EASEMENTS

An easement is a right annexed to land to utilise other land of different ownership in a particular manner or to prevent the owner of the other land from utilising their land in a particular manner. It lies in grant, not in contract (Windeyer J in *JEA Holdings*). This means that, compared to a mere personal right that binds only the parties to its creation, an easement also binds successors in title.

Whether X has a right to Y by virtue of an easement depends on whether the essential characteristics of an easement from *Re Ellenborough Park* are satisfied, and if so, whether it is an easement that can be enforced against Z as the owner of Q. [Extinguished? Extent of rights granted?]

ESSENTIAL CHARACTERISTICS

(1) There must be a dominant and servient tenement.
The dominant tenement is usually a parcel of land, but it could be another easement or a profit.

(2) The right must accommodate the dominant tenement.
A mere personal privilege or commercial advantage, intended to benefit the owner of the dominant tenement but unconnected with the land, cannot be an easement.

- In *Re Ellenborough Park*, the purchasers of land adjacent to a park were given rights to use the park as a 'pleasure ground'. Lord Evershed held that while it wasn't sufficient to merely prove that the right increased the value of the dominant tenement, the park was effectively used as a garden for the properties, which were small in size, thus enhancing the enjoyment of the dominant tenement.
    - Compare to *Clos Farming* where there was no connection between the operations of a vineyard and Lot 86 (the dominant land), beyond mere personal advantage. There was nothing particular about Lot 86 which it is appropriate for carry out farm maintenance.
- Tenements need not be contiguous. Some of the houses in *Re Ellenborough Park* did not border the park. However, the park was still held to accommodate them.
- If a dominant tenement is subdivided, the easement is presumed to accommodate the subdivided parts, enabling successive owners to use the easement. This presumption was applied in *Gallagher v Rainbow* regarding a private road, but it can be rebutted.
- In *Frater v Finlay*, an easement to receive water came with an obligation to pay half the cost of keeping the plumbing equipment in good condition. Newtown DCJ held that the obligation could not amount to an independent easement because it was a mere contractual right with the owners.

(3) The same person must not own and occupy the dominant and servient tenements.
This rule has been supplanted by statute: CA s 88B, RPA s 46A.

(4) The right claimed must be capable of forming the subject matter of a grant.
This is because the traditional method of creating an easement was by deed of grant: *Re Ellenborough Park*.

(A) First, the right must not be too vague or indefinite.

- Yes easement:
    - Right to enjoy a garden: *Re Ellenborough Park*
    - Right to use leisure and recreational facilities: *Regency Villas v Diamond Resorts*
    - Light through a defined channel: *Wheeldon v Burrows*
- No easement:
    - Free flow of air: *Webb v Bird* (unless through a defined channel: *Bass v Gregory*)
    - Protection from television interference: *Hunter v Canary Wharf*
    - Protection of privacy: *Browne v Flower*
    - Protection of a view: *Gilbert v Spoor*

(B) Second, the right cannot amount to proprietorship or possession of the servient land. The cases on this topic are difficult to reconcile. Recently, in *Theunissen v Barter* (NSWCA 2025), Kirk JA held that while every purported easement prevents some ordinary use of the servient tenement, the question is whether it substantially deprives the servient owner of proprietorship or legal possession to an extent that it is inconsistent with ownership.
    - The greater the proportionate area is affected, the more likely it cannot be an easement.
    - What is the effect on the rights of the servient owner? What can/can't they do?
- Storage
    - Easement: coal in a shed in *Wright v Macadam;* boat on land in *White v Betalli*
    - No easement: goods in the cellar: *Grigsby v Melville*
- Parking
    - Easement: Grant of a vehicle parking and garage: *Stolyar v Towers*
    - No easement: Right to park trucks in a locked area: *Copeland v Greenhalf*
    - Right to park overnight was ancillary to "right of access", but on the facts, there was nowhere else for the dominant holder to park: *Moncrieff*. Transient exclusion of an owner from their property is not inconsistent with the servient owner's possession.
    - *JEA Holdings* concerned a car park with 198 spaces shared for the business of the dominant and servient tenement holders. In upholding the easement, Windeyer JA noted that the servient holder had far more than nominal proprietorship. This was endorsed by Bathurst CJ and Beazley P on appeal.
- Footway
    - Right of footway that excludes the servient owner all year except for one day was held to be a valid easement that did not grant exclusive possession: *Evanel v Nelson*
    - In *Dickson v Petrie*, an easement was granted to allow for gardening, paving and landscaping. This was a valid easement, since the servient tenement could still use that land for other purposes.
- Recreation
    - Right to use rooftop as a balcony or terrace (but only for specific purposes), where the servient owner could only access through a skylight and ladder = valid easement: *Theunissen v Barter*
- Construction
    - Building on someone's land: *Tileska v Bevelon*
    - In *Dickson v Petrie*, an easement contained the right to build a shed for storage and laundry activities. It was held that this did not grant exclusive possession because the servient tenement could use the shed for other purposes (like installing solar panels).
    - Overhead powerlines that prohibited buildings: *Harada v Registrar of Titles*
    - "Easement for Vineyard": *Clos Farming*
        - The dominant tenement holder could enter the land and control it by planting, maintenance, harvesting, packaging and selling. Sought caveat to protect their interest. Santow JA held that the servient tenement holder was left with merely his rights of residual recreational activities, totally subordinated to the over-arching rights of the dominant owner. Not a valid easement.

(C) If relevant, in *Re Ellensborough Park*, the fact that the servient holders also sold rights to access the land to others did not prevent the dominant holders from having an easement.

CREATION OF EASEMENTS

EXPRESS EASEMENTS

Creation by express grant

Under the Torrens system, easements are created by executing an approved form of transfer: RPA s 46(1). The burden of an easement, therefore, is transferred with the land: RPA s 51.

