Real Property Notes (Examinable Topics 4-9)

Table of Contents

Topic 4: Co-ownership ........................................................................................................... 1
  Joint Tenancy (JT).................................................................................................................. 2
  Tenancy in Common .............................................................................................................. 3
  Equity .................................................................................................................................... 4
    Delehunt v Carmody (1986) 161 CLR 464 ........................................................................... 5
  Co-ownership and Indefeasibility ....................................................................................... 6
  Severance .............................................................................................................................. 7
    Corin v Patton (1990) 169 CLR 540 ................................................................................... 9
  Ending Co-ownership ................................................................................................---------- 10
  Rights of co-owners inter se: accounting between co-owners ............................................... 10
    Ryan v Dries (2002) 10 BPR 19,497 ................................................................................ 12

Topic 5: Easements .................................................................................................................. 13
  Re Ellenborough Park [1956] Ch 131 .................................................................................. 16
  Clos Farming Estates v Easton [2002] NSW CA 389 ............................................................ 17

Topic 7: Leases ......................................................................................................................... 19
  Leases Checklist ................................................................................................................... 20
    Radaich v Smith ................................................................................................................ 21
    Swan v Uecker .................................................................................................................. 21
  Indefeasibility ...................................................................................................................... 22
    Exceptions to Indefeasibility ............................................................................................. 23
  Unregistered (legal) v Unregistered (legal) Priority Contests ............................................. 24

Topic 6: Covenants .................................................................................................................. 25
  Rights and obligations between landlords and tenants ......................................................... 26
  Landlord’s covenant at Common Law .................................................................................. 27
    Aussie Traveller ............................................................................................................... 28
  Assignment of Leasehold Covenants .................................................................................... 29
  Sublease ............................................................................................................................... 30
  Privity of Contract ................................................................................................................. 31
  Privity of Estate .................................................................................................................... 32
    REAL PROPERTY ACT 1900 - SECT 51 ......................................................................... 33

Topic 4: Co-ownership

* Can include: Lease, mortgage or estate in fee-simple
* All co-owners have the benefit of 100% ownership and occupancy Thrift v Thrift subject only to the rights of other tenancies
* Key cases:
  Delehunt v Carmody (1986) 161 CLR 464 pp 470-473
  Severance: Corin v Patton (1990) 169 CLR 540
## Co-ownership

### Joint Tenancy (JT)
- Right of Survivorship (Jus Accrescendi)
  - Right of all tenants to have their interests enlarged upon the death of another JT
- Both are completely free to transfer interest at any time without permission from the other co-owners

### Tenancy in Common (TIC)
- No Right of Survivorship
  - Interest continues after death and can be transferred to another person either by will or by the rules of intestacy

### Requirements:
All 4 unities need to be present for a JT to exist:

- **Possession (unity of)**
  - For it to be co-ownership every owner must have the right of ownership
- **Interest (unity of)**
  - Each JT’s interest must be the same. If grandmother splits interest to a life-estate and an estate in fee-simple they are differing interests and are considered a TIC
  - Also includes how much of the interest; in severance in situations the splits need to be even, in uneven, then a TIC
- **Title**
  - All JT’s must derive their title from the same instrument (i.e. same written document, transfer, will or contract of sale)
- **Time**
  - Each JT’s interest needs to vest at the same time. For unity of time to be established, the interest will be vested at the same moment for all (e.g. if an interest is granted only when someone turns 18 and someone has already acquired their interest whilst someone is still below that age it will be a TIC)

### Right of Survivorship (Jus Accrescendi)
- Right of all tenants to have their rights and interests enlarged upon the death of another JT
- When one tenant dies, they **can’t pass on their interest through a will or by rules of intestacy** = their interest is extinguished. Gould v Kemp
- Can only be transferred when they are alive = Corin v Patton

### Requirements:
- Only need to establish possession

### Characteristics:
- Undivided fixed shares: each co-owner is given a fractional financial interest e.g. 1/3 + 2/3 but can also be ½ + ½
- Can still own property as a whole and have possession

### Rules:
- No right of survivorship; can only pass interest in will after death or through rules of intestacy
Legislation
S 35 Conveyancing Act: Presumption of Survivorship
- If both JT's die together then there is a presumption under s35 for death to occur from oldest to youngest

Joint Tenants
Frank 1/3
Lina 1/3
Julie 1/3

Dies = Lina and Julie's shares are increased to ½ share in the property. **The right of survivorship will override any will!**

If Frank puts his son into his will validly, there is nothing to pass on as it is an extinguished interest due to survivorship

* To get out of a JT = Severance to then convert the interest to a TIC

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**Tenancy in Common (TIC)**

Always check status of co-owners at Law and equity to determine who has formal title and who has beneficial ownership

Creation of a TIC
First Check
LAW

- Does it expressly state somewhere in the question the parties are to take as JT's?
  - Yes
    - s 26 (2) CA 1919: **does not apply** if it expressly states the interest is to be taken as a Joint Tenancy
  - No
    - s 26 (1) CA 1919: **Statutory Presumption of a TIC**
      'In the construction of any instrument a disposition of the beneficial interest in any property whether with or without the legal estate to or for two or more persons together beneficially shall be deemed to be made to or for them as TIC and not as JT’s.'
Second Check

