Gray *Elements of land law* 5 ed (2009) 627.

[138] K Gray & SF Gray *Elements of land law* 5 ed (2009) 627.

[139] K Gray & SF Gray *Elements of land law* 5 ed (2009) 627; *Gallagher v Rainbow* (1994) 179 CLR 624 640.

[140] *Allen v Gomme* (1840) 11 A & E 795 772, 774; 113 ER 602 607-608.

[141] *Jelbert v Davis* (1968) 1 WLR 589 596.

of Appeal decided that the volume of the proposed use was likely to be outside the reasonable contemplation of the parties at the time of the grant.[142] The question is thus always whether the change in use creates an excessive burden on the servient property, and the measure of excessiveness will be scrutinised according to the intention of the parties at creation of the easement.

Because easements created by implication and prescription receive their content from the circumstances existing at the time of grant, changes in the exercise of the easement are approached much more strictly and the rights are always limited to the category and quantum that existed at the time of creation. A dominant owner may be deprived of his right to enjoy an implied or prescriptive easement when it can be shown that he brought about a radical alteration of the purpose underlying the easement (meaning the use of the dominant property has undergone a change in character) and a substantial increase in the burden on the servient land.[143] It will be immaterial if it is only the form of exercise of the easement that is altered. However, where repairs are effected to a road or way that is subject to a prescriptive right of way, the rule is that only repairs and no improvements to the way are allowed. The reason is that improvements (such as the construction of a tarred road) are likely to have the effect of increasing the burden on the servient tenement.[144] It is not clear how strictly this "rule" will be enforced, but the clear difference in treatment of expressly created easements and prescriptive easements creates the idea that it does carry some

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[142] K Gray & SF Gray *Elements of land law* 5 ed (2009) 627-628; *Jelbert v Davis* (1968) 1 WLR 589 596.

[143] K Gray & SF Gray *Elements of land law* 5 ed (2009) 629.

[144] K Gray & SF Gray *Elements of land law* 5 ed (2009) 636. There is an important distinction between this rule and the rule applicable to expressly created easements. In relation to expressly created easements, not only repairs, but also development or improvement of the way is allowed, in order to render it suitable for the reasonable enjoyment of the dominant tenement.

weight. However, it seems rather a stringent requirement that repairs may not involve improvements, especially where the object is something as permanent and long-standing as an easement.

3 3 4 Proposed reform

The English Law Commission published a report in 2011, considering the reform of the current system of easements, covenants and *profits à prendre.*[145] The report recommends a wide range of amendments to the current law, of which the reform of the current law of covenants[146] is far more extensive than that relating to easements and profits.[147] The most noteworthy changes to the law relating to easements include

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[145] The Law Commission LAW COM No 327: *Making land work: Easements, covenants and profits à prendre* (2011) http://lawcommission.justice.gov.uk/docs/lc327_easements_report.pdf. The report also incorporated the Draft Law of Property Bill, which the Law Commission hoped to introduce into parliament, although to date there has not been parliamentary time to do so. As such, it is hard to determine when the findings of the report will be incorporated as legislation and whether the resulting legislation will be in the same form as the draft Bill proposed by the Commission: UK parliamentary website (http://www.parliament.uk/business/bills-and-legislation/) (accessed November 2014). See further C Sara *Boundaries and easements* 5 ed (2011) 203.

[146] The law commission recommends the replacement of positive and negative covenants with a new legal interest in land, which will be known as land obligations (these interests will run with the benefitted land and bind successors in title to the burdened land). The following will all fall under the heading of land obligations: (1) a promise not to do something on the covenantor's land; (2) a promise to do something on one's own land or on a boundary structure; and (3) a promise to make a reciprocal payment, provided that the benefit of the promise touches and concerns the land of the covenantee, and that the promise is not expressed to be personal to the promisor or the promisee. There will sometimes be an overlap between negative easements and land obligations (for example an easement of support which could be framed as an obligation not to undermine or a right to light framed as an obligation not to obstruct).

[147] C Sara *Boundaries and easements* 5 ed (2011) 203; J Stevens & R Pearce *Land law* 5 ed (2013) 488.

replacing the current methods for prescriptive acquisition by a single statutory scheme to obtain easements through prescription;[148] abolition of the distinction between implied grant and implied reservation;[149] the introduction of presumptive abandonment of easements after a period of 20 years of non-use,[150] and the possibility of judicial amendment or termination of easements.[151]

Furthermore, the report proposes to replace the current complex law of implication, as discussed above, with a single statutory principle that easements will be implied where they are necessary for the reasonable use of the land at the time of

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[148] The Law Commission LAW COM No 327: *Making land work: Easements, covenants and profits à prendre* (2011) http://lawcommission.justice.gov.uk/docs/lc327_easements_report.pdf 52 para 3.123. Clauses 16(1) and 17(1) recommend that easements may arise through prescription after a period of 20 years of continuous use without force, without stealth and without permission. The use may further not be in conflict with criminal law.

[149] The Law Commission LAW COM No 327: *Making land work: Easements, covenants and profits à prendre* (2011) http://lawcommission.justice.gov.uk/docs/lc327_easements_report.pdf 33 para 3.30. See section 3 3 2 above where this is discussed in more detail.

[150] The Law Commission LAW COM No 327: *Making land work: Easements, covenants and profits à prendre* (2011) http://lawcommission.justice.gov.uk/docs/lc327_easements_report.pdf 74 para 3.230. Clause 27 of the draft Bill gives effect to this recommendation.

[151] The Law Commission LAW COM No 327: *Making land work: Easements, covenants and profits à prendre* (2011) http://lawcommission.justice.gov.uk/docs/lc327_easements_report.pdf para 7.35 164; Clause 30-31 (and Schedule 2) of the draft Law of Property Bill 2011. Although the report only recommends the possibility of amendment or termination for easements created after implementation of the reforms proposed by the Commission, the 2014 Law Commission Report on rights to light (in para 1.26) stated that the Commission had reconsidered and now recommend that all easements, including rights to light, created before or after reform, should be brought within the Lands Chamber's proposed jurisdiction to discharge or modify easements, and that the 2011 Easements Bill be amended to achieve this change before its introduction into Parliament. As far as existing interests are concerned, the reform recommended for the abandonment of easements and profits is aimed at providing an easier route to termination of obsolete interests.

the transaction.[152] The question of what is reasonable is determined by considering the relevant circumstances with reference to a prescribed list of factors including (i) the use of the land at the time of the grant; (ii) the physical features of the land; (iii) the intentions for future use of the land known to both parties; (iv) the possible routes available for the easement (where this is relevant); and (v) the potential interference with the servient land or inconvenience to the servient owner.[153] This approach was inspired by the American *Restatement* relating to servitudes[154] and was chosen deliberately as an alternative to a test based on the intention of the parties upon creation of the servitude, since it provides an objective measure of determining what is practically necessary for the effective use of the land. Furthermore, it is important to note the time of application of this test. What is necessary for the reasonable use of the land will be considered at the time of the transaction[155] and any right or easement that becomes necessary after the land was transferred, for reasons that were not contemplated by the parties, will be irrelevant.

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[152] The Law Commission LAW COM No 327: *Making land work: Easements, covenants and profits à prendre* (2011) http://lawcommission.justice.gov.uk/docs/lc327_easements_report.pdf 33-36 paras 3.45, 3.32, 3.35. J Stevens & R Pearce *Land law* 5 ed (2013) 488 state that although these proposals present some clarification, most of the considerations are reflected in the current law and accordingly will result in "little appreciable change". Clause 20 of the draft Bill provides for the new rules on implication.

[153] The Law Commission LAW COM No 327: *Making land work: Easements, covenants and profits à prendre* (2011) http://lawcommission.justice.gov.uk/docs/lc327_easements_report.pdf paras 1.15 & 3.45; Clause 20 of the draft Law of Property Bill, 2011; B McFarlane, N Hopkins & S Nield *Land law: Text, cases, and materials* 2 ed (2012) 927.

[154] American Law Institute, *Restatement (Third) of Property: Servitudes: Volume 1* (2000) 202.

[155] This requirement is subject to an exception where, at the time of the grant, the owner of the servient land knew that a necessity would arise at a later date.

The report includes proposals for the amendment or termination of easements. Clause 30 of the draft Bill contains a provision enabling the Lands Chamber of the Upper Tribunal ("Tribunal")[156] to "discharge or modify" easements upon application of a person interested in any land affected by such rights.[157] In considering a discharge or modification under this provision the Tribunal must take into account a range of different factors,[158] and it will only be able to grant the order if it is satisfied that the modified easement will not be materially less convenient to the holder of the rights and will not be more burdensome to the land affected.[159] Schedule 2 to the draft Bill contains the grounds which would justify orders under clause 30. The first general ground[160] that may lead to the discharge or modification[161] is the obsoleteness of an

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[156] This is the Lands Chamber of the Upper Tribunal, as established in terms of the Tribunals, Courts and Enforcement Act, 2007.

[157] See fn 151 above explaining that this clause will apply to all easements, and not only those created after enactment of the Bill.

[158] Clause 31(1) and (2) provide that the Tribunal must take into account factors such as the development plan for the land, patterns in grants or refusals of building permissions in the relevant areas, as well as the period and context in which the rights were created in making its decision in terms of clause 30. Furthermore, the tribunal may only make an order in terms of clause 30 if it has considered the effects of the order on each of the persons entitled to the benefit of the interest. Sections 3-6 of Schedule 2 to the Bill contains a list of specific considerations that must be taken into account, including the impediment caused by the continued existence of the rights without alteration and the adequateness of money as compensation for loss or disadvantage suffered by any party as a result of the discharge or modification of the rights.

[159] Clause 31 (3).

[160] Schedule 2 is divided into two parts. Part 1 relates to all interests in land and is thus applicable to easements and profits. Part 2 applies only to positive obligations as imposed under clause 1 of the draft Law of Property Bill. These positive obligations will fall under the wider category of *land obligations* as imposed by the draft Bill and are accordingly not included in this discussion relating to easements and profits.

[161] The wording used in clause 30 as well as in the draft Bill to refer to all the rights that may be discharged or modified is "interests in land". This includes easements and profits, which are the exclusive subjects of the discussion at hand. In other sections of clause 30, and the draft Bill in general,

easement or profit. Where the Tribunal is satisfied that the interests ought to be deemed obsolete because of changes in the character of the property or neighbourhood or other material circumstances, it may order a discharge or modification of the rights.[162] The second ground that would justify discharge or modification of an easement or profit is the consent (by implied or express agreement) of the parties entitled to the benefit of the interest.[163] The third ground is slightly more extensively formulated.[164] It holds that the Tribunal may make an order under clause 30 if it is satisfied, in relation to *each person entitled to benefit from the profit or interest*, that one of the following situations are applicable: (i) that the continued (or unmodified) existence of the interest will impede some reasonable use of the land which either holds no practical benefit to the person or is contrary to the public interest, and furthermore that the loss or disadvantage the person suffers can be adequately compensated by a monetary award;[165] (ii) that the person has agreed by act or omission (either expressly or impliedly) to the proposed discharge or modification;[166] or (iii) that the Tribunal is satisfied that the proposed discharge or modification will not injure the person.[167]

Although subject to a number of restrictions, the possibilities presented by the recommendations for modification and termination of easements signify

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reference is made specifically to land obligations or positive obligations. Where these sections become relevant, it will be stated specifically.

[162] Article 1, Schedule 2 to the draft Law of Property Bill 2011.

[163] Article 1, Schedule 2 to the draft Law of Property Bill 2011.

[164] Articles 3-6, Schedule 2 to the draft Law of Property Bill 2011.

[165] Article 4, Schedule 2 to the draft Law of Property Bill 2011.

[166] Article 5, Schedule 2 to the draft Law of Property Bill 2011.

[167] Article 6, Schedule 2 to the draft Law of Property Bill 2011.

acknowledgement by the Law Commission of the need for flexibility in relation to limited real rights.[168] Furthermore, the grounds for a successful application to have an easement modified are aimed at eliminating burdens which are clearly obsolete, unnecessary or otherwise provide some impediment to the effective use of property. It is not clear to what extent the reform will take place as proposed, but statements such as those made by Lightman J in *Greenwich Healthcare NHS Trust v London and Quadrant Housing Trust*,[169] that "there is (unfortunately) no statutory equivalent in case of easements to the jurisdiction vested by statute in the Lands Tribunal in case of restrictive covenants to modify the covenant to enable servient land to be put to a proper use", as well as the wide number of jurisdictions considered by the Commission that have in fact implemented a similar option for judicial intervention in dealing with the same problem, can provide some incentive for implementing change in this area.

[168] See Chapter 5 for a detailed discussion on this issue.

[169] *Greenwich Healthcare NHS Trust v London and Quadrant Housing Trust* [1998] 1 WLR 1749, 1755.

3 4 Scots law[170]

3 4 1 Nature and establishment of servitudes

The Scots law of servitude is both similar to and different from the English law relating to easements.[171] Cusine and Paisley explain:

> "To describe servitudes as the Scottish version of easements is the reverse of the truth. It would be truer to say that easements are the English version of servitudes. Servitudes originate in Roman law and Scots law has followed and developed this concept. The English law of easements also owes much to the Roman law of servitudes."[172]

One of the differences between the English law of easements and the Scots law of servitudes used to be evident in their respective perceptions of a closed list of rights. As discussed in section 3 3 1 above, English law allows for the creation of new types of easements, subject only to compliance with the requirements laid down in *Re*

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[170] The focus in this part will be on conventional servitudes. These are servitudes created by express grant or reservation in a deed or by implication from the terms of a deed and are to be distinguished from servitudes created by other means not related to deeds, such as natural or legal servitudes. The term "conventional servitude" is used in Scotland (and by Cusine and Paisley in their book) but is not accepted universally. Refer to section 3 5 1 below, where it is explained how these servitudes function in the law of Louisiana.

[171] Lord Neuberger made the following statement in *Moncrieff v Jamieson* [2007] UKHL 42 para 111: "While some aspects of the juridical nature, origin and incidents of servitudes in Scotland are different from those of easements in England and Wales, there are main aspects of similarity, as can be appreciated even from a quick perusal both of Cusine and Paisley and of Gale on Easements (17th edition, 2002). Servitudes and easements are inherently very similar, and there is very little difference between life-styles and standards north and south of the Cheviots. Further, courts in both jurisdictions have expressly and beneficially relied on each other's analyses and developments in this area of law." However, it is important to note that there are scholars who differ on this point. See in this regard KGC Reid & GL Gretton *Conveyancing* (2007) 108.

[172] DJ Cusine & RRM Paisley *Servitudes and rights of way* (1998) 3, referring to J Mackintosh *Roman law in modern practice* (1934) 141.

Ellenborough Park.[173] In Scots law only a number of servitudes were historically known and generally created in law.[174] However, in *Patrick v Napier*[175] Lord Ardmilian held that it was possible to create new servitudes where necessary, subject to the requirements that they must be praedial[176] and similar in nature and quality to the existing servitudes.[177] When the right to park was accepted as a servitude in 2007,[178] this was the first new servitude to be recognised in more than 200 years.[179] As a result, the notion of a *closed* list of servitudes should rather be seen as a *fixed* list, since it is now clear that there can be specific additions to the list if they are justified and explicitly recognised by a court. The principle that new rights must be similar to one of the

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[173] DJ Cusine & RRM Paisley *Servitudes and rights of way* (1998) para 1.30 36-37; *Re Ellenborough Park* [1956] Ch 131.

[174] KGC Reid "Praedial servitudes" in EC Reid & VV Palmer (eds) *Mixed jurisdictions compared: Private law in Louisiana and Scotland* (2009) 1-29 7.

[175] *Patrick v Napier* (1867) 5 M 683 709.

[176] This means that they must regulate the burdened property for the benefit of the benefitted property and not simply provide personal benefit to the owner of the dominant property: KGC Reid "Modernising land burdens: The new law in Scotland" in S van Erp & B Akkermans (eds) *Towards a unified system of land burdens* (2006) 63-108 65; WM Gordon & MJ De Waal "Servitudes and real burdens" in R Zimmermann, D Visser & K Reid (eds) *Mixed legal systems in comparative perspective: Property and obligations in Scotland and South Africa* (2004) 738.

[177] DJ Cusine & RRM Paisley *Servitudes and rights of way* (1998) para 1.30 37.

[178] *Moncrieff v Jamieson* [2007] UKHL 42. The case concerned the question of a right to park as a necessary ancillary to a servitude of right of way. However, the House of Lords felt it necessary to decide whether a right to park could be established as a servitude in its own right. See *Moncrieff v Jamieson* [2007] UKHL 42 paras 22-24 (Lord Hope), 47 (Lord Scott), 72, 75-76 (Lord Rodger), 102 (Lord Mance) and 137 (Lord Neuberger).

[179] KGC Reid "Praedial servitudes" in EC Reid & VV Palmer (eds) *Mixed jurisdictions compared: Private law in Louisiana and Scotland* (2009) 1-29 8.

existing forms of servitudes was confirmed as recently as 2008.[180] However, it needs some clarification.

The reason for the reluctance in Scots law to accept new servitudes was the fact that there was no publicity requirement up until 2004,[181] because registration was not formally required.[182] For that reason it was essential that the limited real rights that could attach to land and burden property were limited, in order to protect third parties who could not easily establish whether or not a property was subject to a burden. By only recognising a limited number of rights to burden property, a prudent purchaser could more easily establish whether a property was in fact burdened by one of these rights.[183]

However, the Title Conditions (Scotland) Act 2003 introduced a change to the position of servitudes in Scots law. Section 76 of the Act provides that any servitude created by a deed (and accordingly registered in terms of section 75(1))[184] will no longer be required to be of a type known to the law. This provision has no retrospective effect and thus only applies to servitudes created after 28 November 2004, when the Act came into force. Furthermore, the explicit reference to expressly created

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[180] *Romano v Standard Commercial Property Securities Limited and Atlas Investments Limited* [2008] CSOH 105. See also WM Gordon "The struggle for recognition of new servitudes" (2009) 13 *Edinburgh Law Review* 139-143 142.

[181] The Title Conditions (Scotland) Act entered into force on 28 November 2004. Servitudes were in practice always registered against one of the properties, although this was not necessarily the servient land. I am grateful to Prof Kenneth Reid for this insight.

[182] KGC Reid "Praedial servitudes" in EC Reid & VV Palmer (eds) *Mixed jurisdictions compared: Private law in Louisiana and Scotland* (2009) 1-29 8.

[183] KGC Reid "Praedial servitudes" in EC Reid & VV Palmer (eds) *Mixed jurisdictions compared: Private law in Louisiana and Scotland* (2009) 1-29 8; GL Gretton & AJM Steven *Property, trusts and succession* 2ed (2013) 171.

[184] See the following paragraph for a discussion of s 75 of the Title Conditions (Scotland) Act 2003.

servitudes means that the provision does not apply to servitudes created by implication or prescription.[185] Accordingly, rights created before that date, and all servitudes created by prescriptive or implied means must still be of a known type or otherwise akin to one of the known types of servitudes.[186] It is not hard to determine that the reason for this deviation is the protection of third parties who might not be able to ascertain the existence of unregistered burdens over a property.

The Title Conditions (Scotland) Act 2003 also brought about a number of other changes to servitude law as it stood at the time. The first of these was the abolition of negative servitudes.[187] All servitudes are now required to be of a positive nature. [188]

Another change implemented by the Act is the registration requirement, which did not previously form part of Scots law.[189] A deed of servitude does not effectively

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[185] GL Gretton & AJM Steven *Property, trusts and succession* 2ed (2013) 171.

[186] GL Gretton & AJM Steven *Property, trusts and succession* 2ed (2013) 168, 171; TG Guthrie *Scottish property law* (2005) 171 expresses the opinion that the Sheriff court decision of *Moncrieff v Jamieson* 2004 SCLR 135 confirms the possibility that new types of servitudes can be created through implication or prescription. The Sheriff in this case made an obiter statement to the effect that a servitude of parking could have been created in the case and would thus be added to the list of "known" servitudes.

[187] The distinction between positive and negative in this regard refers only to the right of the dominant proprietor. A positive servitude provides him with a right to do some positive act on the servient tenement which he would not otherwise be lawfully able to do. A negative servitude allows him to prevent the owner of the servient tenement to do something on his own land which he (the servient owner) would otherwise be lawfully permitted to do. See WM Gordon *Scottish land law* (1989) para 24.17 756.

[188] Section 79 Title Conditions (Scotland) Act 2003. All negative servitudes (ie. all obligations not to do something on your own land) were to be converted (in terms of s 80 of the Act) into real burdens. The reason for this change, according to the Scottish Law Commission (*Discussion Paper No 106* (1998) para 2.42-43), was that the same function could be achieved by real burdens and it was therefore unnecessary to retain the category of negative servitudes.

[189] S 75 Title Conditions (Scotland) Act 2003. This requirement does not apply to servitudes to lead pipes, cables, wires or other such enclosed units over or under land: s 75(3)(b).

create a positive servitude (by express provision) unless it is registered against the titles of both the dominant and servient properties.[190] The imposition of this requirement reduces the need for the strict regulation of the types of servitudes which are allowed since it provides protection to third parties by way of the publicity provided by registration.

Before the Act was implemented in 2004, the development of servitude law in Scotland had been a slow, incremental process. One of the reasons proposed to explain this, is that the creation of real burdens in the nineteenth century replaced much of the use that servitudes had before that time.[191] During the late eighteenth century, in response to increasing urbanisation, servitudes were no longer adequate to effectively regulate property rights, and real burdens were introduced to provide a more flexible mechanism of obtaining much the same effect as servitudes, but "without the limitations that had made servitudes unsuited to the task of urban regulation".[192] These real burdens provided everything that servitudes could and more, in that they were not limited by the notion of *numerus clausus* and they were practically unrestricted regarding content – even allowing the imposition of positive obligations on the servient property owner.[193]

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[190] Section 75(1) Title Conditions (Scotland) Act 2003.

[191] KGC Reid "Praedial servitudes" in EC Reid & VV Palmer (eds) *Mixed jurisdictions compared: Private law in Louisiana and Scotland* (2009) 1-29 8-9; KGC Reid "Modernising land burdens: The new law in Scotland" in S van Erp & B Akkermans (eds) *Towards a unified system of land burdens* (2006) 63-108 65.

[192] KGC Reid "Modernising land burdens: The new law in Scotland" in S van Erp & B Akkermans (eds) *Towards a unified system of land burdens* (2006) 63-108 65.

[193] KGC Reid "Modernising land burdens: The new law in Scotland" in S van Erp & B Akkermans (eds) *Towards a unified system of land burdens* (2006) 63-108 65.

The main goal of the Title Conditions (Scotland) Act 2003 was to reform and restate the law of real burdens, but it also effected some minor changes in respect of other title conditions such as servitudes.[194] What is now seen under the collective term "title condition" includes three kinds of rights comparable to the servitude type *iura in re aliena* in English and South African law, namely:

(1) affirmative burdens: obligations on the burdened property owner to do something (such as maintain a wall or structure);

(2) negative burdens: obligations to refrain from doing something (not to build on the property or not to use it for commercial or other specified purposes); and

(3) servitudes: an obligation to allow a person limited use of the property (to walk or drive over part of the property).

As explained briefly before, the last two categories previously comprised servitudes in Scotland. For purposes of this discussion, real burdens will not be considered and the focus will be solely on servitudes as described in (3) above.

Servitudes are created in Scots law expressly (through grant or reservation), impliedly and by way of prescription. For the valid establishment of a servitude the right must be enforceable and controllable in law; there must be two properties in separate ownership (one will be the servient and the other the dominant property[195]); the rights involved must be praedial in nature[196] and must provide a benefit to the one

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[194] Steven AJM "Reform of real burdens" (2001) 5 *Edinburgh Law Review* 235-242 235-237.

[195] The new terminology implemented by the 2003 Act is "burdened" and "benefitted". This change is a result of the objective to get rid of any connotations with the old feudal system of land law.

[196] According to the principle of praediality, the rights must be connected to the relevant *land* and not to a person. Another form of this is the principle of "touch and concern" (requiring the rights to *touch* and *concern* the land), mainly used in US law.

property while burdening the other; and the obligation imposed on the servient proprietor must not be positive, but simply *in patiendo* (permitting or allowing).[197]

Expressly created servitudes are mostly[198] established by way of express grant or reservation in a deed.[199] All deeds creating a servitude must be registered against the titles of both the dominant and servient properties to have effect.[200] The express creation of a servitude through *grant* will either be in the form of an independent agreement, or may form part of the transfer documents for a property at subdivision.[201] An express *reservation* of a servitude will always be the result of a subdivision of land. The seller reserves for himself servitudal rights over the land being sold, to benefit the property he retains.[202]

Implied servitudes[203] can be created in Scots law through implied grant or implied reservation.[204] Servitudes will be implied only as part of the conveyance of a property, in situations where there has been a subdivision of land and a part of that subdivided

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[197] DJ Cusine & RRM Paisley *Servitudes and rights of way* (1998) 81.

[198] The creation of servitudes by statutory means is also classified by some authors as expressly created easements: WM Gordon *Scottish land law* (1989) para 24.26 761.

[199] DJ Cusine & RRM Paisley *Servitudes and rights of way* (1998) 261.

[200] S 75 (1) Title Conditions (Scotland) Act 2013. Cable and pipeline servitudes are exempt from this requirement because of the cumbersome effect it could have where the servitude covers long distances: GL Gretton & AJM Steven *Property, trusts and succession* 2ed (2013) 172. See s 75(3) read with 77(1) of the Title Conditions (Scotland) Act 2013.

[201] TG Guthrie *Scottish property law* (2005) 174; GL Gretton & AJM Steven *Property, trusts and succession* 2ed (2013) 172.

[202] TG Guthrie *Scottish property law* (2005) 175; GL Gretton & AJM Steven *Property, trusts and succession* 2ed (2013) 172-173.

[203] Implied servitudes, which are independent servitudes created by way of implication, should be distinguished from implied rights to servitudes (mentioned below), which do not in effect lead to the creation of an independent servitude

[204] TG Guthrie *Scottish property law* (2005) 174.

land is sold off.[205] Implied *grant* will arise where the subdivided land was sold off without the express creation of a servitude, which is necessary for the reasonable enjoyment of the property. The servitudal rights are deemed to have been granted by the seller of the land on the basis that they are incidental to the comfortable use and enjoyment of the purchased property.[206]

Implied *reservations,* on the other hand, arise where the seller of a subdivided parcel of land wants to argue that certain servitudal rights have been impliedly created in his favour at the time the property was sold.[207] Implied reservations are much less favoured than implied grants[208] because the seller of the subdivided parcel is expected to reserve for himself expressly those rights that he claims over the property he sells.[209] However, it is not impossible for a servitude to be created by this method and it will depend whether there are enough favourable circumstances and a sufficient degree of necessity to outweigh the effect of the rule of non-derogation from the grant.[210]

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[205] GL Gretton & AJM Steven *Property, trusts and succession* 2ed (2013) 173.

[206] TG Guthrie *Scottish property law* (2005) 174; A McAllister & TG Guthrie *Scottish property law: An introduction* (1992) 91-92. GL Gretton & AJM Steven *Property, trusts and succession* 2ed (2013) 173.

[207] TG Guthrie *Scottish property law* (2005) 175.

[208] DJ Cusine & RRM Paisley *Servitudes and rights of way* (1998) para 8.04 287; WM Gordon *Scottish land law* (1989) para 24.40 768.

[209] WM Gordon *Scottish land law* (1989) para 24.40 768. See A McAllister & TG Guthrie *Scottish property law: An introduction* (1992) 92-93 (explaining that implied reservations have the effect of the seller telling the purchaser of the subdivided part of property, after the event, that he has sold him less than he (the purchaser) had thought because the property that he obtained is now subject to a servitude that has the effect of reducing his title; the result is a derogation from the original grant of the property.

[210] *Murray v Medley* 1973 SLT (Sh Ct) 75; DJ Cusine & RRM Paisley *Servitudes and rights of way* (1998) para 8.19 297; TG Guthrie *Scottish property law* (2005) 175-176.

