i. Leases **Leases are an estate in land.** The lessor maintains ownership, however, a possessor rights are carved out of ownership for the lessee for a period of time. As a proprietary interest they can be transferred to others. Leases have dual character: they create property rights and contractual rights.

A. Requirements for a valid lease

1. Firstly, there must be a fixed or periodic term, and this must be defined.
- There must be a date or event which signals termination of the lease. For example, a lease for the duration of WW2 (*Lace v Chantler*)
- A short term lease is an unregistered lease that commences no later than 20 working days after the date of the contract and is a lease for a period of 1 year or less or is a periodic tenancy for periods of 1 year or less (s 207 PLA)

2. Secondly, there must be certainty of premises. The specific area that the leases rights pertain to must be clearly identifiable (*Fatac* at 71).

3. The lessee must have exclusive possession. This is the main distinction between a lease and license (*Street; Fatac*).
- Factors which indicate exclusive possession but which are not determinative include: rent payable (this can also be a feature of a license), the term created, any conditions on the lessee (may point to license) (*Street; Fatac*)
- In *Fatac*, there was no clearly defined area of which Atlas (the potential lessee) would have exclusive use, the area which comprised the quarry was relatively small compared to the 10 hectare property, and the owner had the right of re-access provided it did not distribute Atlas's activities. Thus Atlas is merely a licensee not a lessee.
- However in *John Fuller v Brooks* the Court departed from the exclusive possession test to look at the perceived purpose/ intention of the parties. The Court held that while Brooks did not have exclusive control (she did nto have control of the lighting system, power to the refrigerator of her stall, or a key to the theater's main door), a tenancy had been created, for this is what the parties intended in the contract.

4.Fourthly, leases must comply with formalities (*Fatac*)
- Leases which are for longer than one year must be in writing and signed by the parties to be enforceable - leases for less than one year can be oral (s 24 PLA). Leases longer than a year must be registered to create a legal estate. Without registration, lessees only have an equitable interest. Unregistered leases may be defeated by bona fide purchasers without notice. Leases which are for less than one year create a legal interest even without registration (but may be defeated by bona fide purchasers without notice).

B. Compare With Licenses Licenses are merely contractual rights which permit a person to be on another's land, and may confer additional permissions to perform particular acts on the land, in situations which would trespass without the license. A license is a personal right, whereas a lease contains an interest in land. Lessees have the right to assign or sublet whereas a licensee cannot alienate their land unless it is explicitly permitted in the license. Lesses can sue against the world (in rem right) whereas a licensee can only sue the other contracting party Lesses have statutory protection from eviction but licensees do not.

C. Transfer of lease interests Traditionally, common law treated leases as merely contractual, only giving personal rights not proprietary rights to the parties entering into the agreement. Consequently, when the parties changed (for example the landlord sold the land or there is a new tenant), the original relationship disappeared. Thus the new land owner could evict the tenant. However, common law has evolved in tandem with statute, and nowadays, leases have a dual contractual and proprietary character. Privity of estate is the proprietary relationship between the landlord/lessor and the tenant. Privity of contract is the contractual relationship between the parties to the contract. Thus, both landlords and tenants can transfer their estate to someone else.

With assignment of a lease at CL: An assignment is done through registering a memorandum of transfer. The ***entire*** leasehold interest is transferred to someone else.

1. Original lessor/ landlord and original lessee/ tenant = both privity of contract and privity of estate (*City of London*)
2. Lessor sells property to the new lessor. Privity of contract remains with original lessor and original lessee. Privity of estate is now between the new lessor and the original lessee even though there is no contract between them
3. Original lessee assigns lease to assignee/ new lessee. Privity of estate therefore moves from the original lessee to the new lessee. There is now privity of estate between the new lessor and the assignee/ new lessee. However, there is no privity of contract between them unless they create a new one. Privity of contract remains between the original lessor/ landlord and the original lessee until the contract ends (*City of London*).

With sublease: The transferor/original lessee retains privity of contract and privity of estate because they carve out a section of their property rights and transfer this to the transferee/ sub-lessee. Thus the transferor/ assignor has an interest in land (namely reversion). Likewise, the carve out gives the sub-lessee privity of contract and privity of estate. S 215 PLA removes the requirement that a sublease must finish before the lease so that there is a period of time when the property reverts back to the transferor.

Original lessor's (landlords) obligations in both situations: The original lessor remains responsible for all covenants in the original lease, even after assignment

Original lessee's obligations At CL the original lessee is only bound by the terms stipulated in the original lease, for privity of contract binds parties to the contract. (*City of London v Fell*). The assignee is not liable for a breach of a covenant committed after they assign the lease because at this point they ceased to be the owner of the term to which the covenants were annexed (City of London)Changed by S 240 and 241 PLA = following assignment the original lessee, and all lessees/ assignors in the chain after them, remain liable to the original lessor for the payment of rent as stipulated in the rent, and the performance of all covenants in the lease

Current lessee's obligations At CL privity of estate means that assignees and transferees are bound only bound by covenants which "touch and concern" the land in question (*City of London*). S 240(3) PLA changes the CL position. Assignees are now bound by all covenants in the original lease, both the benefit and burden.

C Transfer of Lease Continued

Original lessee's obligations when contract finishes

- The original lessee is not liable for payment of rent or performance of covenants when the assignee/ current lessee exercises their right of renewal, because this is a new grant. However, the original lessee will be liable where the assignee/ current lessee and landlord extend the lease (*Senar Holdings*).

- City of London v Fell CA 1993 The assignor is bound by the contract and thus liable to pay Grovebell's rent in arrears for the 10 contractual period (privity of contract). However, the assignor is not bound by the tenancy relationship (privity of estate) if that relationship goes beyond what their contract provided for. This is because there was no express covenant to pay rent during any statutory continuation, and there was no statute which extended the original tenant's liability in any way. Thus, the assignor is not liable to pay rent after the contractual term. However, the Court in City of London recognised the outcome may be different where the contract provides for a period of "holding over." In Herbert Duncan, the contract between the lessor and lessee stated "(Y)ielding and paying therefore unto the lessor during the said term." The Court held that the word "term" includes the period of "holding over." Thus, the original lessee was liable to pay the assignees rent after its the contract ended but during the holding over period.

ii Breaching Leases: Personal Covenants

A. Schedule 3 Part 2 of the PLA covers covenants, conditions and powers implied in all leases (lessee's obligations)

-Cl 4 of Schedule 3 Part 2 PLA - The lessee is required to pay **rent** when due (cl 4(1)), however, where the premises is destroyed or damaged rent will be reduced in a fair and just proportion (cl 4(2)) unless the damage is caused by the act or omission of the lessee, their agent, contractor, or invitee (cl 4(4)).

