LECTURE NOTES

What is an easement?

- A right annexed to land to utilise the land of another in a particular manner, or to prevent another using her or his land in a particular manner. In other words, easements and profits are sets of limited rights that non-occupiers of land hold over land occupied by someone else.

Characteristics of easements

- **Incorporeal hereditaments:**
  - They are intangible interests in land.
  - In the context of an easement, it is a form of real property that we distinguish from personal property.
- **Run with the land**
  - They carry on to successors in title.
  - This means, they will also be able to enforce that right.
- **Dominant vs servient tenements**
  - The party with the benefit of the easement, that is who gets to use the easement, are the dominant tenement.
  - The party with the burden is the servient tenement.
  - Example: if A grants the right to B to pass over her land so as to reach the road, A's land is the servient tenement and B's land is the dominant tenement

Positive vs negative easements

- A positive easement entitles a party to do something.
- E.g. Right of way to utilise the land + cross the land, share drainage etc.
- A negative easement prohibits a party from doing something.
- E.g. Right to receive light from a particular window in a building on your property. This is negative as it means that the other party cannot block you from receiving that light; the other party is not able to construct something which might get in the way of the light filtering through.
- E.g. Right to receive for your building to receive support. A neighbour cannot just damage a shared wall and as such a right to support operates between two adjacent properties.

***Re Ellenborough Park* [1956]**

What kind of requirements the parties must have to establish an easement?

Four key characteristics of an easement:

(1) There must be a dominant and servient tenement;
(2) An easement must accommodate the dominant tenement, that is, be connected with its enjoyment and for its benefit;
(3) The dominant and servient owners must be different persons; and
(4) The right claimed must be capable of forming the subject-matter of a grant

Dominant and servient tenements

- First criteria of creating an easement is that there must be a dominant and servient tenement. The whole point of an easement is that 1 party gets benefit, while 1 party gets burden, over a particular parcel of land. Thus, you must show for this requirement that there are 2 affected parcels of land (1 being the benefitted land, and 1 being the burdened land).
- Easements are appurtenant to a property (attach to a property). Easements that are annexed/**appurtenant** to the property cannot exist in gross easements i.e. you cannot have a right to an easement where the properties are not in any way connected to one another; the idea is that you have 2 parcels of land because 1 parcel will flow onto the other. Thus, at common law, you cannot have an easement in gross.

- However, if the common law is unable to provide for some circumstances, then statute can change common law requirement. S 88A *CA* says that you can have easement in gross. By s 88A of the Conveyancing Act, easements in gross are permitted in favour of the Crown, a public or local authority established by legislation, or, where the easement is for the supply of a utility service to the public. Because we have this requirement for dominant and servient tenements, we want people to know who owns what land. **Therefore, s 88(1) *CA* says that if you execute a document which is intended to create an easement, it will only be enforceable if it specifies a number of things:**
- the land to which the benefit of the easement or restriction is appurtenant;
- i.e. it has to specify the land which has the benefit (dominant tenement)
- the land which is subject to the burden of the easement or restriction
- i.e. it has to specify who has the burden (servient tenement)
- the persons (if any) having the right to vary, release, or modify the restriction
- the persons (if any) whose consent to a release, variation, or modification of the easement or restriction is stipulated for

- You also need to know who you owe obligations (who might have a right over your land); thus (c) and (d) both state that the easement must specify anybody that has a right to vary, release or modify the restriction, and also anyone whose consent is required to do those things
- In this instance (c) and (d) are not referring to the owners of the land, but rather they are referring to the council; the council may impose an easement over the title (for whatever reason) and it may be that only the council can consent to that easement being varied, released/withdrawn or modified.