- Executed by owners of land benefited and burdened, with consent of mortgagees: s 46(1A)
- Under CA s 45A, an easement may be "reserved" on a conveyance of land without any regrant by the grantee and without the grantee executing the conveyance.

Per CA s 88(1), easements in writing are unenforceable unless they "clearly indicate" the land benefited and burdened + the person whose consent is required to vary the easement.

Created by the court (where the servient holder refuses to comply with request)

Courts have the power to create easements under CA s 88K(1) where it is "reasonably necessary" for the effective use of other land. The rationale behind these court orders is to advance a more productive use of land, where private negotiations have failed.

The phrase “reasonably necessary” is somewhere between absolute necessity and convenience. In *ING Bank v O'Shea*, the test was described as "far closer to necessity than to convenience".

- The purported easements in *117 York Street* were scaffolding, guttering and the swinging of a crane in the airspace of neighbouring land. In granting these easements, Hodgson J compared the cost of pursuing alternatives (e.g. 250K indoor crane) with the minor inconvenience to the neighbour.
- The easement must also be reasonably necessary for the enjoyment of the *land*, not merely the convenience of the owner. For example, in *Bloom v Lepre*, an easement for vehicular access was refused because it was only for the benefit of the owner.

Under s 88K(2), an order cannot be made unless:

A. The use of benefited land will be consistent with the public interest
B. The owner of the burdened land can be adequately compensated (which court can order: s 88K(4))
C. Applicant has made all reasonable attempts to obtain an easement, without success

Courts are less likely to grant an easement under s 88K where the parties have already been released from the easement by a court order, as occurred in *ING Bank v O’Shea*.

IMPLIED EASEMENTS

(1) Abutting road: *Dabbs v Seaman* OR Common intention e.g. party wall in *Richards v Rose*
(2) Necessity following subdivision, leaving one of the lots landlocked. The rationale for this principle was once thought to arise from a public policy consideration to ensure all land is usable (Megarry VC in *Nickerson v Baraclough*). However, the current view is that there is a presumed intention of the parties for land to be accessible (*North Sydney Printing v Sabemo Investments*).
    - The corollary of this is that, where parties intend for land to be "sterilised", there is no implied easement. For example, in *Sabemo*, retained land was expected to be subsumed into a council carpark, so the court refused to recognise an implied easement.
    - Conventionally, no right of way is implied where there exists an alternative, though highly inconvenient, means of access. No implied easement when:
        - Land could only be reached by river: *Manjang v Drammeh*
        - Land could be reached by foot, not by vehicle: *MRA Engineering v Trimster.*

(3) Non-derogation from grant. Where the parties intended the grantee to use land for certain purposes, the grantor cannot use retained land in a way that renders the land unfit for its intended use: *Kebewar v Harkin*. The parties must have contemplated that the intended use of the land would require some form of easement over the retained land: *Nelson v Walker*.
    - Argument failed in *Kitching v Phillips,* where land was zoned as a dog park but wasn't recorded on the written contract and transfer. This evidenced a lack of intention.

(4) Rule in *Wheeldon v Burrows,* a case regarding access to light. The principle of an implied easement outlined by Thesiger LJ has developed into four elements.

1. First, there must be a grant of a part of land (a severance).
    - Also applies to simultaneous dispositions. That is, if both parts of the land are given away at the same time, the easements between them persist: *McGrath v Campbell.*
2. Second, at the time of severance, exercise of the quasi-easement was "continuous and apparent"
    - Continuous? Need not be constant, but more than merely occasional: *McGrath v Campbell* (right of access used for several years).
    - Apparent? Must be obvious, not like undergrounds cables in *McKeand v Thomas.* Vehicle tracks in *McGrath v Campbell* was enough.
3. Third, quasi-easement must be necessary for the reasonable enjoyment of the land granted
    - Requires more than mere convenience (dog park in *Kitching v Phillips* where the plaintiff's land was large enough to exercise dogs).
    - According to Handley JA in *Wilcox v Richardson*, it must be necessary for "reasonable enjoyment of the property granted".
4. Fourth, just before the time of severance, the grantor must have been using the quasi-easement for the benefit of the land granted.

PRESCRIPTIVE EASEMENTS

Prescriptive easements arise after at least 20 years of use, based on the legal fiction of the doctrine of the lost modern grant: *Delohery v Permanent Trustee Co*.

- Has there been 20 years? It is arguable whether successive owners can tack their periods of use together. There is some authority for this approach in New Zealand (*Auckran v Pakuranga Hunt Club*).

Requirements for prescriptive easement to be enforceable:

(1) Use must arrive "as of right", which requires the claimant to demonstrate that they were entitled to use the servient land as an incident of owning the dominant land: *Hamilton v Joyce*. In *Hamilton v Joyce*, the servient owner believed that a right of way was public land. This meant their failure to assert title was not acquiescence to a "right" of the dominant holder.

(2) Use must not be by force, secrecy or permission: *Eaton v Swansea Waterworks*.
    a. Evidence of force of secrecy?
    b. Permission? In *Dobbie v Davidson*, an access road was used by dominant landholders for 60 years. This use began as neighbourly indulgence and eventually converted into a right. Importantly, there was no evidence that the dominant landholders ever asked for permission to use the road. If they did, this would not be a prescriptive easement because the use could be explained by this permission and not by a "lost modern grant".

(3) There must be continuity of use, which depends on the right claimed. For example, a right of way may not be used every day. In *Pekel v Humich*, there was sufficient continuity when a track to access a holiday home was used for 30% of the year.

(4) From *Williams v State Transit Authority*, Mason P held that the servient owner must have knowledge of the use of their land. This can be either actual or constructive knowledge.