-Cl 5 - the lessee will not, without the consent of the lessor, **alter any building** that is part of the leased premises (cl 5(1)) however the lessor will not unreasonably without consent (cl 5(2)).

- Cl 6 - the lessee will not do or permit any **noxious or offensive act** or thing (cl 6(2)(a)) or anything that is or is likely to be a nuisance or disturbance (cl 6(2)(b)) to the lessor, other lessees of the lessor or neighbours

- Cl 7 the lessee will not commit the **tort of involuntary waste**

B. Landlord rights and lessee obligations

- Cl 11 - the lessor or their agent may at all reasonable times **enter the premises** for the purpose of inspecting their state of repair, carrying out repairs, complying with the requirements of any bylaw (cl 11(1)). However, the lessor will not unreasonably interfere with the lessee's occupation and use of the leased premises in the exercise of the power conferred by sub clause 1 (cl 11(2)).

- Cl 12(1) - the **lessor may cancel the lease** if rent is unpaid for 15 working days after the due date for payment or the lessee has failed, for a period of 15 days, to observe or perform any other covenant, condition or stipulation which is expressed or implied in the lease

- Cl 12(2) - the lessee is not released from liability for the **payment of unpaid** rent for the breach or non-observance of covenant, condition or stipulation in cl 12(1) if the lessor cancels the lease

C. Schedule 3 Part 2 of the PLA covers covenants, conditions and powers implied in all leases landlords obligations

- Cl 10 - the lessee may terminate the lease, on reasonable notice of the lessor if it is an express or implied term of the lease that the leased premises may be used for 1 or more specified purposes, and at the time during the lease, the premises **cannot be used for 1 or more of those specified purposes** (cl 10(1)), unless this is because of an act or omission by the lessee, their agent, contractor or invitee.

E. Cl 9 - quiet enjoyment - the lessee and all persons claiming under the lease are entitled to the quiet enjoyment of the premise without any disturbance from the lessor, and all persons who claim through or under the lessor (s 218 PLA). Four elements must be satisfied.

1. Firstly, there must be a substantial interference with the tenant's possession (Tram Lease)
    a. A substantial interference does not have to be a physical interference; it is sufficient that there is a substantial interference which prevents the lessee from using and enjoying their premise for the purpose for which it was leased (Kalmac). Here, "enjoyment" means having the full benefit of the rights to the property (*Kalmac*).
    b. In principle, excessive noise or explosions can qualify a breach (*Southwark*). However, the lessor/landlord does not have any obligation to prevent children running around for this is an ordinary part of life (Southwark).
    c. The noise, dust, and disruption caused by the landlord demolishing the building around the lessee's shop constituted a breach of quiet enjoyment (Kalmac).
2. Secondly, the covenant must be breached by the landlord or those claiming under the landlord (s 218 PLA)
3. Thirdly, covenants are prospective - the substantial interference cannot be attributable to the pre-existing condition of the premise/ a condition before the premise began (*Southwark*).
    a. The landlord is under no obligation to improve the state of the building (for example, make it soundproof) because (1) there was no clause in the agreement stating the property was soundproof (2) the interference was a condition before the premise began
4. Finally, the remedy may be damages, an injunction or cancellation of the lease. While derogation from the grant is always serious enough to justify cancellation, a breach of quiet enjoyment is a lower threshold - it may not be serious enough to justify cancellation (*Norden*). Considering that quiet enjoyment is a lower threshold than non-derogation, where non-derogation is established, so too will quiet enjoyment

D. Cl 8 - the lessor will not derogate from the lease

Non-derogation is a higher standard than the covenant of quiet enjoyment. requires the landlord or anyone claiming under them to not do anything which is inconsistent with the lease (Kalmac). This is a question of fact and degree (Nordern). The bar for non-derogation and cancellation of the lease agreement is very high - something is needed to frustrate the lease (Nordern).

Tram Lease establishes four elements which must be established

1. The activity which causes the derogation must occur on land which is also owned by the landlord (Tram Lease)
2. The activity must be done/ permitted by the landlord, or is something which the landlord can control (Tram Lease)
    a. The Court in Nordern created a similar test: the landlord can be liable when:
        i. The landlord the landlord authorises, consents to or participates in the activities that amount to a substantial interference
        ii. The landlord knew about problems but did not intervene
3. The activity must be a substantial interference with the use of the premise (Tram Lease)
    a. .In *Kalmac*, the CA held that the lease contained an implied covenant for the building to be maintained in its existing state. Thus, demolishing the building surrounding the shop constituted a derogation from the grant - it was a substantial interruption which prevented the lessee from enjoying its premise for the very purpose for which they were leased (*Kalmac*).
    b. The reach must render the premise "materially less fit" for the purpose for which they were leased. However, non-derogation does not need to render the purpose of the lease impossible (*Norden* - brothel). In Norden, the noise, vomit and urine from the brothel, and the brothel's clients accidently going to the lessee's premise and proposition clients, constituted a "substantial interference." The illegality of the brothel cast a stigma over the lessee's business which could not be remedied. Critical analysis - with less stigma the result may be slightly diff nowadays
    c. NB the brothel in Norden arose after the lessee (claimant) entered into the lease.
4. The activity must frustrate the purpose for which the landlord knows the lessee is taking the premise or is likely to use the premise (Tram Lease)

CA in *Team Lease* held that the landlord demolishing the wall would constitute non-derogation from the grant. The purpose of the lease to the shoe repair shop would be frustrated if the wall was pulled down and consequently, the shoe repair shop building would collapse.

