

Two types of easements

- **Positive easements**

- Concept: A positive easement allows the owner of the dominant land **the right to do something** on the servient land
 - Examples: the right to enter into the land either by foot or by vehicle. OR the right to discharge water through pipe
- The law is flexible to recognize the new forms of the positive easement

- **Negative easements**

- Concept: a negative easement grants the dominant land owner **the right to prevent the servient land owner from** doing something that they would otherwise be entitled to do. (e.g. easement to prevent removal of a supporting wall)
 - Examples: 1. the right to receive light. 2. The right to receive air 3. The right to receive water through pipes and channel 4. The easement for support. Eg: if in the servient land, there is a structure supporting the structure on main land, the negative easement will stop you from tiling over the land.
- The law is reluctant to recognize the new forms of the negative easement. They have apply for the strict covenant.

- **Method of creation**

- **Grant:**
 - Neighbours can grant an easement by negotiation.
 - Land is in common ownership, one parcel sold and one parcel has been retained.

- **Reservation** (note Conveyancing Act, s 45A in regard to old system title land)

The only street entrance (Scenario 1)	BLUE LAND (retained by Vendor)	Reservation of access	The only street entrance (Scenario 2)
	Grant of right of way	GREEN LAND (sold to purchaser)	

- **Scenario 1:** S owned the Blue land, and sold the green land to P. **S can grant a right of way.** P will have a dominate land and S will have a servient land cause S has the burden of the easement. S will grant an easement
- **Scenario 2:** S owned the Blue land, and sold the green land to P. S can create an easement by reservation.

Substantive requirements of the easement

What are the bundle must the grantor intended to invest in the grantee for the easement to be created?

Re Ellenborough Park (1956)

1. There must be a dominant and a servient tenement
2. **The easement must accommodate the dominant tenement**
3. The same persons must not own and occupy the dominant and servient tenements
4. **The right must be capable of forming the subject matter of a grant**

Requirement 1. There must be a dominant and a servient tenement

- Easement in CL cannot exist in gross which mean it is **not possible to have an easement** without dominant land being benefit by the easement
 - contrast: profit a prendre can exist in gross which can exist without dominant land
- **Under statute** it is possible to create easement under TT land or Old system land in gross

Creation of Easements – formal requirement

Creation of Easements – formal requirement		
Easements by Express grant	Old System title	<p>Legal interest - A deed is needed or an equitable interest will be created - s 23 CA</p> <ul style="list-style-type: none"> • Person holding an equitable interest cannot create a legal easement
	Old System title	<p>Equitable interest— must be created or evidenced in writing — ss 23C, 54A CA</p> <ul style="list-style-type: none"> • NO writing when there are sufficient acts of part performance — ss 23E(d), 54A(2) • Binding agreement to grant a legal easement creates an equitable easement <ul style="list-style-type: none"> ◦ Where parties intended a legal easement but have failed, the court will grant equitable easement • Equitable easements must satisfy the four characteristics from Re Ellensborough Park
	Torrens title land	<p>Legal interest - ss 41, 42, 46, 47(1) - registration on folios for dominant AND servient parcels</p> <ul style="list-style-type: none"> • S41 – registration make it effect at law. • S42 – indefeasibility will attach to the land • S46 – need a particular form of transfer • Ss47(1) - registration on folios for dominant and servient parcels – once registered on the burdened land -> indefeasibility attached <ul style="list-style-type: none"> ◦ Registration confer indefeasibility even when the procedural requirement of granting the easement has not been satisfied. • Dominate land (TT), servient land (OS) -> This is okay
	Registration of a plan (S88B CA) – Apply both to TT and OS land	<p>INTRODUCE IN 1946</p> <p>Operates where a plan of land lodged for registration with R-G indicates easements/covenants that are intended to be created. On registration of the plan, the easements are automatically created</p> <ul style="list-style-type: none"> • This is so even though the land benefited and burdened are in common ownership • s88B(3) - Easement will not be distinguished even if benefited and burdened lands come into Common Ownership. • S88B(4) – The R-G records the existence of the easements on the folios of the register of the bene&burd land. • Must lodged with S88B instrument or no easement will be created – Goff

