

Mortgages

CA = *Conveyancing Act 1919* (NSW)

RPA = *Real Property Act 1900* (NSW)

- A. Unregistered Mortgages
- B. The equity of redemption and early discharge of mortgage
- C. Early discharge of mortgage
- D. Penalty clauses
- E. Foreclosure
- F. Powers of mortgagee
- G. Mortgagee sale
- H. Priorities between mortgagees where there have been further advances – Tacking

A. UNREGISTERED MORTGAGES

In the event that a mortgage is unregistered, consider whether or not it could be an equitable mortgage:

Equitable mortgage by deposit of title deeds

- An equitable mortgage arises where you give the bank your title deeds. The bank gives you money in exchange, and the bank retains your deeds for the duration of the loan.
- The title deeds function as security for the loan; by this conduct a mortgage has been created in equity.
- This mortgage is unregistrable because the bank retains the title deeds.
- *Cooney v Burns*

Equitable mortgage arising through an agreement to grant a mortgage

- An equitable mortgage arises where a borrower promises to grant a mortgage as security for the bank lending money through a loan agreement.
- This will occur pre-registration of the mortgage.
- *ANZ Banking Group v Widdin*

Equitable mortgage that is in registrable form

- An equitable mortgage arises where the borrower signs a mortgage in registrable form but the bank doesn't ever bother to register it.

B. THE EQUITY OF REDEMPTION

- The equity of redemption is the borrower's equitable right to get their property back, free of mortgage, once they have redeemed their debt (i.e. repaid the debt in full): *Santley v Wilde*

C. EARLY DISCHARGE OF MORTGAGE

- Both at common law and equity, a borrower has no right to repay the principal of the loan before the due date, unless the mortgage agreement gives the borrower such a right: *Hyde Management Services v FAI Insurances*. (But note s 93(1) CA).

Where a borrower wants to repay early:

- S 93(1) CA provides that a person can redeem early, 'although the time appointed for redemption has not arrived.' However, the borrower must pay interest 'for the unexpired portion of the term of the mortgage.'

Co-ownership

- A. Joint tenancy
- B. Tenancy in common
- C. Creation of co-ownership
- D. Severance
- E. Rights during co-ownership: occupation fee
- F. Ending a co-ownership

A. JOINT TENANCY

The four unities:

- In order for a joint tenancy to exist, the four unities must be present:
 1. **Possession**
 - Every owner must have the right to possess the ENTIRE property
 2. **Interest**
 - All co-owners must be the same owners of the same interests (e.g. all must own the mortgage)
 - If you transfer an interest to two or more people, you must give them the same interest
 3. **Title**
 - Co-ownership must be created using the exact same instrument
 4. **Time**
 - Co-ownership is created at the exact same time
 - Where there is unity of title, there is also unity of time

Characteristics of joint tenancy:

1. **Potential or aliquot shares**
 - Every joint tenant must have the same fractional interest
 - E.g. if you have two joint tenants, they have potential one-half shares; three joint tenants, they have potential one-third shares.
2. **Right of survivorship**
 - If Alice and Bob are joint tenants, and Alice dies, then Bob's interest is enlarged to the extent of Alice's share. Bob is now the sole proprietor.
 - If Alice, Bob and Carlie are joint tenants, and Alice dies, Bob and Carlie's interests are enlarged to the extent of Alice's interest. Bob and Carlie have one-half shares.
 - Right of survivorship overrides any will to the contrary. If a co-owner has stipulated in their will that their share will be left to a beneficiary, this is inoperable because the right of survivorship in a joint tenancy will override the will.
 - However, if you are the last man standing in a joint tenancy, only then will your share be inherited by your heirs under your will.
 - Presumption of survivorship: we presume that people die in order of their age; the eldest person dies first: [s 35 CA](#)
3. **Alienable**
 - Interests are transferrable (alienable) and the transferee is entitled to possession of the whole.
 - Each joint tenant can alienate their interest at any time.

- Both Alice and Bob can separately transfer their mortgage or lease their interest.
- Bob and Alice are joint tenants. Bob transfers his interest to Carlie, Carlie and Alice become joint tenants.

B. TENANCY IN COMMON

Characteristics of a tenancy in common:

1. Unity of possession

- Every co-owner is entitled to possession of the whole

2. 'Undivided shares'

- Rather than 'potential shares', they are 'undivided shares' in tenancy in common
- The shares can be any fraction or percentage combination you want (e.g. Alice has one-third, Bob has two-thirds share)
- Unlike joint tenancy where each co-owner has the exact same fractional share

3. No right of survivorship

- After death, the interests in the property are distributed according to the will of the co-owner.
- Alice and Bob have one-third and two-third shares respectively. Alice dies. Her heir inherits her one-third share. Her heir becomes a tenant in common with Bob.