5. Remedy: in Norden, the court held Blueprint (computer company) was entitled to cancel the lease due to the noise, smell and disruptions from the brothel. Cancellation is an automatic remedy for non-derogation (Nordern)

CL covenant to keep in good repair - now codified in PLA:

F. CL 13 of Schedule 3 Part 3 (implied covenant that does not apply to short term leases)- the lessee will keep the premise in the same condition that they were in when the term of the lease began (cl 13(1)(a)), however the lessee is not bound to repair any damage caused by (i) reasonable wear or tear (ii) fire, flood or explosion (iii) natural disaster or (iii) any other cause of risk for which the lessor has insured the premise

1. A covenant to keep a premise in good condition does not require the lessee to put the premise in a good condition if it was not in good condition when the lease began (s 223 PLA; *Proudfoot*). Such repair should have "regard to the age, character, and locality of the house" (Proudfoot). For example in *Mobile*, the lessee was not responsible for cleaning up decades of pollution (oil spillage into the ground) which occurred before their two year lease. "The shorter the tenancy, the stronger the inference must be against a common intention to impose onerous, extensive, and expensive repair obligations" (*Mobile* at [40]). However, *Mobile* also adds two qualifications to the Proudfoot test:
2. First, the premise needs to be repaired according to the standard required by a reasonably minding tenant envisaged at the lease's inception (*Mobile*). The standard of the land when the 1985 agreement was signed was industrial. Thus, Mobile only had to repair the premise to an industrial standard not a commercial or residential standard (*Mobile*). However, an obligation " to keep a building in 'good and tenantable repair' may require a particular building element (such as a dilapidated roof) to be replaced (for instance to prevent water damage to the interior of the building) with consequent improvement of the building" (Mobile at [68]). 3. Secondly, those repairs need to be in contemplation at the commencement of the lease (*Mobile*). When the 1985 agreement was signed, Mobile would not have contemplated that land which had previously been a rubbish dump and now stored oil would later become a commercial or residential area. Thus, mobile does not have to repair the land to a commercial or residential standard because this was never contemplated. Likewise, the landlord must have known that oil spillage is an anticipated consequence of a lease for the storage of oil (*Mobile*). Further, the court held that the word "keep" in the context of keeping the premise clean and tidy did not amount to an obligation to effect transformative change (Mobile at [58]). Mobile did not have to clean the site by replacing soil to a depth of 3.5 m because this would amount to "transformative" change (Mobile).

4. Implied Covenant: Development Auckland (lessor) argued that there was an implied covenant that Mobile would take all steps available to prevent contamination of the sites by hydrocarbon pollution, and would remediate any pollution caused by its or its predecessors activities (Mobile at [76]).

The Court in Mobile established the five criteria for establishing an implied covenant at 79

1. The implied covenant must be reasonable and equitable
2. It must be necessary to give business efficacy to the contract, (i.e. the contract would be ineffective without the implied covenant)
3. It must be so obvious that it 'goes without saying'
4. It must be capable of clear expression
5. It must not contradict any express term of the contract

The Court held that at least three of the criteria (2, 3, and 5) were not met at [82].
2. The Agreement was effective without the implied term/ the agreement did not depend on the implied term
3. The absence of complaint amount contamination by Auckland Development in 1985 suggested that remedian obligation was not so obvious it 'goes without saying'
5. The implied term would imply conditions that went beyond the ordinary meaning of "clean and tidy" - it would amount to transformative change not covered by the agreement. The court cannot imply a covenant that goes beyond the meaning of the implied contractual terms

E. Schedule 3 Part 4 Cl 14 - implied covenant in short term lease the lessee will use the premise in a way that a reasonable tenant would

Renewal and Termination of Lease

1. Renewal of lease can be through a covenant (the lessee can *definitely* renew the lease) or an option (the lessee may *choose* to renew)
2. Termination can be through expiry, surrender (parties agree to terminate), determining event (lease ends upon a specified event), break clause (gives a party the power to terminate the lease themselves), notice to quit (one party tells the other party in accordance to law, cancellation (one party is entitled to terminate due to the conduct of another), and frustration (premature termination due to an unforeseen event - very rare).

Roman Catholic Bishop v RFD (HC 2015)

- Termination: The Court rejected RFD's argument that the lease must have been terminated because: (1) it was impossible for the purpose for which the premises was leased (worship) to continue after the earthquake damage. There could be other purposes, the purposes could change over time, and even if the chapel was destroyed, the Bishops interest in the common property around the chapel would continue to exist. (2) Unit Titles Act states that leases confer rights over common areas. The value of the leasehold interest is far more than the value of the chapel (the only thing covered by the insurance payout). It includes the land around the chapel, which can still be used and which is very valuable in the city centre (3) where the lease is silent, a party cannot imply a term to terminate the lease.

- Frustration: Held that frustration arises where the contract makes no provision for an event which occurred. There must be a connection between the frustrating event (earthquake) and the impediment on the performance of the lease. The narrower the purpose, the easier to frustrate the lease. However, the longer the lease, the harder it is to frustrate it (because short leases tend to be for a narrower purpose). The Court therefore held that the lease was not frustrated. It was speculative to say that the perpetual lease had been fundamentally altered or undermined before Crown acquisition, RFD's interest in the land was worth less than Bishop's perpetual lease for nominal rent ($1 per year), and the Canterbury Earthquate Recovery Act 2011 includes the phrase "lessees as owners of the land" which implies lessees cannot be stripped of their land just because the use/ purpose of the lad changes. Thus it would be unjust enrichment for FRD to take all of the Crowns money/ for Bishop to get one.

iii. Easements

An easement is a right annexed to land to (i) utilise land (ii) owned by another (iii) in a particular manner (*Halsbury's Laws of England*). Easements are proprietary rights. Because they relate to land, they must be registered to become a legal interest and be fully enforceable (*Sutton v O'Kane*). There are three types of easements.

1. Positive easements entitles the dominant tenement (D) to do something on the servient tenements (S) land. For example, where X has a right of way over Y's land, X is the dominant (benefited) tenement and Y is the servient tenement.
2. Negative easements enable the dominant tenement (D) to prevent the servient tenement (S) from doing something on the servient tenements land. For example, D can prevent S from building right on the boundary lind
3. Easements in gross are easements without a dominant tenement.

-The dominant tenement/ owner is the land/person with the benefit of the easement. The servient tenement/ owner is the land/person with the burden of the easement

A. Re Ellenborough Parks establishes the four requirements at common law that must be established for there to be an easement. However, in New Zealand the PLA and LTA have modified these requirements slightly.