Must accommodate the dominant tenement

- This relates to whether the easement actually accommodates the dominant tenement land. This requires you to establish that the right you have is in connection with the land itself. Courts have said that this test encompasses a few things:
- Easement has to **benefit** the dominant tenement and it has to be **connected** with its enjoyment. The fact that the owner may get a personal benefit is going to be irrelevant. It has to be connected to or with the enjoyment itself. This is a question of fact and depends on the particular easement and the surrounding circumstances.
- One thing which may demonstrate this benefit is if the easement increases the value of the property. E.g. If a property has no access to main road, and there is no easement allowing someone to cross another's land to get to main road, having an easement which entitles the owner to drive across that property will actually increase value of property.
- However, court has said that "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". In this essence, there needs to be **connection** between right and the property.

Re Ellenborough Park:

- **Issue:** Was there a benefit? Was this actually accommodating dominant tenement
- Argument against it being an easement was that there were some properties that did not face the park and some properties that did not have direct access to the park (e.g. had to cross street to get to park).
- Does this actually mean it cannot benefit the dominant tenement? Court had to consider does that mean that it is no longer benefitting the land.
- **Held:** Court said the fact that not all of the properties/owners were immediately able to access the park does not deny it from being able to accommodate the dominant tenement.
- The real question is that is there a connection between the right enjoyed and the dominant tenement itself? Does it actually provide a benefit to the land?

- Courts held that the right to be able to enjoy the park does give benefit to land of the dominant tenement. It gives them that benefit because the owners of the dominant tenement do not have a front yard/backyard, meaning the park is their space, hence connected to enjoyment of their dominant tenement
- Therefore, in this case, there was sufficient benefit.

Moody v Steggles:

What if the dominant tenement owner is operating a business and they are trying to exercise some right over the servient tenement to assist with the running of their business? Can that particular right accommodate the dominant tenement?

- **Facts:** Two properties adjacent to one another. One of them was a pub, and pub was advertising their business on the adjoining property. Dominant tenement is the pub, and right next to its property they have a sign that advertises their business on the servient tenement. New owner comes in and buys servient tenement. They do not want sign on their property. New owner argues that it is not an easement because it does not actually benefit the land
- **Issue:** New owner argued that it is not an easement because it does not actually benefit the land.
- **HELD:** Court disagreed, saying right to hang the sign directly benefitted the pub (dominant tenement) because it directly related to the activities being carried out on the dominant tenement. Thus, as there was nowhere else to advertise, use of the sign upon servient tenement's land was directly connected with use and enjoyment of dominant tenement land.

***Clos Farming Estates v Easton* [2002]**

- **Facts:** Clos Farming (Owned by *Cassegrain*) purchases a massive parcel of land. Cassegrain has an idea of sub-dividing land and establishing a winery. Divided into smaller lots, and each lot is separated into Part A (which has the dwelling house; residential component) and Part B (which has the farming component; grape-growing component). Cassegrain sets this up as an investment scheme, where the idea was that rich people would buy the lots. Contracts for each sale had restrictive clause which gave Clos Farms developers and its agents the right to enter onto the lot at any time with or without machinery for the purposes of cultivating, growing, harvesting and ultimately selling the products of the land in return for profits. Eastons bought a lot, and decided to sell it but did not want to sell it subject to the restrictions. Eastons enter into contract to sell land, but Clos Farms wants the new owner to be subject to this right too, hence they lodge a caveat.
- **Issue:** Is it even an easement, or is it some kind of other right? The only possible property arrangement is that it is an easement; and that too a positive easement. This raises the question if it is a valid easement? Does it comply with the criteria in Re Ellenborough Park?
- Criteria 1 was not an issue.
- Clos farms picked Lot 86 and ran their business from the lot (e.g. stored machinery there), and they chose this particular lot because it was the most convenient location to allow them to access all other lots.
- Thus, Lot 86 is the dominant tenement (right to go onto other lots) and servient tenement was all other Lots.
- Criteria 2 was contentious as did the easement (right to go on to other lots) actually accommodate the dominant tenement?
- **HELD:** The easement did not accommodate the dominant tenement; there is nothing intrinsic about the land that is improved because it has access to another lot of land in order to grow grapes. It is convenient to have the office + machinery shed, but there is no ultimate connection between the machinery shed, office and the land it is sitting on, with the servient tenement. Court held the easement was merely a convenience to the business but was not a benefit to the land itself. **Thus, the benefit must be more than convenience; the benefit must be connected to the land itself.**

