

EASEMENTS

- An easement is a non-possessory right to use and/or enter onto the real property of another without possessing it.
 - It is best typified in the right of way which one landowner, A, may enjoy over the land of another, B.
-

Characteristics of Easements

- Four characteristics must exist before a right will be an easement:
 1. There must be **dominant tenement** (a piece of land that benefits from or has the advantage of an easement) and a **servient tenement** (the land which has the burden of an easement).
 - There must be land that benefits (not profits) from the easement AND land that is burdened by the easement.
 - The instrument creating the easement need not expressly identify the dominant tenement although it must be capable of being identified by the surrounding circumstances.
 2. The easement must '**accommodate**' the dominant tenement
 - The dominant tenement must benefit from the easement. The easement must be reasonably necessary for the enjoyment of that land.
 - Determined as a question of fact by the surrounding circumstances.
 - ➔ **Re Ellenborough Park**
 - Satisfied where there is a "natural connection" between the tenements. Consider:
 - Location/existence: DT and ST must be physically close enough to satisfy the relevant benefit/burden - are often adjacent to each other, or in the same vicinity. Need not be contiguous.
 - It is **not** enough for the ST to be a convenient incident to the right - the nexus between DT and ST must be real and intelligible.
 - ➔ **Clos Farming Estates**
 - An easement is limited to the needs of the DT. If the DT does not need the right conferred then there is no easement. The need must relate to the **land** itself, not a benefit to the person in occupation (e.g. a business).
 - The fact that people other than the DT owner/occupier benefit from the easement does not prevent it from existing.
 - ➔ **Re Ellenborough Park**

3. The dominant tenement and servient tenement must not be **owned and occupied** by the same person
 - The rationale is that a person cannot acquire rights against themselves
 - Easements are not precluded unless ST and DT owned **and** occupied by the same person
 - E.g.: both tenements can be owned by the same person, but one may be occupied by a third party under lease, licence, etc.

 4. The right must be capable of forming the **subject of a grant**
 - This is satisfied if the rights expressed as the subject of the easement are:
 - Not too wide or too vague
 - Not inconsistent with the ST's rights of ownership / possession
 - Confer utility and benefit to the DT
 - Depending on the wording of the grant, the following rights may fail these tests:
 - Right to wander on land
 - Right to prospect
 - Right of unrestricted air flow
 - Rights of recreation
- ➔ ***Copeland v Greenhalf***

Creation of Easements

- Easements may be created by:
 - Express grant or reservation
 - Implied grant; an express grant has failed for some reason, but easement is necessary for the proper enjoyment of the DT. Implication by:
 - Necessity
 - Common intention
 - Under the rule in ***Wheeldon v Burrows***
 - Manner of description (under the *Subdivision Act*)
 - General words
 - Prescription (long user)
 - Statutory easements

Express Grants

- Rights granted by the ST owner to the DT owner arise from a written document or oral agreement (partly performed).
- For easements over general law land:
 - the document or agreement must be in the form of a deed to create the legal interest in the ST. If not, then the rights will be interpreted as personal (by way of licence).
 - Equity may give effect to an agreement that does not meet these formalities if the other elements stated in **Re Ellenborough Park** are met.
- For easements over Torrens land:
 - Registration takes the place of a deed. Easement is created by instrument in an approved form (which may also be underpinned by a written agreement).
 - Equity may give effect to an agreement that does not meet these formalities if the other elements stated in **Re Ellenborough Park** are met.

Express Reservation

- Rights are reserved by the DT owner for their benefit in a conveyance or agreement with the ST owner (e.g. **Clos Farming**).
- At common law:
 - reservation of an easement operates at law without the purchaser having to execute the conveyance: **PLA s 65**.
 - A vendor can declare a use that is intended to be reserved: **PLA s 194**.
- Easements created by reservation can be noted on title by the Registrar at its discretion: **TLA s 72**

Implied Grant

- An implied easement arises where the parties have failed to expressly create the easement in accordance with the requirements above, but nonetheless the easement is necessary for the proper enjoyment of the DT. Easements can be implied by:
 - Necessity
 - Common intention
 - Under the rule in **Wheeldon v Burrows**
 - By manner of description under the *SDA*
 - By general words

IG: Necessity

- An easement by necessity arises when an easement is **necessary** for the use and enjoyment of land granted or retained.

- At common law: easements by necessity are implied if the use of the ST is **essential** and **not a matter of convenience**. For example: if the DT owner cuts off their access to a road, an easement of necessity is not implied over other adjoining land to provide alternative road access.
- Examples:
 - Easements of way (road access)
 - Easements of support (common party wall)
- NOTE: an easement by necessity is an exception to the general rule that only grants of easements can be implied: i.e. an easement of necessity can be implied by **grant** or **reservation**.

