

INTERESTS IN LAND

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LEASES

- Key concepts: Definition, dual character of leases, leases vs licenses
- Essentials for a valid lease (5 steps, exclusive possession test from *Fatac*)
- Assignment: Difference from a sub-lease, obligations of parties
- Obligations and rights of the parties: Quiet enjoyment, non-derogation from grant, covenant to repair

Some Key Concepts

Lease definition > a period of possessory rights carved out of ownership. The lessee has possession, but the lessor has the reversion.

Dual Character of leases

- Privity of contract > contractual relationship between the parties to the contract
- Privity of estate > tenurial relationship between landlord and tenant.
- These privities determine who can be sued by whom.

Leases vs License

- License > permission given by the occupier of the land to do something on the land that would otherwise be trespass. The licensee can only enter and use the land to the extent that permission has been given.
- A license is not an interest in land (in rem), it is a personal right (in personam).
- A license can be revoked easily.

Formalities are important to ensure a lease is created and not a mere license. Licenses do not have any specific formality requirements. Licenses are not registrable.

Lessee's also get various other rights and causes of action:

- Right to assign or sublet whereas a licensee cannot alienate their interest unless it's expressly permitted in the terms of the license
- Can sue against the world (in rem right) whereas licensees can only sue the other contracting party.
- Lessee's have statutory protection from eviction, but licensees don't.

Fatac:

- Right to operate quarry for 12 years > lease or license?
- Exclusive possession test/refinement of it.
- Held: License

Essentials for a valid lease:

Fixed or period term	Leasehold is an estate which is less than freehold because the term is fixed/can be fixed.
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	<p>Can be fixed (e.g 10 years) or capable of being ascertained (e.g determination of an event that is sufficiently defined, such as when you are awarded undergraduate degree).</p> <ul style="list-style-type: none"> - S212(1) PLA > For 'event' leases, the event must occur within 10 years. On the 10th anniversary, the lease terminates - 'Event' leases cannot be registered, these are just equitable leases. <p>Can be as long as you want, but cannot have a lease that lasts forever > perpetual lease</p> <ul style="list-style-type: none"> - If you try do this, may be statutory lease OR grant of fee simple subject to payment of rent - Partially renewable lease that renews every 21 or 42 years > Glasgow lease > renew means not a 'perpetual lease'. <p>PLA has code for short term leases which are for a term of 1 year or less.</p> <p>Statutory tenancy > term of lease has expired but tenant remains in possession > 'holding over' period.</p> <p>Tenancy at sufferance > where there is no indication from the lessor whether the tenant can continue in occupation.</p> <p>Tenancy at will > Confers upon the occupier exclusive possession for a definite period but terminable at any time by either party. Just a personal right and not a property right.</p>
<p>Certainty of premises - what is lease about? What is this agreement about?</p>	<p>The spatial extent of the lease must be clearly defined and identifiable.</p> <p>Usually unproblematic but can pop up e.g lack of definition with parking areas vs specific parking lot.</p>
<p>Exclusive possession</p>	<p>Leases are estates carved out of the greater estates. For the fixed period of time, you have possession and can exclude everyone else including the landowner. This is crucial (and what makes it distinct from simply a factual occupation).</p> <p>Test carved out in <i>Fatac</i></p>
<p>Proper creation: formalities – what form does a lease have to take according to the law?</p>	<p>Must comply with s24 of the PLA formality requirements.</p> <ul style="list-style-type: none"> - Must be in writing > Oral K's not enforceable. - Doctrine of part performance will also apply here - Leases are registerable - Long term leases must be registered to be a legal estate, if not then they can be defeated by a registered purchaser who purchases without notice <ul style="list-style-type: none"> o Exception is short term leases > s24 says they are excepted from writing requirement o Can be created orally (s 208) - S 209: Lessee's who occupy the land have a legal interest in land even though created orally and not registered. But even though this is a legal estate, it can be defeated by a bona fide purchaser without notice because indefeasibility and RP take priority.

	- If you register your short term lease, it is no longer a short term lease
Rent not essential	But the absence of rent can be interested as a lack of intention to create legal relations.

Assignment and Sublease:

Assignment is done through registering a memorandum of transfer. Formalities must be complied with or the assignment will be merely equitable.

Sublease

- Both a privity of contract and privity of estate between the parties
- A sublease covers only part of the lease, and must end before the original lease ends (note: PLA now allows a sublease to end at the same time as original lease)
- Therefore, a sublease cannot transfer the whole of the leasehold – if it does then it is an assignment.

City of London Corp v Fell:

- Sub-let situation, subletter in possession during holding over period, paid no rent > is it Fell's obligation to pay rent or sub letters?
- Privity of contract/estate > privity of contract stays the same, privity of estate moves.
 - Liability remains with privity of contract unless new contract entered into
 - Privity of estate > obligations which touch and involve the land.
- Held: Fell not liable.