	<p>Conveyancing Act, s 88(1), apply to TT land</p>	<p>s 88(1) - Provides that an easement expressed to be created by an instrument coming into operation after 1 January 1931 is unenforceable against a person not a party to its creation, <u>unless</u> the instrument creating the easement clearly indicates:</p> <ol style="list-style-type: none"> 1. 88(1)(a) the land benefited; 2. 88(1)(b) the land burdened; and ... 3. 88(1)(d) the persons whose consent is required to release/vary/modify the easement <ul style="list-style-type: none"> • “Instrument” – under TT land needs to be in registerable form ?? • Aim – helping the subsequent owners of the servient land see how their rights are going to be affected
Easements by Express reservation	<p>Two steps</p> <ol style="list-style-type: none"> 1. The grantor (A) conveys / transfers the fee simple to B 2. B grants an easement to A <p>Easement now can be granted by <u>express reservation in a conveyance</u> s 45A CA – only OS land</p>	
Implied easements	Easement by general words	<p>OS land - s67 Conveyancing Act – does not apply to Torrens Title land.</p> <p>TT land - s 51 Real Property Act – passes to the transferee all the existing easements, even though it is not specific referred in the transfer. There is not case law on this case.</p> <ul style="list-style-type: none"> • Upon the registration of any transfer, the transferor’s the estate or interest in land set out in the transfer <u>passes to the transferee with all rights, powers and privileges thereto belonging or appertaining</u> • Land – s3(1) RPA – land.. and hereditaments corporeal and incorporeal of every kind... together with all paths, liberties, privileges, easements, profits à prendre,..
	Easement by Common intention	<p>implied grant – the implication is needed to give effect to the common intention of grantor and grantee as to the use that the GRANTEE will make of the land</p> <ul style="list-style-type: none"> • S sell one parcel to A and retain the other parcel land with the intent that A can build a radio station. Easement: wave transmission • Requirement: <ul style="list-style-type: none"> ○ Construction of the term ○ The circumstances known to both parties ○ Implication – must be inherent in the very nature of the transaction itself
		<p>Implied reservation - the implication is needed to give effect to the common intention of grantor and grantee as to the use that the GRANTOR will make of the RETAINED land</p> <ul style="list-style-type: none"> • sell the land based on the intention that your land will be burdened to benefit the land I reserved –court is reluctant to this position
	Easement s of necessity	<p>When arises - Only arise when the land is in common ownership and there is a severance of land</p> <p>Element 1: severance of land in common ownership</p>

		<ul style="list-style-type: none"> • People who is bound by the easement of necessity(the grantor) can chose the location but must be reasonable • Grantee bears the costs of establishing the easement. <p>element 2 – must be “absolutely necessary” for use of one of the parcels of land (eg, landlocked parcel - the only way to get access to my land is to cross you land)</p> <ul style="list-style-type: none"> • not just enjoyment. -> Very high threshold, as in completely unreachable unless being able to cross servient land. • Intentions of the parties on severance is critical – North Sydney Printing v Sabemo <ul style="list-style-type: none"> ○ Case where the parties plainly intended for no easement to arise.
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Topic 5. Covenants over freehold land