Equity

s 26 also applies in equity

Delehunt v Carmody

*even if at law it is found to be a JT because an instrument expressly states, equity will presume a TIC in specific situations (below)

Rules:
- Does it expressly state a Joint Tenancy?
  Equity follows the law unless one of the 3 below exceptions are present:
  - Co-owners contribute unequal amounts to the purchase price
    - 2 sisters Rachel and Claire buy a house, registered as JT’s at law because it says expressly on registered transfer
    - Purchase price 500 K differing amounts, Rach 100K, Claire 400K, equity says both are co-owners as TIC both holding undivided share equal to their contribution to the purchase price and hold on trust for themselves in a 1/5, 4/5 split in accordance to how much they paid for the property
    - Both entitled to possess the whole of the property
    - Both registered a TIC at law with ½ then equity will presume a hold on trust for themselves a 1/5 and 4/5 divided share in equity
    - Presumption to unequal purchase price: It can be rebutted in an equitable presumption, in Cummins v Cummins HC held when parties to a marriage contribute unequal amount to purchase price but expressly state as JT’s it can be assumed to be taken as beneficially as JT’s due to matrimonial relationship supports JT with prospect of survivorship
  - Co-owners advance money on a mortgage (equal or unequal shares)
    - Rachel lends her dad 500K, Claire also lends 500K. Dad buys property for 1 million and executed a mortgage with Rachel and Claire registered as JT’s of the mortgage interest. In equity though they are considered TIC. Morley v Bird
  - Property is acquired by partnership or Joint Tenancy business venture
    - Rachel and Claire go into business, registered as Joint Tenants when they purchase the property. As they are purchasing a property to run a business, an asset acquired for partnership (assumes entered into partnership as legally defined), equity will show a TIC as a fixed share proportionate to the contribution of the purchase price. This can be then passed on in a will

* if one of these exceptions is present then in equity a TIC will be presumed

Exam Example:
  Rachel and Claire are registered as Joint Tenants following the purchase of a property
  - Rachel paid 70% of purchase price
  - Claire paid 30% of purchase price

In Law: s 26(1) does not apply as it is expressly stated they are JT’s pursuant to s 26(2)

In Equity: equity follows the law except when one of the exceptions to the rule applies:
  - Co-owners contribute unequal amounts to the purchase price
    - This would see them as Tenants in Common TIC for a 70% and 30% fixed proportional share according to the contribution of the purchase price

If Rachel died:
Answer: As they are JT’s, Claire would become the sole proprietor and absorb Rachel’s share due to survivorship but at equity Claire will hold on trust for Rachel 70% with herself as a 30% TIC.
If Claire died first:

Answer: Rachel would absorb her interest as a JT through survivorship but would hold on trust her own 70% share and Claire’s 30% share as a TIC

* If there is a difference between law and equity it will become a trust arrangement where they are both holding the property on trust for themselves as Tenants in Common.

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Delehunt v Carmody (1986) 161 CLR 464

**Facts:**
- Steps through s26 and why equity is needed
- Miss Delehunt and Mr Carmody *(de facto relationship)* contributed equally to purchase price of a property in Enmore.
- Mr Carmody on CT as RP
- Mr Carmody died without a will
- Property went to his wife, Mrs Carmody (RP), from whom he had separated in 1939 but rules of intestacy it went to her in 1980.
- However, Mr and Mrs Carmody married in 1935 and only lived together for 4 years, one child and separated in 1939
- Mr Carmody only lived at Enmore from 1949, ten years after the separation from Mrs Carmody (never divorced)
- Lived with his de facto Mrs Delehunt at the property with her mother and two children – one which was Mrs Carmody’s
- First the property was rented but in 1956 he entered into a contract to purchase the property on terms and when the contract was paid the land was transferred to MR Carmody as RP
- Miss Delehunt also contributed to payment of the deposit and instalments on the basis of an express oral agreement that both would own the property in equal shares and in due course the property would be put in both names

**Relevance:**
- The importance of equity is demonstrated in this case as if formal title was the only element of consideration, despite not living at property or being in a relationship with Mr Carmody for 50 years, nor contributing to the purchase price, Mrs Carmody would be able to gain title to the property.
- Proceedings were commenced in the Supreme Court by Mrs Carmody and Miss Delehunt
- Miss Delehunt argued that *equity* presumed a joint tenancy when equal contribution to purchase price – i.e. that she held the entire beneficial interest by right of survivorship.
- Mrs Carmody and Miss Delehunt took their case to the Supreme Court, both believing they were beneficially entitled to the property

