

VARIOUS INTERESTS IN LAND (1)

EASEMENTS – Non-possessory interest. Proprietary b/c it gives a right to DT to use part of another's land in a specific way. DT has no title in ST's land, yet still has certain proprietary rights in respect of the burdened land.

TLA s 72(1) A folio of the Register *may* contain a recording to the effect that the land is subject to an easement.

PLA s 62(1) (applies to TS land in Vic for conveyances - not sale contracts / leases) "conveyance of land shall be deemed to include all EASEMENTS appertaining to land at time of conveyance" ← **62(3)** applies *only if no contrary intention expressed in conveyance*

Is it an easement? → **Re Ellenborough Park**: 4 essential characteristics for a valid easement:

1) is there a dominant and a servient tenement?

- (a) An easement cannot benefit the public at large. The CL does not recognise easements in gross.
- (b) Easements are limited to the needs of the DT (the guise of an easement cannot be used to establish a business enterprise which has no normal connection with the use of the DT) → (**Hill v Tupper**)

2) does the easement accommodate the dominant tenement?

→ **Ackroyd v Smith**: "the alleged easement must also be *reasonably necessary* for the enjoyment of the DT"

→ Expanded in **Clos Farming**: "there must be a *natural connection* between the DT + ST and *the right must be reasonably necessary* for the DT. *It is not enough that the land is a convenient incident* – a *nexus must exist in a real, intelligible sense*."

→ facilitation of a commercial venture MAY, IN LIMITED CIRCUMSTANCES be sufficient to create the required nexus. (**Clos**)

3) are the owners of the dominant and servient tenements different people?

4) Is the right capable of forming the subject matter of a grant? 3 Sub-requirements of **Evershed MR** in **Re Ellenborough**:

4.1 *Are the rights purported to be conferred expressed in words too wide / vague?*

→ if it is so indeterminate that it defies possibility of precise definition; eg) 'wandering at will,' it cannot be SM of a grant

4.2 *Does the right constitute mere rights of recreation?* If the grant lacks real utility / benefit for DT, it will not be valid

→ Not static; informed by judicial discretion + social norms. Necessity of having a garden was accepted in **Re Ellenborough**.

4.3 *Are the rights conferred by the alleged easement inconsistent with the rights of the ST?*

(**Clos Farming**) → if the benefits of the easement unduly interfere with the normal enjoyment of the burdened land, it will not be valid. Ask: are the rights remaining for the ST "sterile / nominal" if the DT asserts the existence of the easement?

Does the easement "substantially deprive the owner of the ST of proprietorship? If yes, it is undue interference (**Clos**).

* For the purpose of this, it may be necessary to consider the nature of the land and its size – eg.) in **Clos** the ST was rural agricultural land and the alleged easement prevented ST's owner from using the land for that purpose. The alleged easement also encumbered the vast majority of the land – it clearly wasn't just for convenience; but for running a business.

Was it validly created?

→ Implied by lost modern grant **Wheeldon v Burrows** (1879) → applied to TS land in **Wilcox v Richardson** (NSWSCA 1997)

Thesiger LJ, the rule: "on the grant by the owner of a tenement as it is then used and enjoyed, the grantee will receive all those *continuous and apparent* easements – which are necessary to the reasonable enjoyment of the property granted and which have been, and are at the time of the grant, used by the owners of the entirety for the benefit of the part granted."

Elements of the test:

- Continuous and apparent (courts tend to construe as a 'permanent, physically evident feature that is not transitory')
- Necessary to the reasonable enjoyment of the property granted
Wilcox v Richardson → *means needed or required; not 'essential'* this would be *too strict a test* (Meagher J). Liberal interpretation preferred. Rights in the nature of a quasi-easement can be implied. Handley JA: the difference is significant b/c rights which are not necessary for the operation of a business may be necessary for the *reasonable* operation/enjoyment of land leased for that business. "Such rights may be required for business efficacy + must've been intended"
- At the time of the grant, used by the owners of the entirety for the benefit of the part granted.

→ By Prescription (**Dalton v Angus**)

HOL, Lord Selborne: support of *land* (not buildings) = prima facie a right of property. Support of buildings is founded on prescription / grant. Acquisition of right of support occurs by prescription after 20y of peaceable, uninterrupted user. Support from one piece of land to another is natural and necessary as long as the status quo of the land is maintained.

Has easement been validly extinguished? (By unity of DT + ST / express agreement / intention to permanently abandon.

s 73(1) A RP may make application to Registrar for deletion of easement in whole/part *where it has been abandoned or extinguished*.

EQUITABLE AND UNREGISTERED INTERESTS (1)

SPECIFIC PERFORMANCE → requires a valid, specifically enforceable contract. (have the formalities been satisfied?)