The tendency in practice seems to be that courts attribute much weight to the consideration of prior use as part of the test to establish the existence of implied servitudes.[211] However, the need for a servitude may sometimes only arise after severance and the doctrine will be unnecessarily narrowed if implied servitudes were only allowed in cases where the servitudal rights were already enjoyed before the severance.[212] Furthermore, evidence of prior use might not always be available and thus this cannot be an absolute requirement for establishment. Reid argues that servitudes should not be created by the fact of prior use, either by itself or in combination with other factors.[213] As real rights and burdens on land, servitudes require a public act and the consent of the landowner.[214] However, the possibility of creating servitudes on the grounds of prior use or exercise of rights has been incorporated in Scots law[215] and it is now implemented by balancing the interest of the

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[211] In the case of *Harton Homes Ltd v Durk* [2012] SCLR 554 paras 46 & 54 the court found that prior use was, in this case, a critical component to the constitution of an implied servitude and that there are very limited circumstances where prior use would not be required for the establishment of a servitude by implied grant. See also L Gretton & AJM Steven *Property, trusts and succession* 2ed (2013) 173; B Bolton, E Piggot & S Higgins "The life of a servitude: Creation, use, enforcement and termination" (October 2013) Enhance with Tods <https://enhancecpd.wordpress.com/2014/10/09/the-life-of-a-servitude-creation-use-enforcement-and-termination/> (accessed 19-11-2014).

[212] WM Gordon *Scottish land law* (1989) para 24.39 768.

[213] Servitudes created solely by *prior use* are in effect servitudes created by destination (or by the doctrine of *destination du père de famille*) as discussed in 3 2 relating to Dutch law.

[214] Reid supplements this argument with reference to various countries that reject the possibility of servitudes of prior use, such as Germany, Switzerland, Greece, and the Netherlands.

[215] KGC Reid "Praedial servitudes" in EC Reid & VV Palmer (eds) *Mixed jurisdictions compared: Private law in Louisiana and Scotland* (2009) 1-29 20-23 explains how the incorporation came about by a reception form English law.

putative dominant property in acquiring the servitude against the need to protect the present and future owners of the putative servient property.[216]

Servitudes can also be created by acquisitive prescription (if they are possessed openly, peaceably and without judicial interruption for a period of 20 years[217]) or by Act of Parliament.[218]

3 4 2 Content and interpretation of servitudes

The content of servitudes is determined according to different rules, depending on the manner of creation of the rights.

The contents of expressly created servitudes will always be determined by the terms of the deed.[219] Paisley states:

> "The terms of the deed govern the matter entirely, subject always to the implication by law of such ancillary rights as are required to make the servitude exercisable in a proper and safe way."[220]

Furthermore, the general rules of servitude law are taken into account during the process of determining the scope of the rights. Burdens may only be imposed in clear

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[216] KGC Reid "Praedial servitudes" in EC Reid & VV Palmer (eds) *Mixed jurisdictions compared: Private law in Louisiana and Scotland* (2009) 1-29 23.

[217] S 3 Prescription and Limitation (Scotland) Act 1973.

[218] DJ Cusine & RRM Paisley *Servitudes and rights of way* (1998) para 11.02 353; WM Gordon *Scottish land law 2 ed* (1999) 736.

[219] *Moncrieff v Jamieson* [2007] UKHL 42 para 7 per Lord Hope; DJ Cusine & RRM Paisley *Servitudes and rights of way* (1998) para 15.04 610; WM Gordon *Scottish land law* 2 ed (1999) 750.

[220] RRM Paisley "The demon drink and the straight and narrow way: The expansion and limitation of praedial servitudes" in H Mostert & MJ de Waal (eds) *Essays in honour of CG van der Merwe* (2011) 193-237 221.

terms[221] and servitudes are always to be interpreted in the manner least burdensome to the servient property.[222] Therefore, courts will apply a reasonable interpretation of the deed, taking into account the interests the parties intended to protect and the principle that a servitude is deemed to include all the rights necessary for its effective exercise.[223]

The main consideration by courts in these cases is the particularity of the description of the rights in the servitude grant. If the description is extensive and precise, the court has no power to interfere and allow any form of use outside of those boundaries. Where the extent of the burden is unclear from the deed, courts refer to surrounding circumstances and the possession subsequent to grant to determine what is ordinary and reasonable.[224] Courts establish what a "reasonable heritable proprietor" would have anticipated at the time of, and in the circumstances surrounding, the original grant or reservation.[225] Such proprietor would only have been

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[221] *Cronin v Sutherland* (1899) 2 F 217 220 per Lord Trayner; RRM Paisley "The demon drink and the straight and narrow way: The expansion and limitation of praedial servitudes" in H Mostert & MJ de Waal (eds) *Essays in honour of CG van der Merwe* (2011) 193-237 229; WM Gordon *Scottish land law* 2 ed (1999) 750.

[222] *Cronin v Sutherland* (1899) 2 F 217 219 per Lord Justice Clerk Macdonald; DJ Cusine & RRM Paisley *Servitudes and rights of way* (1998) para 14.35 584-587; WM Gordon *Scottish land law* 2 ed (1999) 750. In *Moncrieff v Jamieson* [2007] UKHL 42 para 34, Lord Hope stated that "while a servitude right must be construed in such a way as to minimise the burden on the servient proprietor, it must not be construed so strictly as to defeat the right granted to the dominant proprietor."

[223] Gretton GL & Reid KGC *Conveyancing* 4 ed (2011) 253 n 205; B Bolton, E Piggot & S Higgins "The life of a servitude: Creation, use, enforcement and termination" (October 2013) Enhance with Tods <https://enhancecpd.wordpress.com/2014/10/09/the-life-of-a-servitude-creation-use-enforcement-and-termination/> (accessed 19-11-2014).

[224] WM Gordon *Scottish land law* (1989) para 24.65 779; DJ Cusine & RRM Paisley *Servitudes and rights of way* (1998) para 12.187 517, 15.10 615.

[225] DJ Cusine & RRM Paisley *Servitudes and rights of way* (1998) para 12.187 517.

able to anticipate that which was reasonably foreseeable.[226] The subsequent "possession" or exercise of the servitude will give a good indication of what was intended by the parties and the possession need not extend over the whole of the prescriptive period to have effect. This instance of referring to possession of a servitude in order to establish the extent of the servitudal rights, should be distinguished from the reference made to possession of a servitude where it is used to prove the establishment of a prescriptive servitude. The servitude in this case is simply understood better by taking into account the subsequent use made thereof and is attached to the proviso that the effect of this insight may not result in the extension of the servitude beyond that which was expressly or impliedly contemplated or could have been within the reasonable contemplation of the parties at the time.[227]

Determining the scope of implied servitudes requires a slightly stricter approach. As mentioned above, these servitudes exist because they are incidental to the comfortable use and enjoyment of the property. The test for the determining the contents of implied rights was developed in the 1861 case of *Ewart v Cochrane.*[228] Lord Campbell held in this judgement that rights are only implied where they can be seen as necessary *for the comfortable enjoyment* at the time of the grant, but that they need not be so essentially necessary that the property cannot be used without them.[229] This test is still often referred to by courts, although some deem it to be quite a strict

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[226] DJ Cusine & RRM Paisley *Servitudes and rights of way* (1998) para 12.187 517.

[227] DJ Cusine & RRM Paisley *Servitudes and rights of way* (1998) para 15.10 615-616.

[228] *Ewart v Cochrane* (1861) 4 Macq 117; *Moncrieff v Jamieson* [2007] UKHL 42 para 27.

[229] *Ewart v Cochrane* (1861) 4 Macq 117 122-123.

standard.[230] To determine what is reasonably necessary for the comfortable enjoyment of the property courts look at extrinsic evidence to determine the circumstances surrounding the creation of the right.[231] Provisions of the deed and terms of conveyance effecting the severance of the two properties may also influence the acceptance of an implied servitude.[232]

When it comes to servitudes created by prescription, they will be given content by application of the maxim of *tantum praescriptum quantum possessum,* meaning that the right will be acquired as it was possessed and thus be interpreted to include only the rights which were enjoyed during the prescriptive period.[233]

3 4 3 Effective exercise and variation of servitudes

The same general principles apply in Scots law as in the two systems discussed above. A property owner who granted a servitude over her property may continue to

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[230] B Bolton, E Piggot & S Higgins "The life of a servitude: Creation, use, enforcement and termination" (October 2013) Enhance with Tods <https://enhancecpd.wordpress.com/2014/10/09/the-life-of-a-servitude-creation-use-enforcement-and-termination/> (accessed 19-11-2014).

[231] DJ Cusine & RRM Paisley *Servitudes and rights of way* (1998) para 8.21 299-300.

[232] If the deed includes an express provision that excludes a servitudes, they cannot be implied from the facts or circumstances surrounding the conveyance; where a certain servitude is expressly created in a deed, it may be an indication that another servitude was not implied in the same document (based on the maxim *expressio unius est exclusio alterius* translated as "the expression of the one excludes the other"); and where a deed contains a reference to extrinsic facts and circumstances such as *conveyance of subjects as presently possessed*, this has been interpreted by courts to favour the implication of a servitude. See DJ Cusine & RRM Paisley *Servitudes and rights of way* (1998) para 8.26 302-303.

[233] Cusine and Paisley argue that a servitude created through prescription can sometimes be "extended beyond former usage, if, without such extension, the right would be unprofitable": DJ Cusine & RRM Paisley *Servitudes and rights of way* (1998) para 15.27, 15.29 635-638.

use her property, but is generally prohibited from changing the conditions related to the servitude or from interfering in any way with the exercise of the servitude by the dominant proprietor.[234] Servitudes must be exercised in a reasonable manner or *civiliter modo*. The dominant proprietor may do all that is necessary for the comfortable enjoyment of his servitude but, in line with the principle of reasonableness, he is not allowed to change his use of the servitude to the effect that it creates an increased burden on the servient land.[235] As long as there is no such increase, ancillary rights can be grafted onto servitudes to render them more effective.

In contrast to the jurisdictions discussed previously, the issue of ancillary rights to servitudes is discussed in some detail in Scottish legal literature. It is explained that ancillary rights can be either expressly or impliedly created to form part of or provide support to the main servitude.[236]

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[234] GL Gretton & AJM Steven *Property, trusts and succession* 2ed (2013) 180; DJ Cusine & RRM Paisley *Servitudes and rights of way* (1998) 392-399; TG Guthrie *Scottish property law* (2005) 177.

[235] GL Gretton & AJM Steven *Property, trusts and succession* 2ed (2013) 176; TG Guthrie *Scottish property law* (2005) 176-177.

[236] These rights also sometimes look like separate servitudes (although they are dependent on and intricately connected to the parent servitude). However, an important distinction can be drawn between implied servitudes and ancillary rights which appear to be individual servitudes in that the former can only be created as a result of the subdivision (and subsequent selling off) of a property. Ancillary rights or ancillary servitudes are created where they are deemed sufficiently necessary for the exercise of the parent servitude. Paisley refers to “bespoke” servitudes where he explains that both South African and Scots law permit individualism in servitudes to a certain extent: [236] RRM Paisley “The demon drink and the straight and narrow way: The expansion and limitation of praedial servitudes” in H Mostert & MJ de Waal (eds) *Essays in honour of CG van der Merwe* (2011) 193-237 227.

Express ancillary rights are used and accepted in Scotland without objection, although their doctrinal basis is not clear.[237] In *Robertson v Duke of Atholl*[238] a servitude grant, which included an express ancillary right of erecting huts for the temporary shelter of shepherds, was accepted without much ado.[239] The problem in Scots law regarding express ancillary rights is that there is no clear indication of the scope of rights that are acceptable within this class.[240] However, the accepted practice of allowing the implication of ancillary rights by law (on the basis of the implied intention of the parties) is said to lay a solid foundation for the recognition of ancillary rights in cases where the intention of the parties is clearly expressed.[241]

Ancillary rights may also be implied. The principle that all rights necessary for the effective use of the servitude are implied by law also applies here.[242] In the landmark case on ancillary rights in Scots law, *Moncrieff v Jamieson*,[243] an ancillary right of

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[237] KGC Reid "Praedial servitudes" in EC Reid & VV Palmer (eds) *Mixed jurisdictions compared: Private law in Louisiana and Scotland* (2009) 1-29 11; RRM Paisley "The demon drink and the straight and narrow way: The expansion and limitation of praedial servitudes" in H Mostert & MJ de Waal (eds) *Essays in honour of CG van der Merwe* (2011) 193-237 234.

[238] *Robertson v Duke of Atholl* (1798) 4 Pat 54 55 56 and 61.

[239] According to Maecianus, this ancillary right was accepted in much the same way in classical Roman law, where the holder of a servitude of pasturage or watering was allowed to erect a hut on the servient tenement to provide him with shelter in times of storms. *D* 8 3 6.

[240] RRM Paisley "The demon drink and the straight and narrow way: The expansion and limitation of praedial servitudes" in H Mostert & MJ de Waal (eds) *Essays in honour of CG van der Merwe* (2011) 193-237 234.

[241] RRM Paisley "The demon drink and the straight and narrow way: The expansion and limitation of praedial servitudes" in H Mostert & MJ de Waal (eds) *Essays in honour of CG van der Merwe* (2011) 193-237 234.

[242] Gretton GL & Reid KGC *Conveyancing* 4 ed (2011) 253-254; GL Gretton & AJM Steven *Property, trusts and succession* 2ed (2013) 177; KGC Reid "Praedial servitudes" in EC Reid & VV Palmer (eds) *Mixed jurisdictions compared: Private law in Louisiana and Scotland* (2009) 1-29 12.

[243] *Moncrieff v Jamieson* [2007] UKHL 42.

parking was found to be implied in an expressly created servitude of access. The facts of the case were particularly important to the outcome of the decision as it concerned a unique geographical situation.[244] The dominant land was bordered on one side by the sea and on the other by a cliff. The only access or egress that could be obtained by land was via a stairway that led to a gate at the top of the cliff. On these facts, it was found that the right of access enjoyed by the dominant landowners would be defeated if the vehicles used to obtain access to the buildings on the dominant property were not allowed to be left parked at or near the entrance gate until they were again needed. The test that was developed in this case was aimed at determining whether the claimed right was, firstly, reasonably necessary for the exercise and enjoyment of the main servitude and, secondly, whether it was within the contemplation of the parties at the time of the grant.[245] This is thought to have established the doctrinal basis for the implication of ancillary rights into expressly created servitudes.[246] Paisley highlights the uncertainty that arises with the implication of ancillary rights in that the detailed extent of the additional rights is never clear.[247] Lord Neuberger states in the decision that the second requirement of the test is based on an implied term as it is

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[244] *Moncrieff v Jamieson* [2007] UKHL 42 para 48.

[245] *Moncrieff v Jamieson* [2007] UKHL 42 para 29-30; KGC Reid "Praedial servitudes" in EC Reid & VV Palmer (eds) *Mixed jurisdictions compared: Private law in Louisiana and Scotland* (2009) 1-29 11; RRM Paisley "The demon drink and the straight and narrow way: The expansion and limitation of praedial servitudes" in H Mostert & MJ de Waal (eds) *Essays in honour of CG van der Merwe* (2011) 193-237 233.

[246] RRM Paisley "The demon drink and the straight and narrow way: The expansion and limitation of praedial servitudes" in H Mostert & MJ de Waal (eds) *Essays in honour of CG van der Merwe* (2011) 193-237 233-234.

[247] RRM Paisley "The demon drink and the straight and narrow way: The expansion and limitation of praedial servitudes" in H Mostert & MJ de Waal (eds) *Essays in honour of CG van der Merwe* (2011) 193-237 234.

understood in contract law.[248] The focus is accordingly on the presumed intention of the parties in the light of the surrounding circumstances.[249]

However, this decision requires close scrutiny. Reid and Gretton state that the decision is "not entirely welcome" from a Scottish perspective. The reasons for this statement are based, firstly, on the poor portrayal of genuine Scots law in the case.[250] They point out that the test for the implication of ancillary rights has never been certain in Scots law, and they emphasise the different views of the Lords in this decision. According to Lord Roger, rights must be "essential" in order to be implied, while Lord Neuberger expresses the standard as relating to rights that are "reasonably necessary". Lord Hope, on the other hand, is more lenient in viewing the test to be one of "what is necessary for the convenient and comfortable enjoyment of the servitude".[251] Reid and Gretton express their opinion of the two-fold test developed in the case as follows:

> "On the whole the change is unwelcome. On the one hand, the justification for the test – that parties should not be signed up to things which they could not have predicted or wished – does not seem particularly strong in the case of

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[248] KGC Reid "Praedial servitudes" in EC Reid & VV Palmer (eds) *Mixed jurisdictions compared: Private law in Louisiana and Scotland* (2009) 1-29 12.

[249] KGC Reid "Praedial servitudes" in EC Reid & VV Palmer (eds) *Mixed jurisdictions compared: Private law in Louisiana and Scotland* (2009) 1-29 12; RRM Paisley "The demon drink and the straight and narrow way: The expansion and limitation of praedial servitudes" in H Mostert & MJ de Waal (eds) *Essays in honour of CG van der Merwe* (2011) 193-237 233.

[250] See KGC Reid & GL Gretton *Conveyancing* (2007) 108 (explaining that only two of the 5 judges, Lords Hope and Roger base their views largely on Scottish authority, and that their views of the law are influenced very differently because of it). The authors further do not agree with the arguments in the case relating to the issue of the acceptance of the right to park as a servitude in Scots law, and on the principle that a servitude must not be repugnant with ownership. See KGC Reid & GL Gretton *Conveyancing* (2007) 108-111 in this regard.

[251] KGC Reid & GL Gretton *Conveyancing* (2007) 111-112.

> rights which are merely ancillary in nature. On the other hand, the test is undeniably awkward in practice. The older a servitude, the more difficult it will be to say what rights the parties might have had in contemplation, or to admit rights of a kind which are made necessary only by modern technological developments."[252]

Reid argues elsewhere that the fact that a right is "implied" does not require that it be implied as a term of a contract, and that this is a crucial distinction to make.[253] A better approach would be one based not on the contractual notion of an implied term that is determined by the intention of the parties at creation, but rather on sound legal policy.[254] Accordingly he proposes a freestanding rule that holds that a servitude will include all the rights which are reasonably necessary at any given point in time, for the effective exercise of the servitude.[255]

There is a fine line between acceptable ancillary rights being grafted onto a servitude and an outcome that has the effect of increasing the burden on the servient property.[256] Once the extent of the servitudal rights have been established, the type of servitude will have an impact in determining whether there has been an unwarranted increase in the burden.[257] Depending on the servitude at hand, different factors can lead to an increase in the burden on the servient land, and the effects of the change

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[252] KGC Reid & GL Gretton *Conveyancing* (2007) 113.

[253] KGC Reid "Accessory rights in servitudes" (2008) 12 *Edinburgh Law Review* 455-459 456.

[254] KGC Reid "Accessory rights in servitudes" (2008) 12 *Edinburgh Law Review* 455-459 457.

[255] KGC Reid & GL Gretton *Conveyancing* (2007) 113; KGC Reid "Accessory rights in servitudes" (2008) 12 *Edinburgh Law Review* 455-459 456; KGC Reid "Praedial servitudes" in EC Reid & VV Palmer (eds) *Mixed jurisdictions compared: Private law in Louisiana and Scotland* (2009) 1-29 14.

[256] DJ Cusine & RRM Paisley *Servitudes and rights of way* (1998) para 12.187 517.

[257] DJ Cusine & RRM Paisley *Servitudes and rights of way* (1998) para 12.192 522.

in exercise will not always be equally distinctive.[258] The dominant proprietor is entitled to exploit the burden and increase it only insofar as it is necessary to make the servitude effectual to the extent originally granted.[259] Furthermore, although purely personal considerations must be excluded from determining the scope of the burden, a qualitative approach is followed, taking account of a wide range of factors that could result from a changed use of the rights.[260]

Although any change of existing (allowed) use of a servitude is *prima facie* objectionable,[261] it is possible to amend servitudes in Scots law. Variation of servitudes is generally sought by servient proprietors on the grounds that they want to change the layout or use of their land in a manner that might be hindered by the location or manner of exercise of the existing servitude.

Historically, variation of a servitude was only possible by way of the common law.[262] However, the Conveyancing and Feudal Reform (Scotland) Act 1970 created the possibility for the servient proprietor to apply to the Lands Tribunal for a variation

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[258] It is much easier to establish an increase in the use of a right that involves the discharge or abstraction of a substance than it is to measure an increase in the use of a right that involves the exercise of certain entitlements such as access.

[259] Thus, if he is not using the rights to the maximum potential envisaged by the initial grant, he will be allowed to increase his use of the servitude as long as it remains within the boundaries of the initial grant. DJ Cusine & RRM Paisley *Servitudes and rights of way* (1998) para 12.186 516 with reference to GJ Bell *Principles of the law of Scotland* 10 ed by W Guthrie (ed) (1899).

[260] DJ Cusine & RRM Paisley *Servitudes and rights of way* (1998) para 12.192 522.

[261] WM Gordon *Scottish land law* 2ed (1999) para 24.65 753; DJ Cusine & RRM Paisley *Servitudes and rights of way* (1998) para 8.26 303.

[262] B Bolton, E Piggot & S Higgins “The life of a servitude: Creation, use, enforcement and termination” (October 2013) Enhance with Tods <https://enhancecpd.wordpress.com/2014/10/09/the-life-of-a-servitude-creation-use-enforcement-and-termination/> (accessed 19-11-2014).

of a servitude. The Title Conditions (Scotland) Act 2003 further enabled the Lands Tribunal to vary or discharge servitudes where it deems it reasonable.

Under the common law the location of exercise of a servitude could be varied by way of agreement; [263] by unilateral alteration of the route of a servitude by the servient proprietor in certain instances;[264] or by court order.[265] However, in both the latter cases, variation was only possible where the details (the exact location for the exercise of the rights) were not set out clearly in the servitude deed. This view was based on the sanctity of contractual rights, and is aimed at avoiding a situation of derogation from grant.[266]

Gordon questions this approach of strict enforcement by referring to the situation where a servitude was granted 100 years before between the original parties who no longer have any interest in the matter.[267] He suggests that, instead of assuming that the interests of the original parties still exist, a unilateral relocation of a servitude should be permitted by the servient proprietor, but should be subject to the

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[263] WM Gordon *Scottish land law* (1989) para 24.65 779.

[264] This was only possible in limited instances and there is little clarity regarding the exact position on this matter in Scots law. The conclusion by most writers is that where the route (or other location) for the exercise of the servitude was not specified in the deed, the servient proprietor could alter these elements of the servitude that were not expressly fixed in the deed. See DJ Cusine & RRM Paisley *Servitudes and rights of way* (1998) para 12.61 421; WM Gordon *Scottish land law* (1989) para 24.65-24.67 778-780.

[265] See WM Gordon *Scottish land law* (1989) para 24.65 778.

[266] WM Gordon *Scottish land law* 2 ed (1999) para 24.65 753-754.

[267] WM Gordon *Scottish land law* 2 ed (1999) para 24.66 754.

proviso that an objecting dominant proprietor may show an interest in objecting.[268] This issue was addressed by statutory intervention.[269]

Since the commencement in 2004 of the Title Conditions (Scotland) Act 2003, the Lands Tribunal has the power to vary or discharge servitudes on application of the *servient* proprietor in terms of section 90(1)(a)(i) of the Act. Where a servient proprietor applies for the variation or discharge of a servitude, the Tribunal will grant the application only if it is satisfied that it is reasonable with regard to the factors set out in section 100 of the Act.[270] These factors include the following: (i) any change in circumstances since the creation of the servitude (including any change in the character of either one of the properties or the neighbourhood where they are situated); (ii) the extent to which the servitude confers benefit on the dominant property; (iii) the extent to which the servitude impedes enjoyment of the servient property; (iv) if the servitude is an obligation to do something, how practicable or costly it is to comply with the condition; (v) the length of time which has elapsed since creation of the servitude; (vi) the purpose of the servitude; (vii) whether in relation to the burdened property there is the consent, or deemed consent, of a planning authority, or the consent of some other regulatory authority for a use which the servitude prevents; (viii) whether the owner of the servient property is willing to pay

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[268] For example, by arguing that the new passage will be substantially more inconvenient or that there is no offer to constitute his right properly. See WM Gordon *Scottish land law* 2 ed (1999) para 24.66 754.

[269] The Conveyancing and Feudal Reform (Scotland) Act 1970, and later replaced by the Title Conditions (Scotland) Act 2003.

[270] S 98 of the Title Conditions (Scotland) Act 2003.

compensation; (ix) any other factor which the Lands Tribunal considers to be material.[271]

The factors are not all equally important. In practice, the Tribunal often has regard to factors (ii) and (iii) above and balance the interests of the servient and dominant properties to resolve the matter at hand.[272] The other factors are considered insofar as they inform the balancing.[273] As becomes apparent from a consideration of the elements listed above, the decision of the court is based on the facts of each case[274] and accordingly previous cases are not very helpful in solving a particular issue. The approach of the Tribunal is said to have changed since the implementation of the 2003 Act in that the role of the factor referring to the purpose of the provision no longer plays a key role in the considerations of the Tribunal.[275] Previously, under the 1970 Act, the Lands Tribunal only considered the benefit conferred on the dominant property that resulted from the original purpose of the servitude. Now, under the 2003 Act, all benefit

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[271] S 100 of the Title Conditions (Scotland) Act 2003.

[272] B Bolton, E Piggot & S Higgins "The life of a servitude: Creation, use, enforcement and termination" (October 2013) Enhance with Tods <https://enhancecpd.wordpress.com/2014/10/09/the-life-of-a-servitude-creation-use-enforcement-and-termination/> (accessed 19-11-2014).

[273] B Bolton, E Piggot & S Higgins "The life of a servitude: Creation, use, enforcement and termination" (October 2013) Enhance with Tods <https://enhancecpd.wordpress.com/2014/10/09/the-life-of-a-servitude-creation-use-enforcement-and-termination/> (accessed 19-11-2014).

[274] An important part of each case is the cite-visit done by the members of the Tribunal to get a clear picture of the facts at hand: B Bolton, E Piggot & S Higgins "The life of a servitude: Creation, use, enforcement and termination" (October 2013) Enhance with Tods <https://enhancecpd.wordpress.com/2014/10/09/the-life-of-a-servitude-creation-use-enforcement-and-termination/> (accessed 19-11-2014).

[275] B Bolton, E Piggot & S Higgins "The life of a servitude: Creation, use, enforcement and termination" (October 2013) Enhance with Tods <https://enhancecpd.wordpress.com/2014/10/09/the-life-of-a-servitude-creation-use-enforcement-and-termination/> (accessed 19-11-2014).

derived from the servitude will be relevant, irrespective of whether it was foreseen as a result of the original purpose.[276]

In another attempt to counter the negative effects of changed circumstances, the Scottish system has introduced a presumptive sunset provision applicable to real burdens.[277] All real burdens that reach the age of 100 years are presumptively discharged on the basis of their long existence. However, to protect right holders, the termination does not take place automatically. Before a notice of discharge can be registered, the burdened property owner must give notice to the benefitted owner, who is provided the opportunity to apply to the Lands Tribunal with reasons justifying the continued existence of the servitude. If the grounds required by the Tribunal[278] can be proven, the servitude will not be extinguished. The introduction of similar temporal limits have also been proposed in American law with relation to servitudes.[279]

The doctrinal establishment of ancillary rights to servitudes, and the willingness of Scottish courts to amend or terminate servitudes on application by the servient proprietor suggests that there has been acknowledgement of the impact of changed circumstances and the need for flexibility in servitude law. However, as far as ancillary

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[276] B Bolton, E Piggot & S Higgins "The life of a servitude: Creation, use, enforcement and termination" (October 2013) Enhance with Tods <https://enhancecpd.wordpress.com/2014/10/09/the-life-of-a-servitude-creation-use-enforcement-and-termination/> (accessed 19-11-2014).

[277] The Title Conditions (Scotland) Act 2003 sections 20-21; JA Lovett "Creating and controlling private land use restrictions in Scotland and Louisiana: A comparative mixed jurisdiction analysis" (2008) 19 *Stellenbosch Law Review* 231-257 252.

[278] These grounds are set out in section 100 of the Title Conditions (Scotland) Act 2003.

[279] CM Rose "Servitudes, Security and Assent: Some Comments on Professors French and Reichman" (1982) 55 *Southern California Law Review* 1403-1417 1413-1414; BWF Depoorter & F Parisi "Fragmentation of property rights: A functional interpretation of the law of servitudes" (2003) 3 *Global Jurist Frontiers* 1-41 36.

rights are concerned, the current approach, as laid down in the *Moncrieff* case, is not generally supported.

