

PROPERTY CHECKLIST

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7.1 EASEMENTS

1. Who is claiming an interest over the land?

- a. Are you representing the owner of the servient or dominant tenement?
 - i. No need to state anything but keep this in mind throughout.
 - 1. Phrase your answer as though 'X's title will be *subject to*' for the owner of the servient tenement or 'X's right to the easement' for the dominant tenement.

2. Does X's easement meet the substantive requirements for an easement?

EXAM: The four substantive requirements for a valid easement are drawn from *Re Ellenborough Park*. In X's claim, the characteristics at issue are [STATE: 1/2/3/4].

a. Is there a dominant and servient tenement?

- i. No easements in gross exist at common law – you cannot grant an easement to the public at large.
 - 1. Statutory exceptions exist

b. Does the easement accommodate or benefit the dominant tenement?

- i. It is not sufficient that the servient tenement increases the value of the dominant tenement (*Re Ellenborough*)
 - 1. This is still indicative of an easement, however (*Re Ellenborough*)
- ii. '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*)
 - 1. A question of fact
 - a. Note that *Clos* was in a commercial context
 - b. Easement wasn't necessary for enjoyment of the land in *Clos*, it was necessary for the effective running of the vineyard business.
 - 2. 'Convenient incidence' to the exercise of a right is insufficient (*Clos*)
- iii. The nature of the land lots must be examined (*Re Ellenborough*)
 - 1. What are the purposes of each lot?
 - 2. What is the regular use of each lot?
- iv. The lots need not be contiguous (*Re Ellenborough*)
 - 1. However, the further apart the lots are, the harder it is make out the sufficient nexus (*Re Ellenborough*)
- v. If dealing with a commercial enterprise, there must be something specific about it that makes it ideal for running that commercial enterprise (*Hill*)
 - 1. It must facilitate the mooring and hiring as a natural use of the land, for example

c. Do two different people own or occupy the dominant and servient tenement?

- i. Note that it is perfectly possible for both tenements to be owned by one person in freehold, but have one tenement be held under a leasehold granted by the first owner

d. Are the rights conferred capable of being the subject matter of a grant?

- i. **RULE:** For the rights to capable of being the subject matter of a grant they must meet the three sub-criteria established by Lord Evershed in *Re Ellenborough*.

1. Are the rights too wide or vague?
 - a. *Re Ellenborough*
 - i. The same considerations apply as with implied reservation
2. Are the rights well-defined and commonly understood?
 - a. The rights cannot be *jus spatiandi*
3. Are the rights *jus spatiandi*?
 - a. The rights cannot be *jus spatiandi*
 - b. Legal rights of way
- ii. The rights must not interfere too greatly with the burdened owner's enjoyment of land
 1. The right cannot deprive the owners of the servient tenement of proprietorship or possession (*Clos*)
 - a. 'Suffocate' (*Clos*)
 - b. 'So attenuated' (*Clos*)
 2. The rights cannot amount to joint occupation (*Clos*)
 3. An argument was raised in *Clos* that, since the rights only affected one part of the lot, the rights would not be suffocated
 - a. Rejected on the basis that Part B was five times the size of Part A
 - b. Still remains an alternative argument
- iii. The rights must be of utility
 1. The rights cannot be of mere recreation
 - a. Exercise and rest qualify as utility (*Re Ellenborough*)
 - b. Horse races and games would not (*Re Ellenborough*)

3. Does X's easement meet the formal requirements for an easement?

- a. Legal easements
 - i. Express reservation / grant
 1. General law
 - a. Requires a deed under *PLA* s 52
 - b. Requires writing under *PLA* s 53
 - c. To bring an action to enforce an easement, it needs to be signed under *IA* s 126
 2. Torrens
 - a. Requires registration under *TLA* s 72(1)
 - b. Rare, since easements are an exception to indefeasibility under *TLA* s 42(2)(d)
 3. May be created expressly by documentation
 - a. As a general rule, a deed is essential
 - b. Torrens requires registration under *TLA* s 72(1)
 - ii. Implied reservation
 1. On a disposition of part of the land, no reservation of any easement in favour of any part will be implied
 - a. A general rule
 - b. A grantor is expected to specify clearly anything that detracts from the grant