1. Firstly, there must be a dominant tenement and a servient tenement (*Re Ellenbourough*). S 291(1) of the PLA modifies this requirement and allows for easements in gross, that is, where there is just a servient tenement.
2. Secondly, the easement must accommodate the dominant tenement.
   a. It is insufficient to show that the easement has increased the value of the property. Rather, the easement must benefit the land, and have some connection to the use and enjoyment of the land by the dominant tenement (Re Ellenborough). The Court held that the easement was connected to the use and enjoyment of the land - it benefited the dominant owners who could use the communal garden/ park.
   b. The Court in *Re Ellenborough* also held that the ability for both the dominant owners and the public to access the park did not negate the easement because only the dominant owners have enforceable rights because the easement is linked to their property. Thus, the owners could build a fence, gate the park, and only hand out keys to the owners if they choose. There is a difference between factual and lawful use.
   c. The benefit of the easement must be attached to ownership, not the person, so that it can be passed onto successors (*Re Ellenborough)*
   d. The dominant tenement does not have to be directly connected to the servient tenement. It does not have to be a neighbouring lot; rather it can be in the geographic vicinity (*Re Ellenborough*)
3. Thirdly, the dominant and servient owners must be different people because an easement is a right over another persons land. However, New Zealand has removed this requirement with s 108(3) of the LTA which states the grantor and grantee can be the same person.
4. Fourthly, the right must be capable of being the subject matter of the grant.

a. The right granted by the easement cannot be too vague or wide - it must be defined (*Re Ellenborough*)

b. The Court in Re Ellenborough held that while *jus spatiandi* (recreational rights/ the right to walk about at pleasure on another's land) alone is not capable of being the subject matter of a grant, here, the right went beyond mere jus spatiandi. The park is not just used for exercise and rest but also for domestic purposes like taking small children out in prams and is therefore not merely a recreational right, but one which is beneficial to the premise to which it is attached (p 179).

More recently in *Regency Villas*, an easement allowed neighbours to use sporting facilities including a swimming pool, golf park, and tennis court. The court held exercise was more than leisure or recreation - it has utility because exercise is an "essential or at least a desirable part of (people's) daily routines" at [54]. The court defined utility as "(benefiting) the trade carried on upon the dominant tenement or the utility of living there" at [56].

Critical analysis - blurry line between merely recreational and having some added benefit or utility. The tests from Re Ellenborough and Regency Villas set the threshold for benefit/ utility very low - this makes it very difficult to negate an easement for almost anything can now be seen as having benefit or utility

c. Courts will apply the wording of an easement in a strict manner and only define the rights as defined in the documents (*Barry v Fenton*).

- An easement which grants the dominant tenement "vehicular access only" does not grant lessor rights like walking access. To do so would constitute a greater burden on the servient land than what the easement allowed (*Barry v Fenton*).
- In, *Peacock* the Court of Appeal held that Custins (the dominant tenement) cannot use the right of way to access and farm the blue land. This is outside the scope of the grant (which allows Curtis to use the right of way to access and farm the red land only) and is therefore trespass.

Thus the dominant owner cannot intend to take advantage of an easement to reach land which is ot included in the terms of the grant. However, the dominant can occasionally use the easement to access and use land not included in the grant provided that is not their purpose or intention. This is known as 'ancillary use' - where the use that is not for the benefit of the additional land, it can be permitted under the original easement (*Peacock)*. (e.g. farming the red land, and wandering off to have a picnic on the blue land is acceptable, however here, the very purpose was to use the right of way to get to the blue land) (*Peacock*).

In *National Trust*, while an easement was only granted over a historic site, the Court held that visitors using the car park (which the easement did not extend to) constitute an ancillary use because the car park was not the visitors final destination - they used the car park to access the historic site.

In Linden use, owners shared a right of way along a private street. Two owners purchased a lot at the end of the street and used the right of way to parked their cars there. The Court distinguished National Trust, where the car par was ancillary to use the right of way. Conversely, here the car park was being used for the enjoyment of the land.

5. Additionally, the right cannot be inconsistent with the proprietorship or possession of the servient owners. It cannot amount to **joint occupation** (*Re Ellenborough*). The Ouster Principle is used to assess whether the easement amounts to joint occupation which is not permitted (Schmuck at 88).
1.The ouster principle establishes that joint occupation depends on whether the rights contained in the proposed easement would leave the servient owner without reasonable use of their land. Reasonable use is assessed by reference to the burdened land as a whole (Schmuck)
2. The Court of Appeal in *Schmuck* held that Schmuck's (the dominant owners) easement over the reserve amounted to joint ownership because the District Council (servient owner, owner of the reserve) could not retain possession and in certain instances, control of the reserve. There were no time restrictions on when the boats protruding into the reserve could be worked on, maintenance and repair work was very wide, there was no limit to the number of people who could enter the work to work on the boats. - --However, the Supreme Court overturned the Court of Appeals ruling, holding that the easement does not deprive the District Council of possession, control, or reasonable use of the area (at 94). The easement is only over a small strip of the reserve, the circumstances in which it can be invoked are there is a limit to the amount of time that Schmuck can work on the boats on the reserve.
2.5 Likewise the ability for the public to access the park that the dominant owners had an easement over does not amount to joint ownership because the owners could exercise their rights (e.g. fence and gate the park) if they choose (*Re Ellenborough*)
3. However, Lord Scott in *Moncrief* has criticised the application of the ouster principle, stating that the question should not be whether the servient owner is deprived of reasonable use of their land as a whole. Rather the question should be weather the easement would result in the servient owner being deprived of the portion of their land over which the easement is granted (not the burdened land as a whole).

B. Landlocked land
Sections 326-238 of the PLA are the empowering provisions regarding landlocked land. Under s 327(1), an owner or occupier of landlocked land may apply to the court for an order under s 328(1) granting reasonable access to any such land
The court has the power to grant relief, namely vesting the land to the owner of the landlocked land or granting an easement (s 328). *Squally Cove* establishes a three step test for determining whether the Court should grant an order.
Firstly, the land must be landlocked (Squally Cove). S 326 of the PLA defines landlocked land as "a piece of land to which there is no reasonable access." Reasonable access "in relation to land, means physical access...of a nature and quality that is reasonably necessary to enable the owner or occupier of the land to use and enjoy the land for any purpose which may be used in accordance with any right….under the Resource Management Act 19991 (s 326 PLA). Squally Cove at [23] collates principles for determining whether land is landlocked:
→