Dominant and servient tenements must be owned and occupied by different persons

- The 3rd requirement under *Re Ellenborough Park* is that the parcels of land must be owned by different people. This means that a party cannot exercise an easement over your own land i.e. cannot impose burden upon yourself. This is a common law principle that you must have two different owners enforcing those rights. However, this has been modified by statute into s 88B *CA* and ss 46A. 47(7) *RPA.*
- S 88B: allows that where a party is going to subdivide the land (e.g. a developer who owns all of the land at the outset), they can lodge a s 88B instrument specifying what all the easements are, and it won't matter if he or she owns all of the parcels of land
- When land is subdivided, all of easements will automatically be recorded on all of the titles. Thus, this section gets over this hurdle of having easement over your own land (because usually at time of subdivision, developer owns all land).
- This can also affect individuals (e.g. an individual may buy 2 adjacent blocks of land, then renovate land, and it might be that land has to be subject to some kind of easement). S 46 tells us that you can still create an easement even if you own both parcels of land at the same time, while s 47 says that should same person come into ownership of both dominant and servient land, easement will not be extinguished just because the same person owns both parcels of the land. This helps individuals with the intention of buying properties, renovating and then selling as they do not have to go through the process of re-recording the easement.
- Thus, these provisions are essentially trying to make it a more practical process. Courts do not want easements to fail just because same person buys lots and they are adjacent to each other.

Right claimed must be capable of forming the subject matter of a grant

- The 4th requirement for a valid easement concerns whether the right claimed is capable of forming the subject matter of a grant. In *Re Ellenborough*, the court listed this as three main things:
  - Whether or not the right can form the subject matter of the grant is whether or not it's too vague.
- To work out this answer, ask the question "could a conveyancer draft it? Could you actually reduce whatever that particular right is into words?". If it is an unclear concept that you cannot put into writing, then it is not capable of forming the subject matter of the grant, thus it cannot be an easement.
  - Whether or not the right is so broad that it amounts to rights of joint occupation. So, does it give the person the right to live on that property?
- In ***Moncrief v Jameson***; they asked the question does it still leave you with a right to posses the property, or are the rights under the easement so broad that they have given you this right to joint occupation?
- Courts in NSW have accepted that it is fair question to ask, but *Clos Farms* and *JA Holdings* said you need more than that; the question is not just "does it leave you with possession", but rather it should be "**what is the extent of the interference? Does it leave you with a reasonable use of the property**?"
- It is a question of degree and proportionality.
- Thus, depending on what the right is, what degree of use do you still have over your property? So, what proportion of your property can you enjoy while that easement is still on the title.
- In looking at the idea whether you still have reasonable use of your property, in **Clos Farms** the court considers the question what rights the servient tenement owner still had over their land? In terms of what rights the dominant tenement can exercise, where the rights were very broad (i.e. to enter on land and conduct work for as long as possible), the court said that dominant tenement had so many rights they could exercise that it left the servient tenements with very little.
- This is also why *Clos Farms* didn't satisfy the criteria; as the easement was very broad.
- *Clos Farms* thus argued what is the degree of the reasonable use.

*In **Moncrief v Jameson**:*

- **Facts:** Court had to deal with easement where property was located at bottom of cliff. Nature of right was that dominant owner who was bottom of cliff had to be able to access their property somehow, and it was fair distance. There was a pathway, and easement gave them the right to be able to use that pathway. Easement also said they could drive across pathway to get to property. However, problem was distance from where property was and where road was.
- **Issue:** Dominant tenement (Moncrieff) argued that not only should they be able to walk and drive across property, but they should also be able to park on servient tenement land. Court had to consider whether this was going too far.
- Court considered the question "would it leave the owner of the servient tenement with reasonable use of their land?"
- **HELD:** The current test (of "would it leave the owner of the servient tenement with reasonable use of their land?") was not very helpful; because you can always argue that there is some kind of reasonable use of the land. Hence, the court said it needs to ask instead "do they still retain right to possession? Does the servient tenement still have the right to possess the land, or is the easement too broad?"
- Therefore, the position in UK was "have you ended up in a position where the servient tenement owner no longer has possession of their property?"