**Court Decision:**
- Court needed to decide what kind of equitable interest did Miss Delehunt hold in the Enmore property and before Mr Carmody’s death did the Mr Carmody and Miss Delehunt hold the property as JT’s or TIC
- They know equity presumes a TIC when there is an unequal contribution to the purchase price BUT if there is an equal contribution purchase price the reverse must happen and equity must recognise a Joint Tenancy, so equity would hold the interest as JT’s and when Mr Carmody dies, her interest would be expanded and she would then hold the interest as a sole beneficial and equitable interest in the house
- Mrs Carmody argued there never really was an equitable presumption of JT is equal contributions were paid, equity follows the law so unless one of the scenario applied it would follow the law. There was only a transfer of land to one person
- Court said now there was s26 of CA and NSW CA held that s26 held a indicates a general legislative favouring of TIC over JT and the courts should follow the legislation even in situations when they do not entirely fall within the ambit of this provision. The HC affirmed this decision on appeal saying the
indirect effect was to require that the trust arrangement was established in this case to Carmody and Delehunt as if it had been conveyed to them both in a document so that s 26 applied and they would have been presumed as TIC. They affirmed the argument that equity follows the law in its present state, as it has been amended by s26 which brings the favouring of TIC over JT’s.

- When there is no co-ownership at law and there is only one legal owner of a property, equity might impose a resulting trust when someone else has contributed to the purchase price. This was the case in Delehunt v Carmody (1986) 161 CLR 464, whereby the property was legally owned by the husband, but the wife had contributed to the purchase price. The result was that a resulting trust arose, and accordingly, the wife was equitable joint tenant for the proportion of the share of her contribution to the purchase price.

Nutshell:
- Issue: What was the effect of s 26 CA on equity’s presumptions re: tenants in common/joint tenants?
- Held: Section 26 CA applies to legal and equitable interests.
- Although s 26 CA did not strictly apply in this case (because the transfer was to one person only), it operated indirectly by overturning the general common law presumption of joint tenancies. The general rule is that equity follows the law, and that includes the law in its present state, i.e. as it stands under s 26 of the CA.

Co-ownership and Indefeasibility

Principle:
Importing the laws of Torrens into co-ownership; when parties register as proprietors in a joint interest then they will have a Joint Tenancy

Legislation and Case Law:
- s 100 (1) of the RPA NSW 1900
  - “Two or more persons who may be registered as joint proprietors of an estate or interest in land...shall be deemed to be entitled to the same as joint tenants”
  - Held: s100(1) imports the laws of joint tenancy into Torrens. It did not create a presumption of joint tenancy: Hircock v Windsor Homes [1979]
  - NB: not all features of common law of joint tenancy will necessarily be carried across to Torrens. E.g. fraud by one joint tenant will not necessarily “infect” the registered title of another JT: Cassegrain v Gerard Cassegrain (2015)

Indefeasibility:
- Cassegrain v Cassegrain
  - s 100 said both were considered JT’s, only one was fraudulent. The company argued the fraud should automatically infect the other JT (Mrs Cassegrain). The HC said this wasn’t the case because that assumes the actions of one party would automatically implicate the other; as fraud needs to be brought home to the RP this argument would not hold as not each and every one of them can be held accountable.

* Not all features of common law of Joint Tenancies will necessarily be carried across to Torrens, e.g. the fraud of one Joint Tenant will not necessarily infect the registered title of another Joint Tenant.
Severance

**Principle:**
- Many ways to sever a Joint Tenancy
- Most often Severance is performed to stop the benefit of survivorship against another
- Severance may operate at law or at equity

**Legislation and Case Law:**
- Section 97 of the RPA NSW 1900: transferring to oneself
- Corin v Patton (1990) 169 CLR 540: Corin could have used s97 or s23 (2)B to effect
- Section 23C (2)B: granting a trust over the land

**Effected in 6 ways:**

1. **Unilateral act by one Joint Tenant (Cassegrain)**
   - Alienation/transfer to 3rd party
   - Declaration of a trust
   - At Law: 
     - **§ 42 RPA**: Effective at law when the legal interest is transferred (upon registration of transfer)
   - In Equity:

2. **Mutual agreement by Joint Tenants**
   - If all JT agree to hold as tenants in common, the joint tenancy is severed in equity: Lysaght v Edwards (1876) 2 Ch D 499; s 54A CA

3. **Course of dealing by Joint Tenants**
   - Discussions about how to sever will not sever: Magill v Magill (1997)
   - Need to have conduct that shows that all the co-owners agreed and assumed that each held an undivided proportionate share and no right of survivorship: Williams v Hendsman (1861)

4. **Court Order**
   - A court order may effect severance.
   - For example, under the Family Law Act 1975 (Cth), the court has powers to make orders in relation to property, that may expressly or by implication, sever the joint tenancy.

5. **Unlawful Killing**
   - If Alice murders Betty, Alice retains the legal estate by right of survivorship, but in equity the estate is held by Alice and Betty’s heirs at TIC.
   - This is known as the forfeiture rule.
   - In cases of unlawful killing (but not murder), ss 4 and 5 of the Forfeiture Act give the Supreme Court power to vary the forfeiture rule if justice requires it.

6. **Bankruptcy**
   - Bankruptcy of a JT will sever the joint tenancy.
   - Occurs at law when the JT’s property vests in the trustee: s 58 Bankruptcy Act 1966 (Cth)
   - Occurs in equity from moment JT is declared bankrupt: Re: Holland.