(a) Whether there is reasonable access to land is a question of practical physical access in fact, not legal access
- In *Squally Cove*, the court recognised that while the applicants technically had legal access through another road, in reality it was impossible due to damage.
- In *Kingfish*, the applicants only had access to their tourist lodge by land or sea. The Court of Appeal held that while the applicants did not have legal access (because the Crown owns the coastal strip) it is sufficient that they did have "actual access in fact." The whole purpose of vesting ownership of the coastal strip in the Crown is so that the public can have access (*Kingfish* at 27).
(b) It is a question of present fact, concerned with whether reasonable access now exists, not whether it is possible for access to exist through modification or upgrades on the applicants own land (for example)
- A road which was inaccessible due to damage does not constitute reasonable access (*Squally Cove*).
(c) Access "at the whim of the adjoining owner" or dependent on the "courtesy and goodwill" of the adjoining owner is not reasonable access
- In *Squally Cove*, the Court recognised that the ability for neighbours to grant or deny access was not reasonable access.
(d) reasonable access is concerned with current needs/ uses, not future or potential needs/ uses.
(e) Reasonable access is not necessarily the same as the best access that could be achieved. Other access may be more convenient, but that does not mean that the present access to land is unreasonable
- The Court in *Squally Cove* held that it did not have jurisdiction to grant an order because the applicant's properties were not landlocked. Squally Cove's offer to grant the property owners a legal easement over a different albeit slightly slower route (the yellow road) in return for their payment and contributions to maintain the road was reasonable and thus no alternative relief needed to be granted.
- In *Kingfish* (the applicants) had previously applied for resource consent to upgrade their seawalls and wharf, and increase the size of their lodge. In the application, Kingfish argued that upgrading their seawalls and wharf was necessary to make access by sea reasonable. Thus the Court of Appeal held that because Kingfish itself thought sea access was good enough for resource consent, it did not need road access.
(f) Reasonable access is a value judgement made by the court which considers the characteristics of locality (residential, commercial, mixed), topography and contemporary transport requirements
In *Murray,* pedestrian access is typical of a hilly Wellington suburb and is therefore reasonable (court may reach a diff conclusion in another city)
(g) The circumstances as they existed at the time the land was acquired may be relevant in indicating what the purchaser regarded as reasonable at the time
If purchasers know that land is landlocked and only has pedestrian access at the time of purchase, this can point towards not granting the order (*Murray*).
(h) Reasonable access does not necessarily mean vehicular access (Murray). However, the situations where non-vehicular access is reasonable are likely to be few due to the great dependence people now have on motor vehicles.
(i)The legislation is remedial. There is no presumption in favour of non-interference with another title

2. If the Court determines that the land is landlocked, it must then determine whether an order for reasonable access should be made, using the criteria under s 329 of the PLA
(a) the nature and quality of access (if any) to the landlocked land at the time when the applicant purchased or otherwise acquired the land e.g. what was the knowledge at the time of purchase
(b) the circumstances under which the land became landlocked e.g did it become landlocked by mistake - if the applicant is blameless the court is more likely to grant relief
(c) the conduct of the parties, including any attempts they have made to negotiate access to the landlocked land
(d) the hardship that would be caused to the applicant by the refusal to make an order, in comparison with the hardship that would be caused to any other person by the making of an order
- In *Kingfish*, the court recognised that granting an easement would result in business and commercial benefits for Kingfish, due to an increase in tourists. However, the easement would result in an increase in the size of the road and the number of people using it (to access Kingfish's lodge). This would harm neighbours who purchased their property due to the secluded and quiet nature. Ultimately, the court held that the inconvenience and harms that granting the easement would cause the neighbours outweighed the harms that would be caused to Kingfish by not granting the easement. Thus the court refused to grant the order.
(e) any other relevant matters
3. If the Court determines an order for reasonable access should be made, it must then determine what conditions should be placed upon this reasonable access under s 330(1) of the PLA
1(a) the payment of reasonable compensation by the applicant to any other person
(b) the exchange of land between the applicant and any other person
(c) fencing of any land and the upkeep and maintenance of any fence
(d) the upkeep and maintenance of any land over which an easement is granted
…

C. Modification and Extinguishment of Easements (or Covenants - *Synlait* Below!)
-Easements can be modified by the parties provided formalities are complied with.
- A court can rectify an easement or covenant where the instrument does not reflect the true agreement between the parties (i.e. the rights conferred are described incorrectly)
- Parties can also apply for courts to modify or extinguish an easement or covenant (PLA ss 316 and 317)

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Under s 317(1), the court can modify or extinguish (wholly or partly) an easement or covenant if it is satisfied that:
(a)the easement or covenant ought to be modified or extinguished because of a change since its creation including
(i)the nature or extent of the use being made of the benefited land, the burdened land, or both
(ii) the character of the neighbourhood
(iii) any other circumstance the court considers relevant
(b) the continuation of the easement or covenant in its existing form would impede the reasonable use of the burdened land, in a different way or to a different extent, from that which could reasonably have been foreseen by the original parties at the time of the easement or covenants creation
(c) every person consents to the modification or extinguishment

Harden v Collins (HC, 2010)
- The term "modify" in s 317 means that the court has the power to enlarge an easement over servient land (Harden at 39). It is a matter of fact and degree as to what kinds of modification will be legitimate. For example, widening the right of way on the property of a servient owner may be necessary to provide for a range of owners and their vehicles using the common driveway.
- The inclusion of the power to award compensation in s 317 is a clear indication that Parliament intended the courts to have the ability to grant an application to modify an easement, even if this causes some degree of detriment to other parties. Finding otherwise would make the compensation provision redundant (Harden at 43).
- The plots were interconnected so that the plot owners were simultaneously dominant and servient owners. The easement therefore had to be considered in its wider context, as a composite whole. Here, the first and second appellant were applying in their capacity as dominant, not servient owners, for they are not seeking any modification or extinguishment of the easement on their land. Only servient owners may apply under s 316 because the compensation is only payable to the dominant owner. Thus, the third appellant could bring the application under s 316 for the extinguishment of the easement on lot F (of which he is the servient owner over this land). However, the third appellant could not apply to the court for extinguishment of an easement on Mr Collin's land, for he is a dominant owner with respect to the easement on Mr Collin's land, and the court had no jurisdiction to make an order under s 317.