***Registrar-General of NSW v JEA Holdings (Aust) Pty Ltd* (2015)**

- One of the problems with *Clos Farms* was that it did not actually articulate a test; this is problematic, not with regard to Santow JA's judgement, but rather Santow JA did not tell us a test that needed to be applied. All he said was it left the servient tenement with "a shadow of ownership", which implies (but he did not say) a degree/proportionality or 'reasonable use' test. In JEA Holdings, the court too did not articulate a clear test either.
- **Facts:** Concerned a parking easement; the right was that the dominant tenement owner had the right to park on land of servient tenement's owner. Language of easement was poorly drafted, which begged questions relating to broadness
- **Issue:** Court had to consider whether or not it was too broad. Based off language of easement and reliance on test of *Moncrieff*, it would not leave servient tenement with any use because under terms of easement, dominant tenement could literally use every square inch of servient tenement's land as a carpark. Court asked "what is the degree of interference? To what degree does it interfere with servient tenement's land?"
- test in *Moncrieff* isn't very helpful, thus we get to question of proportionality
- **HELD:** Test is a test of proportionality. Upon looking at language, particularly brackets, although it says that they can park at all times and have exclusive use, it also says that the servient tenement owner retains rights in bracket, which is to erect building of 12 feet. This is what court relies on.
- On the surface, what proportion does the easement cover (covers entire land)? However, court says there are exceptions because they can actually use the subterranean space (space below) and the air space, meaning easement is giving servient tenement owner valuable rights (e.g. you can sell air space).
- Thus, court held that they might have lost use of land on the surface, but as a proportion of the entire land, they still have all of that space above and below.
- Hence, court rejected the *Moncrieff* test on the grounds that 'possession' should not be key focus, but rather should be on proportionality (how much of the land do you still get to actively use as servient tenement owner). As a matter of proportion, they still get land above and below, and that is a significant right
- Therefore, it did not violate criteria, and was a valid easement.

TERMINATION OF LEASES

There are 2 primary remedies of ending a lease:

1. **Re-entry and forfeiture for lessee's breach of covenant; and/or**
   - Comes from the proprietary nature of lease
2. **Common law right to terminate for lessee's repudiation (ordinary contractual right) or fundamental breach**
   - Comes from the common law

The remedies show the dual nature of a lease and both are designed to do quite different things.

1. Forfeiture by re-entry

- There are two circumstances, either:
  1. expressly provided; or
  2. implied by statute

1. Where a tenant breaches a covenant in the lease (look at the lease first; what does it say?) – if the lease **expressly says** that on breach, the landlord may forfeit and re-enter, then the landlord can do that (i.e. terminate the lease and take possession). Where the right is express, look to the terms of the clause to see if it is to be exercised in a particular way.

2. In circumstances where the lease does not say this expressly but there is an **implied statutory right** under **s 85(1)(d) *CA*** (says upon breach landlord has right to forfeit (terminate lease) and re-enter (take possession).

Statutory requirements for re-entry

In cases where there is no express clause; there is an implied statutory right under s 85(1)(d).

- For breach of a **rental covenant** → the landlord will have an implied right to forfeit under s 85(1)(d) if the rent is in arrears for at least 1 month; [in such circumstances, the landlord may forfeit without giving notice???] not sure if correct.
- For breach of a **non-rental covenant** → s 85(1)(d) stipulates that the landlord has this same right when the breach has continued for 2 months, OR the landlord has served notice to repair and those repairs have not been carried out within a reasonable time.
- In both cases, **s 129 *CA*** states that the right to forfeit is only enforceable if the landlord has served notice. Notice must specify breach, require the tenant to remedy the breach, and require the tenant to pay any compensation that may be being claimed. The tenant must then actually fail to remedy the breach and/or pay compensation within reasonable time.
- **You can't contract out of the requirement for notice – see s 129(10)**