1. **Alienation/transfer to 3rd party**
2. **Unilateral act by one Joint Tenant (Cassegrain)**

### Alienation/transfer to 3rd party

**At Law:**
- **§ 42 RPA**: Effective at law when the legal interest is transferred (upon registration of transfer)

**In Equity:**

### Alienation/transfer to self

**At Law:**
- **§ 97 RPA**
  - effected following decision in Corin v Patton
  - § 97 permits a JT to register a transfer to herself to sever the JT

**Rules:**
- **§ 23C (2)B**
  - granting a trust over the land
  - if the trust is to be enforceable is needs to
- When a JT has entered into a specifically enforceable contract
  Result = Original JT holds legal title on trust for a purchaser as a TIC.
  Wright v Gibbons (1949) 78 CLR 313

- No need to produce CT
- Need to sign transfer document
- Transfer document needs to be registered
- Notice is given to other tenants before the registration and transfer goes ahead

No registration = severance fails.
Mc Coy v Caeli [2008] NSW SC 986
- Mother and son were JT’s, son wanted to sever the JT using s 97 RPA
- Son executed a transfer document but dies before registration (see below)

In Equity:
- The court considered if there was a severance in equity and did the party take reasonable steps to put the interest beyond their recall?

Signed transfer document: yes
Registered: no
- Court said no. The court found it couldn’t apply a gift analysis because there is no second party (by transferring to self)
- Court also found there was no unconscionability due to a transfer to one’s self so held a JT remained and passed the interest to his mum through rules of survivorship.

Unilateral act: Gift to a 3rd Party

Rule:
- If legal title is transferred (s 42 RPA) = severance
- BUT if it isn’t registered = equity will not step in as a valid interest

- Didn’t work in Corin v Patton because she was attempting to appoint someone else as having the legal interest. She can’t cut around the legal registration by appointing a trustee as equity follows the law
- Trustee has legal interest
- Beneficiary has equitable interest
- Mrs Corin could have done it by reversing the names on the trust deed by making herself the trustee with her brother as the beneficiary as she was already the RP, held legal interest and would have simply been executing an equitable trust holding for her brother (I now hold it subject to interest in favour of my brother)
- She also could have used s 97 RPA by transferring it to herself
Facts:
- Mr and Mrs Patton despite being registered Joint Tenants of a family home want to sever the Joint Tenancy (they hate each other and don’t wish for survivorship to operate)
- Mrs Patton terminally ill and wants to sever the tenancy so enlists her brother, Mr Corin, to help
- Mrs Patton wanted her interest to pass to her children to gain the benefit so executed a registrable memorandum of transfer to her brother, Mr Corin
- She executed a deed of trust, appointing Mr Corin as trustee with her as beneficiary (so he held a legal interest and held her interest on trust (he had to act in a way that was beneficial to her interest and can’t breech the terms of the trust). She left a will, leaving her interest to her children
- Mrs Patton had signed the transfer form but did not hold the CT, essential for registering the interest. The CT was with the bank due to the mortgage. Before authorising its release to Mr Corin or the solicitor, or passing the CT over to Mr Corin, Mrs Patton died.
- Transfer to Mr Corin was not registered.

Issue:
- No severance at law because no registration. So – did Mrs Patton effectively transfer her interest to Mr Corin in equity, thereby severing the joint tenancy?
- Despite not being registered (so didn’t affect it at law) would the court of equity conclude that interest is now held subject to that trust arrangement?

Courts Decision, Held:
- “If an intending donor…has done everything which is necessary for him to have done to effect a transfer of legal title, then equity will recognise the gift.” [per Mason CJ and McHugh J at 559].
- CT required to register transfer. By failing to authorize bank to release CT, Mrs Patton had not done everything necessary. No severance at equity
- Court said no – Mrs Patton as the donor needed to show she had done everything necessary which only she can do
- Signed the transfer: yes
- Gained the CT: no
- Gave authorization to release the CT to the Donee: No
  - only the donor can sign the transfer otherwise its fraud. Only the RP can provide the CT or give the authority that it is provided to the Donee, She should have authorized the bank to release it to her brother, The court also said that she didn’t do all that was required that was beyond her recall (beyond stopping the donee). So, it wasn’t in effected at law but effected in equity so the interest was held on trust for the donee (but not the kids)
- They said s 97 severing to one self would have been better- that’s how it came into effect

Other ways a severance can occur (in a unilateral fashion):
- Lease: No. It merely suspends it for exclusive possession, it is reactivated upon the cessation of a lease. Frieze v Unger
- Mortgage:
  - JT can grant a mortgage over the individual’s interest or the whole interest
  - Under OST it would have severed because they gave the interest away with equity of redemption
  - With TT mortgages, the title is not given away – it is just recorded on the folio so the JT remains
the title holder and the RP (merely a security interest, a charge) = a mortgage won’t sever the joint tenancy
- The mortgage that is granted only affects your portion of land. But with survivorship, if I die before Danny, on the death of a JT survivorship applies, but Danny would take free of the mortgage and the mortgagee is left with nothing
- Husband grants the mortgage wife dies first, husband gains survivorship and the mortgagee gains the wife’s interest i.e., the mortgagee has gone from 50% to 100%
- Courts always favours survivorship when dictating the outcome. Banks will usually never execute a mortgage to only one JT because otherwise the run the risk of losing out.