- c. Exceptions to this general rule have been recognised in respect of easements of necessity and intended easements

iii. Implied grant

1. Easements of necessity and intended easements

- a. May be implied in appropriate circumstances in favour of a grantee as well as a grantor of the land
 - i. The same considerations apply as with implied reservation
 - ii. In addition, may be implied under the rule of *Wheeldon*, under general words imported into conveyances by State legislation, by implication from the description of the land, on simultaneous conveyances by one landowner, and by creation of a plan of subdivision

2. *Wheeldon*

- a. 'On the grant by the owner of a tenement of part of the tenement as it is then used and enjoyed, there will pass to the grantee all those continuous and apparent easements (by which, of course I mean quasi-easements) or, in other words, all those 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.'
 - i. (a): 'continuous and apparent'
 - 1. Has given rise to problems of interpretation
 - a. The courts tend to ignore the need for continuity
 - b. Have tended to read 'continuous' as 'permanent'
 - i. A right of way over a made-up road, an easement of watercourse, and a right of light have all satisfied this requirement
 - ii. Alleged rights having no physical evidence pointing to their existence have been held to fail the test
 - ii. (b): 'necessary to the reasonable enjoyment of the property granted'
 - 1. Less strict than the test of necessity in an easement of necessity
 - 2. Can be satisfied by showing that the alleged easement is necessary to the enjoyment of the tenement demised or by showing that it is necessary to the enjoyment in a reasonable manner of some permanent feature or part of the demised tenement
 - iii. (c): 'at the time of the grant used by the owners of the entirety for the benefit of the part granted'

3. Easements of necessity

- a. Usually, but not necessarily, arise in the context of rights of way where, on the sale by a common owner of part of her land, either the grantor or grantee is left without any means of access to her property
 - i. *North Sydney*

- ii. The unfortunate practical effect of the conclusion that a way of necessity is not based on public policy is that the doctrine of necessity cannot be regarded as a universal remedy for providing access to landlocked land
- 4. In respect of Torrens land, the doctrine appears to be within the scope of s 42(2)(d) of the *TLA*
- b. Equitable easements
 - i. Specific performance of a written agreement (*Walsh*)
 - 1. s 126 *Instruments Act*
 - 2. s 53(1)(a) *PLA*
 - ii. Part performance of an oral contract
 - 1. s 55(d) *PLA*

4. PRESCRIPTION

- a. Prescription must be distinguished from limitation
 - i. In the case of limitation, adverse possession of land for the requisite period of time operates to extinguish the existing title to land
 - ii. In contrast, prescription does not extinguish the landowner's title – it creates an additional incorporeal right which is superimposed on the title of the servient tenement
- b. Some easements are incapable of acquisition by prescription under statute
 - i. Easements of light
 - ii. Easements of air everywhere but South Australia

5. *Transfer of Land Act 1958 (Vic)*

- a. Section 42(2)(d)
 - i. Statutory exception to indefeasibility for easements
- b. Section 73
 - i. Removal of easement
- c. Section 73A
 - i. Abandonment of easement of right of way

6. Extinguishing easements

- a. Under statute (s 73 *TLA*)
- b. Abandonment (can fall under s 73A *TLA*)
- c. Express release
- d. Alteration to the dominant tenant that renders the right not an easement
- e. Unity of dominant and servient tenements

7. Conveyancing of easements

- a. Section 62 *PLA*

8. CONCLUSION:

- a. In light of the preceding analysis X will/will not have a valid easement over Y's land.
- b. *Note: Easements generally arise in the context of exceptions to indefeasibility.
 - i. State the effect that the validity of the easement will have on **YOUR** client with respect to indefeasibility.

7.2 PROFITS

- 1. A profit a prendre is a right to enter another's land to take something that naturally occurs on the land (*Clos*)

- a. Different from a lease
 - i. No right to exclusive possession
- b. Different from a license
 - i. A proprietary right, not a personal right
- c. Different from an easement
 - i. Can be created in gross (for the benefit of the world at large)
 - ii. Does not require a dominant tenement

2. Is the profit granted over Torrens or General Law land?

a. Torrens Land

- i. There is some ambiguity surrounding whether a profit can be granted over Torrens land as the TLA doesn't expressly mention profits.
- ii. Section 4 – TLA – Definition of 'Land'
 - 1. TLA defines land as 'any estate or interest in Land'
 - 2. Generally accepted that profits are an 'interest in land' and therefore the TLA applies.
- iii. *Worth a BRIEF mention though.

b. General Law Land

- i. All good. Move on.