Schmuck v Opua Coastal Preservation (2019, SC)
- In *Schmuck* the Supreme Court recognised the general rule from *Green Growth* that valid easements should be interpreted without regard to extrinsic evidence. However, in this case, the court held that easement was legitimate because the easement document itself referred to extrinsic evidence (resource management plans and resource consent). Thus, it was reasonable to expect people reading the title to be aware of this extrinsic evidence (*Schmuck* at 59),
- The Court also held that easement was capable of being an easement under the Reserves Act. There is no reason to take a different approach to interpreting an easement over public land compared to private land unless the easement conflicts with the statutory purpose of the reserve.

iv. Covenants

Covenants are promises, expressed or implied in an instrument (contract) regarding the use of land. They are an obligation for the servient owner to do something or not do something for the benefit of the dominant owners land
There are three types of covenants.
- Positive covenants are promises to do something on your land e.g. maintain a hedge that borders on neighbours property.
- Negative covenants are promises to not do something on your land e.g. not build higher than a certain height so as to not obstraint a neighbours view
- The covenantor carries the burden (servient owner). The covenantee carries the benefit (dominant owner).
- Covenants in gross are covenant where there is no dominant tenement

A. At common law the benefit of the covenant would pass with the land if (1) there was an intention for the covenant to run with the land (2) the covenant "touches and concerns" the land of the covenantee/ benefited owner (personal covenants therefore cannot be transferred) (3) the successor acquires the same legal estate as the original covenantee.

B. At common law the burden could not run with the land/ be transferred. This is an orthodox principle of contract law. Due to the injustice this caused, *Tulk v Moxhay* established that a covenant can in equity bind the conscience of a bona fide purchaser with notice provided that the covenant (1) touches and concerns the land and (2) when the covenant was made, there was a common intention between the parties that the covenant would run with the land.
- The Court in *Tulk* held that covenants significantly impact the value of burdened land. Where the original vendor purchases land with a covenant, the covenant is reflected with the relatively lower price. Injustice is caused when the original vendor can then sell the land at a higher price, in consideration of the fact an assignee will not be bound by the covenant (because covenants do not run with the land). The original vendor will unjustly profit. Thus, equity will intervene and enforce a covenant against a bona fide purchaser with notice of the covenant, such as Moxhay.

3. The traditional common law position was amended by ss 301-303 of the PLA, so that there is no longer a distinction between positive and negative/ restrictive covenants at law.

The PLA, LTA and equity establishes five key principles regarding the enforcement of covenants

1. Firstly unless there is a contrary intention in the instrument, all covenants are enforceable by the covenantee, successors in title, and people claiming through the covenantee (s 301(2) PLA). Likewise, the covenant binds the covenantor, their successors, and those claiming under the covenantor unless there is a contrary intention in the instrument (s 302(2) PLA).
2. Secondly, like at equity, the covenants still need to touch and concern the land (*Tulk*; s 302 PLA). It must affect the nature, quality, value or mode of enjoying the land.
2. Secondly, both positive and restrictive covenants can now run with the land (s 303 PLA). This amends the position in equity, where only restrictive covenants run with the land (*Tulk*).
4. Fourthly, covenants can now be registered on the LTA (as set out in s 307 PLA and s 116 LTA) in order to be enforceable against bona fide purchasers. Registration provides sufficient notice to potential purchasers that a covenant exists. However, registration does not turn covenants into legal interests. They remain equitable interests, enforceable against covenantors in equity.
5. Finally, covenants must generally benefit the dominant tenement (*Tulk*). However, s 242 LTA 2017 amends the common law position allowing covenants in gross.

Covenants in gross are covenants that are (a) expressed in an instrument after the operation of s 242, (b) require the covenantor to do or refrain from doing something in relation to the covenanters land (thus it can be a positive or restrictive covenant) and (c) they benefit another ***person*** but are not attached to the ***land*** (s 242 LTA). This means there can be a covenant even where there is no dominant tenement. Prior to the 2017 LTA, covenants in gross were prohibited as reflected in *ANZCO v AFFCO*.

ANZCO v AFFCO (CA 2006): Covenants in Gross

- ANZCO is liable to AFFCO because there is a contract between them. Thus the encumbrance/ restraint of trade binds ANZCO directly. ANZCO is also liable for Itoham, because Itoham is ANZCO's lessee. ANZCO is not liable for Riverlands, because Riverlands, for it is the lessee of a previous owner.
- AFFCO has no direct action against Itoham or Riverlands of a previous owner, because there is no contract between them. The Court held that covenants in gross do not run with the land, and thus AFFCO does not have an action against Itoham or riverlands through this pathway either.
- The Court would not modify the covenant under s 126G PLA 1952 (equivalent to s 317 PLA 2017) to allow ANZCO to carry out meat processing, because it is a covenant in gross, which at the time was barred in NZ. NB if ANZCO decided today, where covenants in gross are recognised under s 242 LTA, the result may be different
- The encumbrance cannot be considered a restrictive covenant, because while it imposes restrictions over the burdened land, there is no dominant/ benefiting land. NB if decided under LTA 2017, which recognises covenants in gross (s 242), then AFFCO would have a direct action against Itoham and Riverlands.
- However, the introduction of covenants in gross had little practical impact on the law. As the Court of Appeal recognises in ANZCO, encumbrances are enforceable against the original owners, and they can also be attached to a mortgage. Thus, parties can register an encumbrance through a mortgage, enabling the encumbrance to be registered on the LTA. This would mean that the encumbrance is enforceable against future owners of the land.
- In some ways, registering an encumbrance through a mortgage actually provides more protections than registering an covenant in gross. Covenants in gross are merely equitable interests that can be noted on the title, but they cannot be registered. Conversely, an encumbrance can be registered via a mortgage agreement. Encumbrances therefore provide the dominant owner with greater rights.

Synlait Milk v NZ Industrial Park (NZIP): Modification of Covenants (like easements)

- The Supreme Court in *Synlait* granted Synlait's (the burdened owner) application for the modification of two covenants on the basis that modification would not substantially injure NZIP (the benefited owner). Three factors were determinative in the Supreme Court's decision. Firstly, the Supreme Court overturned the Court of Appeals holding that Synlait's dairy plant would have an impact on NZIP's resource applications. If Synlait was developing residential housing this may be the case, however, a dairy plant/ factory will have very limited impact resource consent. Secondly, changes in the nature of the neighbourhood over time justified modification of the covenant. Only allowing farming and forestry on the burdened land was not in keeping with the time. Finally, the chain of subdividing and recomining land, and the multiple changes in ownership, so that parties like Synlait owned both benefited and burdened land, was a factor which pointed towards modification of the covenant.