Assignment

- **Privity of contract remains between the original lessor and the original lessee**
- But privity of estate will change e.g as between the original landlord and subsequent lessees/assignees.

Original lessor's obligations

- Statute: the original lessor remains responsible for all covenants in the original lease, even after assignment. Bound by own contract

Original lessee's obligations

- Common law: bound only by the terms stipulated in the original lease
- Statute: s241 PLA 2007: following assignment the original lessee remains liable to the original lessor for the payment of rent stipulated in the lease, and the performance of all covenants in the lease.

Assignee/new lessee's obligations

- Common law: assignees are bound only by covenants which "touch and concern" the land in question.

- Statute: s240(3) = assignees are now bound by all covenants in the original lease, both the benefit and the burden.

Transferee of the reversion/new lessor's obligations

- Statute:
 - o S231(1): Transferees are bound by the covenants of the original lessor. Assignees/current lessees can enforce these covenants against the transferee.
 - o S 232: Transferees can also enforce the original lessee's covenants as against the assignee/new lessee.
 - o Effect of these is that the transferee of the reversion has the benefits and the burdens of the original lessor – inherits their rights and obligations.

Parties Rights and Obligations

Important to remember that we are looking at different sources > common law, case law, statute, lease agreements and contracts. These rights and obligations are:

- Typically stipulated in the lease agreement
- Inherent in landlord-tenant relationships and implied by common law
- However these CL implied covenants are now replaced by covenants implied by statute.
 - o **PLA s281(2)**: CL implied covenants are abolished
 - o PLA schedule 3: sets out covenants

PLA Schedule 3:

- **Payment of rent**
- Alteration of buildings
- Noxious or offensive acts or things
- Commission of waste
- **Lessor not to depart from grant / non-derogation from grant**
- **Lessee entitled to quiet enjoyment**
- Premises unable to be used for particular purpose
- Power to inspect premises
- Power to cancel lease for non-payment of rent or other breach
- **Lessee to keep and yield up premises in existing condition (all land except short term leases).**

Covenant of Quiet Enjoyment (Landlord Covenant)

9 Lessee entitled to quiet enjoyment

The lessee and all persons claiming under the lessee will be able quietly to enjoy the leased premises without disturbance by any person specified in [section 218\(2\)](#).

Compare: 1952 No 51 ss 106, 107

This is a fundamental undertaking by the lessor against interruption in the possession of the leased property.

- “quiet” > means peaceful and free from interruption/interference
- “Enjoy” refers to exercise and use of right/full benefit.

<p>1: There must be ‘substantial interference’ with ability to use premises in an ordinary way</p>	<p><u>Kalmar</u>: demolition caused noise, vibration, access difficulty and business obstruction</p> <p><u>Nordern</u>: shit and urine, customers of brothel would proposition staff</p> <p><u>Southward v Tanner</u>: can be noise</p>
<p>2: Lessor responsible for people under or through themselves > depends on element of control i.e cannot control neighbors</p>	<p><u>Nordern</u>: Traditional position that landlord is not responsible for the activities of another tenant. If lessee wants to limit the other tenant, needs to say so in lease. But on the facts, interference was so substantial and N were “shutting their eyes in knowing that was using a brothel”.</p>
<p>3: Prospective – the covenant cannot impose a positive obligation for the landlord to do something</p>	<p><u>Southwark v Tanner</u>: The state housing was not soundproof. However, the covenant of quiet enjoyment did not apply in requiring the landlord to fix it, because it was pre-existing condition. The tenant accepted the premises as they were at the commencement of the lease.</p>
<p>4: Remedy? Does not give automatic right of cancellation: Damages > injunction > cancellation</p>	<p><u>Nordern</u>: must be a substantial breach of the covenant (but substantial interference is the first limb, therefore would be rare not to grant cancellation)</p> <p>But normal remedy is an injunction.</p> <p>PLA Cancellation Code? For lessor’s cancellation only, not helpful if you are a lessee who wants to cancel so not relevant here.</p>

Non-derogation from the grant (Landlord Covenant)

Some act of the lessor or persons the lessor has control over, which renders the premises unfit or materially less fit for the purpose for which the premises were leased.

Nordern: grantor cannot derogate from the promise, that is a rule of common honesty.

Tram Lease: Court can imply a term in the grant which the lessor cannot derogate from.