Instruments Act 126: Certain agreements to be in writing, *otherwise action cannot be brought* (doesn't invalidate the instrument)

PLAs 53(1): Instruments creating/disposing interests in land required to be in writing, otherwise *invalid*

S 54: (1) Creation of interests in land by parol have force of *interests at will only*, **(2)** except for oral leases <3 years

Lysaght v Edwards: specifically enforceable contract of sale confers an equitable interest on P of land. Eq. doctrine of "conversion" is based on principle that equity deems done what ought to be done, therefore regarding contract as effectively implemented.

However equity will only take this view where there's no bar to awarding the equitable remedy

→ *The interest of the purchaser is commensurate with the availability of SP (Bunny, Tanwar)*

Bunny – Qld case applies *Lysaght*. FSW (V) held property on trust for Bunny (P) after contract for sale + deposit. B/c FSW sold to a BFPFVWN, remedy of SP not available. However as constructive trustee FSW held the profits made from 2nd sale on trust for B, as well as the deposit. Court prevented FSW, as fiduciary, from benefiting from sale which deprived Bunny of equitable ownership.

Tanwar – 5xHC judges JJ: between contract for sale and settlement, vendor DOES NOT become constructive trustee for the purchaser. (Rejects characterization of trust r'ship between V + P in *Lysaght v Edwards*). Provides no definition of P's equitable interest, but P is less than *cestui que* trust. (Chambers / other academics v frustrated by HC for this). Trust characterisation at least explains why V cannot damage the land, why P can secure finance on a property – equitable title passing to P makes sense).

→ Two or more documents can be read together to constitute a 'sufficient memorandum' in writing for the purposes of s 53 of the PLA, however, parol evidence cannot be used to substitute written evidence. The writing in a note must sufficiently describe the subject matter (land) so that it can be identified. Without valid mortgage agreement, SP not available. (**ANZ v Widdin**: SP n/a)

PART PERFORMANCE – may allow enforcement of *oral* contracts where contract has been sufficiently acted upon by party seeking enforcement. **PLA s 55(d)** → *nothing in ss 53, 54 affects the doctrine of the law relating to part-performance* (can overcome SoF).

Rule in **Maddison v Alderson**: acts of PP must provide some evidence of the contract; be *unequivocally referable* to alleged agree't.

→ ^ rule upheld **Ogilvie** → (Ryan's acts failed 'unequivocal' requirement b/c her conduct could've been explained by love / affection)

→ 'taking possession' can sometimes be enough to constitute an act of PP. (Removing rabbits in **Mason v Clarke**)

→ payment alone not enough to constitute act of PP (ANZ v Widdin) ANZ did more - enough to prove existence of a contract (making them mortgagees in equity even if formalities were not complied with).

RESULTING TRUSTS – *contribution of different amounts to purchase price: presumptions: PoA / RT*

(**Calverly**) → A resulting trust due to unequal contributions to purchase price requires:

- Direct contributions to the purchase price at the time the property was purchased (include undertaking a mortgage obligation. Paying off the mortgage is an indirect contribution and is not counted as a contribution to the purchase price)
- *Equitable ownership will be in direct proportion to the contributions to the purchase price*
- The trust results from a presumption about the parties' intentions
- Presumption can be rebutted by:
 - o Evidence of a contrary intention
 - o Existence of competing presumption of advancement

The relevant intention = subjective intention of person contributing at time of the payment of the purchase price, not later.

(**Cummins**) → No evidence of any intention at the time of purchase that their beneficial interests in the property should differ from the 50/50 split suggested by the legal title. They were a married couple buying matrimonial home. **SPLIT=50/50**. Majority: In the context of marriage, it is often purely coincidental which party will pay more than the other for particular expenses.

COMMON INTENTION CT → Elements which need to exist before equity will recognise a CICT (Upheld **Rasmussen**)

- The parties had a *common intention* about the beneficial ownership of the property;
- the party claiming the beneficial interest acted to his/her *detriment* on the basis of C.I.
- It would be unconscionable for the legal title holder to deny the interest claimed.

→ All the above = made out in **Ogilvie**. Case also found the *common intention can be express, imputed or implied*.

→ The common intention can arise before or after the acquisition of property (Ogilvie v Ryan).

→ the CICT trust is based on the fraud of the constructive trustee in asserting his legal title to defeat the beneficial interest of Ryan who had acted to her detriment on the understanding that she would gain a life tenancy in return for nursing and providing companionship for Ogilvie until his death. (**Ogilvie**)

Rationale: the law should give effect to Ogilvie's promise (despite it not being contained in his will) because it would be fraud for the plaintiff to assert his legal title in order to defeat Ryan's beneficial interest after the deceased had received the full benefit of Ryan's performance of her obligations, and she'd received nothing. (**Ogilvie v Ryan**)

Effect of declaring CICT: The legal title holder remains the legal title holder, however they must exercise their title in the interest of the beneficial title owner, the beneficial interest of whom equity acknowledges. (they do not obtain legal title. Eq. rights recognised).