Service where assignment or sublease

- Must be served on the assignee
- No requirement to serve the notice on the assignor
- Where there is a sublease, you must serve the notice on the sub-lessor

Manner of forfeiture

- You must make sure **relevant notices have been served i.e. a summons for possession**
- The landlord gets a writ from the Supreme Court to remove the tenant
- Even where the lease has been validly forfeited, the **lessee may be entitled to apply** to the Supreme Court **for relief against forfeiture** of the lease
  - A court can make orders that enable a tenant to return and occupy the premises
  - This is equitable relief
  - The tenant has to prove that it would be unfair not to allow them to return to the premises

- Forfeiture and re-entry is a simple remedy primarily designed to get the landlord's property back.
  - The **only damages a landlord can get** here are **whatever rent has been unpaid** up until the termination date.
  - If at the time a landlord exercises this remedy and terminates, their damages will be capped at their rent in arrears.

2. Fundamental breach / repudiation

- As a lease is also a contract, the Court has allowed landlords to use contractual remedies.
- If you want to terminate a lease for fundamental breach and repudiation, then you must go to the Court and prove that this has transpired.
- While forfeiture and re-entry is just filing a summons, fundamental breach and repudiation involves going to Supreme Court → more expensive / complicated option.
- Not an alternative remedy to re-entry. Both can be exercised: ***Progressive Mailing House***.
- A landlord will use fundamental breach and repudiation when you want to argue loss of bargain damages
- You'd go down this route if you wanted to argue fundamental breach and repudiation and therefore that they are entitled to loss of bargain damages; if it was a property that is very difficult to re-let (e.g. petrol station).
- This will allow them to access a higher level of damages

- E.g.: Assume Peter leased petrol station and he continually breaches covenants in the lease. Landlord has had enough, so they decide to exercise right to forfeit and re-enter. Lease comes to an end. Although the landlord has now gotten rid of Peter, landlord is now left with difficult property to rent, and it takes landlord 2 years to find new tenant. Landlord would want to go to Court and argue that they have been out of pocket for last 2 years. They would argue that there was fundamental breach and repudiation, and argue that they are entitled to loss of bargain damages; i.e. "I am entitled to the rent for that particular 2 year period" (period = from termination up until when they find new tenant). Here, landlord is using both remedies (initially forfeiture and re-entry, and then 2 years later they go to Court and argue fundamental breach in order to access higher level of damages). Landlord has a duty to mitigate their losses in that time. Usually, landlord will use forfeiture and re-entry to terminate lease, then **try and re-let the property**, and then go to court and ask for damages (there is no point in going to court straight away when landlord may not know how long it would take them to re-let the premises).

Fundamental breach

- **CASE*: Shevill v Builders Licensing Board* (1982) is the leading authority that decided this**
  - Facts: Shevill is repeatedly late with rent. He breaches express term in lease by failing to pay on time but then catches up. Then it happens again, etc. It happens often, where there is a breach, then a catch up, then breach, etc. Eventually, landlord gets sick of this and exercises forfeiture and re-entry. Landlord has issues in re-letting property, so they go to court and they argue that there was a fundamental breach and repudiation, and they argued that they were entitled to the higher level of damages (NB: they had to show court there is fundamental breach or repudiation; **contract law stipulates the fundamental breach is an essential term that goes to the root of the contract, while a repudiation is evincing an intention to no longer be bound or perform it in a manner in which it is specified in the contract)**
  - **Issue:** Is this fundamental breach of not paying rent on time
  - **HELD:** Court said is not repudiation as the tenant did want to perform the contract (every time they were behind on rent, they caught up). Regarding fundamental breach, court had to answer the question of "is rent a fundamental or an essential term of a lease?" Court said that it is not an essential term of a lease, so while the basic law of contracts applies, that does not mean that everything subjectively thought of as an essential term is an essential term. Thus,

the Court held there was no fundamental breach, hence lessor was only entitled to recover other unpaid rent up until the date of re-entry.