Elias J in Nordern: Overlap with quiet enjoyment > most cases a breach there will be a breach here. But not always (keep separate in analysis though)

1: Activity causing derogation. Is done on other land the lessor has

<p>2: Activity is done by the lessor, or permitted by the lessor. If not lessor must have control and choose not to intervene (<i>Nordern</i>)</p>	
<p>1: Ascertain the purpose of the lease</p> <p>Lessor cannot give with one hand and take away with the other, must make sure they are upholding rights in K.</p>	<p>This is because the claim is predicated that the acts of the lessor are so severe they prejudice the successful fulfilment of the lease. This can be implied in the lease – does not depend on a specific clause.</p> <p><i>Nordern</i>: Purpose = “general commercial purposes”.</p>
<p>2: Have the alleged derogating activities rendered the lease ‘materially less fit’ for achieving that purpose (<i>Nordern</i>) / Has the activity frustrated the purpose for which the lessor knows the lessee is taking the premises or is likely to use the premises for</p>	<p>Substantial interference does not necessarily relate to physical interference. Any consistent use that renders the premises unfit is sufficient.</p> <p><i>Nordern</i>: Purpose = interference here so severe that the premises has been rendered unfit (shit. Urine, prepositions). BUT substantial interference does not = interference with amenities/inconvenience (e.g privacy, tranquility, insurance costs). It is a question of fact and degree</p> <p><i>Nordern</i>: Interference does not need to be so substantial that it renders the purpose of the lease impossible.</p> <p><i>Kalmar</i>: Implied covenant in the lease not to alter the building. Grant is on condition that the whole building will remain > demolishing it derogates that.</p>
<p>3: Remedy? Cancellation. Will always be substantial.</p>	

Covenant to Repair (Tenant’s covenant)

PLA Schedule 3, s13: Includes an implied lessee’s covenant to keep the premises in existing condition. Lessee has to keep the premises in the same condition they were in when the lease started AND return the premises in this condition. Except for wear and tear.

- Can replace implied covenant with express covenant. May include setting out standard of repair.

<p>1: Standard of repair is what a reasonably minded tenant would do in the circumstances <i>(Proudfoot)</i></p>	<p>Such repair as having regard to the age, character and locality of the property that would make it for the occupation of the reasonably minded tenant of the class likely to do it.</p>
<p>2: Qualifications to that standard <i>(Mobil Oil)</i></p>	<p>a) Reasonably minded tenants of the particular kind</p> <p style="padding-left: 20px;">a. Facts: RMT was bulk oil company engaged in bulk storage of oil. Reason we have this requirement is because the standard does not necessarily require the satisfaction of every potential tenant. Only looking at the repair standard of reasonably minded tenants of the particular kind envisaged in the lease.</p> <p>b) Reasonable contemplation of the parties at the commencement of the lease</p> <p style="padding-left: 20px;">a. If damage was created by some unforeseen event/earthquake, then that will be outside of what was reasonably contemplated by the parties at the time.</p> <p>Standard does not require transformative change to the premise. Sometimes lessee will need to go beyond original state of premise at the time the lease was entered into, that is demonstrated by Proudfoot v Hart. However Mobil Oil puts those two qualifications on that standard, makes it more of a reasonableness standard rather than requiring some sort of transformative change.</p> <p style="padding-left: 20px;">- Mobil Oil: Did not need to fix soil condition, lessor, at the time of signing lease, intended for it to be industrial. Tenant's don't need to carry out transformative sub-soil change.</p> <p>Problem Q: s223: Lessee does not need to put the premises into good condition if not in good condition when lease begins, changes Proudfoot v Hart.</p>

Termination of Leases

Expiry: expires after the term is over. If no term regarding expiry, then the law implies a statutory tenancy and it can be determined by will.

Surrender: lessee gives leasehold back to the lessor before the term expires and lessor accepts this. There is a consensus to end lease before term.

Occurrence of determining event: event cannot be breach of covenant by either party – can end the lease if event doesn't happen.

Break clause: term that gives right to terminate early (long-term leases).

Notice to terminate: usually applies in periodic tenancies.

Merger: leasehold & reversion held by same person.

Cancellation: party entitled to cancel b/c of conduct of another.

- lessor's rights - governed by the [PLA cancellation code](#)
- lessee's right to cancel less clear – CCLA gives more rights to cancel.
- *Nordern:* lessee has right to cancel in cases of non-derogation.

Frustration

Premature determination of the lease because of the happening of an unforeseen event that is so significant to the K so as to destroy its whole basis. This has a high threshold as illustrated in Roman Catholic Bishop v RFD Investment

Roman Catholic Bishop

- Church leased to bishop for pepper corn rent for term of 999 years. Perpetual lease in return for pepper corn rent. Bishop's leasehold interest was more valuable than lessor's freehold interest because of this. Was essentially a forever lasting lease.
- Following Christchurch earthquake, lessor decided not to repair the building, got so much compensation. Bishop argued his interest amounted to a freehold interest, he should have gotten compensation too.
- Challenged it on basis on frustration. Court held leasehold interests in land are hardly ever frustrated.
- Where you have a really valuable lease > hard to argue it has been frustrated beyond the purpose it was let.
 - Purpose was not destroyed here because such a valuable lease. Just because chapel could not be used, purpose of lease was actually wider than using it for worship purposes. Was a perpetual lease.