### Ending Co-ownership

**Can be done by:**
- Action of the parties: mutually sell.
  or

**Legislation: s 66G Conveyancing Act**

- **By order of sale of the court:**
  - court appointed trustee s 66G RPA
  - court will always favour sale over partition (expensive, complex)
  - moment trustee is appointed, JT’s interest is changed from a property interest to a proceeds of sale (person) right
- **By order of partition of the court:**
  - where the lands title is subdivided
  - Any one or more co-owners may apply to the court to hold property on statutory trust for sale or partition: s 66G CA. Need to demonstrate this is the preferred option which is demonstrated in Segal v Barel (2013) 84 NSWLR 193
  - Brothers owned property, one brother renovated it, one wanted to sell, but the other wanted to partition due to an ‘emotional attachment’ for partition to be preferable. Court said no. It didn’t care about emotion, it said to focus on the statue which was based on cost.
  - Sale is the primary remedy under s 66G, and partition allowed only in special circumstances: Re Cordingley (1948) 48 SR (NSW) 248

**Rights of co-owners inter se: accounting between co-owners**

- How do you decide who is entitled to what, what rights do co-owners have and how to you offset those rights?

What rights do the co-owners have?

**Right to possess and/or occupation fee**

- Unity of possession means that all co-owners are entitled to possess the whole of the property: *Thrift v Thrift*;
- If someone went overseas for a year would you be expecting to accrue an equal share in rental return? No. Courts don’t view that as an entitlement
- Therefore, a co-owner occupying the property is generally not liable to pay an occupation fee/rent to any co-owners not in occupation: *Forgeard v Shanahan*
- Occupation fee: when you choose not to occupy the property, and you ask to be compensated by
However, there are exceptions to this rule.

- If agreement otherwise
- If one co-owner ousts (wrongfully excluded) another then they can claim an occupation fee
- To offset a claim for improvements (against an occupation fee)
- Worst case: Biviano: husband and wife DV relationship, AVO and he was excluded off property. He claimed he was ousted and should claim an occupation fee. Court said no because there was a lawful order ordering his exclusion; it wasn’t wrongful
- Normal case: Callow v Rupchev: one moves out upon separation but still subject to a co-ownership relationship. Female decided to leave and claimed an occupation fee. She didn’t comply with the first three points (there was no agreement, she wasn’t ousted, and she wasn’t claiming as an offset to improvements) but said practically she shouldn’t have to stay there. The court agreed, this is an independent ground (the new principle) to claiming an occupation fee. If a domestic relationship has broken down, to the point where it is no longer practical for them to co-habitate, the court will likely decide an occupation fee could apply

**Improvements/Repairs:**

- Paying a mortgage is seen as an improvement as by having it on a title is a liability (equity in the property)
- Brickwood v Young: Property had been renovated by Mr Porter who was a co-owner with Miss Young, he sells his interest and never made a claim for improvements but the right to be compensated runs with the land (so when Brickwood bought he can claim the improvements even if he didn’t renovate himself, but the costing of these was reflected in the sale price)

**Common law:**

- Co-owner has no claim on recovering costs from other co-owners: Leigh v Dickeson

**In equity:**

- Can claim improvement, but not maintenance (Squire v Rogers; Ryan v Dries)
- Forgeard v Shannahan: Forgeard paid mortgage, Shannahan paid insurance and bills. Court found his mortgage was improvement so she would need to pay. The court looked at her bills and looked at which bills were ‘equally liable’ council, water was fine, pest was off her own bat, insurance was only in her name so no. So, the court needs to distinguish if it is a jointly held debt
- Can claim lesser of cost of improvements or increase in value of property, whichever is the lesser: Boulter v Boulter
- Equity sees one acting as agent for the others, and hence liable to account for rent received.

**Entitlement to collected rent**

- If one co-owner collects rent from a co-owned property, do they have to share with other co-owners?
- Occupation fee v rent: Very different
  - Rent is when you leave and the other co-owners lease your space to a tenant.
  - In the 1700’s there was the statute of Anne, is now repealed so court has no statutory power to have the rent given to that co-owner who has left. The court gets around this by acknowledging the lack of statute and inherent power but inherent they can see its wrong. They say ‘he who seeks equity should pay forth and pay equity’. If someone goes to the court and says, he owes me improvements, the court will say well you need to pay forth and pay the rent owing to him.
- Equity sees one acting as agent for the others, and hence liable to account for rent received.
- (Forgeard v Shannahan; Hitchins v Hitchins; Ryan v Dries)

**Profits**

- Profit is different to rent (Squire v Rogers: caravan park is a profit)
- Does one co-owner have to account to others for profits they generate on the co-owned property?
- Was the business personal or on behalf of the co-owners?
- Were profits from the property per se, or from services of the individual co-owner?
- Case: Squire v Rogers
**Ryan v Dries** (2002) 10 BPR 19,497