CAVEATS

TLA s 89(1) “any person **claiming an estate / interest in land** under any **unregistered instrument**... may lodge with the Registrar a caveat in the appropriate form forbidding registration of any person as transferee or proprietor of and of any instrument affecting such estate or interest either absolutely or conditionally” → **91**: no entry to be made on the folio of register while caveat in force.

Caveatable interests A caveat requires: **1) Description of the land and 2) accurate description of identifiable interests relating to that land**. Mere equities cannot support a caveat. (*Swanston Mortgage v Trepan Investments*)

Failure to caveat: effect in TS land will depend on the current administrative conveyancing and lending practice - as to whether it is somehow negligent or indicative of some kind of representation.

Abigail v Lapin

1930 (HCA): Dixon J reluctant to view failure to caveat as ‘postponing conduct’ in any circumstances.

1934 (Privy Council / **Lord Wright**): upholds minority HCA judgment (Gavan Duffy + Starke JJ)

Fairclough rule is too strict - *failure to caveat is merely something to take into account when assessing the matrix of facts in regard to what each party has done*. Court = reluctant to say failure to caveat will NEVER constitute postponing conduct; it could be important in certain circumstances, however *there is no positive obligation to caveat in order to protect equitable interests*.

In this case, the subsequent interest holder didn’t even check the register, so it’s not possible to say they placed reliance on the *lack* of any caveat – although, it’s not ‘notice’ anyway!

→ Case decided on basis of the fact the Lapins had ‘armed’ Mrs H to deal with the land as if she were full legal and equitable owner. While failure to caveat wasn’t an irrelevant consideration; it was not substantially determinative.

*Had the Lapins caveated their interest prior to the creation of Abigail’s subsequent interest, they might have been able to ‘disarm’ Mrs H, and thereby *neutralise* their own postponing conduct (so, to an extent, lodging a caveat could have been advantageous).

Heid v Reliance Finance – *what conduct will be sufficient to postpone a prior equitable interest?*

Gibbs J – estoppel (narrow) approach: representations + detriment (will not always be appropriate, as in *Jacobs*)

Mason + Deane J – negligence (broad) approach: reasonable foreseeability of subsequent interests being created + compare equities.

J & H Just (Holdings) 1971

Barwick CJ: In the circumstances, the failure to caveat *did not make it inequitable* that the bank should retain its priority.

- 1) TS imposes no obligation on a m/gee to register m/gage or to lodge caveat. There can be no neglect in absence of a duty.
- 2) Evidence shows that lenders in possession of certificates of title often lodge no caveats. (asks: what is *common practice*?).
- 3) *The purpose of the caveat is protective - not to give notice*. it’s a signal to the *registrar* not to do certain things, and designed to Pursue remedies against those lodging registration
- 4) A failure to give notice by lodging a caveat should not be regarded as entitling any person subsequently dealing with the RP to regard the title as clear of any outstanding equitable interest.
- 5) A prior equitable owner does not lose his priority merely by not lodging a caveat.

Windeyer J: Lack of a caveat should NOT be taken as notice to the world of no interests regarding that land. (this inverse analysis is flawed and does not accurately reflect the purpose of caveats)

Jacobs v Platt – in this case, failure to caveat was the only possible concession by Jacobs. Court: in the circumstances, it was insufficient to establish ‘*postponing*’ conduct, as it was reasonable for the party to believe that their interest would otherwise be protected by trusted RPs – ie, one’s parents.

→ *Jacobs endorses application of 2 diverse approaches forwarded in Heid*. Both the narrow estoppel (Gibbs) and broad negligence-based (Mason, Deane) approaches in this case failed to establish postponing conduct on Jacobs’ behalf. Here it was not ‘reasonably foreseeable’ that subsequent interests would be created, as Jacobs could not have predicted her brother would deceptively take over their mother’s power of attorney to deal with their parents’ land + subordinate J’s equitable rights. In the circumstances, J believed in would be offensive to place a caveat on the land, which her parents assured her she would have an option to buy. Her mother, up until that stage, had always protected J’s interest. Therefore: not reasonably foreseeable; failure to caveat = not postponing in the circumstances; + no real detriment for 2nd interest holder; they had merely entered a contract and paid refundable money.

CAVEATABLE	NON-CAVEATABLE
Interest of a beneficiary under a resulting trust	Mere equities
Unregistered profit à prendre	Even within a broad interpretation of s 89(1) , a mere equity is not considered capable of being caveated because it is a personal right (Swanston Mortgages).
Interest of a holder of an option	Licences
Purchaser under contract for sale	An RP’s own interests (<i>Swanston Mortgage</i>)
Vendor’s lien	
Lease or Easement	