Big River Paradise Ltd v Congreve: Relationship between PRA and RMA

The CA held at [28] that adopting a more mobile approach and allowing evidence such as the RMA definition of 'subdivision' is fine, however, this should not go against the scope underlying the contract. The CA held that a reasonable person would understand the covenant to mean there would be a maximum of three lots with a maximum of one building per lot. Thus, the CA rejected the definition of subdivision in the RMA and favoured the intentions of the party. For "no sensible conveyancing solicitor would draft a restrictive covenant in the way postulated" by Big River (i.e. to use the phrase "no subdivision" but then allow 3 lots with one house each on each lot to become 52 houses).

- Criticism: There is a tension between giving effect to the intentions of the parties and following New Zealand statute law. An argument can be made that this judgement is poor, for it violates the RMA. Further, by implication, the Court is stating that the reasonable person would not look at the RMA to determine the definition of subdivision, rather they will look at hundreds of years of case law. Thus, the CA's judgement is contradictory. For, a reasonable person is far more likely to look at statute than case law. If other cases adopt Big River, we will see subdivisions being treated differently in resource management law and conveyancing law (this is undesirable if we want integrated results). Parl change law better outcome

V. Mortgages

Mortgages are grants of an interest in property as security for a loan.
Mortgagees have dual character. Firstly, they contain a covenant: a promise in contract to repay money or perform certain obligations. Secondly, they contain security over property to secure the performance of the promise.
The mortgagor borrows money and gives property as security for the money borrowed. The mortgagee is the lender and they take the security. Mortgages must be registered to be legally valid/ indefsesible (Frazer v Walker).
Unregistered mortgages are merely equitable interests, and can be defeated by bona fide purchasers without notice (Westpac v Clark).
-Mortgages secure three obligations. Firstly, the amount borrowed. This can be fixed sum or all-obligations. Secondly, the interest on the amount borrowed. Thirdly, expenses, such as the expenses the bank incurs in enforcing the mortgage.

A. Difference between fixed sum mortgage and all obligation mortgage

There are two different types of mortgages
Fixed-sum: under Fixed sum mortgages, parties specify the sum being secured and include all terms and conditions - both the associated loan and the security document - in one document which is registered
All obligations: An all obligations mortgage identifies the mortgaged property and records that the mortgage secures all money that the mortgagor may owe the mortgagee. The security is registered, however, the terms of the lan appear in a separate, unregistered loan agreement.
In *Westpac v Clark* (SC, 2010), Westpack (the mortgagee) was induced by a fraudster to loan money, with security being taken over a property. It was an all-obligations mortgage. The true owner/ RP of the property was innocent - the fraudster forged the loan agreement in the RP's name. Clark, a lawyer, forgot to register the mortgage. Thus Westpac had an unregistered instrument. The fraud mortgage would have been validated through registration, for registration validates an otherwise invalid mortgage (Frazer v Walker; Westpack)
Issue = hypothetically if the mortgage had been registered, would it have been secured

- Westpac (the mortgage/ borrower's) ability to enforce the agreement turned on the difference between a fixed sum mortgage and an all obligations mortgage.
- "If Westpac had taken a fixed sum mortgage from the fraudster, it would have obtained security for the sum plus interest and expenses of enforcement" at 43. In fixed sum mortgages, the debt owed is the debt secured, for the sum of money is specified in the mortgage agreement. Thus if both the personal covenant and real security were registered, Westpack would have a valid mortgage and could bring a claim against the fraudster. This is the case in Duncan, where a fraudulently made, fixed sum mortgage was registered. ___ would enforce the covenant to achieve security for the mortgage.
- However, westpac had an all obligations mortgage. Under an all obligations mortgage, whoever signs the loan agreement (covenant) owes the debt. Here, the "you" in the loan agreement referred to the fraudster. The fraudster signed the agreement, and therefore owes the debt. Thus, Westpack is linking a document to the security which is not signed by the registered proprietor. It is the fraudster's covenant to pay.
- Conversely, the mortgage instrument only refers to the RP/ true owner of the property. Note that because an all-obligations mortgage contains two documents, only the mortgage instrument is registered. The covenant (loan agreement is not registered. Thus, the mortgage instrument only secures the RP's debt. It did not include the fraudster purporting to be the RP. Clause 1.1 of the mortgage instrument stated 'all money which you [the real Mrs Fentch - RP] may owe to Westpack. This confirms that the RP owed no debt because it was the fraudster who executed the loan agreement. Thus, if the solicitor had registered the mortgage instrument, the security would be over nothing, because it was linked to the loan agreement which was signed by the fraudster not the actual RP.

B. Equity of Redemption

Considering that a mortgage is a form of security, the mortgagor (borrower) has the right to equity of redemption. That is, the mortgagor has the right to take their property back free from all mortgaged burdens upon the payment of all debts and performance of all obligations (ss 97 & 98 PLA). Thus, mortgages cannot be made irredeemable (*Fairclough*). If mortgages are made irredeemable, equity will consider the right of redemption "clogged" and will strike down the offending element (*Fairclough*). There are five key ways that the right to redemption may be clogged

