

## Other Interests

### i) Option

- It is probably a proprietary interest in land. (the case we did in priorities *Jacobs v Platt Nominees* – she only had an option) An option to purchase a piece of land generally.
- It gives the optionee a right to purchase the property under conditions specified in the document.
- Do not confuse with right of first refusal – similar to an option but not proprietary in nature. The holder of right of first refusal cannot compel the owner to sell.

### ii) Easement

- 4 requirements - Ellenborough Park

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

- Dominant = the land benefitted, servient = the burdened land
- No easements in gross – an easement cannot benefit the public at large (attempt will confer a mere licence)
- Statutory exceptions to the rule against easement in gross → Vic: *Local Governments Act 1989 s187A* – enables easements to be created without dominant tenements in favour of a council of any municipality and the *Water Act 1989 (Vic) s136* – gives a similar right in favour of any water authority.

#### 2. The easement must accommodate the dominant tenement

- The dominant tenement must benefit → There must be a connection between the alleged easement and the dominant tenement in the sense that the dominant tenement benefits from the easement.
- Need to be close enough so that benefit can exist: The dominant and servient tenements need not be contiguous. They do not have to be physically adjoining but do have to be close to one another. (*Wilcox v Richardson*) → ‘There cannot be a right of way over land in Kent appurtenant to an estate in Northumberland.’
- There must be right to enjoyment and must be reasonably necessary: In *Clos Farming*: The court held that there must be a natural connection between the dominant and servient tenements and that the right must be reasonably necessary for the enjoyment of the dominant tenement.
- It can accommodate business: *Clos Farming* – that the facilitation of the business or commercial use in which the dominant land is involved may, in limited circumstances, be sufficient to create the required nexus with the land provided that the criteria for an easement is satisfied.
- Re Ellenborough Park: Must be connected with the normal enjoyment of the property. → this depends on the nature of the right granted and the nature of the dominant tenement.
  - Not sufficient connection that it increases value of the dominant tenement
  - Garden – sufficiently connected to the normal enjoyment of a house. The park here became a communal garden for the benefit of the adjoining land (or land close to) it and therefore there is sufficient connexion.
- Hill v Tupper: Was just trying to establish a monopoly which had no normal connexion to the ordinary enjoyment of the land but was merely an independent business enterprise.

- Not an easement because no connection to the ordinary enjoyment of land. It is a mere contractual licence.

**3. The owners of the dominant and servient tenement must be different persons:**

- Based on the rationale that no-one can acquire rights against herself or himself. → rests on the facts that there is nobody who could have prevented the user.

**4. The right must be capable of forming the subject matter of a grant**

Further →

**i) The right must be clearly defined**

- Cannot be expressed in terms too wide or vague
- Wandering at will too imprecise. Right to privacy and right of prospect or view also too wide. → cannot be just spatiendi
- Must be sufficiently certain – right to enjoy an area of a defined area such as garden or park, grant of way (ok if it does not clearly define the exact way – the nearest way possible is taken to be at)
- *Re Ellenborough Park*: There is was fine. Well-defined and commonly understood. It is a provision for limited number of houses in a uniform crescent of one single but large private garden.

**ii) The right must not interfere too greatly with the burdened owner's enjoyment of the land**

- Cannot amount to a right of joint occupation or would substantially deprive the owner of the servient tenement of proprietorship or legal possession
- The right must be reasonably necessary for the enjoyment of the dominant tenement and not merely confer advantage on the owner of that tenement as would a mere contractual right. (*Clos Farming*)
- An easement must not unduly detract from the enjoyment of burdened land and must not exclude the burdened owner from the land.
- A right that would substantially deprive the burdened owner of proprietorship or possession of part of her or his land is incapable of being an easement.
  - *Clos Farming*: 'shadow of ownership' The dominant owner had a plethora of rights – cultivate and harvest vines, take and sell and the produce, prevent the titleholder from using the land for other agricultural purposes, exclude others from the lot, limit the recreational use of the lot → the production and accumulation of profits from use of the land is wholly in control of the dominant owner. → these rights were inconsistent with proprietorship of the servient owners.
- Rights which purport to confer exclusive use for part of land or a right that is too extensive or practically amounts to possession is not an easement.
- *Re Ellenborough Park*: Fine. The interference with possession was no more than a right of way. Perfectly fine for a man to have an ornamental garden and let a few people come in. The proprietor can still cut down trees etc.
- *Approach* – nature of dominant tenement and the right plus → that is how you determine whether the right is connected to the normal enjoyment of the dominant tenement (*Clos Farming*)
- *Business*: Right benefitting a trade carried out on a dominant tenement may be a valid easement but this is provided that the conduct of the trade is a necessary incident to the normal enjoyment of the land nor merely an independent business exercise. (*Clos Farming*)

