

Easement

Definition: "A right enjoyed by the owner of one piece of land to carry out some limited activity (short of taking possession) on another piece of land."

I) 4 characteristics of easement:

Re Ellenborough Park (1956): Ellenborough Park is located across the street from a row of houses. The person who owned the land that the park was on gave the builders of the houses "the full enjoyment at all times hereafter in common pleasure of the ground" when he sold them the land to build the houses. The people who now live in the houses are applying to have their right to use the park recognized as an easement. The trial judge found that this did constitute an easement, which the owners of the land appealed.

Held: Appeal dismissed, easement granted.

In order for an easement to exist there must be four things:

(1) The existence of a dominant and servient tenement.

The party gaining the benefit of the easement is the dominant estate (or dominant tenement), while the party granting the benefit or suffering the burden is the servient estate (or servient tenement).

(2) the easement must "accommodate" the dominant tenant - the use must be connected to the use of the dominant land (more than simply adds value);

(*) Common law does not recognise easement in gross. But according to **s.41A Law of Property Act 1946**, the dominant tenement may be an incorporeal interest (such as a right to fishing): **Hanbury v Jenkins (1901)**.

The dominant tenement must benefit from the easement (must offer a practical benefit).

The easement must be necessary for the enjoyment of the dominant tenement: **Ackroyd v Smith (1850)** (not for convenience). Otherwise it would be a personal privilege not connected with the land: **Hill v Tupper (1863)**.

An easement may be beneficial to people other than the owner of a dominant land (a short cut way): **Re Ellenborough Park [1956]**.

The dominant and servient tenements need not to be contiguous but they must be approximately close: **Re Ellenborough Park [1956]**.

An easement may accommodate the subdivided parts of the dominant land

(3) the dominant and servient owners must be different people; and

(*) Statutory exception in **s.90C RPA 1886**.

(4) the right, which must be "of utility and benefit", must be capable of being the subject matter of a grant.

(*) The right cannot be too wide, vague or indefinite: **Re Ellenborough Park [1956]**.

- Those essential characteristics of an easement were approved in the leading Australian case **Riley v Penttila (1974)**.

II) Creation of an easement:

1) Express easement (by grant or reservation):

* Legal easement:

- General law system: legal easements are created by deed: **S.28 LPA**
- **Torrens system**: Legal easements are created by registration: **S.67 RPA**
- Statutory Requirements:

S.84 RPA: Easements not binding on registered proprietor subsequently acquiring land unless entered on CT

S.88 RPA: An Easement granted shall be entered on the original and duplicate certificates for the dominant and servient lands by the Registrar-General

S.96 RPA: Creation and transfer of any easement shall be executed in the appropriate form...

* Equitable easement:

General law equitable easements:

Walsh v Lonsdale: The Plaintiff [Walsh] entered an agreement to lease a property off the Defendant [Lonsdale]. The agreement was made, but there was no actual formal lease (ie, a deed), which means it is not a legal lease. The Plaintiff was behind on his rent and the Defendant tried to use his right to 'distress' (right of a landlord to take tenant's chattels if behind on rent). The Plaintiff is trying to get an injunction against the distress.

Held: An equitable lease arises where there is an agreement to lease in writing which does not abide by formal requirements (ie, not a deed). An equitable lease, where the court would grant specific performance on the agreement, should be respected as if it a legal lease.

Torrens system equitable easement: **Barry v Heider + Bahr v Nicolay**.

(*) A mortgagee, when exercising his or her power of sale may grant an easement: **LPA, S.47 (1) (a)**

2) Implied Reservation Easements:

a) Common intention of the grantor and grantee:

Pwllbach Colliery Co v Woodman (1915): The claimant butcher made a nuisance claim against Pwllbach Colliery for dust thrown up by their mining operation due to the recent addition of screening equipment on the defendant's land. The butcher had taken a lease on his land 'subject to all rights and easements belonging to any adjoining and neighbouring property'.

Held: As the screening equipment was not necessary for the mining to take place, there could be no easement of necessity. There was also no easement implied by way of common intention, as there