Covenants in general		
Definition of covenant	<ol style="list-style-type: none"> 1. Covenant – obligation to repair or restrict the use of land <ol style="list-style-type: none"> a. eg: promising to build or not to build something 2. restrictive (negative) covenant – nan act not to be done – not to build a house 3. Positive covenant – a act to be done – to build a house 4. Burden of covenant – obligation to repair 5. Benefit of covenant – right to enjoy the repair 	
covenants v easements	Similarities	Differences
	<ul style="list-style-type: none"> • Both involves an obligation which burdens servient land and benefits dominant land. • Covenant&Easement could not exclude the servient land owner’s exclusive position but only grant limited procession right 	<ul style="list-style-type: none"> • Easement can exist in law and equity-> depends on the formalities. • A <u>restrictive (negative) covenant</u> is an equitable interest and can <u>only exists in equity</u>.
Checklist for the running of the benefit and burden		
At law	Burden doesn’t run , subject to limited exceptions -> Or you have to go to the equity	
	<ol style="list-style-type: none"> 1) Exception one - Benefit and burden principle 2) Exception two - Essential fabric of easement 3) Exception three - Conveyancing Act, s 88BA 	
	Benefit runs:	

	1) the covenant must 'touch and concern' land then owned by the covenantee 2) benefit must have been intended to run: s 70 Conveyancing Act 3) the successor in title to the dominant land must receive a legal estate in the land
In equity	<p>Burden runs:</p> 1) covenant must be negative in substance 2) covenant must have benefited land then owned by covenantee 3) burden of covenant intended to run: s 70A Conveyancing Act 4) successor in title to servient land not bona fide purchaser of legal state for value without notice 5) s 88(1) details clearly indicated
	<p>Benefit runs:</p> 1) covenant must have benefited land then owned by covenantee 2) benefit of covenant intended to run: s 70 Conveyancing Act 3) might need Words of annexation?

Leases and Licences compared

1. Cases about - Essential requirement 1 for a lease – exclusive possession

a. **Bruton v London & Quadrant Housing Trust [2000]- non-estate lease**

- i. **Fact:** Council owned block of flats, which it intended to demolish and build new houses and flats on site. In interim, Council **granted licence of the flats to housing trust (Trust)** to use flats in furtherance of its **charitable housing purposes**. The council did not have all the legal power as an individual to grant a lease. Based on the constitution, the council only has power to grant limited hours of licence of the flats. It would have been ultra vires for Council to have granted a lease to the Trust.

- (1). **Trust grants a "weekly licence"** to Mr Bruton to occupy one of the flats. The grant provided that it **did not create a proprietary interest in the flat** and that the grantee **allowed the Trust access to the flat for all purposes connected with the work of the Trust**, including for the purpose of **inspecting the state of repair and cleanliness**.

- (2). The trust reckoned that B breached his licence and intended to terminate that. Bruton claimed that **the Trust had granted a lease over the flat because it granted him an exclusive possession to the flat**.

- ii. **Held: There was a lease between B and the trust.** But this will not help B against the Council because B did not have the proprietary interest in the land due to that the trust did not have the proprietary in the land. However, since there was a lease, B can use this to against the Trust. This might have been a breach of the Trust's licence from the council, but was not ultra vires the powers of the Trust.

- iii. Lord Hoffmann

- (1). **Definition of lease / tenancy** - a “lease” or “tenancy” is a **contractually binding agreement**, not referable to any other relationship between parties, by which one person gives another **the right to exclusive occupation of land for a fixed or renewable period or periods of time, usually in return for a periodic payment in money**. An agreement having these characteristics creates a relationship of landlord and tenant to which the common law or statute may then attach various incidents.
- (2). **True construction is needed and language used in the document is irrelevant** - The fact that the parties use language..., such as a licence, is irrelevant if upon its **true construction** it has the identifying characteristics of a lease.’ (at 413)
- (3). **Very important point - The reason why Mr B has exclusive possession** because based on the construction of the fact:
 - (a). **NO fact suggested that B was to share possession with the Trust, the Council or anyone else.**
 - (b). **Trust did not retain such control over the premises**
 - (c). The Trust reserved the rights to **enter at certain times and for limited purposes, such an express reservation “only serves to emphasise the fact that the grantee is entitled to exclusive possession and is a tenant.”**
 - (d). The relationship b/t B and the trust **did not fall with the exceptions** of the exclusive possessions.