4. Alienable

- Interests are transferrable (alienable) and the transferee is entitled to possession of the whole.

Where joint tenancy simultaneously exists with tenancy in common:

- Alice and Bob are joint tenants. Together they are tenants in common with Carlie with two-third, one-third shares respectively. Alice dies. Bob's share is enlarged to the extent of Alice's share, AND Bob and Carlie become tenants in common. Bob has two-thirds share, and Carlie has one-third share.
- If Carlie dies, however, her heir inherits her one-third share. Alice and Bob remain joint tenants, but are now tenants in common with Carlie's heir.

Leases

Lessor = landlord – person who grants the lease
 Lessee = tenant – person who takes the interest
 Leasehold estate = the interest held by the tenant
 Reversion = the interest held by the landlord

- A. Leases vs. licences
- B. Creation/essential characteristics
- C. Types of leases
- D. Express covenants
- E. Implied covenants
- F. Assignment and sub-leasing
- G. Enforceability
- H. Termination

A. LEASES VS. LICENCES

Leases

- A lease is an interest in land granted by the landlord (lessor) to the tenant (lessee), which confers exclusive possession for a fixed period of certain duration.
- A lease or agreement for lease operates as an instrument/contract.
- A lease also operates as a property right.
 - An agreement for lease may be enforceable in equity.

Licences

- Functionally similar to leases
- Can allow access to and use of land for various purposes
- BUT, no exclusive possession

<i>Bare licences</i>	<i>Contractual licence</i>	<i>Profit a prendre</i>
<ul style="list-style-type: none"> • A privilege granted to do something which would otherwise be unlawful. • Purely personal interest; does not create any interest in land. • Cannot be assigned, or bind third parties. • For example, there is an implied licence that someone may come onto your property to knock on your door, e.g. salesman. • Can be revoked at any time – “please go away.” If the person does not leave, they are trespassing. 	<ul style="list-style-type: none"> • Need consideration. • Rights given by contractual terms. • Cannot be assigned, or bind third parties. • Can be revoked on terms of contract or by reasonable notice. • For example, hiring a hotel room. 	<ul style="list-style-type: none"> • A proprietary right to go on someone’s land and take part of the natural produce. • For example, take soil, minerals or animals. • Irrevocable as long as the interest exists. • Capable of assignment.

B. CREATION/ESSENTIAL CHARACTERISTICS

Essential characteristics

1. Right of exclusive possession of the premises

- The key to a lease is whether or not the grant confers exclusive possession
- Exclusive possession is a question of fact – concerned with the substance, and not form of the lease.
- Where there is exclusive possession, there is a lease: *Radaich v Smith*
- Features that amount to exclusive possession
 - The lessee has a right to exclude all others from the land, including the lessor
 - The obligation to return the premises at the end of the term
 - Obligation to pay rent
 - Responsibility for repair of locks and windows
 - The tenant has a key
- The premises:
 - 'The premises' has to be identified
 - Premises can be the entire estate in fee simple or can be something less (e.g. 2 floors of an office building).

2. The lease must be for a definite period

- Date of commencement and date of conclusion must be certain/definite: *Lace v Chantler*
 - FACTS: lease was given from beginning to end of WWII.
 - HELD: lease was void because duration was uncertain, did not know when WWII would end.
- If it is not certain, the lease is void *ab initio*

3. The lease must be created in the appropriate form

Registered legal lease

- Leases for 3 years or more must be registered and executed in the appropriate form: s 53(1) RPA
- Registered leases provide the benefit of indefeasibility: s 42(1) RPA
- Leases of less than 3 years can be registered (not legally required).
- If a short-term lease (less than 3 years) is not registered, it may be protected by the exception to indefeasibility, short-term leases under s 42(1)(d) RPA

Unregistered legal lease

- In order to have an unregistered legal lease, it must comply with s 23D(2) CA:
 - An oral agreement, a deed or an instrument in writing
 - It must take effect in possession, constructive (e.g. landlord gives you keys) or actual
 - Must not exceed a term of 3 years
 - For the best rent reasonably obtainable
 - It must not take effect in a fine (a lump sum)

Unregistered equitable lease

- An unregistered equitable lease can arise in the following scenarios:
 - i. In order to have an unregistered equitable lease, it must have consideration (rent), be in writing and is executed/signed: s 23C(1) CA
 - ii. *Walsh v Lonsdale*:

- The contract is final/enforceable, and
 - The contract is sufficiently certain, and
 - The contract is in writing (s 54A CA) OR part performance (s 23E CA) and
 - Equity would grant specific performance (discretionary).
- If there is an unregistered equitable lease, equity will:
 - Treat the parties as if they have a lease
 - Order the parties to enter into a legal lease
 - Restrain the landlord from exercising the right to terminate an implied legal lease

Covenants

Covenantor = burden → obligation to fulfil the covenant

Covenantee = benefit → can enforce the covenant

- A. Enforcing a covenant – pre 1964
- B. Enforcing a covenant – post 1964
- C. Remedies
- D. Extinguishment

A. ENFORCING A COVENANT – PRE 1964

*if the covenant is created pursuant to s 88B CA, disregard the below steps and move on to B.