IG: Presumption of Intent

- An easement may be implied by a court to give effect to the parties intended use. For example: under a contract for the sale of land.
- Examples:
 - collateral easements: of **support** (in terrace housing - for common party walls, access to drainage, etc)
- NOTE: an easement by presumption is an exception to the general rule that only grants of easements can be implied: i.e. an easement by presumption of intent can be implied by **grant** or **reservation**.

IG: Wheeldon v Burrows

- **RULE:** On grant by the owner of a tenement as it is then used and enjoyed, all **continuous** and **apparent** easements which are **necessary** to the **reasonable enjoyment** of the DT will pass to the grantee.
 - Continuous and apparent: not transitory or intermittent.
 - Necessary in this case NOT as strict as in an easement by necessity.
 - At the time of sale.
- Applies where 2 or more blocks of adjacent land is owned by the same person, and one is sold to a third party (not by subdivision).
- NOTE: an easement implied under the rule in **Wheeldon v Burrows** is implied by grant only and the benefit of the easement does **not** automatically pass to a purchaser upon disposal of the DT (except if 22 the easement also qualifies as an easement by necessity).

IG: Subdivision Act 1988

- Easements can be implied under the SDA:
 - If the easement is **necessary** for the **reasonable use** and **enjoyment** of the **lot** or the **common property** [i.e. **appurtenant** to that lot/common property]
 - AND the easement is constant with the reasonable use and enjoyment of the other lots of the common property.
 - FOR: support, shelter or protection; passage or provision of essential services, utilities or data transmission; rights of way; access to and use of light for windows, doors or openings; maintenance of overhanging eaves
 - Relevant provisions: **SDA ss 6(1)(k), 12(2), 24(2)(e), 23**
 - NOTE: an easement implied under the SDA is implied by grant **only**.
- ➡ **Body Corporate No 41324R v Sheppard**

IG: Prescription (Long User)

- Doctrine of **Lost Modern Grant**: grant of an easement will be presumed irrefutably from 20 years user as a right where the use has been open and uninterrupted.
 - **As a right**: claimant must show that they have exercised the use as though they were entitled to do so as an incident of ownership of the DT.
 - This right is exercised without force, secrecy, or permission.
 - Use is not secret if the owner of the ST has a means of ascertaining DT owner's use of the land.
 - KEY: acquiescence by ST owner.
 - **Continuous use**: throughout the 20 year period - depends on rights claimed. Authorities support "common sense" approach.
 - ➔ **Cargill v Gotts**
 - Claim must be: holder of the fee simple estate in ST versus holder of the fee simple state in DT.
 - Note: *PLA* ss 195, 196: no rights for the use of light, or access to air by long user.
- ➔ **Sunshine Retail Investments Pty Ltd v Wulff**
- Used five elements to be established in an easement by "lost modern grant"
 1. Doing of an act by a person upon the land of another
 2. Absence of a right to do that act by the person doing it
 3. Knowledge of the person affected by the act
 4. Power of the person affected to prevent it (by own act or through courts)
 5. Abstinance by that person from interfering with the act for so long that they should no longer being able to interfere with the act.
 - Burden of proof: person claiming rights to prove acquiescence.

IG: General Words

- Easements can be implied by statute if express words are committed from the conveyance **so long as** no contrary intention to such implied easement is expressed in that conveyance
- **PLA s 62**: A conveyance includes liberties, privileges, easements, rights and advantages... appertaining to the land... at the time of the conveyance demised... enjoyed or reputed or know as part o the land... or any part thereof.
- **NOTE**: an easement by general words can be implied by **grant only**.

Scope of Easements

- Ask:
 - what does the grant authorise?
 - What is the use intended by the grant?
- Determined objectively in relation to the surrounding circumstances including the physical circumstances of DT and ST.
- Does NOT include an investigation into the issues contemplated by the parties
- E.g.: Right of Way:
 - Nature or route, meaning of words in grant, changes to purpose over time, location in which rights are exercised

➔ *Westfield Management Limited v Perpetual Trustee Company Limited*

- DT bears the cost of repairing and maintaining the easement
- ST is under no obligation to repair and maintain (merely avoid interference / obstruction)

- Easements (however acquired, and whether or not included on the Register) are statutory exceptions to indefeasible title: **TLA s 42(2)(d)**
- The rights, powers and privileges attached to an easement are passed to the subsequent DT with the instrument of transfer per **TLA s 45(2)**

- An easement can be removed, or varied by:
 1. **Abandonment**
 - DT does not intend to use or benefit from easement in the future (note: high threshold: more than non use).
 2. **Express release**
 - DT owner can expressly release ST owner.
 3. **Alteration to the DT (excessive use)**
 - Where alteration to the DT increases the burden of the easement on ST.
 4. **Unity of DT/ST (merger)**
 - Where DT and ST are occupied and owned by the same person.
 5. **Statutory extinguishment**
 - (same as for restrictive covenants) under **TLA s 73** and **SDA ss 23, 36**