Reid mentions a number of reasons why the analysis in *Moncrieff*, based on contract law principles, is problematic when applied to real rights.[280] Because servitudes are binding on third parties who were not necessarily involved in the creation of the rights, problems often occur in determining what the intended content of the servitude was at the time of creation. These problems are often amplified by a long passage of time.[281] Reid points out an important difference between the principles of servitude law and that of contract. The principle of non-derogation from grant does not form part of contract law and thus from a contract law perspective, there is no problem with implying certain rights in favour of the grantor of a servitude (where a servitude and its ancillary rights are created by reservation). However, in servitude law the principle of non-derogation from grant is aimed at ensuring that a grantor of a servitude cannot derogate from his grant by adding certain ancillary rights thereto and thus this counteracts the notion of implication.[282] Furthermore, the parties who create the servitude can only *intend* that which they can foresee and this will most likely not incorporate future changes in society and technology.[283] Finally, a theory built on the intention of the parties can only apply to servitudes created by juridical act and leaves

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[280] See KGC Reid "Praedial servitudes" in EC Reid & VV Palmer (eds) *Mixed jurisdictions compared: Private law in Louisiana and Scotland* (2009) 1-29 14.

[281] KGC Reid "Praedial servitudes" in EC Reid & VV Palmer (eds) *Mixed jurisdictions compared: Private law in Louisiana and Scotland* (2009) 1-29 14.

[282] KGC Reid "Praedial servitudes" in EC Reid & VV Palmer (eds) *Mixed jurisdictions compared: Private law in Louisiana and Scotland* (2009) 1-29 14.

[283] KGC Reid "Praedial servitudes" in EC Reid & VV Palmer (eds) *Mixed jurisdictions compared: Private law in Louisiana and Scotland* (2009) 1-29 14.

open the issue of prescriptive servitudes altogether, since they preclude an evaluation of the intention of the parties.[284]

3 5 The state law of Louisiana

3 5 1 Nature and establishment of servitudes

Louisiana, like Scotland and South Africa, is a mixed jurisdiction, and its private law accordingly displays both common law and civil law characteristics. The law of servitudes forms part of the civil law and is based completely on the Louisiana Civil Code, which was influenced by the French *Code Civil*. The first Civil Code of Louisiana was promulgated in 1808,[285] but was soon replaced by the Civil Code of 1825, which was revised again in 1870. This Code is still in force today, but has undergone particular reforms, including an amendment in 1977, of the part relating to servitudes.[286]

A praedial servitude is defined in article 646 of the Code as being "a charge on a servient estate for the benefit of a dominant estate". The same basic requirements and characteristics that were discussed in relation to the jurisdictions above apply to praedial servitudes in Louisiana. These include that a servitude must involve two

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[284] KGC Reid "Praedial servitudes" in EC Reid & VV Palmer (eds) *Mixed jurisdictions compared: Private law in Louisiana and Scotland* (2009) 1-29 15.

[285] The "Digest of the civil laws now in force in the Territory of Orleans".

[286] KGC Reid "Praedial servitudes" in EC Reid & VV Palmer (eds) *Mixed jurisdictions compared: Private law in Louisiana and Scotland* (2009) 1-29 3-4.

tenements;[287] must provide benefit for a dominant tenement;[288] must be interpreted in a manner least burdensome to the servient tenement;[289] "runs with the land"; and may not impose positive duties[290] or be contrary to public policy.[291] No prescribed form is necessary to establish a servitude. It is simply required that the parties express their intention to create a servitude clearly in the originating document.[292]

Conventional servitudes are generally created by juridical act,[293] acquisitive prescription or destination of the owner.[294] However, a further classification is made between apparent and non-apparent servitudes.[295] Apparent servitudes are those that

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[287] KGC Reid "Praedial servitudes" in EC Reid & VV Palmer (eds) *Mixed jurisdictions compared: Private law in Louisiana and Scotland* (2009) 1-29 4; AN Yiannopoulos *Predial servitudes: Volume 4, Louisiana Civil Law Treatise* 3 ed (2004) § 107 315.

[288] Article 647 of the Louisiana Civil Code. This article provides further that the benefit need not exist at the time the servitude is created and that a possible convenience or a future advantage suffices to support a servitude.

[289] Louisiana Civil Code Article 730.

[290] Louisiana Civil Code Article 651, 706. AN Yiannopoulos *Predial servitudes: Volume 4, Louisiana Civil Law Treatise* 3 ed (2004) § 106 313-314 mentions that positive obligations may be imposed if they are merely incidental obligations that may be necessary for the exercise and preservation of a servitude.

[291] KGC Reid "Praedial servitudes" in EC Reid & VV Palmer (eds) *Mixed jurisdictions compared: Private law in Louisiana and Scotland* (2009) 1-29 4.

[292] *Noel Estate v Kansas City Southern & Gulf Ry Co* 187 La 717, 175 So 468 (La 1937).

[293] Article 740 reads as follows: "Apparent servitudes may be acquired by title, by destination of the owner, or by acquisitive prescription." Yiannopoulos states that the reference to "title" does not necessarily refer to a written agreement and that an oral grant might be sufficient to establish a servitude "provided that the servitude has in fact been used and that the grantor recognizes the grant when interrogated under oath". However, to have third party effect, a servitude has to be registered. AN Yiannopoulos *Predial servitudes: Volume 4, Louisiana Civil Law Treatise* 3 ed (2004) § 112 328-330 (fn 3) and § 125 358.

[294] Louisiana Civil Code article 739-740. Conventional servitudes can also be created by expropriation for public use, even though this is not mentioned or regulated in the Civil Code. See AN Yiannopoulos *Predial servitudes: Volume 4, Louisiana Civil Law Treatise* 3 ed (2004) § 147 411-416.

[295] Louisiana Civil Code article 707.

can be perceived by exterior signs such as a roadway or a window, while non-apparent servitudes have no exterior qualities to testify of their existence and are normally framed as prohibitions, such as a prohibition against building, or against building above a particular height. Because of their nature, non-apparent servitudes cannot be acquired by way of prescription.[296]

The same rules governing acquisitive prescription of immovables also apply to apparent servitudes in Louisiana. Thus, a servitude can be acquired by uninterrupted possession for ten years if it is possessed in good faith and by just title; if the possession is without title or in bad faith, it must be uninterrupted for thirty years before acquisition will take effect.[297]

As far as implied servitudes are concerned, servitudes can only be created in Louisiana law through the doctrine of destination, and no servitude will be implied if the prior relationship required for creation by destination of the owner cannot be shown.[298] According to the doctrine, where a property is subdivided and one part of that property had previously made use of another part, this use will be allowed to continue after subdivision in the form of a servitude established over the one part in favour of the other.[299] The servitude is created upon severance, not because the

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[296] AN Yiannopoulos *Predial servitudes: Volume 4, Louisiana Civil Law Treatise* 3 ed (2004) § 134 388.

[297] Louisiana Civil Code article 742.

[298] Louisiana Civil Code article 741;KGC Reid "Praedial servitudes" in EC Reid & VV Palmer (eds) *Mixed jurisdictions compared: Private law in Louisiana and Scotland* (2009) 1-29 123; AN Yiannopoulos *Predial servitudes: Volume 4, Louisiana Civil Law Treatise* 3 ed (2004) § 141 404. Creation of servitudes by way of destination is also found in Belgian Law: *BW* art. 692-694. See also section 3 2 1 above for a discussion of the doctrine of destination as it applied in Dutch law under the previous *BW*.

[299] Louisiana Civil Code article 741 reads as follows:

owner of the properties intends for it to be created, but simply because he does not express a different intention. The servitude is accordingly not a result of an "implied term of the deed of transfer" as it would be in Scots (and English) law.[300] This doctrine takes into account the balance of interests between, on the one hand, the potential dominant property in the acquisition of a servitude and, on the other, the protection of the present and future owners of the potential servient land. [301]

3 5 2 Content and interpretation of servitudes

According to article 697 of the Code, the extent and manner of use of conventional servitudes are regulated by the title by which they are created.[302] This is interpreted to mean that the intention of the parties, as expressed in the title, will determine the

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> "Destination of the owner is a relationship established between two estates owned by the same owner that would be a predial servitude if the estates belonged to different owners.
>
> When the two estates cease to belong to the same owner, unless there is express provision to the contrary, an apparent servitude comes into existence of right and a nonapparent servitude comes into existence if the owner has previously filed for registry in the conveyance records of the parish in which the immovable is located a formal declaration establishing the destination."

[300] This was also the case in Dutch law under the old *BW*.

[301] KGC Reid "Praedial servitudes" in EC Reid & VV Palmer (eds) *Mixed jurisdictions compared: Private law in Louisiana and Scotland* (2009) 1-29 23.

[302] Louisiana Civil Code article 697; AN Yiannopoulos *Predial servitudes: Volume 4, Louisiana Civil Law Treatise* 3 ed (2004) § 149 418-420. Art 686 of the Belgian *Burgerlijk Wetboek* contains the same provision. The similarities between Belgian law and the law of Louisiana are mainly due to the reception of the French *Code Civil* in both these jurisdictions. Servitudes created by prescription are given content based on the application of the maxim *tantum prescriptum quantum possessum* (so much is acquired as has been possessed); and the extent and manner of use of servitudes created by destination will depend on the intention of the party who established the servitude, in light of the facts that he created or maintained at subdivision of the relevant properties. See AN Yiannopoulos *Predial servitudes: Volume 4, Louisiana Civil Law Treatise* 3 ed (2004) § 149 419-420.

contents and manner of exercise of a servitude.[303] To the extent that the title does not provide specifically for the extent and manner of exercise, the intention of the parties is determined in light of the purpose of the servitude.[304] In case of doubt regarding the existence, extent or manner of exercise of a praedial servitude, the most favourable (least burdensome) outcome for the servient proprietor is sought.[305] Ambiguities in the title are resolved with reference to provisions of the Code, the situation surrounding the servitude and the manner in which the servitude was exercised previously.[306] However, the originating document is not the only factor taken into consideration because the dominant proprietor may have acquired additional rights by prescription or the servitude may have been modified by verbal agreement.[307]

The emphasis on the intention of the parties creates the impression that courts determine the content and scope of a servitude with reference to what exactly the parties had in mind at the time of creation. However, this requires further consideration. In the case of *Palace Properties, LLC v Sizeler Hammond Square Ltd Partnership*[308] the court considered the servitude in light of the current circumstances, and came to the conclusion that although the initial parties had not envisaged the

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[303] AN Yiannopoulos *Predial servitudes: Volume 4, Louisiana Civil Law Treatise* 3 ed (2004) § 149 418.

[304] AN Yiannopoulos *Predial servitudes: Volume 4, Louisiana Civil Law Treatise* 3 ed (2004) § 149 418.

[305] Louisiana Civil Code article 730; *Tournillon v Sewerage and Water Board of New Orleans* 692 So 2d 1091 (La 1997); *Tilley v Lowery* 511 So 2d 1245 (La 1987) 1247; AN Yiannopoulos *Predial servitudes: Volume 4, Louisiana Civil Law Treatise* 3 ed (2004) § 128 372.

[306] AN Yiannopoulos *Predial servitudes: Volume 4, Louisiana Civil Law Treatise* 3 ed (2004) § 149 418-419.

[307] AN Yiannopoulos *Predial servitudes: Volume 4, Louisiana Civil Law Treatise* 3 ed (2004) § 149 419.

[308] *Palace Properties, LLC v Sizeler Hammond Square Ltd Partnership,* 839 So 2d 82 (La 2002).

ancillary right[309] the servitude would be "virtually unusable" without it, and that that could not have been the intention of the parties who created it. The court held that:

> "Although these rights and limitations seem irreconcilable at first glance, under the facts of this case, we conclude that one of the 'works necessary for the use' of the servitude of passage is the installation of drainage."[310]

This suggests that in considering the *intention of the parties* to determine the extent of the servitude courts will focus on the purpose the parties had wished the servitude to fulfil, and not on the exact manner of use they had foreseen at the time.[311] This seems a fairly more flexible approach.

The Code provides specifically for ancillary rights[312] to servitudes.[313] Two separate provisions in the Code provide dominant proprietors with access to all the rights (and works) necessary to use and maintain their servitudes:

> "Article 743: Rights that are necessary for the use of a servitude are acquired at the time the servitude is established. They are to be exercised in a way least inconvenient for the servient estate."
>
> "Article 744: The owner of the dominant estate has the right to make at his expense all the works that are necessary for the use and preservation of the servitude."

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[309] The dominant property in this case wanted to pave a part of the road subject to a servitude of right of way, and the court found that this would require certain levelling and fill work, which would require drainage. The installation of the drainage system was thus one of the works necessary for the full enjoyment of the servitude.

[310] *Palace Properties, LLC v Sizeler Hammond Square Ltd Partnership,* 839 So 2d 82 (La 2002) 102-103.

[311] This contention is based on the manner in which the court considered the purpose of the servitude in the current circumstances (thus, after circumstances have changed), even though the intention of the parties was clearly expressed in the title.

[312] In Louisiana law the term "accessory" is used.

[313] AN Yiannopoulos *Predial servitudes: Volume 4, Louisiana Civil Law Treatise* 3 ed (2004) § 150 420-422.

Reid remarks that the *making of works* would most likely be the very accessory right that a servitude holder would want to exercise, and that article 744 does not leave much content to the general rule in article 743.[314] In *Barnes v Dixie Elec Membership Corp*[315] the court held that there must be a balancing between that which is necessary in order for a servitude holder to use his servitude and that which a servient landowner must suffer as a result of a servitude.

Reid points out that the article that provided for ancillary rights under the Code before the 1977 amendments had been titled "What grant to implies", and the wording was that everything necessary "is supposed to be granted at the same time with the servitude".[316] He draws an insightful conclusion from the amendment that ensued in that the deliberate departure from the idea of an implied grant was to establish a freestanding rule for the acceptance of ancillary rights that is independent from the terms (or intention) of the original grant.[317] He contends that the wording of article 771 in the previous version of the Code invited consideration of the intention of the parties – presumably on the basis that what is "supposed to be granted" is inferred from the manner in which the parties expressed their intention, but that the amendment introduced the notion of ancillary rights created by operation of law.[318] He explains in

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[314] KGC Reid "Praedial servitudes" in EC Reid & VV Palmer (eds) *Mixed jurisdictions compared: Private law in Louisiana and Scotland* (2009) 1-29 13.

[315] *Barnes v Dixie Elec Membership Corp* 323 So 2d 247 (La 1975) 249.

[316] KGC Reid "Praedial servitudes" in EC Reid & VV Palmer (eds) *Mixed jurisdictions compared: Private law in Louisiana and Scotland* (2009) 1-29 13.

[317] KGC Reid "Praedial servitudes" in EC Reid & VV Palmer (eds) *Mixed jurisdictions compared: Private law in Louisiana and Scotland* (2009) 1-29 13.

[318] KGC Reid "Accessory rights in servitudes" (2008) 12 *Edinburgh Law Review* 455-459 456; KGC Reid "Praedial servitudes" in EC Reid & VV Palmer (eds) *Mixed jurisdictions compared: Private law in Louisiana and Scotland* (2009) 1-29 13.

more than one of his articles[319] that an ancillary right can be characterised either as an implied term or as a freestanding rule of law. The ancillary right in the former instance is part of the juridical act that brings about the servitude and this is, at least in theory, a creation of the parties. In the second instance, the ancillary right is a consequence of the creation of the servitude and thus arises by operation of law, and it is applicable to all servitudes. As was mentioned earlier with reference to the *Moncrieff* case in Scots law, Reid argues, that a freestanding rule is better suited to the context of ancillary rights. He is of the opinion that the change in the provisions of the Louisiana Code had the effect of changing the approach in Louisiana law to one based on a freestanding rule.[320] However, as appears from the next section below, this interpretation of the effects of the revision of the Code is not straightforward or self-evident.

3 5 3 Effective exercise and variation of servitudes

Article 778 of the Louisiana Civil Code of 1870 provided that a dominant proprietor must use a servitude according to the terms of the deed (or "title") and that he may not change his use of the servitude in a way that creates an increased burden on the servient property. No similar provision was included after the 1977 amendments, but

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KGC Reid "Praedial servitudes" in EC Reid & VV Palmer (eds) *Mixed jurisdictions compared: Private law in Louisiana and Scotland* (2009) 1-29 16.

[319] KGC Reid "Accessory rights in servitudes" (2008) 12 *Edinburgh Law Review* 455-459 456; KGC Reid "Praedial servitudes" in EC Reid & VV Palmer (eds) *Mixed jurisdictions compared: Private law in Louisiana and Scotland* (2009) 1-29 13.

[320] See the discussion in section 3 4 4 above. This issue is also discussed in sections 5 3 and 5 4 below.

Yiannopoulos stresses that this does not indicate a change in the law, as the prohibition on increasing the burden on the servient property is self-evident.[321]

The strong reference to the intention of the parties to determine the content and scope of a servitude creates the impression that the focus is to a great extent on the originating document rather than on the current circumstances relevant to the servitude. This is indicative of strong *ex ante* limits and weak *ex post* controls over servitudes.[322] Even though it is possible for a servitude to be modified by verbal agreement,[323] the enforceability of the modified use against third parties is not certain. If one considers the wording of article 743, relating to ancillary rights, it is confined to rights *acquired at the time the servitude is established,* and thus seems to only encompass that which the parties have thought about at that time. The principle that the contents of a servitude is determined by the intention of the parties is also repeatedly stated in case law.[324] However, the case of *Palace Properties, LLC v Sizeler Hammond Square Ltd Partnership*[325] suggests that courts are willing to approach the question of what is necessary for the use of the servitude flexibly in some instances. This shows that the seemingly rigid *ex ante* approach described by the

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[321] AN Yiannopoulos *Predial servitudes: Volume 4, Louisiana Civil Law Treatise* 3 ed (2004) § 152 426.

[322] JA Lovett "Creating and controlling private land use restrictions in Scotland and Louisiana: A comparative mixed jurisdiction analysis" (2008) 19 *Stellenbosch Law Review* 231-257 252.

[323] AN Yiannopoulos *Predial servitudes: Volume 4, Louisiana Civil Law Treatise* 3 ed (2004) § 149 419.

[324] *Burgess-Blanchard v SCIACCA* 818 So 2d 786 (La 2002), 819 So 2d 352 (La 2002) 358; *Harris v Darinn Corp* 431 So 2d 441 (La 1983) 443; *McGuire v Central Louisiana Electric Company Inc* 337 So 2d 1070 (La 1976) 1072.

[325] *Palace Properties, LLC v Sizeler Hammond Square Ltd Partnership,* 839 So 2d 82 (La 2002).

provisions of the Code is not enforced too strictly and that servitudes can adapt to changed circumstances when necessary.[326]

If a dominant proprietor uses his servitude in a manner that is more extensive than what was provided for in the originating document, he will not acquire additional rights, unless he exercises these additional rights for the period required for prescription.[327] However, it is important to note that additional rights cannot be "but an extension of the scope or manner of use of an apparent servitude"; they must be rights that can independently form the object of an apparent praedial servitude.[328]

Accordingly, it seems as though the general approach followed in Louisiana law is relatively rigid and does not easily allow an interpretation of existing rights with reference to the current context of the servitude. The strongest indication of the unwillingness of the law to accommodate changed circumstances is evident in article 752 of the Code, which provides, in the case of changed circumstances, for the "re-instatement" of a servitude that might have become redundant, if the initial conditions are re-established.[329] However, with regard to ancillary rights, the *Palace Properties* case suggests that courts are sometimes willing to follow a flexible interpretation of what is necessary for the use of a servitude. Although an actual change in the existing use of a servitude as a result of changes in surrounding conditions will not easily be accepted, the *Palace Properties* decision suggests that a flexible approach might be

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[326] See sections 3 2 3, 3 3 4 and 3 4 4 above for various references to the effects of changed circumstances on the original contents of a servitude.

[327] Louisiana Civil Code article 760; AN Yiannopoulos *Predial servitudes: Volume 4, Louisiana Civil Law Treatise* 3 ed (2004) § 136 395.

[328] AN Yiannopoulos *Predial servitudes: Volume 4, Louisiana Civil Law Treatise* 3 ed (2004) § 136 396.

[329] Louisiana Civil Code article 752.

possible in suitable cases to allow the addition of ancillary rights. As appeared from the previous section above, Reid suggests that a flexible, *ex post* approach would assume the form of a freestanding rule rather than an extensive interpretation of the servitude creating agreement. It remains unclear whether, and if so to what extent, the courts will follow the approach suggested in *Palace Properties* and confirm Reid's analysis.

3 6 Considerations in comparative view

3 6 1 Implied terms, ancillary rights and implied servitudes

In Chapter 2 it was shown that there is much confusion in South African law regarding different kinds of rights and the terminology used to describe these rights which are not in essence part of a servitude because they have not been clearly expressed or because they simply play a supporting role. South African courts use the terms "ancillary rights", "accessory rights" and "implied rights" or "implied terms" to refer to the same concept.

The comparative analysis in this chapter suggests that courts in foreign jurisdictions are more aware of the distinctions drawn between the different concepts based on the terminology used. *Ancillary rights*[330] are accepted to be rights that attach to the main servitudal rights by way of their accessory nature to render the servitude effective. Ancillary rights are sometimes accepted by courts based on the reading in of an *implied term* in the servitude deed or originating agreement – thus, based on

[330] In Louisiana law the word "accessory" is used in the Code, although case law also refers to ancillary rights.

principles of contract law. However, ancillary rights can also be created *ex lege,* not as a result of the agreement between the parties, but by operation of law, on the basis that they are necessary for the exercise of the main servitudal rights.

Implied servitudes (or easements) on the other hand, are something completely different. These are independent servitudes, which are normally created at subdivision of a property based on the necessity of the servitudal rights to fully use and enjoy the separate parts of the subdivided land.

3 6 2 General principles for the regulation of servitudes or easements

From the comparative analysis in this chapter, several similarities and differences become apparent in the way servitudes are approached in different jurisdictions. Firstly, it is noteworthy how similar the basic principles that regulate the law of servitudes (or easements) are across the four jurisdictions. Because servitudes burden land, their establishment is strictly regulated by the same rules or principles aimed at the stability of property rights. It is evident that, although not all the jurisdictions discussed in this chapter have a strict *numerus clausus* of servitudes, the principle is enforced to different extents in all of them so that only certain types of rights may be established as servitudes. Furthermore, other *ex ante* controls that limit the creation of servitudes, such as the general requirements for their valid establishment,

are also present in all four jurisdictions.[331] This *ex ante* approach reinforces the values of security and stability in property law.

In Chapter two, it was suggested that the principles that regulate the relationship between the parties to a servitude are aimed at incorporating some *ex post* controls into the regulatory framework applicable to servitudes. These same principles are also present in the foreign jurisdictions considered here. The principle that the dominant proprietor may do all that is necessary for the reasonable enjoyment of his servitude is present in all four jurisdictions, and is subject to the requirement of reasonable or *civiliter modo* exercise of the rights, with due regard to the interests of the servient proprietor. Despite the value of these principles to add a measure of flexibility to the regulation of servitudes, courts in most jurisdictions[332] approach servitudes from a predominantly *ex ante* perspective, focussing on the *numerus clausus* principle and traditional requirements and considering the moment of creation of the rights to determine their contents and decide what the effective exercise of the rights would entail. Dutch law seems to be more flexible in that courts pay more attention to the current context of servitudes in applying regulatory measures. The traditional requirements are still enforced, but the options for flexible *ex post* regulation are available and accessible.

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[331] The requirement of two properties owned by different parties; the need for one property to provide some benefit or utility to the other and the general prohibition of positive duties on the servient landowner.

[332] Dutch law is the exception, as it does not follow the tendency to view servitudes exclusively as at the moment of creation.

The *ex ante* approach is also followed in American law. However, the American *Restatement*[333] has proposed a departure from this rigid approach toward servitudes. Although the American position does not form part of the comparative analysis and is not discussed in detail, it is necessary to pay some attention to the extensive reform introduced by the *Restatement*. The aim of the *Restatement* was to adopt an approach toward servitudes in which landowners could freely create servitudes without the constraints posed by validity requirements or principles such as a *numerus clausus* of property rights. In doing so, the focus was shifted to the interpretation and implementation of existing, and still useful servitudes, and the modification and termination of servitudes that have become obsolete.[334] Changed conditions and the effect they have on servitudes are embraced and provided for in much detail.[335] French explains that this shift is aimed at a more productive use of legal and other resources in that landowners seeking to develop their land are no longer forced to spend unnecessary resources on getting around the restrictive rules of servitude law, but can rather focus on achieving the optimal development and use of land.[336] Depoorter and Parisi consider some of the reasons advocated for this shift from *ex ante* to *ex post*[337]

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[333] American Law Institute, *Restatement (Third) of Property: Servitudes: Volume 1* (2000); The Law Commission LAW COM No 327: *Making land work: Easements, covenants and profits à prendre* (2011) http://lawcommission.justice.gov.uk/docs/lc327_easements_report pdf34 para 3.35.

[334] S French "The American Restatement of servitude law: Reforming doctrine by shifting from *ex ante* to *ex post* controls on the risks posed by servitudes" in S van Erp & B Akkermans (eds) *Towards a unified system of land burdens* (2006) 109-118 112.

[335] American Law Institute, *Restatement (Third) of Property: Servitudes: Volume 1* (2000) sections 7.10, 7.11 and 7.13.

[336] S French "The American Restatement of servitude law: Reforming doctrine by shifting from *ex ante* to *ex post* controls on the risks posed by servitudes" in S van Erp & B Akkermans (eds) *Towards a unified system of land burdens* (2006) 109-118 112.

[337] See section 2 2 1 above for an explanation of the concept of *ex ante* and *ex post* regulation.

regulation of servitudes that has taken place across civil and Anglo common law jurisdictions. One of the reasons is the opinion that there has simply been a gradual corrosion of traditional property doctrines and an increase in judicial pragmatism in finding new solutions to current problems.[338] Another view was that the traditional validity requirements for servitudes and the enumerated approach towards real rights was formulated for the standard needs of rural and urban societies and no longer fits the profile of the modern economy and changing needs of society.[339] The shift to a more flexible corrective approach is said to accommodate new property needs and minimise the risk of persisting property fragmentation.[340]

Signs of this shift is apparent to different degrees in English, Scots, Dutch and Louisiana law. However, this shift has not taken place in South African law. It is suggested in the section that follows that most of the significant changes toward an *ex post* approach have been introduced by way of statutory reforms and intervention.

3 6 3 Contents and scope of servitude rights

The method followed for determining the scope of a servitude is similar in all the jurisdictions considered. Where a servitude is created by agreement, the words of the deed will be decisive in determining the content and scope of the rights, unless they are ambiguous or in some way unclear. Where there is uncertainty as to the extent of

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[338] BWF Depoorter & F Parisi "Fragmentation of property rights: A functional interpretation of the law of servitudes" (2003) 3 *Global Jurist Frontiers* 1-41 36.

[339] BWF Depoorter & F Parisi "Fragmentation of property rights: A functional interpretation of the law of servitudes" (2003) 3 *Global Jurist Frontiers* 1-41 37.

[340] BWF Depoorter & F Parisi "Fragmentation of property rights: A functional interpretation of the law of servitudes" (2003) 3 Global Jurist Frontiers 1-41 37.

the rights, other factors must be considered. However, each jurisdiction approaches this issue in its own way. English and Scots law make reference to surrounding circumstances upon creation of the servitude,[341] while Dutch law sees local custom or the manner of use that has been established over time as sources to clarify the terms of the deed.[342] The rule in Louisiana holds that where the deed does not regulate the extent and manner of use, the intention of the parties is determined in the light of the purpose of the servitude.[343] In cases where servitudes are established in a manner other than by deed, these secondary sources will determine the contents and scope of the rights.

The comparative analysis shows that English and Scots law focus on the circumstances existing at the time of creation of the rights to provide context to the words used in the deed. In Dutch law, reference is made rather to the manner in which the rights have been exercised for a certain period of time. This, along with a consideration of the local custom suggests that the content of the rights is determined with reference to current or recent and relevant circumstances. In Louisiana, the consideration of the purpose of the servitude seems to create the possibility to take account of the current circumstances in determining the scope of the servitude, but the reference to the intention of the (original) parties enforces the contractual approach followed in English and Scots law. The approach followed in Dutch law indicates a more flexible view of servitudes that is an improvement on the approach following a rigid interpretation of the contract in the context in which it was created. This addresses

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[341] See sections 3 3 2 and 3 4 3.

[342] *BW* 5:73. See section 3 2 2 above.

[343] Louisiana Civil Code article 697. See section 3 5 2 above.

Reid's concerns about the analysis of servitudal rights based on principles of contract law.[344] If a servitude is viewed within its current context (with consideration of how it has been exercised for a reasonable time or how it might be viewed in terms of local custom), factors such as changes in technology or a change in the land or needs of the parties over time can be taken into account. There is thus no need to superficially try to determine the intention of parties who might have created the rights in an entirely different context or in different circumstances. The guiding principle is then one of property law, namely effective use of the servitude.