3. Does the right granted meet the substantive characteristics of a profit?

- a. The substance must be a part of the land (*Clos*)
 - i. The thing must 'come from the land itself' and be capable of being property (*Clos*)
 - 1. Soil, minerals, vegetation, natural produce
 - a. Any crops that require tending after being planted are excepted (*Clos*)
 - 2. Wild animals (*Mason*)
 - 3. Slate (*Mills*)
 - ii. Not valid if it purports to take all of the property (*Clos*)
 - 1. A right to enter a property, dig up clay, sand, gravel, earth, soil, and turf is not a valid profit (*Clayton*)
 - iii. It is not sufficient that the use of the land can result in a profit gained (*Clos*)
- b. Has the subject of the profit (eg. Berries, animals) already been removed from the land?
 - i. If the things connection with the land has already been severed then it is a possibility that the interest should be properly characterised as a licence coupled with an interest to take a chattel.
 - 1. Example:
 - a. Profit: I grant you a right to take berries from a bush on my land.
 - b. Licence + interest: I grant you a right to take berries from my land *after I have removed them from the bush*.
- c. The agreement must be to remove it, and nothing more (*Clos*)
 - i. The profit cannot deprive the owner of their interests (*Clos*)
 - 1. The rights disputed in *Clos* would sterilise or burden the servient tenement – not a valid tenement

- a. The right to recover costs went far beyond anything contemplated in the notion of an interest in the nature of a profit

4. Creating a profit

- a. See above – same as with an easement
 - i. But **NOT** governed by the *TLA*.
- b. Profits will be passed on by legal conveyance (s 62 *PLA*)

5. Conclusion:

- a. In light of the preceding analysis X will/will not have a valid profit over Y's land.
- b. *Note: Profits generally arise in the context of exceptions to indefeasibility.
 - i. State that irrespective of the validity of the profit, there will be no effect on the defeasibility of the registered proprietors title as profits are **defeasible**.

9.0 EQUITABLE INTERESTS

9.1 SPECIFIC PERFORMANCE

EXAM:

(X) will be able to argue their [INTEREST] arose under the equitable doctrine of specific performance, if there is a valid written contract yet to be performed, though it is unclear at law at which stage of the transaction they will accrue their [INTEREST].

There is some uncertainty and debate here as to how *Lysaght v Edwards*, and *Bunny Industries* stand in light of *Tanwar*. This may affect the interest awarded.

THRESHOLD ISSUES

1. It is arguable that there are threshold requirements for the remedy of specific performance:

- a. Damages must be inadequate
- b. There must be a valid contract
 - i. Cannot be void or voidable
 - ii. Cannot be unenforceable
 - 1. *Note – however, exception for part performance
 - iii. Not otherwise problematic
 - 1. i.e where performance has been impossible or futile (eg. Frustration)
- c. Must be a valid contract involving “valuable” consideration
 - i. Equity will not assist a volunteer
 - ii. Nominal consideration is not deemed “valuable” consideration *for equity*
 - 1. Different than for contracts; ‘peppercorn principle’

2. Damages must be inadequate.

- a. Where a party can be adequately compensated by damages a court will not specifically enforce a contract.

3. There must be a valid contract.

- a. Old view (may be overruled by *Tanwar*):
 - i. As soon as there is a valid contract the vendor is the constructive trustee for purchaser's equitable fee simple (*Bunny Industries v FSW Enterprise Pty Ltd*)
- b. Therefore, *Bunny* applies the doctrine of conversion whereby on signing the contract an equitable interest arises in favour of the purchaser
 - i. *Tanwar* doubts the imposition of a trust straight away
 - 1. At minimum, you will have a vendor/purchaser lien
 - 2. Critical about giving a trust where no money has been paid
 - 3. Critical about giving a trust just based on a contract
 - 4. *Nilo Note → *Tanwar* reasoning dubious.