- **Facts:** Parties: Joanne Dries and Gregory Ryan
  - In a relationship and bought a property together in 1990
  - CT said Ryan held 6/7\(^{th}\) share and Dries held 1/7\(^{th}\).
  - Purchase price of $200K funded as follows:
    - 120K mortgage from NAB (in both names)
    - 10K lent to Ryan by Dries’ mother
    - 30K by Dries
    - 40K by Ryan
  - Ryan also paid costs associated with purchase (solicitors fees etc) totaling 9K
  - Ryan paid all mortgage repayments, and used property as residence and business.
  - She lived there on weekends only
  - Relationship ended in 1997

**Offsetting claims:**
Contributed different shares in purchase price (TIC)

- Ryan pays mortgage → could claim improvement
- Dries doesn’t live there during week → could claim occupation fee (if he claims an improvement)

**Initial proportions**
Held: equity, will look at the total cost of purchase to determine relative interests (applying McLelland J in *Currie v Hamilton*): per Holland JA at 19,509.
Result: Dries’ initial interest is 43%
ie: $30k + $60K (half mortgage) of a total of $209K (purchase price plus incidental costs of purchase).

**Adjusting initial interests....**

1. **Mortgage Repayments**
   YES can claim mortgage repayments as improvements.
   Ryan discharged Dries’ 50% share in the mortgage, giving him a claim against her of $97,500 (50% of mortgage repayments, interest + principal)

2. **Occupation Fee**
   YES because Ryan claiming improvements, Dries can claim occupation fee of $55,900
   So: Dries owes Ryan $97,500 less the occupation fee of 55,900 = $41,600 (plus some interest)

**Final accounting:**
Current value of property = $435,000
Dries 43% share = $187,150
Then adjust in equity for improvements + occupancy fees (and interest):
Minus $41,000 (+ interest of $12,480)
= $133,070

* Gives an equitable outcome whereby both needs are met and saves for later disputes
Topic 5: Easements

What is an easement
* Right of way whereby one party with the benefit of that right can use that land
* Dominant (benefit)
* Servient (serve)
* Run with the land
* Will flow through to successors of title
* Also known as incorporeal hereditaments: can necessarily see the easement, and may sometimes pass with an heir
* Positive: entitled you to do something (right of way to walk on someone else’s land, right to drainage)
* Negative: prohibited, less obvious
  - right to receive light – negative because the other can’t block you through construction
  - Right for building to receive support – so neighbour cant cause damage to shared wall
  - When someone is prohibited of doing something

Re Ellenborough Park
- Pleasure ground – park
Dominant tenement were apartment owners (Somerset Estate Owners)
Servient tenements we council looking over park (Ellenborough)
During WW2, it was used for soldiers to sleep and habitat, dominate tenements claimed a restriction placed on their land
The dominant tenement owners were seeking compensation
They were alleging that right to use the park was considered an easement (significant property right)
Held: Per Evershed MR, Birkett and Romer LLJ:

Four key characteristics of an easement at 141:
- Characteristic 2 and 4 are where arguments usually arise so focus on these for exam question

“The essential qualities of an easement are:
NEED TO DETERMINE IF AN EASEMENT ACTUALLY EXISTS (SUBSTANCE) BEFORE INDEFEASIBILITY CAN SHE DETERMINED. IF it cant be an easement it might be a mere contractual right.
- There must be a dominant and servient tenement;

Common Law:
- Need to show there are two affected parcels of land. Easements are annexed to or appurtenant to a property. You can’t have a right to an easement if the property isn’t connected to one other

s 88A Conveyancing Act NSW 1919: Easements in Gross
- If the common law is not apt to provide in the circumstances the parliament can change the requirements (e.g., Conveyancing Act). E.g., although you can’t have an easement without it being annexed to another land, the CA provides in s88A (easement in gross) for councils to access and check electricity, water meters etc. but only allows for those specific type people and only applies to those statutory authorities

s 88(1)(a)-(b) Conveyancing Act NSW 1919
- (1) .....shall not be enforceable against a person interested in the land claimed to be subject to the easement or restriction, and not being a party to its creation unless the instrument clearly indicates:
  - s 88 says, if you execute a document to create an easement it will only be enforceable if it specifies a few things:
    - (a) specify the bland with the benefit (dominant)
    - (b) specify who is the servient tenement (burdened land)
    - (c) specify those who have the right to vary, release modify the document (e.g. council, a developer)
    - (d) specify those whose consent to a release, variation or modification of the easement is stipulated for

An easement must accommodate the dominant tenement, that is, be connected with its enjoyment and for its benefit; (can’t be personal right has to be attached to the land: need to establish it is a right in connection to the land itself)
The easement must benefit the dominant tenement and be connected with its enjoyment (i.e., the enjoyment of the land)
- Must be about the enjoyment of the land not the individual Re Ellenborough
- Question of fact: depends on circumstances and particular easement
- The relevance of value: does the easement enhance the value? Access to a main road, having an easement to create access might increase value. It’s not the only factor to determine but it needs to have the connection with the relevance and the enjoyment (Re Ellenborough Park – the court asked if it was benefiting the dominant tenement. Said some owners who can’t directly access the park or don’t face it, the court said just because of this doesn’t deny the dominant tenement, the question is if the right itself is connected to the enjoyment of the land and yes, it gives benefit and is connected to their dominant tenements. Draw connection between the right and the enjoyment of the land itself.