3 6 4 Statutory interventions and reforms

In all four jurisdictions discussed here there has been some attempt at reforming the traditional law of servitudes (or easements). These reforms are aimed to a large extent at rendering the law more flexible by introducing measures of *ex post* regulation into the law of servitudes (or easements). There is a general shift from *ex ante*, categorical control measures over the creation of servitudes, to *ex post* measures that focus on the remedial control of servitudes by providing for judicial modification or termination of existing servitudes under certain circumstances.[345]

The various options for the variation of servitude rights indicate a general tendency toward greater flexibility and a departure from the traditional *ex ante* regulation of servitudes. In Scots law, the Title Conditions (Scotland) Act 2003

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[344] See section 3 4 4 above.

[345] S French "The American Restatement of servitude law: Reforming doctrine by shifting from *ex ante* to *ex post* controls on the risks posed by servitudes" in S van Erp & B Akkermans (eds) *Towards a unified system of land burdens* (2006) 109-118 112.

provides for the variation of servitudes on application by the servient property owner. In Dutch law options for the amendment or termination of servitudes by either of the parties involved are relatively easily accessible. However, the authority of courts to amend servitude rights on application of the dominant proprietor is much more limited than the options for variation or termination on application of the servient proprietor. The reason for the reluctance to allow amendments on demand of the dominant proprietor is to uphold the stability and ensure the security of the system of property law, despite the incorporation of some measures of flexibility. In English law, the proposed Law of Property Bill 2011 also includes provisions to allow for the variation and termination of easements.[346] It seems that the Bill provides for any interested person to apply for the variation or termination of rights, and it is not certain whether in balancing the interests of the parties, a variation (or termination) requested by a servient proprietor will be viewed more favourably than an application by the dominant proprietor. The American *Restatement* seems to be most favourable to the needs of dominant proprietors. According to the "changed conditions" doctrine incorporated in the *Restatement*, where conditions relating to a servitude have changed to the extent that it is "impossible as a practical matter to accomplish the purpose for which the servitude was created", a court may modify the servitude to enable the

[346] It is mentioned in section 3 3 4 (fn 151) above that the initial proposal was only to allow the variation of new easements, created after the implementation of the reforms proposed by the Commission, but that the Commission had reconsidered and now recommends that all easements, created before or after reform, should be brought within the Lands Chamber's proposed jurisdiction to discharge or modify easements, and that the 2011 Easements Bill be amended to achieve this change before its introduction into Parliament.

accomplishment of the purpose.[347] In cases where modification is not a feasible option, a court may terminate the servitude. If either of the parties might suffer harm as a result of the decision, compensation may be awarded as a condition of modifying or terminating the rights. Furthermore, if the purpose of the servitude can be accomplished, but changed circumstances have caused the servient property to no longer be suitable for the use permitted by the servitude, a court may modify the servitude to permit other uses "under conditions designed to preserve the benefits of the original servitude".[348] Apart from these specific rules, the authority granted to courts for the enforcement of servitudes also ensures flexibility. Section 8.3 (1) reads as follows:

> "A servitude may be enforced by any appropriate remedy or combination of remedies, which may include declaratory judgments, compensatory damages, punitive damages, nominal damages, injunctions, restitution, and imposition of liens. Factors that may be considered in determining the availability and appropriate choice of remedy include the nature and purpose of the servitude, the conduct of the parties, the fairness of the servitude and the transaction that created it, and the costs and benefits of enforcement to the parties, to third parties and to the public."

The *Restatement* is one of the most progressive reformative strategies that has been introduced in servitude law to date and its focus is explicitly on the shift from *ex ante*

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[347] S 7.10 (1) of the *Restatement (Third) of Property: Servitudes (2000).* See also S French "The American Restatement of servitude law: Reforming doctrine by shifting from *ex ante* to *ex post* controls on the risks posed by servitudes" in S van Erp & B Akkermans (eds) *Towards a unified system of land burdens* (2006) 109-118 113.

[348] S 7.10 (2) of the *Restatement (Third) of Property: Servitudes (2000).* Conservation servitudes held by government bodies or conservation organisations are exceptions to s 7.10 (1) and (2) and cannot be modified or terminated because of changed circumstance. S 7.11 of the *Restatement* contains specific provisions regulating these servitudes.

controls over servitudes towards easily accessible *ex post* remedies to prevent the negative effects of inefficient servitudes.

This overview suggests that there are various ways by which flexibility has been (or is in the process of being) introduced into servitude law, and it is obvious that no one system has the right answer to the problem. However, the most valuable conclusion that can be drawn from this chapter is that flexibility can be introduced into the regulatory framework of servitudes while at the same time protecting the underlying value of security so inherent in property law.

3 6 5 Final remarks

The statutory interventions that have taken place in servitude systems across different jurisdictions are indicative of the increased need for and accommodation of flexible control measures applicable to servitudes (and other limited real rights). However, these reforms have led to substantial theoretical debate and need to be considered within the wider framework of property law and property theory. This will be considered in the following Chapter.

Furthermore, this analysis leads to certain questions regarding the appropriate approach of courts to ancillary rights. Should the law adopt a narrow view of ancillary rights to limit the rights that can be grafted onto servitudes in order to render them more effective, or should a more generous perspective of ancillary rights be enforced to consider what is at any given time necessary for the effective exercise of the servitude in question? Ultimately, should courts approach servitudes in an *ex ante* manner enforcing rigid categorical controls or should they be flexible and view servitudes after their creation (*ex post*) in light of the circumstances existing at the

relevant point in time? A choice for either the narrow or rigid approach, or for more flexibility has theoretical implications and the relevant considerations in this regard are discussed in the following chapter.

Chapter 4

Theoretical considerations

Contents

4 1 Introduction

The main argument in this chapter is premised on the understanding that there are two broad approaches to servitudes. On the one hand, a narrow, rigid view of servitudes holds that they should be regulated to ensure the security of property rights and the stability of property law in general. On the other hand, there is a wider functional approach,[1] aimed not at holding servitudes to the idea of what they should be according to a description in a deed or agreement, but to what they actually are in their current context and circumstances as tools to effect the efficient use of land.

Different theoretical approaches toward servitudes are considered in this chapter, along with proposals that have been made by different scholars, to simplify and modernise the law pertaining to servitudes. The previous chapters, considering the occurrence of problems in the area of implied and ancillary rights, have highlighted the issue of changed circumstances as a significant problem in servitude law. This seems to be a result of the perpetual and largely static nature of servitudes and is amplified in modern systems of property law because of the constantly evolving nature of the economy, technology and life in general. The main question that this chapter addresses is whether it is justified to amend servitude law as it currently functions to allow for more flexibility.

From academic literature it becomes apparent that there are two very different answers to this question. On the one hand there are scholars who are of the opinion that servitudes should not be flexible and adaptable to circumstances. They hold that servitudes should continue to be created and to function as they currently do. On the

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[1] FS Cohen “Transcendental nonsense and the functional approach” (1935) 35 *Columbia Law Review* 809-849 822.

other hand, the more flexible approach is based on the notion that the system of servitude law is in desperate need of modernisation and that the old rules governing servitudes are not suitable to 21st century property arrangements.[2] From this perspective the amendment of the contents of a servitude or the termination of servitudes that no longer have real value is acceptable to the extent that it renders the land related to the servitude more efficient, thus enabling the efficient utilisation of land and, in the bigger picture, maximising the potential of servitudes to enhance property arrangements.

Both these approaches consider the fragmentation of property rights as an important underlying element of their arguments. However, they approach the issue from different ends.[3] The security-focussed school approach fragmentation rigidly and are preventatively inclined.[4] From this point of view, fragmentation can be easily limited by only allowing the creation of and protecting a specified number of servitudal rights. The more flexible view embraces the idea of *ex post* remedial solutions to fragmentation. From this perspective it is less important whether the rights created conform to a group of known servitudes. The focus is rather on creating mechanisms for the effective rebundling of rights that have been fragmented. This would include modification and termination mechanisms that could rid the system of ineffective or obsolete rights. The reasons for the shift from *ex ante* to *ex post* regulation of servitudes are much debated and are discussed in more detail below. However, the

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[2] BWF Depoorter & F Parisi "Fragmentation of property rights: A functional interpretation of the law of servitudes" (2003) 3 *Global Jurist Frontiers* 1-41 37.

[3] BWF Depoorter & F Parisi "Fragmentation of property rights: A functional interpretation of the law of servitudes" (2003) 3 *Global Jurist Frontiers* 1-41 35.

[4] BWF Depoorter & F Parisi "Fragmentation of property rights: A functional interpretation of the law of servitudes" (2003) 3 *Global Jurist Frontiers* 1-41 36.

leading proposition is that *ex ante* regulation is viewed as old-fashioned and unsuitable to modern day property arrangements.[5]

4 2 Focus on security in servitude law

Servitudes are aimed at increased utility and productivity of land in order to enhance development and continued investment. However, to achieve this, potential investors must be able to rely on the stability of the rights in which they invest. The need for stability is one of the main reasons for the objections, not only against servitudes in general, but consequently also against the modification, termination or similar forms of flexibility of the contents of servitudes.

There are different views on how to maintain stability. Some scholars argue that it could be achieved through stricter *ex ante* regulation of servitudes so as to minimise the dangers of idiosyncratic burdens on land.[6] In this view, the traditional common law limitations on the establishment of servitudes ensure personal liberty[7] and economic efficiency by only allowing objectively useful rights to be established as servitudes that run with the land.[8]

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[5] BWF Depoorter & F Parisi "Fragmentation of property rights: A functional interpretation of the law of servitudes" (2003) 3 *Global Jurist Frontiers* 1-41 36-37; S French "The American Restatement of servitude law: Reforming doctrine by shifting from *ex ante* to *ex post* controls on the risks posed by servitudes" in S van Erp & B Akkermans (eds) *Towards a unified system of land burdens* (2006) 109-118 112.

[6] U Reichman "Toward a unified concept of servitudes" (1982) 55 *Southern California Law Review* 1177-1260 125.

[7] AJ van der Walt "The continued relevance of servitude" (2013) 3 *Property Law Review* 3-35 7.

[8] J Gordley "Private modification of the right to use property: Servitudes" in *Foundations of private law: property, tort, contract, unjust enrichment* (2006) 81-102 102.

Others see these regulatory measures as an infringement of the private autonomy of the parties to a servitude and argue from a contractarian perspective that stability results from absolute private autonomy.[9] This view holds not only that parties should be allowed to contract for any agreement they wish, but that the consensus they reach to establish a servitude should create a binding and enforceable agreement. The stability of the rights are further ensured by the fact that they form part of a written agreement[10] and are, at least in most instances, required to be registered against the relevant title deeds. The exact contents and scope of the agreed upon rights are thus set out clearly in the registered deed and the certainty so created ensures secure title.

This approach holds that arguments for liberty or efficiency cannot justify the restriction of contractual freedom.[11] As long as there is no infringement of the rights of third parties, parties who wish to create a servitude are free to impose any perpetual rights they wish to bind themselves and their successors in title. The original parties are thus bound to the agreement because they bargained for and contracted into the current conditions of the servitude. All subsequent purchasers are believed to have accepted the terms of this contract in that they had notice of the existence of the

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[9] RA Epstein "Notice and freedom of contract in the law of servitudes" (1982) 55 *Southern California Law Review* 1353-1368 1358; BWF Depoorter & F Parisi "Fragmentation of property rights: A functional interpretation of the law of servitudes" (2003) 3 *Global Jurist Frontiers* 1-41 6; S Sterk "Freedom from freedom of contract: The enduring value of servitude restrictions" (1985) 70 *Iowa Law Review* 615-661 616.

[10] Most jurisdictions require transactions pertaining to land to be in writing in order to be valid.

[11] S Sterk "Freedom from freedom of contract: The enduring value of servitude restrictions" (1985) 70 *Iowa Law Review* 615-661 616; RA Epstein "Notice and freedom of contract in the law of servitudes" (1982) 55 *Southern California Law Review* 1353-1368 1358-1360.

servitudal rights at the time they acquired their entitlements.[12] The binding force of a servitude is thus a result of an entirely consensual relationship. In this view, the only need for public regulation is to provide notice by way of registration of the rights created between the parties.[13] Courts should only be involved in interpreting the terms of grants and supplementing these terms to a limited degree where they are uncertain, but should not intervene in the relationship created by the consensual agreement.[14]

Ultimately, the different approaches toward ensuring the security of property rights have different views on the role and necessity of government intervention. While the traditional view of common law regulation of servitudes depends on public regulation and the enforcement of property rules to ensure the stability and security of rights, the contractarian view, at least in its extreme form, argues for complete private autonomy.

However, both these approaches are inherently flawed. Firstly, the fact that preferences and circumstances change over time renders the stability or static nature of servitudes superficial in a sense.[15] The goal of ensuring the objective and long-term utility-enhancing effect of servitudes is undermined if they cannot be regulated *ex post*

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[12] RA Epstein "Notice and freedom of contract in the law of servitudes" (1982) 55 *Southern California Law Review* 1353-1368 1358; See GS Alexander "Freedom, coercion, and the law of servitudes" (1988) 73 *Cornell Law Review* 883-905 892-895 for criticism of Epstein's view that notice is sufficient to derive consent. See further RA Epstein "A clear view of the cathedral: The dominance of property rules" (1997) 106 *Yale Law Journal* 2091-2120.

[13] RA Epstein "Notice and freedom of contract in the law of servitudes" (1982) 55 *Southern California Law Review* 1353-1368 1354.

[14] RA Epstein "Notice and freedom of contract in the law of servitudes" (1982) 55 *Southern California Law Review* 1353-1368 1357.

[15] S Sterk "Freedom from freedom of contract: The enduring value of servitude restrictions" (1985) 70 *Iowa Law Review* 615-661 632.

when the preferences of the property owners or the circumstances applicable to the rights change. Although the parties, at creation, may be able to take account of the full extent of the burden they create (including the difficulty of modification or termination thereof), and attempt to provide for future changes, they do not have perfect foresight.[16] Just as parties cannot foresee the effects of changed circumstances on a current agreement, doctrine cannot account for all possible future events either.[17] Where circumstances change to an extent that parties have not provided for or foreseen, the argument for *ex post* government intervention is strengthened.

Furthermore, Sterk raises the question of intergenerational fairness of an approach which allows current property owners to create rights "as they wish" as long as they do not infringe on the rights of third parties.[18] The most obvious question that arises in this regard is who can be seen as these third parties and what rights are protected. The permissibility of imposing burdens on future generations should be based at least to some extent on the assumption that these burdens are freely removable. However, that is not generally the case with servitudes, and the very argument of stability of servitude rights based on binding perpetual agreements goes against the removal or modification of burdens.

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[16] S Sterk "Freedom from freedom of contract: The enduring value of servitude restrictions" (1985) 70 *Iowa Law Review* 615-661 632; S Sterk "Foresight and the law of servitudes" (1988) 73 *Cornell Law Review* 956-970 961-963.

[17] See S Sterk "Foresight and the law of servitudes" (1988) 73 *Cornell Law Review* 956-970 961-963 for an explanation of this point with reference to the implementation and inevitable change effected after implementation of the US Constitution.

[18] S Sterk "Freedom from freedom of contract: The enduring value of servitude restrictions" (1985) 70 *Iowa Law Review* 615-661 616.

Another flaw in the contractarian argument is that the parties to a servitude are bound to its terms based on their consent and that servitude law ultimately enhances private autonomy because it maximises individual preferences of land owners in how to use their land. However, Alexander argues that a choice between freedom of contract and public intervention is not equivalent to a choice between freedom and coercion, but that coercion is as prevalent in the private regulation of servitude agreements as it is in instances of public ordering.[19] Ultimately, no contractual agreement is concluded without some element of coercion, as the bargaining power between contracting parties will only be equal in exceptional circumstances. Accordingly, the argument that the intention of the original parties to the servitude, along with the notice provided to future parties by way of registration, is sufficient to prove wilful consent to the terms and creation of a servitude cannot be upheld.

4 3 Focus on flexibility

4 3 1 The need for flexibility in servitude law

The second general approach toward servitudes is aimed at a regulatory framework which focusses not so much on the potential negative effects of the burdens placed on land, but rather on maximising the positive function of servitudes as tools for increased utility and development of land as a resource. Under this approach, as under the security-focussed approach, there are varying views regarding the role of the traditional *ex ante* controls over servitudes, but the focus here is on creating flexibility

[19] See GS Alexander "Freedom, coercion, and the law of servitudes" (1988) 73 *Cornell Law Review* 883-905 900-901; S Sterk "Foresight and the law of servitudes" (1988) 73 *Cornell Law Review* 956-970 965.

by acknowledging the need for servitudes to adapt to changed preferences or circumstances in order to remain effective.

There are different ideas on how to go about implementing a measure of flexibility in modern systems of servitude law. The three ideas discussed below include firstly, the efficiency-focussed approach which is aimed at achieving optimal utility or economic efficiency from property arrangements;[20] secondly, the pliability rule approach suggested by John Lovett[21] and thirdly, the notion of property sharing as described by Rashmi Dyal-Chand.[22] Each of these theoretical views is a valuable contribution to be considered in re-evaluating or reforming servitude law to something more appropriate and applicable to the current needs of property systems.

Before considering the arguments for flexibility, a critical examination of the shortcomings of the contractarian view discussed in section 4 2 above already indicates the need for a more sensible approach toward the treatment of (limited) real rights in land. Sterk explains the three obvious responses that servitude doctrine can take toward the contractarian approach: to enforce no contractual arrangements, to enforce all contractual arrangements or, more sensibly, to enforce contractual arrangements subject to certain limitations.[23] Opting for the third, more nuanced of these options, the result is a response that strikes a good balance between, on the

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[20] BWF Depoorter & F Parisi "Fragmentation of property rights: A functional interpretation of the law of servitudes" (2003) 3 *Global Jurist Frontiers* 1-41; TW Merrill & HE Smith "Optimal standardization in the law of property: The numerus clausus principle" (2000) 110 *Yale Law Journal* 1-70; H Hansmann & R Kraakman "Property, contract and verification: The numerus clausus problem and the divisibility of rights" (2002) 31 *The Journal of Legal Studies* 373-420.

[21] JA Lovett "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Connecticut Law Review* 1-77.

[22] R Dyal-Chand "Sharing the cathedral" (2013) 46 *Connecticut Law Review* 647-723.

[23] S Sterk "Foresight and the law of servitudes" (1988) 73 *Cornell Law Review* 956-970 964.

one hand, allowing private parties to organise their own property arrangements, and on the other hand, compensating for the inability of contracting parties to foresee and effectively accommodate future needs.[24] This option is thus a more nuanced approach – a middle ground between complete freedom of contract and complete public regulation.[25] There seems to be no such thing as a *choice* between freedom and coercion as mutually exclusive elements of an agreement.[26] Similarly, Rose explains that as much as clear, crystalline rules, and muddy ambiguous rules are set up to be complete opposites, excluding each other, in reality the one always seems to include elements of the other.[27] Consequently, it might be necessary to neither allow complete freedom of contract to regulate servitude law nor regulate these rights completely by public intervention, but to rather find an appropriate middle ground allowing intervention when the failures of private planning become apparent. Sterk correctly identifies the lack of foresight by contracting parties as the culprit for such failures in

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[24] S Sterk "Foresight and the law of servitudes" (1988) 73 *Cornell Law Review* 956-970 965. See further RA Epstein "Covenants and constitutions" (1988) 73 *Cornell Law Review* 906-927, 921-923.

[25] S Sterk "Foresight and the law of servitudes" (1988) 73 *Cornell Law Review* 956-970 965.

[26] RL Hale "Coercion and distribution in a supposedly non-coercive state" (1923) 38 *Political Science Quarterly* 470-494 493. See also GS Alexander "Freedom, coercion, and the law of servitudes" (1988) 73 *Cornell Law Review* 883-905 900-901 (arguing that the enforcement of freely created contracts can include in itself elements of coercion while regulation (coercion) at the same time contains elements protecting the freedoms of private parties).

[27] CM Rose "Crystals and mud in property law" (1988) 40 *Stanford Law Review* 577-610 609: "Just as there is a version of sociability and dialogue in crystal rules, there is a version of certainty and predictability in mud rules. These reversals occur just where crystals or mud move into a genuine social context, and it is no wonder that this is the locus of the reversal. Crystals and mud are rhetorical extractions from the practices of ongoing trading relationships where the participants are likely to enjoy both upstream security as well as downstream readjustment."

private organising, but acknowledges that this is a natural and justifiable occurrence.[28] Just as parties cannot foresee the effects of changed circumstances on a current agreement, doctrine cannot account for all possible future events, but allowing flexibility in intervention might well provide a tenable solution.

4 3 2 Efficient land use: utility and economic efficiency

As has been mentioned above, servitudes are helpful and efficient tools to optimise the use of land. They allow property owners to gain valuable use rights in other properties in order to exploit the maximum potential of their own land. Their contributing value is thus clear. However, the nature of the value that can and should be drawn from servitude arrangements is viewed differently from different perspectives. Firstly, the utility-based view is aimed at obtaining optimal use from property and thus focusses on utilising neighbouring properties to the collective benefit of an efficient property system.[29] The economic view is aimed at getting the best economic return from land arrangements and the markets,[30] while other views may

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[28] See S Sterk "Foresight and the law of servitudes" (1988) 73 *Cornell Law Review* 956-970 961-963 for an explanation of this point with reference to the implementation and inevitable change effected after implementation of the US Constitution.

[29] GS Alexander & EM Peñalver *An introduction to property theory* (2012) 30; S French "The American Restatement of servitude law: Reforming doctrine by shifting from *ex ante* to *ex post* controls on the risks posed by servitudes" in S van Erp & B Akkermans (eds) *Towards a unified system of land burdens* (2006) 109-118 112; CM Rose "Servitudes, security and assent: Some comments on Professors French and Reichman" (1982) 55 *Southern California Law Review* 1403-1417

[30] TW Merrill & HE Smith "Optimal standardization in the law of property: The numerus clausus principle" (2000) 110 *Yale Law Journal* 1-70; H Smith "Property and property rules" (2004) 79 *New York University Law Review* 1719-1798; TW Merrill "Trespass, nuisance, and the costs of determining property rights" (1985) 14 *The Journal of Legal Studies*13-48; G Calabresi & AD Melamed "Property rules, liability rules, and inalienability: One view of the cathedral" (1972) 85 *Harvard Law Review* 1089-1128; JE Krier & SJ

focus more on the social obligations between the parties to deal fairly with one another in all exchanges and agreements.[31] Some commentators have concerns regarding the effects of fragmentation of property rights on markets and others simply want to remove regulatory restrictions and complications from the system of servitudes. I address these views in the discussion that follows.

From an economic point of view the main objective of legal rules is to promote an allocation of resources which will lead to the maximum productive exploitation of those resources.[32] The natural assumption would be that to reach such efficient allocation of resources would depend to a great degree on the initial assignment of entitlements.[33] However, Coase challenged this idea and came to the conclusion that, as long as transaction costs in a particular situation are sufficiently low, bargaining will lead to an efficient outcome regardless of the initial assignment of rights.[34] From a utilitarian point of view, the eventual assignment of entitlements should favour the party who values the entitlement most, as this would determine the wealth distribution in a particular system.[35] Following on Coase's ideas, Calabresi and Melamed[36]

Schwab "Property rules and liability rules: The cathedral in another light" (1995) 70 *Northwestern University Law Review* 440-483 451.

[31] J Gordley "Private modification of the right to use property: Servitudes" in *Foundations of private law: property, tort, contract, unjust enrichment* (2006) 81-102 102.

[32] TJ Miceli "Property" in Backhaus G (ed) *The Elgar companion to law and economics* (2005) 246-260 247; JL Coleman *Markets, morals and the law* (2002) 71.

[33] JL Coleman *Markets, morals and the law* (2002) 71.

[34] TJ Miceli "Property" in Backhaus G (ed) *The Elgar companion to law and economics* (2005) 246-260 247 with reference to Coase R 'The problem of social costs' (1960) 3 *The Journal of Law and Economics* 1-44.

[35] GS Alexander & EM Peñalver *An introduction to property theory* (2012) 30; TJ Miceli "Property" in Backhaus G (ed) *The Elgar companion to law and economics* (2005) 246-260 248.

[36] G Calabresi & AD Melamed "Property rules, liability rules, and inalienability: One view of the cathedral" (1972) 85 *Harvard Law Review* 1089-1128.

considered different reasons for a particular allocation of entitlements in a system and came to the conclusion that these reasons can be categorised under three headings, namely economic efficiency factors,[37] distributional preferences[38] and other justice[39] considerations.[40] However, this notion was distorted to some degree by subsequent law and economics commentators. While "Calabresi and Melamed put the various considerations on equal footing, economic efficiency somehow eclipsed the two other values".[41] This is apparent in the bulk of economically inspired literature that followed the *Cathedral* ideas.

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[37] The authors state that economic efficiency urges us to choose the set of entitlements which would lead to that allocation of resources which provided such a favourable position for those who gained from it (thus in whose favour the entitlement was assigned) that they could compensate those who lost from it and still be better off than before. See G Calabresi & AD Melamed "Property rules, liability rules, and inalienability: One view of the cathedral" (1972) 85 *Harvard Law Review* 1089-1128 1093-1098.

[38] The distributional goals considered by the authors include the distribution of wealth and the distribution of merit goods. They argue that the particular assignment of entitlements chosen by a society will depend to a large degree on what they value. They will thus choose to assign an entitlement in the direction that best promotes the wealth distribution that they favour. See G Calabresi & AD Melamed "Property rules, liability rules, and inalienability: One view of the cathedral" (1972) 85 *Harvard Law Review* 1089-1128 1098-1101.

[39] Other justice reasons was explained by the authors as including all those considerations that could not be understood in terms only of efficiency and distributional reasons. However, they emphasise that justice notions follow efficiency and broad distributional preferences as well as other more idiosyncratic ones. See G Calabresi & AD Melamed "Property rules, liability rules, and inalienability: One view of the cathedral" (1972) 85 *Harvard Law Review* 1089-1128 1101-1105.

[40] G Calabresi & AD Melamed "Property rules, liability rules, and inalienability: One view of the cathedral" (1972) 85 *Harvard Law Review* 1089-1128 1093.

[41] A Bell & G Parchomovsky "Pliability rules" (2002) 101 *Michigan Law Review* 1-79 12-13.

Apart from considering the reasons for the initial assignment of entitlements, Calabresi and Melamed created the property and liability rule paradigm which provides an economic theory of rules for the transfer of rights.[42]

According to this paradigm, the protection of property rights or entitlements (such as servitudal rights) can take place through property rules or liability rules.[43] Property rule protection entails that an entitlement is transferred, modified or terminated only through a voluntary transaction. The consent of the entitlement owner is always necessary and she will also be able to determine the value or price of the entitlement.[44] Alexander and Peñalver argue that a specific entitlement should be protected by a property rule where it is relatively certain which party values that entitlement more or where markets can easily enable the transfer of the entitlement to that person. [45] Most private property rights are accordingly protected by property

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[42] TJ Miceli "Property" in Backhaus G (ed) *The Elgar companion to law and economics* (2005) 246-260 249.

[43] G Calabresi & AD Melamed "Property rules, liability rules, and inalienability: One view of the cathedral" (1972) 85 *Harvard Law Review* 1089-1128 1089, 1093. The authors also included a discussion of inalienability rules as a third option for protecting entitlements. However, inalienability rules are different in the sense that they do not only protect entitlements but also limit or regulate the grant of a particular entitlement. According to these rules entitlements are inalienable (thus, they cannot be transferred) either under specific conditions or in general as the law prescribes. Since these rules were not really controversial in subsequent literature, they will not be discussed in much detail here.

[44] A Bell & G Parchomovsky "Pliability rules" (2002) 101 *Michigan Law Review* 1-79 3; TJ Miceli "Property" in Backhaus G (ed) *The Elgar companion to law and economics* (2005) 246-260 249; JA Lovett "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Connecticut Law Review* 1-77 9.

[45] GS Alexander & EM Peñalver *An introduction to property theory* (2012) 30.

rules.[46] Generally, the remedies applied to enforce property rules are interdicts or restoration of rights.

Liability rule protection, on the other hand, does not involve voluntary transactions and is characterised by compensatory remedies. In terms of a liability rule, a party wanting to acquire, modify or terminate a protected entitlement can pay a collectively determined price that is usually set by a court, legislator or an administrative agency, in order to acquire the entitlement without the consent of the entitlement owner.[47] The value of the entitlement is thus determined *ex post*, by an authoritative body based on objective factors, rather than by the entitlement owner herself.[48] Calabresi and Melamed explain that although a private property owner's right is protected by a property rule, a nuisance that can be justified to the extent that it escapes an injunction[49] might result in the private property right only being protected by a liability rule. A court may allow the nuisance to continue without the consent of the property owner against payment of compensation.[50]

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[46] G Calabresi & AD Melamed "Property rules, liability rules, and inalienability: One view of the cathedral" (1972) 85 *Harvard Law Review* 1089-1128 1105.