4. Did it meet the formalities requirements?

- a. Sufficiency of writing for a specifically performable contract:
 - i. Must describe the subject matter – **PLA s 53(1), Instruments Act s 126**
 - ii. Can read multiple documents together to form contract if they explicitly reference the other document (*ANZ v Widin*)
 - iii. Parol evidence for ambiguity as to what the words mean, but NOT to add terms (*ANZ v Widin*)
 - iv. If you have a written contract, you don't need the certificate of title in your possession.

5. Remedy

- a. Bars to remedy
 - i. Damages insufficient
 - ii. Party didn't come to equity will clean hands
 - iii. Remedy would cause undue hardship
 - iv. Party not ready and willing to perform
 - v. Contract entered into due to misconduct/misrepresentation
- b. Have you made out specific performance and the are **NO** bars to remedy?
- c. **WRITE:**

EXAM: There is some debate as to the remedy granted upon finding specific performance. In adopting *Edwards*, *Bunny Industries* granted a constructive trust over the property at the time of the contract. However, *Tanwar* criticises the imposition of a trust based solely on a contract. As the case of *Bunny* features the payment of a deposit, a trust was applicable and the concerns raised in obiter in *Tanwar* were not addressed. As *Tanwar* was decided by the HCA and *Bunny* was decided by the Full Court of the QLD Supreme Court, it is likely that lower courts will follow the *Tanwar* reasoning, and instances of no moneys moving after the contract will result in a lien, rather than a constructive trust.

6. If specific performance is unavailable:

- a. *Bunny Industries*
- b. Property sold to them already sold to third party who registered and had indefeasible title
 - i. Unable to give proprietary right
- c. Awarded a constructive trust on signing of contract, and the sale to 2nd person was breach of trust

7. Is the party seeking to specifically enforce the contract a 'volunteer'?

- a. Equity will typically not assist volunteers.

DISCRETIONARY ISSUES (Pick one if applicable)

1. In addition to threshold issues, various other considerations inform the discretion to award specific performance, including:

- a. The hardship or undue prejudice caused to the defendant if the remedy were granted.
 - i. *Patel v Ali*
 - 1. **Facts:** Defendant (Ali) went bankrupt and went to jail. His wife got bone cancer. Had 3 kids. Patel tried to specifically enforce contract of sale.
 - 2. **Held:** Court refused saying it would cause 'undue hardship' – granted damages instead.
- b. The plaintiff's behaviour or 'clean hands'
 - i. *Summers v Cocks* (1927)
 - 1. **Facts:** Liquor licence going to expire. Summers knew the licence was going to expire and tried to sell the pub quickly. Cocks thinks property is good value and buys it. Signs contract. Refuses to complete. Summers seek specific performance.
 - 2. **Held:** Majority says that Summers' conduct meant he didn't have clean hands. Minority says he was simply acting as a commercial party would.
- c. Laches or undue delay by the plaintiff
 - i. *Lamshed v Lamshed* (1963)
 - 1. **Facts:** Brother buys property from brother. Institutes proceedings to specifically enforce contract. Waits 4 years. Vendor brother tries to sell to someone else. Purchaser brother tries to expedite proceedings when he finds out.
 - 2. **Held:** Purchaser brother had given rise to a reasonable expectation in the vendor brother that he was free to deal with the title. No specific performance.
- d. Whether granting specific performance would mean the court would have to continue exercising their ongoing supervisory jurisdiction.
 - i. *Cooperative Insurance Society v Argyle* [1998]
 - 1. **Facts:** Big supermarket chain terminates lease because business isn't profitable. Landlord offers heaps of stuff to get them to stay (cheaper rent, flexible payments etc). They terminate anyway. Vendor wants them to stay so he seeks specific enforcement.
 - 2. **Held:** Granting specific performance in this case would mean the courts would have to exercise an ongoing 'supervisory' role – they would have to supervise the running of the business.
- e. Mutuality
- f. Where the interests of a bona fide third party have intervened.
 - i. Eg. *Bunny, Breskvar*
- g. Where performance is subject to conditions (i.e 3rd party consents)
 - i. For example, is the building or sale of the property subject to Council approval? Administrative approval more generally?
 - ii. *Tanwar* here.