- A covenant cannot be enforced at law (*Austerberry*); it is only enforceable as a matter of contract where there is privity. However, a covenant may be enforced in equity (*Tulk v Moxhay*). To do this, the following steps must be satisfied:
 1. **The covenant must be negative:**
 - The burden of a positive covenant cannot run with the land, it must be negative: *Tulk v Moxhay*
 - This is a question of substance not form.
 - Note: if the covenant requires the spending of money, this often means it is a positive covenant, not negative.
 - In exam: explain why it is a negative covenant, use the facts. Are the words of the covenant conferring an obligation that is positive or negative?
 2. **The covenantor (when they purchase the land) must take with notice**
 - A restrictive covenant can only run with the land in equity if the purchaser takes with notice: *Tulk v Moxhay*
 - Where the covenant has been registered, the purchaser takes with notice.
 - S 88(3) CA: the covenant may be recorded on the Register.
 - S 47(1) RPA: the covenant must be recorded on the Register, thereby creating an interest under s 42(1) RPA. This will be enough to bind a successor in title but the covenant must also satisfy the remainder of the steps below.
 - If the covenant is not recorded on the Register, there will need to be an exception to indefeasibility (fraud or personal equity) in order to enforce the covenant.
 3. **The covenant must be intended to run the land of the covenantor**
 - S 70A(1) CA: a covenant relating to any land of the covenantor... shall, unless a contrary intention is expressed, be deemed to be made by the covenantor on behalf of himself or herself and the covenantor's successor in title...and...shall have effect as if such successors...were expressed."
 - i.e. even if you do not put the words 'successor in title' in the covenant agreement, s 70A(1) CA will deem you to have made the agreement, not just with the original covenantor, but also his successors in title. This will be so unless a contrary is clearly shown i.e. that you do not intend to bind successors in title.

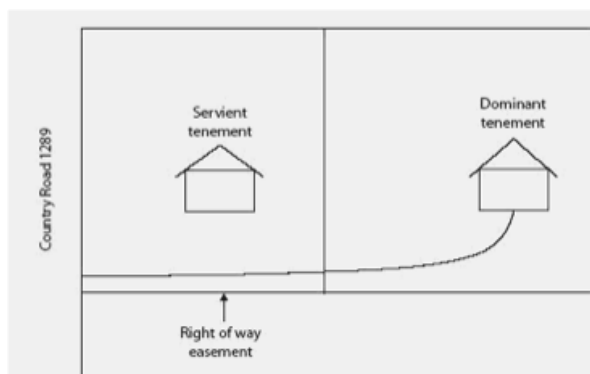
Easements

- A. Terminology
- B. Characteristics
- C. Creation
- D. Indefeasibility
- E. Construction
- F. Remedies
- G. Extinguishment
- H. Profits a prendre

A. TERMINOLOGY

Definition

- A right annexed to land to utilise land of another in a particular manner, or to prevent another using her or his land in a particular manner.
- Incorporeal hereditament = intangible property right
- Non-exclusive right
- Positive easement: gives right of entry upon another person's land (e.g. driveway).
- Negative easement: a right which prevents a landowner from using their land in a particular way.
- Dominant tenement: has the benefit of the easement.
- Servient tenement: is burdened by the easement.
- Appurtenant: the easement is appurtenant (part of/annexed to) the dominant tenement.



B. CHARACTERISTICS

- An valid easement must have the following characteristics: *Re Ellenborough Park*
1. **There must be a dominant and servient tenement**
 - There can be multiple dominant tenements
 - Easement in gross = an easement with no dominant tenement
 - There cannot be an easement in gross, however, it is possible for the Crown and public utility providers to have an easement in gross that runs across your land: [s 88A\(1\) CA](#)
 - *Re Ellenborough Park*:
 - The park formed the servient tenement, and the terrace houses were the dominant tenements benefitting from the park.

2. The easement must accommodate the dominant tenement

- The easement must make the dominant land a better and more convenient property.
- Does the right claimed as an easement have a connection with the land in the sense of being reasonably necessary for its better enjoyment *as a parcel of land*.
- *Re Ellenborough Park*:
 - The park accommodated the terrace houses because it provided a recreational space that terraces would not otherwise have, thereby making the terrace houses better and more convenient properties.