[47] A Bell & G Parchomovsky "Pliability rules" (2002) 101 *Michigan Law Review* 1-79 3; TJ Miceli "Property" in Backhaus G (ed) *The Elgar companion to law and economics* (2005) 246-260 249; JA Lovett "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Connecticut Law Review* 1-77 9.

[48] JA Lovett "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Connecticut Law Review* 1-77 9-10.

[49] A nuisance which holds sufficient public utility, for example, pollution caused by a factory which provides not only valuable products, but also provides a large number of valuable and much needed jobs to the surrounding community. See G Calabresi & AD Melamed "Property rules, liability rules, and inalienability: One view of the cathedral" (1972) 85 *Harvard Law Review* 1089-1128 1116-1120 and *Boomer v Atlantic Cement Co Inc* 256 NE 2d 870 (NY 1970).

[50] G Calabresi & AD Melamed "Property rules, liability rules, and inalienability: One view of the cathedral" (1972) 85 *Harvard Law Review* 1089-1128 1105-1106.

The result of the consent requirement inherent in property rule protection is that on the one hand, consent guarantees an efficient outcome since the parties agree to (and are thus presumed to benefit from) the exchanges that occur.[51] On the other hand, the transaction costs involved in obtaining consent may be so high that it can prevent the completion of these otherwise efficient exchanges.[52] From this, the *conventional wisdom* is derived that property rules are the preferred remedy where transaction costs are low because they facilitate mutually beneficial bargaining between private parties.[53] Liability rule protection, on the other hand, is deemed to be superior in situations where transaction costs are high[54] because it allows a court (or

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[51] TJ Miceli "Property" in Backhaus G (ed) *The Elgar companion to law and economics* (2005) 246-260 249.

[52] TJ Miceli "Property" in Backhaus G (ed) *The Elgar companion to law and economics* (2005) 246-260 249. Transaction costs are assumed to be low where the parties involved are easily identifiable and negotiation, bargaining and transfer of entitlements can take place easily. Rose distinguishes between two types of transaction costs. Type I transaction costs are incurred before the onset of bargaining and involve the costs of identifying and approaching all interested parties, while Type II transaction costs are those that impede the bargaining process itself as a result of strategic bargaining and holdout-situations.

[53] JA Lovett "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Connecticut Law Review* 1-77 14. This conventional wisdom is widely disputed by other authors. See in this regard I Ayres & E Talley "Solomonic bargaining: Dividing a legal entitlement to facilitate Coasean trade" (1995) 104 *Yale Law Journal* 1027-1117; RA Epstein "A clear view of the cathedral: The dominance of property rules" (1997) 106 *Yale Law Journal* 2091-2120; H Smith "Property and property rules" (2004) 79 *New York University Law Review* 1719-1798.

[54] See JE Krier & SJ Schwab "Property rules and liability rules: The cathedral in another light" (1995) 70 *Northwestern University Law Review* 440-483 454-455 questioning the assumption that liability rules are better applied in cases with high transaction costs. The authors contend that the assumption is based on the unsubstantiated view that courts assess damages accurately. According to them, in weighing the costs of private bargaining where transaction costs are high and the costs of judicial assessment of damages in the same situation, it cannot be assumed that judicial assessment costs will be less.

other authority) to force exchanges when bargaining is not possible.[55] On this assumption, the increased tendency of courts to apply compensatory remedies in property disputes instead of injunctory relief, is justified by reasons of efficiency.[56] However, servitudes do not necessarily conform to this idea. Transaction costs are relatively low in most praedial servitude situations as a result of the parties being easily identifiable and the initial allocation of resources already favouring the owner of the servient land.[57] On the other hand, the perpetual existence of servitudes and strategic bargaining as a result of the bilateral monopoly present in servitude situations can easily cause higher transaction costs.[58]

Calabresi and Melamed state that efficiency is not the sole ground for the shift from property to liability rules but that the reason can rather be found in the tendency of society to doubt the market valuation implicit in (*ex ante*) property rules because it

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[55] TJ Miceli "Property" in Backhaus G (ed) *The Elgar companion to law and economics* (2005) 246-260 249; A Bell & G Parchomovsky "Pliability rules" (2002) 101 *Michigan Law Review* 1-79 3; JA Lovett "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Connecticut Law Review* 1-77 14; JE Krier & SJ Schwab "Property rules and liability rules: The cathedral in another light" (1995) 70 *Northwestern University Law Review* 440-483 451.

[56] G Calabresi & AD Melamed "Property rules, liability rules, and inalienability: One view of the cathedral" (1972) 85 *Harvard Law Review* 1089-1128 1108-1110.

[57] JA Lovett "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Connecticut Law Review* 1-77 13-15; AJ van der Walt "The continued relevance of servitude" (2013) 3 *Property Law Review* 3-35 20-24. See also TW Merrill & HE Smith "Optimal standardization in the law of property: The numerus clausus principle" (2000) 110 *Yale Law Journal* 1-70 and H Hansmann & R Kraakman "Property, contract and verification: The numerus clausus problem and the divisibility of rights" (2002) 31 *The Journal of Legal Studies* 373-420.

[58] JA Lovett "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Connecticut Law Review* 1-77 13.

is often either unavailable or too expensive.[59] Instead, people prefer the collective valuation required by (*ex post*) liability rules which facilitate transactions because courts seem more efficient in establishing a fair price where parties are not willing to reveal information about their actual valuations to effectuate a transfer".[60] However, this shift in protection towards liability rules is strongly criticised by some scholars for creating instability in property law and for ultimately discouraging land development and investment.[61]

Lovett[62] emphasises the risks of a sudden shift in a system from property rule protection to liability rule protection and explains four examples of such risks. Firstly, the value assigned to entitlements by courts is superficial at best. In their evaluation of all the relevant objective factors, there is no account of the real value of property entitlements to the holder thereof.[63] Secondly, there are significant risks of extra costs and errors in the process of enforcing liability rules.[64] Just as there are obstacles to

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[59] JA Lovett "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Connecticut Law Review* 1-77 14.

[60] JA Lovett "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Connecticut Law Review* 1-77 14; G Calabresi & AD Melamed "Property rules, liability rules, and inalienability: One view of the cathedral" (1972) 85 *Harvard Law Review* 1089-1128 1110; JE Krier & SJ Schwab "Property rules and liability rules: The cathedral in another light" (1995) 70 *Northwestern University Law Review* 440-483 452 n 43.

[61] CM Rose "Servitudes, security and assent: Some comments on Professors French and Reichman" (1982) 55 *Southern California Law Review* 1403-1417; JA Lovett "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Connecticut Law Review* 1-77 48-50.

[62] JA Lovett "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Connecticut Law Review* 1-77 15-16.

[63] JA Lovett "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Connecticut Law Review* 1-77 15-16.

[64] JA Lovett "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Connecticut Law Review* 1-77 15-16.

bargaining in the property rule context, there are also impediments to obtaining, processing and calculating damages.[65] Thirdly, some scholars are of the opinion that an easy resort to liability rules will discourage bargaining and long-term planning and ultimately increase transaction costs.[66] Finally, when liability rules are applied to possessory interests (as opposed to regulating harmful externalities) they can lead to an infinite serious of takings and take-backs.[67] This can attract third parties to try to buy out rights by taking advantage of liability rules, which in turn will lead to a destabilisation of property rights. From this, it becomes apparent that liability rules are not generally superior to property rules.

From the large body of *Cathedral* literature available there are many reconceptualisations of the ideas of Calabresi and Melamed relating to property and liability rules. Krier and Schwabb[68] point out that most of the authors expanding on the initial *Cathedral* ideas have "gradually obliterated the nuanced, indeed the tentative, nature of the original analysis, substituting for it a simplistic conventional wisdom about how to assign and protect entitlements". Nevertheless, it remains necessary and insightful to consider the different conceptions which built on the property and liability rule paradigm along with other theoretical arguments.

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[65] JE Krier & SJ Schwab "Property rules and liability rules: The cathedral in another light" (1995) 70 *Northwestern University Law Review* 440-483 453.

[66] JA Lovett "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Connecticut Law Review* 1-77 15-16; CM Rose 'The shadow of the cathedral' (1997) 106 *Yale Law Journal* 2175-2200 2184.

[67] JA Lovett "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Connecticut Law Review* 1-77 15-16; CM Rose 'The shadow of the cathedral' (1997) 106 *Yale Law Journal* 2175-2200 2189.

[68] JE Krier & SJ Schwab "Property rules and liability rules: The cathedral in another light" (1995) 70 *Northwestern University Law Review* 440-483 447.

Rose explains the view of certain economic scholars that muddy, liability-type rules, providing courts with a broad discretion to intervene in order to determine and protect entitlements, are inferior because of their lack of certainty and the effect they have of discouraging investment.[69] However, in the real world, both crystal and mud rules contain an element of the other. Furthermore, "the history of property law" shows that even in instances where an active choice is made to implement one of these types of rules, a system will often sway toward the other. In her own words, "the blurring of clear and distinct property rules with the muddy doctrines of *maybe or maybe not*" is inevitable and so is the "reverse tendency to clear up the blur with new crystalline rules".[70] Relating this back to Merrill's argument, the assumption is that even where transaction costs are low, there will sometimes be cases where the law reverts back to *muddy doctrine*.[71] This is typically true in some servitude cases. Because there are generally only two parties involved, and the assignment of entitlements has been determined to favour the servient proprietor, transaction costs are expected to be low and clear property rules should apply. However, when outcomes in line with seemingly clear doctrinal rules seem unjust for social or policy reasons, these rules become instantly muddied.[72]

In the servitude context crystal rules are exemplified by the traditional rules of servitude law which regulate servitudes *ex ante*, determining beforehand what the status of a servitude is to be and denying consideration of anything falling outside

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[69] CM Rose "Crystals and mud in property law" (1988) 40 *Stanford Law* Review 577-610 609.

[70] CM Rose "Crystals and mud in property law" (1988) 40 *Stanford Law* Review 577-610 580.

[71] CM Rose "Crystals and mud in property law" (1988) 40 *Stanford Law* Review 577-610 594.

[72] R Dyal-Chand "Sharing the cathedral" (2013) 46 *Connecticut Law Review* 647-723 679; CM Rose "Crystals and mud in property law" (1988) 40 *Stanford Law* Review 577-610 594.

those boundaries or asking for an *ex post* (muddying) evaluation of the facts. In this regard, Susan French has taken the extreme view in proposing that no restrictive *ex ante* rules should regulate the creation of servitudes.[73] In her view all that should be required for the creation of a servitude is that there is a valid contract which is aimed at the creation of a servitude that complies with the formal requirements for transactions involving land.[74] French is of the view that instead of limiting the creation of idiosyncratic servitudes, the law should rather be focussed on fairly enforcing these rights created by parties while they do exist, and determining when they have outlived their usefulness and should no longer be allowed to burden property.[75] Other authors have taken more nuanced approaches toward this issue.[76] Sagaert for instance, asserts that the value of *ex ante* measures of regulation are found in the extent to which they ensure that burdens placed on land are objectively useful. [77] However, he agrees that a better way to realise the goal of continued usefulness of burdens on land would be to enable the abolishment of these rights when they become obsolete.[78]

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[73] S French 'Servitudes, reform and the new Restatement of Property: Creation doctrines and structural simplification (1988) 73 *Cornell Law Review* 928-955 948.

[74] S French "The American Restatement of servitude law: Reforming doctrine by shifting from *ex ante* to *ex post* controls on the risks posed by servitudes" in S van Erp & B Akkermans (eds) *Towards a unified system of land burdens* (2006) 109-118 112.

[75] S French "Toward a modern law of servitudes: Reweaving the ancient strands" (1982) 55 *Southern California Law Review* 1261-1319 1319.

[76] V Sagaert "The fragmented system of land burdens in French and Belgian law" in S Van Erp & B Akkermans (eds) *Towards a unified system of land burdens* (2006) 31-52 51.

[77] V Sagaert "The fragmented system of land burdens in French and Belgian law" in S Van Erp & B Akkermans (eds) *Towards a unified system of land burdens* (2006) 31-52 51.

[78] V Sagaert "The fragmented system of land burdens in French and Belgian law" in S Van Erp & B Akkermans (eds) *Towards a unified system of land burdens* (2006) 31-52 51.

Depoorter and Parisi, with their concerns regarding the fragmentation of property rights, have also emphasised the valuable role that traditional rules of servitude law can play in the fight against the excessive fragmentation of property rights, but have also expressed the opinion that these rules no longer fit the profile of the dynamic modern land economy.[79] According to the authors, servitudes by their very nature amplify the effects of fragmentation. Not only are servitudes inherently aimed at assigning different entitlements to the same property to different stakeholders, but this assignment is made upon the assumption that the rights will exist perpetually.[80] Although there are different opinions on the acceptability of such a perpetual enforcement of rights without the clearly expressed consent of successive parties, this is the manner in which servitudes function.[81]

The concerns regarding fragmentation are based on the reality that after the different sticks in the ownership bundle of rights have been assigned to different holders, it might sometimes be necessary to rebundle these rights in order to use the property effectively for a new or different purpose. However, if this rebundling is hindered by transaction costs, the land will be left underutilised and under-developed.[82] The argument is that the very aim of servitudes as tools for effective land-

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[79] BWF Depoorter & F Parisi "Fragmentation of property rights: A functional interpretation of the law of servitudes" (2003) 3 *Global Jurist Frontiers* 1-41 37.

[80] BWF Depoorter & F Parisi "Fragmentation of property rights: A functional interpretation of the law of servitudes" (2003) 3 *Global Jurist Frontiers* 1-41 20.

[81] See RA Epstein "A clear view of the cathedral: The dominance of property rules" (1997) 106 *Yale Law Journal* 2091-2120; CM Rose "Servitudes, security and assent: Some comments on Professors French and Reichman" (1982) 55 *Southern California Law Review* 1403-1417 1406-1407.

[82] BWF Depoorter & F Parisi "Fragmentation of property rights: A functional interpretation of the law of servitudes" (2003) 3 *Global Jurist Frontiers* 1-41 20; CM Rose "Servitudes, security and assent: Some comments on Professors French and Reichman" (1982) 55 *Southern California Law Review* 1403-1417 1414.

use management is thus impeded by the perpetuity of their existence. It is for this reason that many scholars have suggested that the removal of obsolete burdens should be possible. The non-consensual removal of burdens has been shown to be a necessary objective in streamlining modern property law and property development, and as seen in Chapter 3 above, various jurisdictions have enabled exactly such removal in recent reforms.[83]

The general shift that has taken place in the regulation of servitudes in an *ex post* manner[84] should be seen as an effort to "accommodate new property needs, while minimising the risk of persisting property fragmentation".[85] Depoorter and Parisi explain that although the reason for the shift is often attributed to factors such as judicial pragmatism and the general decline of traditional legal dogmas, they believe that the rigid approach of *ex ante* regulation of servitudes, which was developed to fit the standard needs of rural and urban societies at the time, is simply no longer suitable to property regimes existing in the 21st century.[86] They propose that parties should be provided with the freedom of contract to decide on the content of the property rights

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[83] S French "The American Restatement of servitude law: Reforming doctrine by shifting from *ex ante* to *ex post* controls on the risks posed by servitudes" in S van Erp & B Akkermans (eds) *Towards a unified system of land burdens* (2006) 109-118 110-114 JA Lovett "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Connecticut Law Review* 1-77 7, 55-56; BWF Depoorter & F Parisi "Fragmentation of property rights: A functional interpretation of the law of servitudes" (2003) 3 *Global Jurist Frontiers* 1-41 33-34, 37-38.

[84] BWF Depoorter & F Parisi "Fragmentation of property rights: A functional interpretation of the law of servitudes" (2003) 3 *Global Jurist Frontiers* 1-41 37-38 list the examples of these *ex post* regulatory measures as including time limits on servitudes, statutes of limitation, liberative prescription, and rules of extinction for non-use.

[85] BWF Depoorter & F Parisi "Fragmentation of property rights: A functional interpretation of the law of servitudes" (2003) 3 *Global Jurist Frontiers* 1-41 37-38

[86] BWF Depoorter & F Parisi "Fragmentation of property rights: A functional interpretation of the law of servitudes" (2003) 3 *Global Jurist Frontiers* 1-41 37.

involved and also on the remedial protection these rights will enjoy.[87] Thus, parties should with the conclusion of every individual servitude agreement be able to choose their future remedies at the time of "creating, transferring or modifying" the servitude. This could mean one of two (equally problematic) things. Firstly, the original creators of the servitude will decide on the remedial protection the rights will enjoy in perpetuity, in which case subsequent parties will be bound by this. The problem with this outcome is obvious. The second possibility is that every subsequent owner, when receiving transfer of his rights, can renegotiate the remedial protection that will be enjoyed. However, this would have the same effect of increasing transaction costs (and possibly strategic bargaining) as would a total renegotiation of rights, which would ultimately defeat the purpose of the servitude's running with the land. This is ultimately still *ex ante* regulation. It is deciding from the outset exactly what the needs of the parties (or other subsequent parties) will be over time and enabling them to only use limited remedial options to solve their problems. Because the freedom of contract is so wide it can be assumed to be enforced strictly and thus there are no options for remedies to rely on if circumstances change to a degree that was not foreseen at the time of creation of the rights.

Another manner of *ex post* regulation often suggested (and already implemented in some jurisdictions to varying extents) is imposing time-limits on the existence of servitudes. The Scottish version of this was simply to introduce a presumptive 100 year lifetime for real burdens.[88] Carol Rose has suggested that parties should be enabled to decide at the outset what the expected lifespan of the

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[87] BWF Depoorter & F Parisi "Fragmentation of property rights: A functional interpretation of the law of servitudes" (2003) 3 *Global Jurist Frontiers* 1-41 38-39.

[88] See Chapter 3 for a more detailed discussion.

rights are that they aim to create, and after the lapse of this period the rights should be renegotiated.[89] Alternatively she proposed that presumed life spans could be determined for different servitudes by the legislature. The possibility of limited duration servitudes is discussed in more detail in section 4 3 3 2 below.

Ultimately, the conclusion of the scholars arguing for greater efficiency of servitudes is that it will be reached by way of flexible, ex post regulation of these rights. The aim is to create land-use arrangements which are "secure" and accordingly able to run with the land they pertain to, but at the same time to enable the removal or modification of burdens which serve no real purpose but lead to the fragmentation of property rights.

4 3 3 The pliability rule approach

4 3 3 1 Pliability rules

Building on the property and liability rule paradigm discussed before, Bell and Parchomovsky came up with what they called a pliability rule analysis. As the word indicates, pliability rules are something in between property and liability rules and the ideas developed as a result of this analysis are aimed at addressing the inherent tensions within the system of property law.[90] Lovett expanded on this analysis and applied it to the context of servitudes.[91] It entails the protection of entitlements in a manner that allows the protection to shift from property rule protection to liability rule

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[89] CM Rose "Servitudes, security and assent: Some comments on Professors French and Reichman" (1982) 55 *Southern California Law Review* 1403-1417 1414.

[90] JW Singer *Entitlement: The paradoxes of property* (2000) 31-32, 55.

[91] JA Lovett "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Connecticut Law Review* 1-77.

protection where a certain trigger is present.[92] This approach is a more nuanced option, choosing not to follow the extremes of either property or liability rules. It takes account of the ownership-model of property,[93] but acknowledges that protecting the interests of both owners and non-owners requires property rights to be limited and regulated.[94]

4 3 3 2 Bell and Parchomovky's pliability rule approach

As explained above, Calabresi and Melamed's *Cathedral* article had a remarkable influence on academic thinking, especially in the area of law and economics. Thirty years later, Bell and Parchomovsky published an article in which they contend to add another level to the analysis of property, liability and inalienability rules set forth by Calabresi and Melamed. According to the authors, Calabresi and Melamed's framework presents a solid understanding of legal entitlements, but their own more comprehensive analysis goes further than simply the superficial dichotomy between property and liability rules, in that their analysis includes room for what they describe as pliability rules.

Bell and Parchomovsky explain that Calabresi and Melamed's paradigm depicted the law as a three-level structure, the ground level being inalienability rules, while property and liability rules symbolise the first and second floors respectively.[95]

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[92] This is simply an example to illustrate the working of pliability rules. The modes can also shift from liability rule protection to property rule protection or even from property rule protection for one party to property rule protection for the other, as will be explained later in this section.

[93] JW Singer *Entitlement: The paradoxes of property* (2000) 31-32, 55.

[94] JW Singer *Entitlement: The paradoxes of property* (2000) 19-55.

[95] A Bell & G Parchomovsky "Pliability rules" (2002) 101 *Michigan Law Review* 1-79 25.

They contend that pliability rules are the stairways and corridors that fill the spaces between these floors to connect them and ultimately provide the functional elements to enable full enjoyment of the different floors.[96] The trigger event which allows the protection mode to change from property rule to liability rule protection (or vice versa) has the effect that these rules are dynamic, changing and adapting according to the circumstances in which they function. The authors explain the application of pliability rules by way of the case of *Boomer v Atlantic Cement*[97] ("*Boomer*").[98] The case was brought on the grounds of nuisance by homeowners complaining of pollution caused by a cement factory in their neighbourhood. The homeowners sought an injunction to close down the factory and further claimed damages for harm caused to their property by the dirt, smoke and vibrations emanating from the manufacturing plant.[99] The court decided on the facts not to close down the factory but to allow it to operate, subject to the payment of permanent damages to the homeowners.[100] Considering this in view of Calabresi and Melamed's paradigm, it seems like the court was faced with a choice between property rule protection in granting the injunctive relief sought by the plaintiffs, and liability rule protection by way of the compensation order eventually decided on by the court.[101] However, according to Bell and Parchomovsky, the court could have opted for a pliability rule, combining both options for protection into one meaningful

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[96] A Bell & G Parchomovsky "Pliability rules" (2002) 101 *Michigan Law Review* 1-79 25.

[97] *Boomer v Atlantic Cement Co Inc* 256 NE 2d 870 (NY 1970).

[98] See G Calabresi & AD Melamed "Property rules, liability rules, and inalienability: One view of the cathedral" (1972) 85 *Harvard Law Review* 1089-1128 1115-1124 where the *Boomer* case is used to illustrate the workings of property and liability rules.

[99] *Boomer v Atlantic Cement Co Inc* 256 NE 2d 870 (NY 1970).

[100] *Boomer v Atlantic Cement Co Inc* 256 NE 2d 870 (NY 1970); A Bell & G Parchomovsky "Pliability rules" (2002) 101 *Michigan Law Review* 1-79 5.

[101] A Bell & G Parchomovsky "Pliability rules" (2002) 101 *Michigan Law Review* 1-79 5.

remedy where both parties are provided partial protection. They propose that a more suitable remedy could be found in allowing the operation of the factory for five more years in order to address the concerns regarding the sudden loss of a large number of jobs. The continued functioning of the factory could be made subject to the payment of damages to the homeowners, until such time as the injunction would become absolute and force the plant to close down in order to provide relief from the pollution to the homeowners.[102] In this example the pliability rule starts off with a limited-period liability protection, followed by indefinite property rule protection, with the lapse of the five-year period acting as the trigger event. According to the authors, this example is an illustration of the three common elements of all pliability rules: (1) the initial stage of entitlement protection, which can be either property or liability rule protection; (2) the triggering event; and (3) at least one more stage of entitlement protection.[103]

As normative justification for the use of pliability rules, Bell and Parchomovsky contend that there are specific conditions in which the dynamic nature of pliability rules render them superior to static property or liability rules in solving disputes.[104] The first example is conditions where policymakers can foresee the possibility of changed circumstances.[105] They state that:

> "Pliability rules allow policymakers to anticipate changed circumstances and incorporate them into a legal rule by identifying the change as the trigger that shifts protection modes."[106]

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[102] A Bell & G Parchomovsky "Pliability rules" (2002) 101 *Michigan Law Review* 1-79 5.

[103] A Bell & G Parchomovsky "Pliability rules" (2002) 101 *Michigan Law Review* 1-79 65; JA Lovett "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Connecticut Law Review* 1-77 18.

[104] A Bell & G Parchomovsky "Pliability rules" (2002) 101 *Michigan Law Review* 1-79 66.

[105] A Bell & G Parchomovsky "Pliability rules" (2002) 101 *Michigan Law Review* 1-79 66.

[106] A Bell & G Parchomovsky "Pliability rules" (2002) 101 *Michigan Law Review* 1-79 67.

They argue further that the application of either a property rule or a liability rule alone in situations of changed circumstances often leads to a loss in efficiency when the rule cannot accommodate the changed reality.[107] However, pliability rules preserve the efficiency advantages of both rules, despite the change.[108] Furthermore, where the original entitlement holder has a measure of control over the changed circumstances, as illustrated above, pliability rules have the further advantage of providing an incentive to the entitlement holder to maintain more desirable circumstances.[109] This is because of the otherwise negative effects implemented by way of the pliability rule.[110] This measure of self-regulation also adds to efficiency in economising on costs that might have been spent seeking regulatory or judicial relief.[111]

The second scenario for which the authors deem pliability rules to be well suited is situations where there is a need to balance competing interests.[112] The flexible nature of pliability rules allows for an option to satisfy opposing interests as seems most effective, without having to choose a winning and a losing interest.[113] The fact that pliability rules operate sequentially rather than simultaneously might seem paradoxical. However, it is exactly this fact that promotes an equilibrium between

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[107] See A Bell & G Parchomovsky "Pliability rules" (2002) 101 *Michigan Law Review* 1-79 67 for an illustration of this as applicable to the essential facilities doctrine.

[108] A Bell & G Parchomovsky "Pliability rules" (2002) 101 *Michigan Law Review* 1-79 67

[109] A Bell & G Parchomovsky "Pliability rules" (2002) 101 *Michigan Law Review* 1-79 67.

[110] A Bell & G Parchomovsky "Pliability rules" (2002) 101 *Michigan Law Review* 1-79 67.

[111] A Bell & G Parchomovsky "Pliability rules" (2002) 101 *Michigan Law Review* 1-79 67.

[112] A Bell & G Parchomovsky "Pliability rules" (2002) 101 *Michigan Law Review* 1-79 66. These competing interests can either be completely different objectives, such as justice and efficiency, or it could be that there are competing interests in the same land, as is often the case in servitude law or a situation such as adverse possession.

[113] This is also an important part of the property sharing perspective discussed below.

competing interests in that it creates the opportunity to consider competing interests and find a single rule best suited to strike a balance between them.

Finally, pliability rules seem to operate at an advantage in situations where it is necessary to overcome the inherent limitations of property or liability rules.[114] By employing the strong points of property rules to balance out the weaknesses of liability rules, and vice versa, the weak points of a singular approach can be overcome and a superior outcome is reached.

The authors believe that these three scenarios also enable pliability rules to facilitate planning by entitlement holders and promote bargaining between entitlement holders and potential acquirers.[115] It is further noteworthy that all three conditions mentioned can occur in servitude situations.

The main contribution of pliability rules (as opposed to property or liability rules) thus far seems to be their flexibility and the dynamic way in which they can accommodate a wide range of complicated legal situations and take account of a wider scope of entitlements involved in a particular dispute. As Bell and Parchomovsky emphasise these rules are already being implemented in different areas of the law.[116]

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[114] An example of this is found in patent law. The baseline property protection rendered to original entitlement holders allows for the absolute exclusion of third parties (for a limited time) and accordingly promotes investment and creates the perfect setting for voluntary exchange and bargaining. However, such absolute protection could easily lead to a market monopoly effecting underproduction and overpricing of resources if it is not controlled.[114] With the application of the pliability rule protection provided in patent law, this is avoided and a balance is struck by preserving the valuable investment incentive in the first stage of protection, while eliminating the possibility for monopoly in the second stage when zero-order liability kicks in. See A Bell & G Parchomovsky "Pliability rules" (2002) 101 *Michigan Law Review* 1-79 69.

[115] A Bell & G Parchomovsky "Pliability rules" (2002) 101 *Michigan Law Review* 1-79 66.

[116] A Bell & G Parchomovsky "Pliability rules" (2002) 101 *Michigan Law Review* 1-79 26.