- Businesses Cf Clos Farming
- The nature of the right being asserted is connected with a business. The dominant trying to assert the right over the servient in running the business. The question to ask is can that be sufficient to amount to an easement.

- The dominant and servient owners must be different persons; and (can’t impose it on yourself)

- At common law, it was not possible to have an easement over your own land, cant burden yourself
- This has been modified by statute:
  ss 88B of the Conveyancing Act 1919 (NSW);
  - where a party is going to subdivide land (as a developer) and want drainage sewerage then they need to be reciprocal. S 88 allows as a developer to lodge a plan for subdivision, it will specify all of the easements and it doesn’t matter if you own all the parcels of land, when it is subdivided then it will be lodged on each individual lots

  ss 46A of the Real Property Act 1900 (NSW)
  - also affects individuals who buy two adjacent blocks that may be subject to an easement. In this is says you can still create an valid easement if you own both parcels of land
    - ss 47(7) of the Real Property Act 1900 (NSW)
  - should the same person come into the ownership of the dominant and servient land, the easement won’t be extinguished just from owning them they will remain on title. You don’t want easements failing from owning both blocks

  ss 88B of the Conveyancing Act 1919 (NSW);
  - On registration or recording under Division 3 of Part 23 of a plan upon which any easement, profit à prendre, restriction or positive covenant is indicated in accordance with paragraph (a), (b), (c) or (d) of subsection (2) then, subject to compliance with the provisions of this Division:
    - (c) any other easement, profit à prendre or any restriction on the use of land so indicated as intended to be created shall:
      - (ii) ….vest in the owner of the land benefited by the
easement or profit à prendre or be annexed to the land benefited by the restriction, as the case may be, notwithstanding that the land benefited and the land burdened may be in the same ownership at the time when the plan is registered or recorded and notwithstanding any rule of law or equity in that behalf....

- The right claimed must be capable of forming the subject-matter of a grant” (question directed at how extensive is the right, the court may impose a limit as to how much you may use that land)
  - In Re Ellenborough Park lists 3 facts to consider
    - 1. Is the right as described in the easement too vague: to work this out ask the question, could a conveyancer draft it. If it’s some kind of nebula of forming then it will be incapable of forming the subject matter grant
    - 2. Is it a mere right of recreation? It can’t just be a personal right, needs to be capable of being an easement because it needs to be more than just that right of recreation and must have some firm of utility. This is the essential one!
    - Now look to slide 18

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**Re Ellenborough Park [1956] Ch 131**

**Held: Per Evershed MR, Birkett and Romer LLJ:**
- At 174-175: “(re Requirement 2: Accommodation): “It is clear that the right did, in some degree, enhance the value of the property, and this consideration cannot be dismissed as wholly irrelevant. It is, of course, a point to be noted; but we agree that it is in no way decisive of the problem; it is not sufficient to show that the right increased the value of the property conveyed, unless it is also shown that it was connected with the normal enjoyment of that property. It appears to us that the question whether or not this connexion exists is primarily one of fact, and depends largely on the nature of the alleged dominant tenement and the nature of the right granted.”

**Held: Per Evershed MR, Birkett and Romer LLJ:**
- At 174-175: “(re Requirement 2: Accommodation): “The park became a communal garden for the benefit and enjoyment of those whose houses adjoined it or were in its close proximity. Its flower beds, lawns and walks were calculated to afford all the amenities which it is the purpose of the garden of a house to provide; and, apart from the fact that these amenities extended to a number of householders, instead of being confined to one (which on this aspect of the case is immaterial), we can see no difference in principle between Ellenborough Park and a garden in the ordinary signification of that word. It is the collective garden of the neighbouring houses, to whose use it was dedicated by the owners of the estate and as such amply satisfied, in our judgment, the requirement of connexion with the dominant tenements to which it is appurtenant.”
Clos Farming Estates v Easton [2002] NSW CA 389
Valid Easement v personal right

Facts:
- Clos owned by Clive Cassegrain as one of their companies
- The bought a block of land and the idea was to subdivide for a winery. In fact, was a viniculture business to sell the grapes
- Clos Farming divided it into individual lots and wanted to enforce an obligation to every one of those lots to enter the land, harvest, tend to soil
- Set up as an investment scheme by where rich people bought but didn’t want to run it, for it to be run and managed by Clos Farming
- Easton’s who had bought, enter into contract to sell land without the right
- Clos farmers lodged a caveat (question if this is actually able to lodge)
- Upon lot 86 is where they put the business, the office and farming equipment as it allowed them to get to the majority of lots
- Dispute was if this was a valid easement. Clos referred to Moody and Steggles to say it’s necessary for the use of the land and it benefits the land
- Court disagreed and said it’s not a necessary incident to the ownership of the land it’s only a necessary incident to the business. No evidence to suggest lot 86 was the lot of connection, it didn’t benefit the dominant tenement as it was felt it could be established anywhere
- No evidence to suggest it benefits the dominant tenant as it had no connection to the land. That connection has to be real, beyond convenience in a more intelligent sense. The connection was a tenuous one and for the benefit that was set to flow to the land
- Clos Farming developed lots with a part residential component (Part A) and a part farming component (Part B)
- The dominant tenement holder could enter the land and control it by means of planting, maintenance, and harvesting of the grapes as well as the right to sell the produce.
- This right was referred to as the Fourteenth Restriction, referred to as the 'Easement for Vineyard'

Issue: Was this a valid easement?
Held: Per Santow JA, with Mason P and Beazley JA Agreeing: No.