- **Takeaway: On its own, the failure to pay rent is not a fundamental breach (*Shevill v Builders*). It is a breach of the contract, but it not a fundamental breach so you cannot argue for the higher level of damages.**

The question becomes "When can you argue for the higher level of damages?"

- **CASE: *Progressive Mailing House* (1985): Court answered the above question of arguing for the higher level of damages.**
  - High Court case, 3 years later.
  - **Facts:** Lessor leased property to lessee (Progressive Mailing). Lessee had sublet the premises in breach of a covenant of the lease against subletting. They had also caused physical damages to the roof of the property, drains and electrical system, and they had obstructed access to the premises, and they had failed to open the premises on time. There was also little or no attempt made to rectify any of those situations, and also, lessee had not paid rent for 6 months.
  - **HELD:** Court held lessee to be in breach of an essential term; lessor was entitled to re-enter, and they were also entitled to recover unpaid rent for balance of the term. Mason J was of the view that the conduct by the lessee amounted to both fundamental breach and a repudiation. It was obvious / the tenant evinced an intention to no longer be bound by the lease).

  - **Takeaway: Failure to pay rent on its own is not breach of essential term, but if you breach that rental clause in addition to other clauses, then all of those breaches can combine to become a fundamental breach.**

Repudiation

- **CASE: *Wood Factory Pty Ltd v Kiritos Pty Ltd* (1985) NSWSC – case on repudiation.**
  - **Facts:** Lessee moved plant and machinery to adjoining premises. They used lease premises for storage. They allowed employee to actually reside on premises. They allowed premises to fall into disrepair (became susceptible to vandalism). They attempted to sublease premises which they were not supposed to. They were significantly behind in rent.
  - **HELD:** All of this showed that they no longer wanted to be bound by the terms of their lease.

  - **Takeaway: Where the lessee's conduct is perceived to be a rejection of their obligations under the lease, the court may conclude that the lessee has repudiated the contract.**

Fundamental breach, repudiation and notice

- S 129(1) A right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant….
- If you choose to exercise the right of re-entry (either in the lease or under statute) then notice is required: ***Wood Factory v Kiritos***
- This is so even where the lease deems a covenant to be essential and there is a breach of that term: ***Macquarie International Health***
- But if the landlord rescinds the contract for repudiation, rather than relying on breach or does not exercise a right of re-entry, the suggestion is that a notice is not required because this is not within the scope of **s 129: *Macquarie International Health.***

Stipulation

- Most leases will not leave the question of "what is a fundamental breach or an essential term?" for the courts to decide. Instead, they will stipulate that a breach of a particular clause will amount to a fundamental breach (i.e. they will expressly put that in the lease).
- They can stipulate in a lease (e.g. breach of rental covenant = a fundamental breach.
- Stipulation allows you to say that something is a fundamental breach; **if you contractually agree, then the court will not interfere** with that because if the parties have agreed, that is freedom of contract, and it would be wrong for a court to chime in and interfere **(Gumland)**.
- When parties stipulate that something will amount to fundamental breach, they will also stipulate the consequences.
  - E.g. Clause may say that "x conduct will be a fundamental breach, allowing the landlord to terminate on x amount of notice and to recover the loss of bargain damages"
- Stipulation is common; if there is a dispute, the question for the court is not whether it is a fundamental breach, but rather how to interpret the clause
- Usually, after breach, the lease is voidable at the option of the lessor (up to lessor whether they will waive breach or end breach/continue, etc.)
  - *Gumland* tells us that it only takes 1 breach to amount to a fundamental breach because that is what they have expressly put in the lease.
- This is not possible at common law because we know that failure to pay rent in it of itself is not a fundamental breach (despite being in the contract).
- If the terms however expressly state that rent is going to be an essential term and if you do not pay rent, it is a fundamental breach. This will then allow lessor to terminate and argue loss of bargain damages.