1. The right of redemption is illusory
2. The right to redeem is substantially postponed. If the right is postponed for such a long time that it renders the equity of redemption illusory, then it is a clog (*Knightsbridge*)
    a. In *Fairclough*, the mortgage agreement stipulated that the lessee would repay the loan over 20 years. This meant that by the time the lessee could repay the loan and redeem the property, he only had one month of the lease left. The House of Lords held that this effectively made the mortgage irredeemable and was a clog on the equity of redemption.
    b. In *Knightsbridge*, the Court of Appeal held that a mortgage for 40 years was not a clog because: the mortgagor (borrower) was the registered proprietor and would therefore be able to enjoy all the rights to the property once the loan was repaid; and there was no oppressive or unconscionable conduct. The mortgage was between two commercial parties who were on equal footing, were at arms length and both had expert advice).
    c. Thus the CA held that courts will not interfere with the freedom of parties to contract on their own terms where the conditions are merely unreasonable; the mortgage must be oppressive or unconscionable for equity to intervene (*Knightsbridge*).
3. Certain restraints of trade. If a contract places an unreasonable restraint on the liberty of the borrower to carry out their trade, it may be a clog (particularly when combined with postponement)
4. The mortgage contract cannot give the mortgagee an option to purchase the mortgaged property, effectively making the property irredeemable (Kreglinger).
    a. In Jones v Morgan, the majority held that the mortgage agreement and an agreement whereby the mortgagor transferred 50% of their farm to the mortgagee was in substance a single and undivided contract. Thus, the agreement to transfer 50% of the farm to the mortgagee was a clog.
    b. However, an agreement or option for the mortgagee to purchase the mortgaged property is acceptable if contained in a separate, independent contract from the original mortgage agreement (Jones v Morgan).
5. Collateral advantages (where a mortgage secures advantages for the mortgagee (lender) beyond the repayment of the loan) can constitute a clog if its effect is to render the right of redemption illusory. If the collateral advantage exists after the debt is repaid, it automatically becomes a clog and is unenforceable.
    a. In *Jones v Morgan*, the majority of the Court of Appeal held that a mortgage agreement which gave the mortgagee a 50% share in the farm (the mortgagor's property) after the mortgagor had repaid the loan constituted a collateral advantage.
    b. Kreglinger establishes that a collateral advantage is acceptable unless it is (a) unfair or unconscionable (b) a clog on the equity of redemption (c) inconsistent with the right to redeem
6. Further, s 97 of the PLA establishes that the mortgagor (borrower) has the right to redeem any time before the mortgaged property is sold under the mortgagee sale.
7. s 98 of the PLA establishes that where the mortgagor (borrower) repays the debt and performs all obligations before the due date, they must still pay interest for the remainder of the term of the mortgage.

C. Re-opening oppressive mortgages

1.Courts have the equitable power and statutory power (under ss 118 - 120 of Credit Contracts and Consumer Finance Act) to re-open oppressive mortgages and address imbalances within them.

2. Under section 120, courts can re-open mortgages provided one of the following three options applies

- (a) The mortgage must be oppressive.
- (b) A party has exercised or intends to exercise a right or power conferred by the contract in an oppressive manner
- (c) A party has induced the other to enter into the contract by oppressive means

-S 118 defines oppressive mortgages as those which are oppressive, harsh, unjustly burdensome, unconscionable, or in breach of reasonable standards of commercial practice.

A lack of legal advice can point towards oppression (GE Custodians)

3. "Oppression" is a broader concept than unconscionable conduct. Conduct may be oppressive even where it would not be set aside as unconscionable in equity (GE Custodians). For the purpose of the CCFA, courts will take a systematic approach - "oppressive" includes where a transaction or its terms are in breach of "reasonable standards of commercial practice." (GE Custodians). This is an objective standard decided by the court. The court will only find oppression if the lender had knowledge of the matter which gives rise to oppression, or knew something which should have made them inquire further (GE Custodians).

4. Here, the Supreme Court held there was nothing to indicate to the mortgagee (GE custodians) or their agent (TML) that any element of the agreement gave rise to oppression. The Bartle's (borrowers) purported that they were in a stable financial condition, and they obtained independent legal advice. Further, the SC held that lenders should be able to assume that this advice is sound and competent.

5. SC also considered policy reasons - lenders should not have to take responsibility for matters which they neither knew nor should have known about. This would require them making a lot of inquiries which is timely and costly. It may also have a chilling effect, decreasing the number of people who wish to loan money, which would have significant commercial consequences.

6. However contrast with HC where Hammond J held that there were oppressive elements because the borrowers had negligible income, were quite old, and the ability to repay the loan depended heavily on the success of their investment. Thus GE Custodians should have realised that the Bartle's did not fully understand the contract, and should have explained the agreement fully rather than brushing over the details. Further CA held they did not have independent legal advice, because Blue Chip recommended the lawyer to them (resulting in a biased legal assessment because Blue Chip wanted this arrangement to go ahead).

7. The CCFA has undergone amendments since GE Custodians to strengthen the rights of borrowers. Thus, there is a strong argument that the case would be decided in favour of the Bartles nowadays.

D. Mortgagee's right to possession and sale

Mortgagee sale upon default of loan (Schedule 2 PLA 2007 s 13) must follow certain requirements

1. Notice must be given to the current mortgagor prior to exercising the power of sale (s 119 PLA). At least 20 days notice must be given (s 120 PLA). However, due to covid-19 the notice period must be longer in certain circumstances (ss 120A-E PLA).
2. A copy of the notice of deeds needs to be served to all relevant parties (s 121 PLA).
3. While the mortgagee must wait until the notice period has passed (to provide the mortgagor with an opportunity to remedy the default), the mortgagee can enter into a conditional sale (s 124)

Mortgagees have three pathways through which to sell mortgaged property

1. Private sale. This is the fastest, cheapest and most flexible option. However, the mortgagor cannot purchase the property themselves.
2. Through the High Court Registrar (s 187 PLA)
3. Through the Courts (s 200 PLA)

Options 2 and 3 are more time consuming and expensive, but they enable the mortgagee to purchase the property

Mortgagees "owe a duty of care...to obtain the best price reasonably obtainable at the time of sale" (s 176 PLA). This duty is co-exists with, but is more onerous than, the equitable duty to act in good faith (Apple Fields)

- Mortgagees are entitled to decide if and when to sell. Only when they decide to sell do they become subject to the duty of care in s 176 and in equity (Apple Fields). The mortgagee's duty to take reasonable care will be met provided they take all reasonable steps to obtain the best price reasonably obtainable at the time (Apple Fields). The Court of Appeal held that Damesh (the mortgagee) met its duty to provide reasonable care for three reasons. Firstly, Apple Fields (the mortgagor) itself wanted to sell at the time and on the same terms. Secondly, the Court rejected Apple Field's argument that the "best price" was not obtained, because waiting for rezoning would have increased the value of the land. Apple Fields also owed ANZ (another mortgagee) 13 million. NZ agreed to only be repaid approximately 5 million (a fraction of the amount it was owed) in exchange for a swift mortgagee sale. Thus, the real worth of the mortgagee sale is not just the amount the property sold for, but also the fact ANZ would write off some of the debt. From this perspective the "best price" was obtained. Thirdly, even though Damesh partially owned the property following the mortgagee sale (because Damesh's CEO was the owner of one of the vendors companies), this was not a breach of the mortgagee's (Damesh's) duty of reasonable care. For Damesh did not end up owning the property, and it was not involved in the sale negotiations.