However, they encourage a wider promotion of pliability rules and advocate for legal theory to be updated to include and expand on this concept in order to move forward.[117]

4 3 3 3 Lovett's application of pliability rules to the servitude context

In view of the new American *Restatement* of Property law,[118] Lovett considered the ideas of Bell and Parchomovsky and applied them to the law of servitudes – particularly in light of the rules proposed for regulating the relocation of an unspecified right of way.[119] Contrary to the traditional common law rule which has always applied in US law, allowing no unilateral relocation of a servitude without the consent of the servitude holder, this section adopts the more flexible approach followed by most civil law jurisdictions.[120]

Lovett explains that the value of the newly proposed rule has created great controversy among property scholars, but adds that the debate is simply "another round in the ongoing debate about the value of property and liability rules as entitlement protection mechanisms".[121] Lovett is of the view that the change brought about by section 4.8 is demonstrative of the shift that has taken place in the approach of property rights from property rule protection to liability rule protection. He

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[117] A Bell & G Parchomovsky "Pliability rules" (2002) 101 *Michigan Law Review* 1-79 78.

[118] Restatement (Third) of Property, Servitudes (2000).

[119] JA Lovett "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Connecticut Law Review* 1-77.

[120] JA Lovett "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Connecticut Law Review* 1-77 2.

[121] JA Lovett "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Connecticut Law Review* 1-77 77.

acknowledges that this shift not only creates uncertainty, but also holds other, more significant dangers and might in the long run discourage investment and effective land-use planning.[122] However, he argues that the particular shift brought about by this rule can be seen positively as enforcing a valuable change in the way servitudes are viewed.[123]

Although the assumption is that the new rule on relocation is aimed at shifting the protection mode from property rule protection in the direction of a liability rule, Lovett states that what the rule actually achieves is to create a *pliability rule* whereby the servitude holder's initial property rule protection is replaced by a liability rule which entails "compensation" in the form of the new (relocated) easement.[124]

He holds that the different reconceptualisations of Calabresi and Melamed's property and liability rule paradigm share the basic view of property rules as involving an element of voluntary action by an entitlement holder, while liability rules on the other end, entail the forceful separation of a holder from his entitlements – in other words,

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[122] JA Lovett "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Connecticut Law Review* 1-77. He identifies four risks of a sudden shift from property rule protection to liability rule protection: see section 5 3 1 above.

[123] JA Lovett "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Connecticut Law Review* 1-77 77.

[124] JA Lovett "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Connecticut Law Review* 1-77 5, 43-44. Section 4.8 reads as follows:

> 4.8 Location, Relocation, and Dimensions of a Servitude
>
> (3) Unless expressly denied by the terms of an easement, as defined in § 1.2, the owner of the servient estate is entitled to make reasonable changes in the location or dimensions of an easement, at the servient owner's expense, to permit normal use or development of the servient estate, but only if the changes do not
>
> (a) significantly lessen the utility of the easement,
>
> (b) increase the burdens on the owner of the easement in its use and enjoyment, or
>
> (c) frustrate the purpose for which the easement was created.

coercion.[125] However, Lovett states that servitude situations are different because the distinction between the voluntary and the coercive is not clear cut. In short, an acquirer of servitudal rights (as opposed to an acquirer of a thing) voluntarily enters into a "long-term relationship that necessarily will entail a degree of mutual neighbourly accommodation and liability rule regulation".[126] Accordingly, pliability rules are specifically well suited to these situations in that they are able to integrate and balance the functions of property and liability rules in a single remedy. Because pliability rules are flexible and able to adapt to different circumstances, they are perfectly applicable to the long-term nature of servitudes. Furthermore, as Bell and Parchomovsky point out, they function particularly well in situations where competing interests must be accommodated in one remedy, as is the case with servitude disputes.[127]

Based on the arguments by Bell and Parchomovsky, Lovett comes to the conclusion that the normative justification for the use of pliability rules is strongest in cases where the original entitlement holder has a measure of control over the change in circumstances that triggers the protection provided to him and weaker in situations where he has no influence over the change. Although servitudes might more often fall

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[125] JA Lovett "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Connecticut Law Review* 1-77 11-12 referring in this regard to JE Krier & SJ Schwab "Property rules and liability rules: The cathedral in another light" (1995) 70 *Northwestern University Law Review* 440-48. Also see RA Epstein "A clear view of the cathedral: The dominance of property rules" (1997) 106 *Yale Law Journal* 2091-2120.

[126] JA Lovett "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Connecticut Law Review* 1-77 11-12. GS Alexander "Freedom, coercion, and the law of servitudes" (1988) 73 *Cornell Law Review* 883-905 900-902 also remarks on this point that servitude situations are not necessarily free of coercive means simply because they involve private regulation.

[127] A Bell & G Parchomovsky "Pliability rules" (2002) 101 *Michigan Law Review* 1-79 67-68.

into the last category, Lovett asserts that pliability rules are "invaluable tools to respond to the problems and needs of parties involved in [servitude] relationships".[128]

With regard to the specific consideration of the pliability rule in section 4.8(3) of the *Restatement*, more needs to be said. According to Lovett, the new rule in section 4.8(3) is an example of a classic, simultaneous or multi-stage pliability rule, [129] as described by Bell and Parchomovsky. In the first phase, the servitude holder enjoys the entitlement of exercising his servitude in a certain location, as was initially agreed upon between the parties. This entitlement is protected by way of a property rule – this is the baseline protection. A triggering event (the need for development or normal use of the servient estate) initiates the second phase in which the owner of the servient land can obtain the entitlement to determine the location of the servitude and has to pay for the expenses of implementing this change – the liability rule phase. Furthermore, it is not inconceivable that the need to develop or use the property in a different way might arise again later. This could mean that this is a multi-stage pliability rule.

As mentioned earlier, the acceptance of this rule was (and remains) an unsettled topic in US law. Conventional lawyers prefer the traditional rule and offer a number of good reasons for their choice.[130] These include that the traditional approach,

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[128] JA Lovett "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Connecticut Law Review* 1-77 19.

[129] Bell and Parchomovsky identify six "prototypical" pliability rules, namely classic pliability rules, loperty rules, simultaneous pliability rules, multi-stage pliability rules, title-shifting pliability rules and zero order pliability rules: see A Bell & G Parchomovsky "Pliability rules" (2002) 101 *Michigan Law Review* 1-79 31-65 and JA Lovett "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Connecticut Law Review* 1-77 17.

[130] JA Lovett "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Connecticut Law Review* 1-77 20-26.

prohibiting unilateral relocation of a servitude, provides legal certainty and encourages investment by purchasers who know exactly what they buy.[131] The second argument in defence of the traditional rule is that a sudden change to allow modification would have disproportionate economic effects in that owners of servient land would suddenly gain an advantage and be in a better position economically because they will enjoy more freedom to develop and exploit their land, while owners of dominant land might suddenly be deprived of part of their initial entitlements in terms of the servitude arrangements. This could in turn affect the value of their property and they could argue that they would have paid less for the land (and will now receive less upon sale) had they known the particular details of the new relocated servitude. A third argument in favour of the traditional non-relocation rule holds that the new rule does not reach the same equality objectives as are promoted by the traditional rule. In terms of the traditional rule both parties to a servitude were restricted in terms of the ability to relocate the servitude, but the new rule maintains the restriction only for the servitude holder. The final argument that Lovett mentions in favour of the traditional approach holds that servitudes are specified property rights of which the contents cannot be violated or altered by any court.[132] This argument accords with the conservative view on servitudes that courts have no discretion to allow amendments (against the will of the parties) to rights that were specifically and consensually created, even if this could promote a more efficient use of the land involved.[133]

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[131] JA Lovett "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Connecticut Law Review* 1-77 20-21.

[132] JA Lovett "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Connecticut Law Review* 1-77 23.

[133] JA Lovett "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Connecticut Law Review* 1-77 23.

Lovett considers the effect of the new rule and the extent of the change it has brought about in diverging from the traditional common law approach. He draws the conclusion, after considering case law of different states over the last 60 years, that there has been a significant shift in the attitude of American courts toward a more flexible approach to servitudes in that they have been willing to take into account a range of policy considerations such as efficient land-use and a "doctrine of accommodation," in order to balance different interests in servitude disputes.[134] Arguments for the new rule in favour of a more flexible approach promote the idea that servitudes should not be seen as "absolute" property rights[135] but should be treated and advanced as resources to maximise the use of land.[136] This "reconceptualization of easements as property interests" is to Lovett the most convincing factor in favour of the new *Restatement*'s approach. However, he admits that the approach is inherently limited and needs to be modified into a more subtle pliability rule.[137] The three minor changes, or "refinements" that he proposes are discussed below. Lovett's arguments pertain specifically to the *change or amendment* effected by the unilateral relocation

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[134] JA Lovett "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Connecticut Law Review* 1-77 30; *Roaring Fork Club LP v St Jude's Co* (Colo 2001) 36 P 3d 1229.

[135] It is mentioned also in the references that Lovett makes to case-law, that the nature of servitudes are non-possessory, and that rendering them absolute and not amendable or adaptable, defies this characteristic: JA Lovett "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Connecticut Law Review* 1-77 37 with reference to *MPM Builders LLC v Dwyer* 809 NE 2d 1053 (2004) 1058.

[136] JA Lovett "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Connecticut Law Review* 1-77 32.

[137] JA Lovett "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Connecticut Law Review* 1-77 6 35.

of a specified servitude of right of way. His discussion can, however, add value to the consideration of amendments to servitudes more generally.

As his first *refinemen*t to the rule in section 4.8(3) Lovett proposes what he calls a two-step triggering mechanism.[138] This entails that the first phase of baseline (property rule) protection be temporally limited. Thus, for a set period of time the servitude will be protected and no modification will be allowed. After the lapse of this period, the non-consensual modification of the servitude will be possible and an accessible means will be provided by which a modification might be achieved.[139] The inspiration for this refinement came as a result of several previous suggestions by property scholars to impose durational limits on servitudes. As mentioned earlier in this chapter, Carol Rose has proposed that the parties themselves should ideally determine the expected lifespan of the particular servitude they are creating.[140] In

[138] JA Lovett "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Connecticut Law Review* 1-77 47.

[139] JA Lovett "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Connecticut Law Review* 1-77 52-55.

[140] CM Rose "Servitudes, security and assent: Some comments on Professors French and Reichman" (1982) 55 *Southern California Law Review* 1403-1417 1413-1414.

addition to this Lovett also refers to the influence of Dunham,[141] Berger,[142] Sterk[143] and Reichman[144] in support for durational limitations on the protection of servitudes.[145]

An example of a rule implementing a temporal limit on absolute protection of servitude rights is article 5:78 of the *Dutch Civil Code*, discussed in Chapter 3.[146] Confirming the position in Dutch law, Lovett states that his main motivation for this refinement is to address the critiques based on the idea that flexible servitudal rights will lead to uncertainty and discourage investment in dominant properties. He proposes a period of 30 years as appropriate for the initial protection stage[147] and concludes that the implementation of a limited-period property-rule protection phase, followed by a classic pliability rule phase, would provide clear incentives for development of dominant estates (and the easements that serve them for fixed periods of time) and yet still limit the "social deadweight loss" that can result from perpetual and exclusive property rule protection.[148]

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[141] A Dunham 'Statutory reformation of land obligations' (1982) 55 *Southern California Law Review* 1345-1352 1351.

[142] CJ Berger "Some reflections on a unified law of servitudes" (1982) 55 *Southern California Law Review* 1323-1338 1330.

[143] S Sterk "Freedom from freedom of contract: The enduring value of servitude restrictions" (1985) 70 *Iowa Law Review* 615-661 656.

[144] U Reichman "Toward a unified concept of servitudes" (1982) 55 *Southern California Law Review* 1177-1260 1256.

[145] JA Lovett "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Connecticut Law Review* 1-77 50-52.

[146] See section 3 3 1 (fn 67) above.

[147] JA Lovett "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Connecticut Law Review* 1-77 53.

[148] JA Lovett "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Connecticut Law Review* 1-77 54-55.

The second refinement proposed by Lovett is incorporation of judicial involvement in the process of relocation (or amendment, if this is considered in more general terms). In other words, after the first stage of supreme protection has lapsed, and amendment has become possible, he suggests that amendment must be subject to judicial authorisation, in the form of a declaration of compliance with the requirements set in section 4.8(3).[149] Lovett mentions in this regard that the authoritative body providing this declaration need not necessarily be a court, but can be an independent body duly authorised with the necessary jurisdiction to make these decisions.[150]

Thirdly, Lovett proposes the possibility of awarding additional monetary compensation to a party who does not receive any gain from the amendment of the servitude. He explains that the motivation behind this proposal is to prevent situations where one private party captures all the economic gain of a unilaterally imposed transaction.[151] Where a servient land owner seeks a relocation of a servitude in terms of section 4.8(3) he will necessarily gain from such relocation, while the relocation of the servitude to a position that is equally suitable for the purposes of the dominant land owner holds no real gain for the latter. However, if the parties had been forced to bargain for their respective interests, the dominant owner would likely have bargained

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[149] See fn 124 above for the requirements set out in s 4.8(3). The same measure has been incorporated in South African Law by the decision in the case of *Linvestment CC v Hammersley* 2008 (3) SA 283 (SCA).

[150] He makes reference in particular to the Lands Tribunal in Scotland as an example of a quasi-judicial institution. See section 3 4 4 above for a discussion of the authority of the Scottish Lands Tribunal in the variation and termination of servitudes.

[151] JA Lovett "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Connecticut Law Review* 1-77 64.

for a better position.[152] Accordingly, Lovett's suggestion of allowing a judicial authority to award premium compensation, will prevent these unfair advantages and will further provide the possibility for decision makers to take into account any subjective factors that might be relevant to the specific circumstances and which could cause a dominant owner to place a higher value on his entitlements than may be expected.[153] Apart from providing protection to easement holders from being exploited by servient land owners who want to gain exclusively from land re-arrangements, this refinement will have the added effect of providing an incentive to servient land owners to bargain with their neighbours for the outcome they desire, rather than applying to a judicial authority that might award compensation to the other party for (even subjective) losses.[154] Introducing the option of premium compensation will align the relocation rule with the other sections of the *Restatement* advancing the idea of modification and termination of servitudes in general.[155] These sections seem to promote a "judicial flexibility" in the available remedies and, when considered in line with Lovett's approach, the framework for effective pliability rule problem solving is already available throughout the *Restatement*.[156]

Lovett's contribution is thus to recognise and implement pliability rules to reach remedial outcomes which are flexible and do not simply provide blunt remedies based

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[152] JA Lovett "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Connecticut Law Review* 1-77 64.

[153] This is one of the risks of a shift toward liability rules discussed in section 5 3 2 above.

[154] JA Lovett "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Connecticut Law Review* 1-77 70.

[155] Section 7.10(1) allows courts to wards compensation for harm resulting from an order for modification or termination of servitudes.

[156] JA Lovett "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Connecticut Law Review* 1-77 71-72.

on title without further consideration of options that could better suit the needs involved in a particular situation.[157] This ties in with the objectives of the interest-outcome approach that is discussed in the following section relating to property sharing. Both these approaches aim to find just and pragmatic solutions to property disputes, without being inhibited by the rigidity of a system that only considers limited, known remedies. While Lovett's pliability approach is motivated by efficiency, the interest-outcome model aims to take account of the moral and social elements present in property disputes.

4 3 4 The interest-outcome perspective

The final perspective to be considered under the flexible approach to servitudes is the interest-outcome model proposed by Rashmi Dyal-Chand.[158] Dyal-Chand summarises the essence of the model as follows:

> "The interest-outcome approach is a means of resolving property disputes where more than one legitimate interest exists concerning use, possession, or access to a piece of property and where such interests are represented in the form of conflicting positions concerning the property".[159]

She discusses a number of cases relating to nuisance law, adverse possession and implied easements and argues that judges are intuitively inclined to "sharing" remedies

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[157] The discussion of Bell and Parchomovsky's proposal of how the court could have approached the *Boomer* case provides a good example contrasting the blunt remedies courts often choose to the flexible ones that pliability rules could allow them to implement. See section 5 3 2 1 above for this discussion. See further A Bell & G Parchomovsky "Pliability rules" (2002) 101 *Michigan Law Review* 1-79 5.

[158] R Dyal-Chand "Sharing the cathedral" (2013) 46 *Connecticut Law Review* 647-723.

[159] R Dyal-Chand "Sharing the cathedral" (2013) 46 *Connecticut Law Review* 647-723 677.

in resolving disputes justly. However, their options of remedies are limited by doctrine and this does not leave room to address the specific situation at hand to reach the best outcome.[160] The aim of her article, Dyal-Chand states, is to *respond* to this impulse to create or implement remedies that allow the sharing of property.[161] She considers property disputes in a new light by proposing that they be resolved on the basis of a new or rearranged set of values. She contrasts the notion of property sharing with the current exclusionist view of property,[162] and places the ideal of sharing at the top of her value-hierarchy.

The interest-outcome model draws inspiration from a variety of different movements such as the common law writ system, negotiation theory and the property and liability rule paradigm as well as the view of the legal realists.[163] Dyal-Chand further considers the criticism of the progressive property scholars on the lack of moral integrity in the efficiency view of property, and develops the interest outcome approach as an alternative which is, in Van der Walt's words, "explicitly informed by notions of morality, fairness and distributive justice".[164]

Stacking these building blocks together, Dyal-Chand constructs a model which is aimed at providing more equitable outcomes than the *winner-takes-all* type of results

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[160] R Dyal-Chand "Sharing the cathedral" (2013) 46 *Connecticut Law Review* 647-723 683-700.

[161] R Dyal-Chand "Sharing the cathedral" (2013) 46 *Connecticut Law Review* 647-723 653, 683-684.

[162] JE Penner *The idea of property in law* (1997) 68–74; TW Merrill "Property and the right to exclude" (1998) 77 *Nebraska Law Review* 730-755 730-731.

[163] R Dyal-Chand "Sharing the cathedral" (2013) 46 *Connecticut Law Review* 647-723 663 674 with reference to OW Holmes "The path of the law" (1897) 10 *Harvard Law Review* 457-478, republished (1997) 110 *Harvard Law Review* 991-1009.

[164] R Dyal-Chand "Sharing the cathedral" (2013) 46 *Connecticut Law Review* 647-723 675; AJ van der Walt "Sharing servitudes" (2016) (forthcoming) 4.

yielded by an exclusionist view of property. [165] Not only does she try to provide parties who can show legitimate interests with some stake in the property they are pursuing, but she also aims to provide a route to allow the natural instincts of judges to manifest in real remedies. She discusses examples where judges instinctively feel the urge to provide the very remedies that she proposes but "lack the vocabulary and remedial building blocks to prioritize sharing as a practice and norm".[166]

Practically, the model proposes three steps or phases in the resolution of disputes. The first step is to determine what the legitimate interests of interested parties are in relation to the property in dispute.[167] To determine legitimate interests, courts need to consider not only the actual and intended uses[168] of the property by a party, but also how such use is perceived by outsiders.[169] In this evaluation, a myriad of different factors must be considered, including the subjective needs of parties and their moral ties to the property at hand.[170] The aim of this step is ultimately to gain information that could enable a court to accommodate different uses of the property based on the needs and intentions of the parties.[171]

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[165] R Dyal-Chand "Sharing the cathedral" (2013) 46 *Connecticut Law Review* 647-723 655, 677.

[166] R Dyal-Chand "Sharing the cathedral" (2013) 46 *Connecticut Law Review* 647-723 655.

[167] R Dyal-Chand "Sharing the cathedral" (2013) 46 *Connecticut Law Review* 647-723 677.

[168] The consideration of intended use is aimed at facilitating long-term planning, protecting the current reliance interest of the parties and at a fair evaluation of compatible uses.

[169] See R Dyal-Chand "Sharing the cathedral" (2013) 46 *Connecticut Law Review* 647-723 707-708 (explaining that the consideration of perceived use will include contemplation of the needs of the community concerning the specific type of property, the current development trends relating to such property, and the ways in which the type of property supports local and regional economic development).

[170] R Dyal-Chand "Sharing the cathedral" (2013) 46 *Connecticut Law Review* 647-723 707-708.

[171] R Dyal-Chand "Sharing the cathedral" (2013) 46 *Connecticut Law Review* 647-723 708.

The second step is to consider the possible outcomes that would best suit each party's interests.[172] Based on the legitimacy of the interests determined in the previous phase, this part of the process is aimed at developing an outcome (preferably in the form of injunctive relief) that suits and accommodates the specific situation of the parties, that is nuanced to their needs and can effectively solve their dispute.[173] Dyal-Chand emphasises the importance in this phase to view *use* not as one of the factors considered in determining an appropriate outcome, but as an outcome in and of itself.[174] The ideal would be for courts to create solutions encompassing shared use of property that could satisfy the needs of both parties in a dispute.[175]

The third step of the process includes a consideration of ownership and other formal entitlements to evaluate their relevance and determine the weight they will carry in guiding a court toward the most appropriate outcome in a particular dispute.[176] Dyal-Chand proposes that the use-considerations in the previous two steps should have revealed the moral connection of the parties to the property. The result is that these moral connections should inform the weight of the formal entitlements to the property in determining an appropriate remedy. The stronger the moral and personal connection to the property, the stronger the protection a party will enjoy.[177] In the same

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[172] R Dyal-Chand "Sharing the cathedral" (2013) 46 *Connecticut Law Review* 647-723 677.

[173] R Dyal-Chand "Sharing the cathedral" (2013) 46 *Connecticut Law Review* 647-723 710-712.

[174] R Dyal-Chand "Sharing the cathedral" (2013) 46 *Connecticut Law Review* 647-723 711.

[175] See R Dyal-Chand "Sharing the cathedral" (2013) 46 *Connecticut Law Review* 647-723 where it is stated that: "[T]he simultaneity of uses is possible in more settings than those involving investors on the one hand and those making physical use of the property on the other. Even in the case of an owner with a strong moral connection to a particular parcel of land, it is quite likely that such an owner would not require the use of her property down to the 'centre of the earth', and that a court could find ways in which to accommodate other uses beyond the limitations imposed by traditional implied easements."

[176] R Dyal-Chand "Sharing the cathedral" (2013) 46 *Connecticut Law Review* 647-723 677.

[177] R Dyal-Chand "Sharing the cathedral" (2013) 46 *Connecticut Law Review* 647-723 714.

sense, if the moral connection to the property is weak, a party might lose certain use-rights and be required to share the property with a party who has obtained some legitimate interest in the property. The result of this phase of dispute resolution is a reversal of the traditional approach in which title is first established and remedies assigned based on the strongest right. What Dyal-Chand aims to achieve is a system where the remedy is determined based on the legitimacy of a party's interest in the property, and thereafter, entitlements are assigned to the parties based on the appropriate remedy decided on by the court.[178]

Dyal-Chand acknowledges that there are certain challenges to the model, the most significant of these probably being that the model would create uncertainty and unpredictability of property rights and that this would cause market instability.[179]

Van der Walt applies this sharing perspective to the context of South African servitude law.[180] What becomes apparent through this practical application is that although considerations of morality and fairness or "equity" might require a wider range of remedies to enable fair outcomes, the law does not always provide these remedies. One of the examples Van der Walt refers to is the case of *Roseveare v Katmer,*[181] an

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[178] R Dyal-Chand "Sharing the cathedral" (2013) 46 *Connecticut Law Review* 647-723 715.

[179] R Dyal-Chand "Sharing the cathedral" (2013) 46 *Connecticut Law Review* 647-723 681. Dyal-Chand explains the view of law and economics scholars based on the notion that low transaction costs exist where exclusive ownership is easily ascertainable and clear-cut. On the other hand, where exclusive ownership is not as easily determined, as would be the case in a system of property sharing, transaction costs are drastically increased. She further states that according to HE Smith "Property and property rules" (2004) 79 *New York University Law Review* 1719-1798 1754-1755 & 1763-64 it would be too costly for anyone other than the owners of property to identify and allocate different property uses to different entitlement holders.

[180] AJ van der Walt "Sharing servitudes" (2016) (forthcoming).

[181] *Roseveare v Katmer* [2013] ZAGPJHC 18 (28 February 2013).

encroachment case in which the court found that the solution to an existing encroachment dispute was to leave in place the minimal encroachment and order the registration of a servitude over the affected land.[182] Although courts have the authority to leave an encroachment in place,[183] the authoritative grounds for the creation of a servitude in this manner, against the will of the servient owner, is unclear.[184] Apart from the creation of a right of way of necessity or an order establishing a servitude acquired through prescription, there is no common law rule providing courts with the authority to order the creation of a servitude.[185] However, in this case Willis J makes the following statement:

> "I have applied my mind to the question of whether a little 'judicial imagination' may be appropriate in making the order in this case. Is there a way in which one can resolve this dispute that is correct and defensible as a matter of law but is one which, as an instrument of conflict resolution, 'sonde met die bure' may be transformed into 'vrede met die bure'?" [186]

From this statement, it seems as though Willis J is doing to a large extent what Dyal-Chand calls for in her sharing approach. He aims to resolve the dispute between the parties in a manner that would result in a peaceful continuation of their neighbourliness, and in doing so, he enforces a remedy that seems most likely to reach

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[182] *Roseveare v Katmer* [2013] ZAGPJHC 18 (28 February 2013) para 22.

[183] ZT Boggenpoel "Creating a servitude to solve an encroachment dispute: A solution or creating another problem?" (2013) 16 *Potchefstroom Electronic Law Journal* 455-486 459.

[184] ZT Boggenpoel "Creating a servitude to solve an encroachment dispute: A solution or creating another problem?" (2013) 16 *Potchefstroom Electronic Law Journal* 455-486 472; AJ van der Walt "Sharing servitudes" (2016) (forthcoming) 32.

[185] AJ van der Walt "Sharing servitudes" (2016) (forthcoming) 32-33.

[186] *Roseveare v Katmer* [2013] ZAGPJHC 18 (28 February 2013) para 18.

this outcome. Whether this is an approach we want courts to follow in South African law, is a different question.

The value that I believe should be drawn from the property sharing perspective lies in the consideration of the different interests of the parties involved, as embodied in their respective uses of the property. Servitude cases, always entail the sharing of property and courts have a discretion to weigh the interests of the parties and reach an outcome favouring one set of interests above another. Dyal-Chand's suggestions urging judges to take account of wider moral interests and subjective factors of the parties involved in a dispute can add value to servitude cases. Van der Walt also emphasises Dyal-Chand's focus on actual use of the property by the parties.[187] If these considerations are taken into account along with economic and other utilitarian factors in the exercise of judicial discretion, the possibility for fair and justifiable outcomes will increase – even if courts do remain bound by the remedial framework that they have at their disposal.

4 4 Conclusion

The aim of the traditional requirements for the establishment of servitudes is to limit the rights which can burden properties perpetually. The effect is that all those rights which do not seem to be objectively useful and might not be regarded as beneficial by future owners, are filtered out. Nevertheless, it became apparent in Chapter 3 that even though these rights are so strictly regulated at establishment, various jurisdictions are struggling with burdens that are created, and accordingly, remain valid

[187] AJ van der Walt "Sharing servitudes" (2016) (forthcoming) 13-18.

over properties, but of which the value that they add to the property is in dispute. In this chapter, different theoretical views have showed that unwanted burdens over property are obstacles to the free and efficient development of land.

There are different approaches toward servitudes that aim first and foremost to protect the stability of property law and ensure security of title. These arguments are aimed at either increasing the *ex ante* controls over the creation of servitudes, or by rendering the law of servitudes free of public regulation as long as notice (by way of registration) is ensured. However, both these approaches are inherently flawed as they do not properly take account of the character of servitudes as property rights in a modern and dynamic property economy. Accordingly, this approach does not enjoy much support from the majority of property scholars as the need for flexibility in property relations currently outweighs the arguments for adherence to such a rigid approach.

The much wider range of literature from various jurisdictions relating to the modernisation of servitude law by adding a measure of flexibility indicates an acknowledgement of the fact that preferences and circumstances relating to property change, and that property law is not isolated from this reality and must be able to adapt.

The economic and utilitarian point of view shows that a shift has taken place in recent years towards a tendency of applying compensatory remedies to property disputes in general, but also to servitude disputes in particular.[188] This shift has brought about a certain reconceptualisation of servitudes to be viewed not as the

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[188] JA Lovett "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Connecticut Law Review* 1-77 77.

unchangeable and static property rights they once were, but as evolving property relationships between parties with concurrent interests in the same land.[189] Accordingly, the need has arisen to also adapt the way in which these rights are regulated. To respond to their capacity to evolve, there should be mechanisms to re-evaluate the status of servitude rights after their creation and reconsider the value that they add to property arrangements in an *ex post* manner.

One of the main concerns highlighted from different theoretical perspectives is that of property fragmentation, or more generally, the problem of obsolete burdens on properties curtailing development of and investment in land. There seems to be wide-ranging support for enabling the removal of burdens, although the ways suggested to enforce such removal differ. However, the conclusion that can be drawn from the different perspectives is that the incorporation of flexibility into the regulation of servitudes does not have to mean sacrificing security or stability in the property system.