- Necessary incident to the normal enjoyment of the land.

Held: Per Santow JA, with Mason P and Beazley JA:

- [31]: “First, it requires there be a natural connection between the dominant and servient tenements. 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…depending upon whether the right granted was connected with the normal enjoyment of the dominant tenement. That is a question of fact, dependent on the nature of the dominant tenement and the right granted... It was not enough that the land be a convenient incident to the right. Rather the nexus must exist in a real and intelligible sense.”

Held: Per Santow JA, with Mason P and Beazley JA:

- [34]: The respondents acknowledged that a right benefiting a trade carried out on the dominant tenement may in appropriate circumstances 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, not merely an independent business exercise. The respondents submit that in accordance with the authority dating back to 1863 (Hill v Tupper) lot 86 as the supposed dominant tenement was not relevantly benefited by the rights conferred by the fourteenth restriction. This was because it was merely a convenience and matter of efficiency that lot 86 be used for the purposes of farm management. Second, it was put that there was no feature of lot 86 that rendered it the natural or only place from which to carry out harvesting and associated works. Highlighted was that, in the agreed statement of facts, there was no evidence which indicated that farm management, as distinct from storage, was actually carried out on that lot. The supposed connection was thus not a real one. I would agree.”
Topic 7: Leases

<table>
<thead>
<tr>
<th>Lease</th>
<th>Licence</th>
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</thead>
<tbody>
<tr>
<td>o Exclusive possession</td>
<td>o No exclusive possession</td>
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<tr>
<td>o Proprietary</td>
<td></td>
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<tr>
<td>o More exclusive</td>
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<tr>
<td>o Can bind third properties</td>
<td></td>
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</tbody>
</table>

(See below)

Lease

- Exclusive possession
- Proprietary
- More exclusive
- Can bind third properties

Licence

- No exclusive possession

<table>
<thead>
<tr>
<th>Bare licence: worst</th>
<th>Contractual licence: less worst</th>
<th>Contractual licence + proprietary interest</th>
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</thead>
<tbody>
<tr>
<td>o Not even a right, a mere privilege granted by one to another that is otherwise unlawful to enter land</td>
<td>o Can come onto land otherwise would be unlawful</td>
<td>o Profit a prendre with implied right of access, implied licence if it does not specify how to get to profit (stream)</td>
</tr>
<tr>
<td>o Implied licence (gas meter)</td>
<td>o Form of contract</td>
<td>o Can be passed onto a third party</td>
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<tr>
<td></td>
<td>o Give money/hotel room</td>
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<td></td>
<td>o Lasts until revocation based on the terms (i.e. Hotel checkout) of the contract</td>
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<td></td>
<td>o Carpark entry is a contractual licence</td>
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<td></td>
<td>o Implied for the purpose to carry out</td>
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Leases are:

- Contract
- Property right/interest

Creation of a leasehold estate (demise)

- Exam: Personal contract between A and B of which they are bound by the terms of the contract. Assuming the rights amount to a lease, A and B have also created a leasehold estate or ‘demise’
- nb, if it is found not to be a lease then it is merely a contractual licence!
<table>
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<tr>
<th>Leases Checklist</th>
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Who is the lessor ____________.  
Who is the lessee ____________.  

**Determining a valid lease:**  

1. Is there exclusive possession (that is for me to determine)  
   - **Radaich v Smith:** It is a question of fact, ‘The true test of a supposed lease is whether exclusive possession is conferred upon the putative lessee’. Held: lease  
   - **Swan v Uecker:** the question remained one of whether exclusive possession was granted. Held: lease  
   - Are there any exceptions?  
     - no intent to contract at all  
     - exclusive possession attributable to another legal relationship (employer/employee, purchaser under and contract of sale): usually no lease

2. The term must be for a **definite** period  
   - No definite period: void at common law  
   - Can have a void fixed lease that due to paying rent fortnightly creates a periodic lease  
   - Requires a definite period for commencement and ending  
   - **Lace and Chantler:** leases were leased out for the duration of the war: void (uncertain duration)  
   - For 15 years unless the tenant decided to leave earlier: (certain) we know the period is still 15 years but we accept it may not go the full term  
   - It might be void at a fixed term lease but if you have been paying rent fortnightly then you would have a periodic tenancy so still a valid lease

3. Created in the appropriate form  
   - **s 53 RPA** execute a lease in the approved form  
     - 3 years or more: must be registered  
   - Leases of less than 3 years can be registered  
   - Benefit of indefeasibility – s 42