**iii) The right must be one of utility not mere recreation or amusement**

- Utility not mere recreation
- Note that in Ellenborough Park it was sort of recreation.
- Re Ellenborough Park: Garden is a pleasure but has utility too. It constitutes a beneficial attribute of residence in a house. Provides for exercise, rest but also domestic purposes of taking small children outside – beneficial to the house. (they say that playing games and horse racing more recreation)

Cases:

**Re Ellenborough Park [1956] Ch 31**

Facts: Estate subdivided in 1855, middle is kept as a park, each of the subdivisions were given right to use the park as a pleasure ground. Is this an easement (during war as training ground and rent needs to be given to someone – if proprietary then them)

Held: Evershed MR

- Factors 1 (dominant and servient tenement are distinct) and 3 (owned by different people) not in question but 2 and 4 were
- Did the park accommodate the dominant tenement in the relevant sense (2)
  - In other words whether there is the required connexion between the servient and dominant tenements
  - Use the example of a zoo – going free of charge – not sufficient connexion there. Or to attend cricket ground for free.
  - The use of a garden is connected to the normal enjoyment of a house to which it belongs – so it is closely connected. → the park became a communal garden for the benefit of those whose houses adjoined to it or were in close proximity.
- Were the rights capable of forming the subject matter of the grant (4)
  - I) Vagueness: It is not too vague – can go onto the land and enjoy a garden, defined. Not a right to wonder at will. Well-defined and commonly understood. It is a provision for limited number of houses in a uniform crescent of one single but large private garden.
  - II) Possession – the right provided conferred no more exclusion of the proprietor than a right of way
  - Recreation: No the right had utility and benefit, not only amusement and recreation. Having a garden is a pleasure but it has a benefit in the legal manner, more than playing games.

**Hill v Tupper**

Facts: Via deed P (Hill) granted the sole & exclusive right to use pleasure boats for hire on their canal. D had property abutting the canal and also had pleasure boats. H wants to claim an easement to stop D using the boats.

- In Re Ellenborough: Say that was just trying to establish a monopoly which had no normal connexion to the ordinary enjoyment of the land but was merely an independent business enterprise.
- Not an easement because no connection to the ordinary enjoyment of land. It is a mere contractual licence.

Clos Farming Estates v Easton & 1 Ors [2002] NSWCA 389

Facts: Wineries, C purchased land in NSW to be developed as a joint viticulture exercise. Part A was residential (1/5<sup>th</sup> of the areas) and lot B was viticultural (4/5<sup>th</sup> of the area). Restrictions in place on the areas – 14<sup>th</sup> restriction ‘an easement of the vineyard’ – allowed C to enter the part B and harvest the grapes etc. Then distributed profits to the owners. Dominant tenements was lot 86 owned by C, the others subservient. Here there is a lot 27 at issue. Caveat lodged to protect the 14<sup>th</sup> restrictions. Then contract expires (after 10 years). What happens – people who own 27 want to have the caveat removed from the register. The caveat is protecting something – the question is if it is proprietary – then can caveat it. If no proprietary interest – then caveat falls away. If an easement – caveat stays if not then does not.

Held:

- The rights were too extensive – the rights of the proprietors were a shadow of ownership
- The business – not a connection to the land to the ordinary enjoyment.

Examples of easements that were recognised:

An easement in a windbreak of natural timber located on the servient tenement.	A right to discharge surplus water from the dominant land when reasonably necessary.	The right to park vehicles.
An easement to create noise over adjoining land.	The right to use an area alongside a wharf for the loading and unloading of vessels	The right to use an airfield for testing planes.
An easement to pollute water and cast noxious matter onto adjoining land	The right to enter the servient tenement to repair and maintain the wall of a cottage build on the extreme edge of the dominant tenement and to clean out the gutters.	The right to use a lavatory on the servient tenement.
A right to place rocks, stones and piles on the servient land for the purpose of protecting and securing a building on the dominant land from the sea.	A right to extend an existing party wall and the right to use the extended portion of the wall.	An easement for the passage (but not the supply) of water or electricity through pipes or wires located on neighbouring land.
A right to bring goods into a shop through the main door of the adjoining shop.	A right to install rock anchors, as part of the work needed in the construction of a nearby freeway.	An easement for the use of cattle yards.

Examples held as not easements:

Rights of prospect	Rights of recreation	The right to ground a barge on the bed of a navigable river
The right to allow trees to overhang neighbouring property	The right to hit cricket balls onto neighbouring property	The right of protection from the weather
The right to spread noxious wastes in indeterminate quantities generally over the servient land	An easement for a vineyard, permitting the dominant owner to enter the servient land to carry out viticulture works, harvest the grapes and sell them	The right to use a nearby block of land as a dog exercise area.