Much of the literature on this topic is approached from a utilitarian perspective, focussed often on economic or other wealth-maximising outcomes. This is not necessarily the most desirable approach. In the democratic society we live in, we need to take stock of the values of individuals and the standards of morality and fairness that drive our society.

Lovett's pliability rule approach is a good example of how existing property law remedies can be applied in a manner that accommodates both the security provided by property rule protection and the necessesary flexibility that is incorporated by

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[189] JA Lovett "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Connecticut Law Review* 1-77 77.

allowing a shift towards liability rule protection where this is necessary in order to avoid typical *winner-takes-all* outcomes. Furthermore, the possibility for courts to award premium compensation in certain instances to equalise the outcomes of coersive remedies can be a valuable tool to provide the balance between security and flexibility in servitude law. Furthermore, in considering compensation awards, courts should take account of the values advanced by Dyal-Chand's interest-outcome model.

The value of the interest-outcome model lies in its emphasis of the fact that formal title to property should not be accepted to trump all other interests and lead to blunt exclusion remedies. Because servitudes always involve the sharing of property, and entails a weighing of the interests of the parties to reach a justifiable outcome, a consideration of wider interests such as the actual use of the property and other subjective and moral interests relevant in a dispute can enhance the remedial process.

By way of summary, a number of conclusions can be drawn from this chapter. The more general conclusion is that it is possible to introduce flexibility into property law without sacrificing the security of existing rights. Furthermore, a number of conclusions have particular relevance to the area of servitude law. Some of the strategies used to implement flexibility in servitude law are relatively easily justifiable. In this regard the unilateral relocation of a servitude of right of way is theoretically easily justified - especially in light of the conditions and limitations that Lovett suggest as *pliability rule refinements*. However, in other cases, where the need for flexibility is stronger than the need to ensure the security of existing rights, even though the theoretical justifiability is not as strong, compensation can play an important role in restoring the balance between these values. Finally, Dyal-Chand's argument that the sharing of property can and should lead to more efficient use of land if it is approached from the right perspective, can also play a valuable role in servitude law. As mentioned

before, servitudes always require the sharing of property, and Dyal-Chand's arguments increase the need to ensure that servitudes function efficiently.

Chapter 5

Conclusions in light of the Constitution

Contents

5 1 Introduction

> "The accommodation of change is a continuing challenge that we, as human beings, face. On the one hand, we crave the novel, the better, the excitement of something new. On the other hand, we seek security, the guaranteed, the comfort of what is known. Tensions between these human impulses can be found throughout law."[1]

In Chapter 2 it was established that South African law follows a relatively conservative approach toward servitudes. According to this approach, servitudes are regulated in a predominantly *ex ante* manner, primarily by limiting the rights that may be established as servitudes, with the goal of minimising the burdens on property that might detract from the unity of ownership. For the most part, servitudes are given content with reference to the wording of the deed of servitude, interpreted in light of the circumstances existing at the time the right was created. By their very nature, servitudal rights are created to outlive property owners and they often exist for a very long time. Consequently, regulating these rights in an *ex ante* fashion, with the point of departure being the time of establishment, is problematic and might lead to inefficient use of land as a valuable resource.

This chapter explores the implications of the comparative and theoretical views on the regulation of servitudes. Since the topic of this research is focussed specifically on ancillary rights to servitudes, that will be the basis of the discussion that follows. It has been established earlier in this dissertation that South African law does not accept the doctrine of implied servitudes as it is recognised in English and Scots law (or the

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[1] LS Underkuffler "Property and change: The constitutional conundrum" (2013) 91 *Texas Law Review* 2015-2037 2036.

doctrine of destination in Louisiana law).[2] Implied servitudes and servitudes created by destination are considered in Chapter 3 simply to distinguish these rights, and the law that regulates them, from implied ancillary rights and because there are some aspects of the law of implication that are interesting and helpful in a discussion of implied ancillary rights. The focus is thus on ancillary rights and, where relevant, implied ancillary rights.

The South African law relating to ancillary rights is not currently applied with much consistency. It was established in Chapter 2 that the terminology employed by courts include references to "implied terms", "implied rights" and ancillary rights (occasionally called accessory or auxiliary rights) and is used interchangeably to refer to the same type of rights – those resulting from the maxim that all the rights necessary for the effective exercise of a servitude are deemed to be granted along with it.[3]

By placing these inconsistencies in South African law in perspective against the foreign jurisdictions considered, it becomes apparent that two types of (implied)

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[2] Section 2 6 above contains an overview of the supplementary rights accepted in South African servitude law.

[3] The law relating to implied servitudes in the foreign jurisdictions considered, is discussed to reach clarity on the confusion of the references in South African law to "implied terms" or implied rights" in relation to implied ancillary rights. South African law does not acknowledge the creation of servitudes by way of implication as it is seen in the foreign jurisdictions considered. The closest comparison to the implied servitudes discussed under foreign jurisdictions is an implied right of access which is created when a property is landlocked, either by way of the rules of right of way of necessity or upon subdivision of a property, where implied consent is read into the terms of the subdivision to provide access over one part of the subdivided property to the part of the land that is now cut off from access to a public road, although this second method is disputed. (See section 2 2 (fn 5) above for a discussion of this method of implication). Since a right of access from a landlocked property to a public road is rather a servitude created by necessity, it cannot be said to constitute an implied servitude as known in English, Scots and Louisiana law. See on this point C Sara *Boundaries and easements* 5 ed (2011) 295; DJ Cusine & RRM Paisley *Servitudes and rights of way* (1998) 286-287, 367-368.

ancillary rights can be identified. The first type includes those rights that are always implied by law to form part of certain servitudes; for example, in the case of a servitude to draw water, a right of access to the water source or a right to inspect the pipes carrying the water will always be implied.[4] These ancillary rights can be seen as forming part of the *naturalia*, or the expected implied contents of all servitudes of a certain type. An access right to the servitude works in order to perform maintenance duties will be implied as an ancillary right to most servitudes. A number of other specific examples are mentioned by the Roman-Dutch writers.[5] The right to draw water always includes an ancillary access right to the water source;[6] and where only an access right to a water source is granted, it can be assumed that a right to draw water is implied.[7] Furthermore, a servitude of pasturage or watering of cattle could include the right to erect a hut on the servient land to provide shelter in case of storms;[8] and a right of way includes the right to build steps or ramps in order to reach the dominant property from the servitude road or path, while a servitude of footpassage includes the right to build bridges and other structures to make the route properly accessible.[9]

The second type of ancillary right is more controversial. Based on Voet's maxim that all rights necessary for the effective exercise of a servitude are deemed to be granted along with it, this type of ancillary right includes any right which is necessary

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[4] Voet 8 4 16; D 8 3 3 3; Huber *Hedendaegse rechtsgeleertheyt* 2 43 16.

[5] See section 2 5 above for a detailed discussion.

[6] D 8 3 3 3.

[7] D 8 3 3 3.

[8] D 8 3 6; R Paisley "The demon drink and the straight and narrow way: The expansion and limitation of praedial servitudes" in H Mostert & MJ de Waal (eds) *Essays in honour of CG van der Merwe* (2011) 193-237 234.

[9] Voet 8 4 16.

in a particular instance for the effective enjoyment of the main servitudal right.[10] What is necessary in a particular instance will depend on the circumstances surrounding the servitude. The controversy surrounding these rights is rooted in the difficulty of determining when rights will be regarded as sufficiently necessary to be accepted as ancillary rights without requiring a modification or renegotiation of the servitude.

Options for the possible development of the common law in this area are discussed in Chapter 3 and Chapter 4, from a comparative and theoretical perspective respectively. In the South African context, the Constitution plays a crucial role in any development of the law, and a constitutional analysis of possible developments is thus necessary to ensure alignment within the single-system-of-law principle under the Constitution. The constitutional aspects are discussed in section 5 5 below.

5 2 The problem of rigidity in the South African law of servitudes

In Chapter 2, a survey of the South African law of servitudes reveals that the current approach toward the regulation of servitude rights is not only uncertain and outdated, but also problematic in view of the modern function of property.[11] Very little provision is made in South African law for the flexible regulation of servitudes.

It is important to mention that there are areas in foreign law where measures for flexible regulation have been put in place which are not necessary in South African law because the same problems are solved by different means. The function of implied servitudes (or servitudes by destination) at subdivision of land is fulfilled in South

[10] Voet 8 4 16.

[11] See section 2 7 above.

African law by the right of way of necessity to solve the problem of inefficient use of land after subdivision. Furthermore, the possibility of unilateral relocation of right of way servitudes did not previously exist in South African law, but has been provided for by the development effected in the case of *Linvestment CC v Hammersley.*[12] This matter has also been dealt with in literature to some extent.[13]

Apart from these instances there remains a need for possibilities of flexible *ex post* regulation of servitudes in South African law. The particular questions that I address include the possibilities for the acceptance of new ancillary rights to render servitudes more flexible in light of changed circumstances; the amendment of existing servitudes or ancillary rights for the same purpose; and the possibility for the termination of rights that have become obsolete or inefficient.

The common law principles that currently regulate servitudes can roughly be divided into two general categories: those that focus on maintaining stability in the property system and those aimed at regulating the continued relationship between the parties to a servitude. The former set of principles function primarily through limiting the establishment of servitudes by enforcement of *ex ante* controls, such as the validity requirements and the subtraction from the dominium test, to ensure clarity and security of title; the latter is aimed at ensuring that the on-going relationship between the parties to a servitude is based on the principle of reasonableness. A servitude holder is required to exercise his rights *civiliter modo*, with due regard for the interests of the servient proprietor. In this way a servient proprietor is provided protection of his

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[12] *Linvestment CC v Hammersley* 2008 (3) SA 283 (SCA).

[13] LA Kiewitz *Relocation of a specified servitude of right of way* (unpublished LLM thesis, Stellenbosch University, 2010); AJ van der Walt "Development of the common law of servitude" (2013) 130 *South African Law Journal* 722-756.

property interests. On the other hand, the dominant proprietor enjoys the right to do all that is necessary (and thus enjoy all necessary ancillary rights) to make effective use of his servitude. Ancillary rights can therefore be "implied" as part of servitude arrangements insofar as they are necessary for the effective exercise of the servitude.[14] However, these principles are often employed in a manner that effectively defies their purpose as forward-looking, *ex post* regulatory controls.[15]

Examples in case law show that the principles intended to govern the relationship between the parties are not applied in the flexible *ex post,* "after the fact" manner that can enable them to provide adequate continued regulation of the servitude relationship. When courts do not find a sufficient solution by applying the basic common law principles of servitude law, they often try to find a solution by shifting their focus to the originating document in order to gain more information on exactly what the contents and scope of the rights are.[16] In doing so, they tend to overemphasise the role of the originating agreement and by focussing their attention on the time of establishment of the rights, they again approach these rights from an *ex ante* point of view. The outcome is that courts determine "what is necessary for the effective use of the servitude" not in light of current circumstances, but by looking back at the intention of the original parties and the circumstances existing at the time the rights were granted. Not only is it often impossible to do so due to the long time lapse since the creation of the rights, but it is also impractical in a modern and dynamic society where preferences and circumstances are expected to change over time.

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[14] See section 2 6 above.

[15] See sections 2 4 and 2 7 above.

[16] See section 2 5 above.

Courts have stated in various cases that this approach is based on the contention that the same rules apply to the *interpretation* of servitudes as to the interpretation of contracts.[17] However, in the process of determining the content and scope of a servitude, the interpretation of the originating document or deed can only be one of various factors that a court should take into consideration, as the outcome should not be a contractual one, but a fair determination of the contents of a real right. However, courts seem to often confuse the idea of "interpreting a servitude" (determining its contents) with interpreting the words of the originating document. These are two different things as the former relates to real rights in land, and the latter to purely contractual rights.

The case of *Zeeman v De Wet*[18] provides a good illustration of this point. The parties in this case were owners of two neighbouring farms. The dominant property, owned by Zeeman, enjoyed a servitude to draw water from the servient land and to lead it to the dominant land by way of two pipes laid in a cement ditch over a specified route. The servitude deed also contained a clause to the effect that the dominant proprietor enjoyed a right of access to the servient land to inspect the pipes and ensure the proper flow of water.[19] However, when the De Wet family became owners of the servient land, they requested an amendment of the original servitude agreement to the effect that the cement ditch and pipes be replaced by underground pipelines and that the route whereby the water is led to Zeeman's property be relocated.[20] Zeeman

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[17] *Le Roux NO & Others v Burger & Others* (21020/2008) [2010] ZAWCHC 127 (10 June 2010) para 12. See the discussion of the case in section 2 5 above.

[18] *Zeeman v De Wet NO and Others* 2012 (6) SA 1 (SCA).

[19] *Zeeman v De Wet NO and Others* 2012 (6) SA 1 (SCA) para 8.

[20] *Zeeman v De Wet NO and Others* 2012 (6) SA 1 (SCA) para 4.

agreed to this amendment and a written agreement to this effect was registered. The agreement also contained a clause providing that the servient proprietor (De Wet) takes upon himself all responsibility for the maintenance and proper functioning of the pipes. However, a dispute arose as a result of vineyards planted perpendicular to the new route so that the pipeline was no longer easily accessible for inspection. A person would be required to walk all along and in between the rows of vineyards to reach the pipeline for inspection, and then turn back to do the same in every third row.[21] This is obviously a significantly more cumbersome way for the dominant land owner to ensure the maintenance and proper functioning of his pipes. However, the court found that because the servient owner had taken all the maintenance duties on himself, the dominant owner no longer had any reason to inspect the pipes.[22] In this regard, it must be noted that the imposition of maintenance duties on the servient proprietor would have the effect of creating a positive obligation on the servient proprietor, which is not allowed in terms of South African servitude law. Accordingly, this clause will create a personal obligation between the parties but cannot be registered as part of the servitude to constitute a real right, and will not be enforceable by or against third parties. A third party acquiring the dominant land could claim his reasonable right of access to inspect the pipes on the servient land. This case illustrates the significance of the distinction between an interpretation of the servitude deed or agreement and interpreting or establishing the actual content and scope of the servitude in terms of property principles.

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[21] *Zeeman v De Wet NO and Others* 2012 (6) SA 1 (SCA) para 6.

[22] *Zeeman v De Wet NO and Others* 2012 (6) SA 1 (SCA) para 18.

If courts applied the common law principles intended to regulate the relationship between the parties in an *ex post* manner, being guided not only by the original agreement and the intention of the parties who concluded it, but also by the current context of the servitude and the needs of the current parties, they might be able to reach fair and effective outcomes that are justified in terms of the current common law principles. The effect would be flexible regulation of servitudes that takes account of changed circumstances, without sacrificing the security that the stabilising servitude principles aim to ensure.

The reality of changed circumstances means that servitudes can no longer be seen as static, unchangeable rights. Not only must their content and scope be determined with reference to current circumstances and preferences, but it might also be necessary to modify existing rights to adapt to changing circumstances so that they will not become obsolete or inefficient burdens on land.

Currently, the common law holds that servitudes may only be amended with the mutual consent of the parties. The development of the common law in the case of *Linvestment CC v Hammersley*[23] is an exception to this approach. In that case, the court allowed unilateral relocation of a specified servitude of right of way in favour of the servient proprietor. It considered various comparative and policy reasons in favour of allowing unilateral relocation and concluded that the interests of justice required the development of this area of law. Accordingly, the common law was developed by court order to the effect that an owner of a dominant property will henceforth be obliged to accept the offer of a servient proprietor to relocate an existing (defined) servitude of

[23] *Linvestment CC v Hammersley* 2008 (3) SA 283 (SCA). See Chapter 2 for a discussion of the case.

right of way, subject to a number of conditions. It must be shown that (i) the servient owner is or will be materially inconvenienced in the use of his property by the status quo; (ii) the relocation will occur on the servient property; (iii) the change will not prejudice the owner of the dominant property; and (iv) the servient proprietor will pay all costs relating to the relocation and amendment of the title deeds to that effect. The relocation will thus only be allowed on application of the servient proprietor and by order of court, after these factors have been considered. This decision appears to create some flexibility in the regulation of servitudes, but the modification created by it is limited in scope and the servitude system generally is still subject to rigid *ex ante* regulation.

If servitudes are viewed in light of their current circumstances and the general intention of the original parties to create a long-standing relationship to achieve increased productivity in the use of the properties in a specific way, it should be possible to amend the scope of the servitude to still reach that goal in changed circumstances. This can either be done by way of recognising new ancillary rights that might be necessary to render the servitude effective in the new circumstances or by allowing amendment of existing servitudes or their ancillary rights. The amendment of existing rights should be aimed at achieving an outcome where the servitude can function effectively without imposing a burden on the servient tenement that cannot be reconciled with the purpose of the servitude in the current context. If this is not possible, it might be necessary to consider termination of the rights.

Consequently, if what is necessary for the proper utilisation of the servitude is perceived from the perspective of current circumstances and needs, recognition of implied ancillary rights might contribute a measure of flexibility in favour of the dominant proprietor without requiring an amendment of the actual terms of the

servitude. This will also contribute to a fair balance in the protection provided to dominant and servient proprietors. Not only are servient proprietors protected by the rule that servitudes are to be interpreted strictly, but the development effected in *Linvestment* further created the option for unilateral amendment of the servitude conditions by servient proprietors, subject to judicial discretion and a regulatory framework that protects the interests of the dominant owner.

5 3 Rationale for a flexible approach

There seems to be a tendency in some legal systems to modernise servitude law by introducing flexibility into the way servitudes are regulated. Apart from the theoretical literature on the recent shift that has taken place from a traditionally *ex ante* approach toward *ex post* regulation of servitudes,[24] the implementation of regulatory measures in various jurisdictions that allow for the variation and termination of servitudes provides a good illustration of this point.[25]

Foreign jurisdictions have approached the incorporation of flexibility into the regulatory framework of servitude law in different ways. The possibility of unilateral relocation of specified servitudes of right of way is one measure employed to overcome the negative effects of the rigidity in servitude law. Another possibility is the

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[24] JA Lovett "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Connecticut Law Review* 1-77 48-50; S French "The American Restatement of servitude law: Reforming doctrine by shifting from *ex ante* to *ex post* controls on the risks posed by servitudes" in S van Erp & B Akkermans (eds) *Towards a unified system of land burdens* (2006) 109-118 112; AJ van der Walt "The continued relevance of servitude" (2013) 3 *Property Law Review* 3-35. See the discussion in section 4 3 2 of the shift from *ex ante* to *ex post* regulation of servitudes.

[25] See section 3 6 above.

modification or termination of servitude rights, which have been implemented to different extents in the jurisdictions considered as part of the comparative overview in this regard. While Scotland, for instance, only allows the modification or termination of servitude rights in favour of servient proprietors in order to protect the stability of property rights, the American *Restatement* values innovation in land use and development more, and allows much wider flexibility in the modification of burdens to fully accomplish their original purpose.[26] There are also other, more nuanced approaches. The Dutch approach allows the modification or termination of servitudes on application of servient proprietors, without many restrictions.[27] However, applications brought by dominant proprietors are subject to specific restrictions and strict scrutiny.[28] This approach aims to satisfy the need for flexibility by allowing modification in favour of both parties but, at the same time, the value of stability is given effect to by providing adequate protection of the servient proprietor's ownership entitlements by limiting the possibility for a dominant proprietor to claim more extensive rights as part of his servitude.[29] Another middle ground that has been suggested is the imposition of durational limits on servitudes, requiring renegotiation of servitude rights after a set period that is determined upon their creation as the expected lifespan of the particular rights.[30] Rose suggests the implementation of a durational limit to require

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[26] S 7.10 and s 8.3 of the *Restatement (Third) of Property: Servitudes (2000).* See also S French "The American Restatement of servitude law: Reforming doctrine by shifting from *ex ante* to *ex post* controls on the risks posed by servitudes" in S van Erp & B Akkermans (eds) *Towards a unified system of land burdens* (2006) 109-118 112-114.

[27] *BW* 5:78-79. See also section 3 2 3 above.

[28] *BW* 5:80.

[29] See section 3 2 3 above for a detailed discussion of *BW* 5:80 that regulates this matter.

[30] CM Rose "Servitudes, security and assent: Some comments on Professors French and Reichman" (1982) 55 Southern California Law Review 1403-1417 1414 ; A Dunham "Statutory reformation of land

parties to determine the expected lifespan of a servitude at the time of its creation and to require renegotiation of the rights after this time, or additionally, to have legislation determine the lifespan of particular rights. Some US states have implemented durational limits of 20 or 30 years on particular rights[31] and the option in Dutch law for the servient proprietor to apply for the variation or limitation of a servitude based on changed circumstances is limited for the first 20 years after creation of the rights.[32] In Scots law a presumptive durational limit of 100 years has been placed on real burdens, and this could be equally applicable to servitudes.[33] Another measure of flexibility was introduced in Scots law by the decision of *Moncrieff v Jamieson*,[34] which arguably created the possibility for the acceptance of new ancillary rights added to an existing servitude where this is deemed necessary.

There are thus a number of possibilities for the incorporation of flexibility into the regulatory framework of servitudes that are recurrent across a number of

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obligations" (1982) 55 *Southern California Law Review* 1345-1352 1351; CJ Berger "Some reflections on a unified law of servitudes" (1982) 55 *Southern California Law Review* 1323-1338 1330; U Reichman "Toward a unified concept of servitudes" (1982) 55 *Southern California Law Review* 1177-1260 1256; S Sterk "Freedom from freedom of contract: The enduring value of servitude restrictions" (1985) 70 *Iowa Law Review* 615-661 642-643; JA Lovett "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Connecticut Law Review* 1-77 52-55. See sections 4 3 2 and 4 3 3 3 above for a discussion of different proposals for durational limits on servitudes.

[31] S Sterk "Freedom from freedom of contract: The enduring value of servitude restrictions" (1985) 70 *Iowa Law Review* 615-661 642-643.

[32] *BW* 5:78*;* JAJ Peter "Erfdienstbaarheden" (Titel 6) in WM Kleijn & AA Velten (eds) *Zakelijke rechten* (supplement 27, 2003) 78-1.

[33] In terms of s 20-21 of the Title Conditions (Scotland) Act 2003 the rights are presumptively discharged. See section 3 4 3 above.

[34] *Moncrieff v Jamieson* [2007] UKHL 42 para 29-30. See also sections 3 4 3 and 3 4 4 for a discussion of the case and its impact.

jurisdictions: durational limits on the lifespan of particular servitudes; the possibility of relocation of servitudes of right of way; judicial amendment of existing servitude rights; or the termination of servitudes in light of changed circumstances. The possibility of adding new ancillary rights to an existing servitude, as it was done in the *Moncrieff* case, is one possibility that is not common to all jurisdictions, although it is a valuable option to consider in the South African context. It is possible that the need for this mechanism is reduced by more liberal options for flexibility (such as judicial amendment), but it is not entirely certain how different jurisdictions would approach the situation if it were to arise. As is indicated in section 5 2 above, some of these flexibility strategies already exist in South African law – the question here is whether the others could also be adopted.

Theoretically, some of these mechanisms will be easily justifiable. The argument for flexibility in the form of unilateral relocation of specified servitudes of right of way will be justifiable in light of efficiency and other policy reasons, especially taking account of the conditions and specific requirements that must be met before it is permitted.[35] Other measures to allow amendment of servitude entitlements in favour of servient proprietors can be supported on the same grounds. However, there is some reluctance to allow flexibility in favour of dominant proprietors, based on concerns for the effect that this will have on the stability of property rights and the general sense of security experienced by property owners.[36] In cases where the need for flexibility in the regulation of servitudes is greater than the need to maintain security,

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[35] JA Lovett "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Connecticut Law Review* 1-77 77; LA Kiewitz *Relocation of a specified servitude of right of way* (unpublished LLM thesis, Stellenbosch University, 2010) 150.

[36] See section 3 2 3 above.

compensation can provide a valuable solution to the imbalance that arises and to effect an outcome that ensures stability, albeit by way of liability rule protection.[37] Furthermore, as servitudes are good examples of property sharing, it is necessary to consider them not as static rights, but rather in light of their function as long-term relationships between property owners to use property efficiently to the shared benefit of all interested parties.[38] A flexible approach that takes account of all current interests in the properties involved in a particular case is thus in line with recent developments in property theory.[39]

Essentially, all the statutory (and other) interventions considered here are aimed at improving on the traditional regulation of servitudes as static and unchangeable rights by allowing them flexibility, to different extents, to evolve as long-term property relationships aimed primarily at the most productive and beneficial utilisation of land.[40] To effectively achieve this goal servitudes must be viewed and accepted as property rights and not as mere creations of contract. Placing undue emphasis on the originating agreement means denying servitude relationships the opportunity to evolve with changing circumstances or public policy. It diminishes the value of servitude rights as real rights in land, aimed to achieve something more than personal rights between specific parties. The inadequacy of the contractual approach lies not only in its inability to provide for instances where servitudes are created *ex lege*, or in the difficulty of determining the intention of the original parties who might

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[37] See references to compensation in sections 4 3 2 and 4 4 above.

[38] See section 4 3 4 above.

[39] AJ van der Walt "Sharing servitudes" (2016) (forthcoming) 3.

[40] JA Lovett "A bend in the road: Easement relocation and pliability in the new Restatement (Third) of Property: Servitudes" (2005) 38 *Connecticut Law Review* 1-77 77.

have created the rights in a completely different context, but in the fact that it diminishes the protection that the parties should enjoy in terms of the common law property principles that are aimed at governing their continued relationship.[41] In relation to ancillary rights, Reid emphasises that the fact that a (ancillary) right is implied does not require that it be implied as a term of a contract.[42] His preference for a test based on a freestanding rule rather than an implied term is based on the convincing argument that the former is rooted in sound legal policy, while the latter is a result of something as indeterminate as the presumed intention of the parties at the time the servitude was granted.[43]

To respond to changed preferences and conditions, a re-evaluation of a servitude might be necessary at certain points after its creation. Furthermore, the scope of a servitude and "all that is necessary for its effective exercise" might change over time. In jurisdictions where the modification of servitude rights is possible, the need for a wide or flexible view of "what is necessary for the effective exercise of the rights" is reduced significantly.[44] In Dutch law, for instance, the issue of ancillary rights is not discussed in much detail, although the principle that a servitude includes all necessary rights is equally applicable. Furthermore, if one imagines a situation

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[41] See section 5 2 above. Refer also to the discussion in section 2 4 on the interaction between the principle that the dominant proprietor may do all that is necessary for the effective use of his servitude with the principle that requires civiliter *modo exercise* of the servitude by imposing the least possible burden on the servient proprietor.

[42] KGC Reid "Accessory rights in servitudes" (2008) 12 *Edinburgh Law Review* 455-459 457.

[43] KGC Reid "Accessory rights in servitudes" (2008) 12 *Edinburgh Law Review* 455-459 456-457. See also See KGC Reid & GL Gretton *Conveyancing* (2007) 113-114 and KGC Reid "Praedial servitudes" in EC Reid & VV Palmer (eds) *Mixed jurisdictions compared: Private law in Louisiana and Scotland* (2009) 1-29 13-14.

[44] See section 3 6 above.

regulated by the American *Restatement* where the amendment or termination of servitude rights, by either dominant or servient owners, is available where circumstances change, there would be no real need to widen the scope of the doctrine for implied ancillary rights.

However, in South African law, the possibility of statutory intervention to allow for the variation or termination of servitude rights is slim.[45] The current uncodified system of servitude law needs to develop innovative measures within the common law framework to incorporate a measure of flexibility into the wider regulatory framework of servitude law. Ancillary rights might have a role to play in the South African servitude system to introduce a measure of flexibility to servitude rights where circumstances change to the extent that the rights of servitude holders are diminished, but cannot otherwise be modified.

However, it is necessary that the law regulating the possibility for ancillary rights is clear and flexible at the same time. To achieve this the law must take account not only of maintaining the necessary stability in property law by way of *ex ante* regulation, but also of the need to view servitudes in their current context (*ex post*) and make optimal use of the available tools to increase flexibility. Because the test for ancillary rights leaves much room for uncertainty, a development of the law pertaining to ancillary rights might be enhanced by a non-exclusive list of factors that courts and parties may take into consideration in determining when rights will be deemed to satisfy the test of "what is necessary for the effective use of the servitude".[46]

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[45] See sections 1 2 and 2 7.

[46] See section 3 3 4 explaining that in the process of reforming the law of implied servitudes in English law, the Law Commission acknowledged that determining what is necessary in a specific instance might

Theoretically such a *development* of the test for implied ancillary rights would be justifiable as it is a good example of the prevalent shift that has taken place in servitude law from the *ex ante* regulation of servitudes toward an *ex post* approach, allowing for flexibility during the course of a servitude's existence.[47] Considering the current circumstances surrounding the properties or pertaining to the parties to the servitude means that the unreasonable weight of a predecessor's lack of foresight[48] will not hinder the full enjoyment of the servitude (and accordingly the efficient use of land) by the current servitude holder. At the same time, the servient owner is protected by the reasonableness element of the test, and her current position will necessarily also be taken into account, providing equal opportunity for her position to be protected.

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be troublesome to parties and courts, and therefore, proposed a non-exclusive list of factors "in order to assists parties and the courts in determining whether that test has been passed". The factors included in the list are based on the current law and the practical problems that arise in relation to implied easements. The point is that the existence of guiding principles and factors that are considered in the determination of what is necessary in different instances creates transparency in the process and adds to legal certainty.

[47] See chapter 5 for a detailed discussion of the theoretical perspectives in this regard. S French "The American Restatement of servitude law: Reforming doctrine by shifting from *ex ante* to *ex post* controls on the risks posed by servitudes" in S van Erp & B Akkermans (eds) *Towards a unified system of land burdens* (2006) 109-118 112; S French "Servitudes, reform and the new Restatement of Property: Creation doctrines and structural simplification (1988) 73 *Cornell Law Review* 928-955 948; BWF Depoorter & F Parisi "Fragmentation of property rights: A functional interpretation of the law of servitudes" (2003) 3 *Global Jurist Frontiers* 1-41 36-37; V Sagaert "The fragmented system of land burdens in French and Belgian law" in S Van Erp & B Akkermans (eds) *Towards a unified system of land burdens* (2006) 31-52 51.

[48] See S Sterk "Foresight and the law of servitudes" (1988) 73 *Cornell Law Review* 956-970 961.

5 4 Development of the common law of servitude in light of the Constitution

In light of the conclusions drawn here, it is necessary to consider whether promoting possibilities for a flexible approach considered throughout the previous chapters necessitates a development in the form of a change in the common law of servitude as it currently stands, or whether the problems could be solved simply by applying the current common law principles differently, in line with a more flexible approach.

In *Linvestment CC v Hammersley*[49] the Supreme Court of Appeal decided to develop the common law of servitude by accepting an amendment of the common law position as it stood at the time.[50] It was held that:

> "By appropriate application of the knowledge thus derived, a modification of our existing law may better serve the interests of justice when the existing law is uncertain or does not adequately serve modern demands on it."[51]

The court declared that a servient proprietor would forthwith be permitted to unilaterally relocate a specified servitude of right of way, subject to certain conditions.[52] In doing so, it referred to the unresolved dichotomy between the arguments in favour of the sanctity of contract and those favouring a measure of flexibility in servitude law. Nevertheless, the court took a step in the direction of flexibility and stated its reasons for doing so:

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[49] *Linvestment CC v Hammersley and Another* 2008 (3) SA 283 (SCA).

[50] The common law position at the time held that the unilateral relocation of a specified servitude of right of way could only be effected by mutual consent of the parties: *Linvestment CC v Hammersley and Another* 2008 (3) SA 283 (SCA) para 11; *Gardens Estate Ltd v Lewis* 1920 AD 144 at 150; LA Kiewitz *Relocation of a specified servitude of right of way* (unpublished LLM thesis, Stellenbosch University, 2010) 20. Refer also to the discussion of this case in section 2 5 above.

[51] *Linvestment CC v Hammersley and Another* 2008 (3) SA 283 (SCA) para 25. Refer also to the discussion in section 5 2 above.

[52] *Linvestment CC v Hammersley and Another* 2008 (3) SA 283 (SCA) para 33.

> "I am persuaded that the interests of justice do indeed require a change in our established law on the subject. The rigid enforcement of a servitude when the sanctity of the contract or the strict terms of the grant benefit neither party but, on the contrary, operate prejudicially on one of them, seems to me indefensible. Servitudes are by their nature often the creation of preceding generations devised in another time to serve ends which must now be satisfied in a different environment."[53]

> "Properly regulated flexibility will not set an unhealthy precedent or encourage abuse. Nor will it cheapen the value of registered title or prejudice third parties."[54]

A development such as this, which changes, and in effect replaces, the existing law must necessarily be justified. In light of the Constitution as the supreme law in South Africa,[55] it is necessary to consider any possible development in light of constitutionally guaranteed rights and values.[56] The Constitutional Court in *Ex Parte President of the Republic of South Africa: In re Pharmaceutical Manufacturers Association of South Africa* SA 674 (CC) held that"

> "There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control".[57]

It is important to ensure that any development within the system of servitude reflects the fact that it is inspired and empowered by the Constitution and that it is directly subject to constitutional control. Any particular development must be the result of a

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[53] *Linvestment CC v Hammersley and Another* 2008 (3) SA 283 (SCA) para 31.

[54] *Linvestment CC v Hammersley and Another* 2008 (3) SA 283 (SCA) para 31.

[55] Constitution of the Republic of South Africa, 1996 s 2.

[56] AJ van der Walt "The continued relevance of servitude" (2013) 3 *Property Law Review* 3-35 31. See also AJ van der Walt *Property and Constitution* (2012) Chapter 2.

[57] *Ex Parte President of the Republic of South Africa: In re Pharmaceutical Manufacturers Association of South Africa 2000 (2) SA 674* (CC) para 44.

constitutional need and should respond to that need in a way that accords with the current constitutional dispensation.

Section 39(2) of the Constitution of the Republic of South Africa, 1996 ("the Constitution") states that when interpreting any legislation, and when developing the common law, courts must promote the spirit, purport and objects of the Bill of Rights. In *Carmichele v Minister of Safety and Security*[58] the Constitutional Court said that it is implicit in section 39(2), read with section 173, that where the common law as it stands is deficient in promoting the section 39(2) objectives, the courts are under a general obligation to develop it appropriately. The superior courts[59] thus have the power to apply and develop the common law, but this power can only be exercised within the limits of the authority granted by the Constitution. They cannot exceed their authority to *develop* existing law by creating new rules of law that are not underpinned by existing common law principles.[60] This would require legislative action. Consequently, the judiciary will not have the authority to implement some of the changes that could bring about a more flexible approach to servitude law.

The mechanisms that have recurrently been implemented in foreign jurisdictions must be considered carefully with reference to the South African context,

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[58] *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies intervening)* 2001 (4) SA 938 (CC) para 39.

[59] The superior courts include the Constitutional Court, the Supreme Court of Appeal, the High Court and any other court of a status similar to that of the High Court, as established by the Superior Courts Act 10 of 2013.

[60] Not only would they exceed the authority granted to them by the Constitution, but they would be imposing on the sphere of the legislative authority.

in light of the fact that any change in the South African law will probably have to be implemented by the judiciary, since legislation is not currently a plausible option.

The matter of relocation of a servitude of right of way has been settled by the decision in *Linvestment* and thus does not require further consideration. However, this serves as a good example to illustrate the power of the judiciary to effect relatively dramatic changes in the law through its authority to develop the common law.

The imposition of durational limits on servitudes might prove problematic in the South African context. Because there is no common law foundation for imposing durational limits on servitudes, any change in the law on this matter will not fall within the authority of the judiciary to develop the common law. The mechanism for termination of servitudes on the grounds that they have become obsolete or inefficient in light of changed circumstances faces the same challenge. These changes of the law can only be effected by legislative action. Because of the current political landscape in South Africa, there are major issues relating to land, especially in the area of land reform, that need urgent attention from the legislator. Consequently, even though servitudes cause problems between private land owners, these are minor issues and a codification of the whole system of servitude law is not plausible while there are far more serious land-related matters that require legislative intervention.

The two options that remain are the possibility of amendment of existing entitlements in light of changed circumstances and the possibility for the acceptance of new ancillary rights to restore the efficient functioning of existing servitudes. Considering the current common law framework for the regulation of the continued relationship between the parties to a servitude, both of these options tie in well with the existing common law principles that hold that a servitude includes all the rights necessary for the effective exercise of the servitude entitlements and the principle that

requires that servitudes be exercised reasonably or *civiliter modo.* Since it was established in Chapter 2 that the efforts of South African courts to solve the problems of inflexibility by focussing on the interpretation of the words and intentions of servitude deeds mostly has the opposite result, as it leads to rigid and ineffective outcomes, a better approach would be for courts to focus on the application of the two common law principles. Within this framework, a flexible approach would mean that courts will consider in each case whether it might be necessary and justified to amend existing servitude entitlements or possibly whether it might be necessary and justified to accept certain ancillary entitlements in order for a servitude to fulfil the functional purpose for which it was established.

The possibility for a flexible approach towards servitudes in South African law is thus rooted in a shift in the focus of servitude disputes from the interpretation of the words and intentions of the servitude deed toward an *ex post* consideration and application of the existing common law principles. This conclusion is motivated by the argument that a freestanding rule considering the current circumstances surrounding a servitude is based on legal policy and thus preferable to an approach that considers the indeterminate intention of the parties at creation of a servitude.

Although the development that is proposed does not amount to a change of the existing common law principles, and will fall within the authority of the courts to develop the common law, it will only be possible if it is justifiable in terms of the Constitution. It is not hard to see that the effect of a development that allows the amendment of existing servitude entitlements or allows for the acceptance of new ancillary entitlements to a servitude will have an impact on the rights of the parties to a servitude. Accordingly, it must be determined whether this impact is justifiable in terms of the Constitution. As the proposed developments are based on utilitarian and policy

reasons, any Constitutional reasons for or against the development will trump these arguments. [61]

5 5 Section 25 analysis

According to the model proposed by Van der Walt the first step of constitutional analysis would be to determine whether an amendment of an existing servitude or the acceptance of new ancillary rights to servitudes will infringe on any democratic, non-utilitarian constitutional rights.[62] Because the development of the common law proposed here merely pertains to minor modifications of servitude entitlements or the acceptance of new entitlements that are ancillary to existing servitudes, it is doubtful whether they would affect any of the fundamentally liberty-enhancing rights such as equality and non-discrimination;[63] human dignity;[64] freedom and security of the person; [65] or the prohibition against slavery, servitude and forced labour.[66] The right not to be deprived of property, as it is set out in section 25(1) of the Constitution, is the right which will be most obviously affected by an action that amends the law of

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[61] AJ van der Walt "Development of the common law of servitude" (2013) 130 *South African Law Journal* 722-756 745.

[62] AJ van der Walt "The continued relevance of servitude" (2013) 3 *Property Law Review* 3-35 32.

[63] Constitution of the Republic of South Africa, 1996 s 9.

[64] Constitution of the Republic of South Africa, 1996 s 10.

[65] Constitution of the Republic of South Africa, 1996 s 12.

[66] Constitution of the Republic of South Africa, 1996 s 13. I single out these rights because they are mentioned as non-derogable rights in the Constitution. AJ van der Walt "The continued relevance of servitude" (2013) 3 *Property Law Review* 3-35 mentions that the other rights that might be applicable, although they do not seem obvious, are freedom of expression s 16); assembly, demonstration, picket and petition (s 17); freedom of movement and residence (s 21); freedom of trade, occupation and profession (s 22); the right to a healthy environment (s 24); access to adequate housing (s 26); just administrative action (s 33); and access to courts (s 34).

servitude to the extent proposed. Van der Walt argues that where any of the "higher" democratic constitutional provisions are relevant, a section 25 analysis should "take a backseat", as it can be regarded to a certain extent as an economic, or utilitarian interest.[67] Once it has been established that "higher" constitutional provisions will not be invoked by the proposed development, as would be the case in the present example, section 25 implications can be considered.[68]

Lending any measure of flexibility to the rights of a dominant proprietor that could increase the burden on the servient property can effect a deprivation of the ownership entitlements of a servient proprietor. Furthermore, an amendment of existing entitlements could favour either the dominant or the servient proprietor: if an amendment is allowed in favour of a servient proprietor, this might mean that the servitude rights of the dominant proprietor are limited, and he is thus impacted negatively; on the other hand, if the servitude is amended in a manner that favours the dominant proprietor, this will have a negative impact on the ownership entitlements of the servient proprietor.

Section 25 provides protection to property owners against unlawful deprivation or expropriation of their property. The case of *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service & another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC)[69] is regarded as a landmark case for the constitutional protection of property rights, as it cleared up

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[67] AJ van der Walt "The continued relevance of servitude" (2013) 3 *Property Law Review* 3-35 34.

[68] AJ van der Walt "The continued relevance of servitude" (2013) 3 *Property Law Review* 3-35 34.

[69] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service & another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100.

a lot of the uncertainty that surrounded the interpretation of the property clause and provides a methodological framework for the application of the clause.[70] The purpose of the constitutional property clause is to strike a proportionate balance between the functions of protection existing private property rights on the one hand, and promoting the public interest, on the other.[71]

The distinction between expropriation and deprivation can be based on a number of aspects. Roux holds that the term expropriation is reserved for situations where the state forces the transfer of a property right to itself or to a third party.[72] In *Agri SA v Minister for Minerals and Energy*[73] the Constitutional Court held that:

> "Deprivation relates to sacrifices that holders of private property rights may have to make without compensation, whereas expropriation entails state acquisition of that property in the public interest and must always be accompanied by compensation."[74]

Van der Walt provides a "preliminary and provisional description of expropriation" with reference to a number of characteristics including the following: expropriation is brought about unilaterally by state action, without the cooperation of the affected owner; it always involves a dispossession or loss of property for an owner; it is brought about for a public purpose or in the public interest and it is normally accompanied by

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[70] T Roux "Property" in Woolman S, Bishop M & Brickhill J (eds) *Constitutional law of South Africa* vol 3 2 ed (2003) 46 2.

[71] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service & another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 50; T Roux "Property" in Woolman S, Bishop M & Brickhill J (eds) *Constitutional law of South Africa* vol 3 2 ed (2003) 46 2.

[72] T Roux "The 'arbitrary deprivation' vortex: Constitutional property law after FNB" in S Woolman and M Bishop (eds) *Constitutional Conversations* (2008) 265-281 266-267.

[73] *Agri SA v Minister for Minerals and Energy* 2013 (4) SA 1 (CC).

[74] *Agri SA v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) para 48.

compensation. [75] Considering the nature of the developments of the common law that are suggested here, the fact that they will only cause minor modifications of existing property entitlements means that there will not be any real dispossession or loss of property by either of the parties. The effect will more likely be classified as a regulatory deprivation of property entitlements. A further distinguishing feature between deprivation and expropriation lies in the authorising source of the action. Expropriation is a state action, and can only be authorised by statute.[76] If the amendment of servitude entitlements and the acceptance of ancillary rights are permitted by a development of the common law, it will be the principles of the common law that authorise these actions. The effect can thus not be expropriatory, as there is no authority in South African law for an expropriation to be carried out in terms of the common law.[77]

The possibility of the proposed developments causing the deprivation of property must be considered more closely. Whether there is a deprivation depends on the extent of the interference with the use, enjoyment or exploitation of constitutionally protected property.[78] In terms of the methodology proposed by the Constitutional Court

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[75] AJ van der Walt *Constitutional property law* 3 ed (2011) 346-347.

[76] *Pretoria City Council v Modimola* 1966 (3) SA 250 (A) 258H; Harvey *v Umhlatuze Municipality and Others* 2011 (1) SA 601 (KZP) para 81; A Gildenhuys *Onteieningsreg* 2 ed (2001) 49; AJ van der Walt *Constitutional property law* 3 ed (2011) 453-454.

[77] See also *Ekurhuleni Metropolitan Municipality v Dada NO and Others* 2009 (4) SA 463 (SCA) para 14 and AJ van der Walt "Constitutional property law" (2009) 2 *Juta's Quarterly Review* para 2.4 on the authority of courts to order expropriation.

[78] *National Credit Regulator v Opperman* 2013 (2) SA 1 (CC) para 66.

in *FNB*[79] a number of questions arise when a particular action is constitutionally challenged as a deprivation of property. The first question to consider in this regard is whether the affected rights constitute property as it is recognised in terms of section 25(1). If the interests involved do constitute property, the question that follows is whether there has been a deprivation of such property, and further, whether such deprivation is consistent with the provisions of section 25(1).

The amendment of existing servitude entitlements, and the addition of new ancillary rights to existing servitude entitlements, can affect the rights of either servient or dominant proprietors. According to the court in *FNB*, ownership of corporeal movables (and of land) lies at the heart of the constitutional concept of property and must therefore enjoy the protection of section 25.[80] An impact on the ownership entitlements of a servient proprietor will accordingly constitute property for purposes of section 25. Where a servitude is amended in a way that causes a negative impact on the servitude rights of a dominant proprietor, the question is slightly more complicated. However, the case of *Ex Parte Optimal Solutions CC*[81] serves as authority that praedial servitudal rights are recognised as property for purposes of section 25.[82] Therefore, where the rights of a servitude holder are diminished as a

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[79] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service & another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100.

[80] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service & another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 51; AJ van der Walt *Constitutional property law* 3 ed (2011) 112.

[81] *Ex Parte Optimal Solutions* CC 2003 (2) SA 136 (C) para 19.

[82] *Ex Parte Optimal Solutions* CC 2003 (2) SA 136 (C) para 19. The court held as follows: “A purposive construction of 'property' means that it should be read to include any right to, or in property. […] Registered praedial servitudal rights are therefore included within the concept of 'property' under s

result of an amendment to a servitude, this too can amount to a deprivation of property in terms of section 25.

In Chapter 1, two cases are discussed to set the background for the research question in this dissertation. The case of *Jersey Lane Properties v Hodgson*[83] concerned the construction of a large security gate entrance over an existing servitude of right of way, seemingly for reasons of security and in response to a general tendency to build similar entrance gates in the area.[84] In the Scottish case of *Moncrieff v Jamieson*[85] the servitude holder applied to court to have an ancillary right of parking recognised as part of his entitlements under a registered right of way.[86] What these cases have in common is that they seek to add certain entitlements to existing servitudes on the basis that they are necessary for the full effective exercise of the servitude, even though they were not mentioned in the servitude deed at the time the rights were registered. If these additional entitlements were allowed, they would create an increase in the burden on the servient property. This will necessarily have an impact on existing rights which will amount to a deprivation of the servient owner's property in terms of section 25(1) of the Constitution. The next question to ask, according to the *FNB* methodology, is whether the deprivation is consistent with the provisions of section 25(1).

25(1). Accordingly any removal or deletion of such rights is *pro tanto* a deprivation of property." See also AJ van der Walt *Constitutional property law* 3 ed (2011) 139.

[83] *Jersey Lane Properties (Pty) Ltd t/a Fairlawn Boutique Hotel & Spa v Hodgson and Another* (A5030/11) [2012] ZAGPJHC 86 (7 May 2012).

[84] Refer to the discussions of the case in sections 1 1 and 2 5 above.

[85] *Moncrieff v Jamieson* [2007] UKHL 42.

[86] Refer to the discussion of the case in section 1 1 and 3 4 4 above.

Section 25(1) of the Constitution provides that no one may be deprived of property *unless* it is in terms of law of general application. Furthermore, the section stipulates that no law may permit the *arbitrary* deprivation of property. Considering the first part of the provision, "law of general application" entails that the authorising law is not "aimed at a specific person or group or being applied without reference to a discernible standard.[87] Furthermore, the reference to *law* of general application (as opposed to *a law)*[88] extends the application of the provision to the rules of common law and customary law.[89] It is contended above that the proposed developments will be authorised by the existing principles of the common law, applied by courts in a different manner, with a focus on *ex post* considerations of what is relevant at the particular time of the dispute. Accordingly, a deprivation that results from such an application of the common law rules will be deemed to satisfy the requirement that it be authorised by "law of general application".

The second element of the deprivation provision in section 25(1) holds that the authorising law may not permit the arbitrary deprivation of property. The court in *FNB* held that a deprivation will be arbitrary where insufficient reason is provided for the particular deprivation or where it is procedurally unfair.[90] Sufficient reason is determined by considering the relationship between the means applied and the ends

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[87] AJ van der Walt *Constitutional property law* 3 ed (2011) 237.

[88] See section 28(1) of the Constitution of the Republic of South Africa, Act 200 of 1993 (interim Constitution), the corresponding article in the interim Constitution, which refers to "a law".

[89] AJ van der Walt *Constitutional property law* 3 ed (2011) 234.

[90] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service & another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100.

sought to be achieved by the deprivation.[91] Furthermore, a complexity of relationships must be considered, including the relationship between the purpose of the deprivation and the person whose property is affected; the purpose of the deprivation and the nature of the property; as well as the extent of the deprivation in respect of the particular property.[92] It is stated in the *FNB* case that there may be circumstances when sufficient reason is established by no more than a mere rational relationship between the means and ends, while in in other circumstances, a full proportionality evaluation might be necessary. The more extensive and invasive the impact of the deprivation is, the greater the onus will be to justify the burden that is imposed. Van der Walt explains that it is hard to imagine that a deprivation authorised by rules of the common law would raise any serious issues in terms of section 25(1).[93]

The complexity of relationships can be considered with reference to the examples in the *Jersey Lane Properties* and *Moncrieff* decisions. In *Jersey Lane Properties*, the servitude holder had constructed a two storey entrance gate on the servient land under the contention that this should be deemed as an ancillary right to his servitude of right of way. Seeing as the purpose of the registered servitude was to

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[91] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service & another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100.

[92] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service & another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100.

[93] With reference to nuisance law, he explains that in terms of the common law principles that require landowners to adjust the use of their property so as not to cause a nuisance, the burden placed on the owners (or users) can be regarded as a deprivation of property, but that it is hard to see how such deprivation can be seen to constitute an insufficient nexus between the reason for the deprivation the means employed and the effects that it has on the owner. See AJ van der Walt *Constitutional property law* 3 ed (2011) 234-235.

tolerate the passing of vehicles over the servient land, the construction of a permanent structure that was so extensive as to block the views from the existing buildings on the servient property,[94] and prevents the servient proprietor from using or developing that part of the servient land, imposes a rather extensive increase in the burden on the servient property. The servient proprietor is deprived in this case of various *incidents of her ownership*[95] in contravention of the common law principle that a servitude must be construed in a manner that imposes the least possible burden on the servient land. This constitutes a significant imbalance between the means employed (the deprivation) and the ends sought to be achieved by the law (flexibility in the law of servitudes). In the *Moncrieff* case, the ancillary right that the servitude holder wished to add to the existing servitude of right of way was a right to park vehicles that reached the dominant land by way of the servitude road. The burden imposed in this case is temporary and could easily be regulated by way of conditions that limited the time or manner of exercise of the rights so as to render it less intrusive to the servient proprietors. In this case one would have to consider the fact that the addition of an entitlement to park vehicles would increase the burden that the existing servitude imposed on the servient property; nonetheless, if the servitude cannot reasonably be exercised without the additional right, it might be justified to impose such an increased

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[94] The servient proprietor alleged that the entrance portico "'impedes and blocks views from his residence'; that the backyard patio and kitchen are flood-lit at night from the lights in the portico and generally, 'that it renders one with a general sense of encroachment, and instils a feeling of claustrophobia when entering the kitchen and the backyard patio'": *Jersey Lane Properties (Pty) Ltd t/a Fairlawn Boutique Hotel & Spa v Hodgson and Another* (A5030/11) [2012] ZAGPJHC 86 (7 May 2012) para 10. Refer also to the discussion of the case in section 2 5 above.

[95] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service & another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100.

burden. Furthermore, it was argued above that compensation can play a valuable role in restoring the balance between the interests of the parties in a servitude dispute if it is disturbed by an order allowing the amendment of entitlements or the addition of new ancillary rights to existing entitlements.[96]

If a South African court allowed the addition of ancillary rights on facts similar to that of *Moncrieff* and decided to exercise its common law authority to award compensation[97] to the servient proprietor for the disadvantage he suffers as a result,[98] the deprivation will arguably fall within the definition of a non-arbitrary deprivation in terms of section 25(1). The burden imposed on the servient proprietor (the deprivation) will be justified to a certain extent by the payment of compensation and it will establish a sufficient nexus between the means employed (the deprivation) and the ends sought to be achieved (flexibility of the servitude rights to ensure the efficient use of land and compliance with public policy reasons in favour of flexibility). Furthermore, the fact that the deprivation is realised by a court exercising a judicial discretion in the application of the common law principles is an indication that the outcome will most likely not be arbitrary in terms of section 25(1).[99]

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[96] See the discussion in section 5 3 above.

[97] The common law authority of the court to award compensation in these instances is assumed based on the authority to award compensation in terms of the common law at establishment of a right of way of necessity.

[98] V*an Rensburg v Coetzee* 1979 (4) SA 655 (A) 658-659, 660 & 676; *Wiles v Praeg* 1952 (1) SA 87 (T) 89-90. It is held in both these cases that the compensation awarded (in case of a right of way of necessity) must be in proportion to the advantage gained by the plaintiff and the disadvantages suffered by the defendant.

[99] *National Credit Regulator v Opperman* 2013 (2) SA 1 (CC) paras 69, 76 & 88.

If the facts of *Jersey Lane properties* are considered in the same way, it seems in all respects that the burden imposed on the servient proprietor would amount to an arbitrary deprivation of property. Because there was no constitutional challenge to the actions of the servitude holder in this case, the factors that should be considered in light of the non-arbitrariness requirement were not considered in the case. However, it might be interesting to consider how the Constitutional Court would have approached this matter if one assumes for a moment that the servient proprietor had received different legal advice and had pursued the case to the Constitutional Court based on the argument that there has been an arbitrary deprivation of his property. Moreover, it is necessary to assume that the actions of the servitude holder were preceded and authorised by the correct procedural steps; thus, it will be assumed that plans were submitted to the local authority for the construction of the entrance gate; that these plans were approved, and that the increase in the burden on the servient property was authorised by an order of the court. Based on the facts, the increased burden on the servient property, by the building of a permanent structure, constitutes a significant interference with the use, enjoyment and exploitation of constitutionally protected property and will amount to a deprivation in terms of section 25.[100] Considering whether the deprivation is arbitrary, it must be determined whether there was sufficient reason for the deprivation, or put differently, whether there was a sufficient nexus between the reason for the deprivation, the means employed and the effects that it had on the owner. On these facts, and especially considering that there was no reason indicating why the entrance gate had to be situated on the servient land, the means

[100] It is important in this sense that no mention was made of a reason why the structure had to be built on the servient property and could not be positioned where the servitude road entered the dominant property.

employed and the impact of the deprivation on the owner are disproportionate to the ends sought by the deprivation. The same ends (flexibility of the servitude rights of the dominant owner in light of various policy and efficiency grounds) could probably have been achieved by less restrictive means.[101] The outcome of a constitutional inquiry based on the proposed facts would thus be that it causes an arbitrary deprivation of property in terms of section 25(1). Because the deprivation is unsubstantiated and its effect is so extensive, an award for compensation would not be able to render it non-arbitrary. However, neither the court order, nor the actions of the private party can be constitutionally challenged in terms of section 25. The constitutional challenge will thus have to be directed at the administrative action that constituted the approval of the building plans. The appropriate form of review for this outcome will accordingly be the provisions of the Promotion of Administrative Justice Act 3 of 2000, as it would enable a more appropriate route by which to challenge the administrative action of approving the building plans.

From the discussion above, it becomes apparent that the need for flexibility in the law of servitudes can be satisfied by a development of the common law in the form of a different application of the existing common law principles. By applying the principles that regulate the relationship between the parties to a servitude in a manner that takes account of the current context of the relevant properties, many of the

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[101] The availability of less restrictive means to achieve a particular purpose has been considered in a number of cases as one of the factors to determine whether a deprivation is arbitrary: *National Credit Regulator v Opperman* 2013 (2) SA 1 (CC) para 79. Section 36(1)(e) requires that the availability of less restrictive means must be considered when deciding whether the limitation of a right in the Bill of Rights is justified. See T Roux "Property" in Woolman S, Bishop M & Brickhill J (eds) *Constitutional law of South Africa* vol 3 2 ed (2003) 46 26-28 for a discussion of the redundancy of section 36 as a result of the "arbitrary deprivation vortex" created in the *FNB* case.

problems created by the rigid approach that views servitudes as static and unchangeable rights, can be solved. These principles provide protection to both the dominant and the servient proprietors, and accordingly, the outcome will be one that reaches a fair balance between their interests. Furthermore, because the value of security of property rights is deeply imbedded in these principles, the proposed flexibility will not compromise the security of property rights and no amendment of existing entitlements nor acceptance of new ancillary entitlements should be permitted if the result would create an unreasonable impact on the servient proprietor's property. Accordingly, the possibility of any serious constitutional issues resulting from the proposed development of the common law seems unlikely.

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