Test for Frustration: Whether a reasonable person would think that the contract is fundamentally different in the new circumstances. Is the purpose of the lease destroyed or frustrated?

EASEMENTS

Definition/terminology

An easement is a right annexed to land to utilize other land of different ownership in a particular matter, or to prevent the owner of the other land from utilizing his land in a particular manner.

Positive easement = entitled someone to do something on another's land (Re Ellenborough's Park)

Negative easement = prevents someone from using their land in a particular way (restrictive covenant)

Servient tenement = land which is being used for the easement

Dominant tenement = whoever has the benefit of the easement

Easement in gross = services (no DT) – powerlines etc.

Characteristics of an easement: easement or a personal right? (page 163)

1: Existence of a dominant/servient tenement	PLA S291 > easements in gross permitted, no dominant servient needed.
2: Easement must “accommodate the dominant tenement” (Good analysis of lecture notes)	<p>Benefit much attach to the land and not the person:</p> <ul style="list-style-type: none"> - Language: legal right intended to be annexed to the land, or privilege personal to possession? - Connected to enjoyment of the property or merely connected to the land? <ul style="list-style-type: none"> o Otherwise it is a mere K - Primarily a question of fact and degree <ul style="list-style-type: none"> o Usually requires some aspect of physical connection between the dominant tenement and the right granted. <p><u>Re Ellenborough</u>: Rights sufficiently connected. Increased value of DT’s property. Different to using a local zoo or cricket ground. A communal garden of sorts was created. You sell part of your land, allow for purchasers to use a communal space.</p>
3: DT and ST must be different people	But LTA 2017 s108(3)
4: Easement must be capable of being a subject matter of a grant (Good analysis in lecture notes)	<p>Is the right too wide, or too vague?</p> <ul style="list-style-type: none"> - <u>Re Ellenborough</u>: well defined, only owed certain <p>Whether the right is inconsistent with the ownership/possession of the ST:</p> <ul style="list-style-type: none"> - <u>Re Ellenborough</u>: using parking is fine <p>Mere right of recreation without utility or benefit:</p> <ul style="list-style-type: none"> - <u>Re Ellenborough</u>: being able to use the park is not a mere right to wander. Served some use. - <u>Regency Villas</u>: swimming, golfing and playing tennis? Exercise is essential, right to use facilitates not just recreational although it is also recreation. - No prohibition against recreational easements, so long as they provide some type of utility to the dominant tenement. <p><u>Re Ellenborough</u></p> <ul style="list-style-type: none"> - There can be an easement for recreational purposes. This was something new. - Must be something more than just increasing the value.

Re Ellenborough Park

Facts:

- Owners of whole land in 1850. They return and decide to sell parts of their land, turn it into small lots that people can build houses on.
- Decided that inner part of land should remain a park.
- Wanted park to be enjoyed by everybody who bought one of their small parcels of land. Right to enjoy park, linked to buying smaller lots close by.
- Park was also used for some hospital work, military used the property.

Issue: Who was to be compensated for this using to Ellenborough park?

- Owner: Owns it, smaller lots do not have an interest in land, they have a license with no proprietary rights.
- Owners of smaller lots: Have right to use park, should be compensated to, constitutes an easement rather than a mere license.

Held: This is an easement, the benefit and burden passes onto the new owners.

Easement must accommodate the dominant tenement (benefitting from easement)

- Benefit must attach to ownership > we are talking about title in land rather than license.
 - o No real issue or the court. Clear to them that it was not only meant to be a personal right. Benefit to use the park was attached to ownership, included in contracts etc.
 - o **This is distinction between license and interest in land**
- Right needs to be connected to enjoyment of the **property**
 - o Landowner: park not connected to enjoyment of those smaller properties and housing lots. Park is no different to a zoo, cinema that you live close you. Because you live in area you benefit from close, easy access to those services. We've granted them the right to use it, but it is not connected to the right of the smaller properties.
 - o Smaller properties: It is connected. Property value increased in connection with this right.
 - Court agreed. But not convinced this was the only element to focus on. They really wanted to see a connection between those two lands.
 - o Connection between two lands: the park and the smaller properties
 - No need to be adjacent to each other (so can include other houses)
 - P 174: Better analogy than landowner's is of man selling freehold o his house and granting to the purchaser, assigning right to use gardens. Use of garden undoubtedly enhances and is connected with enjoyment of the house. You have a piece of land, part being sold to somebody else and this includes the right to use a common garden.
 - See no difference in principle between Ellenborough park and this example. A communal garden was essentially created.
 - o It is a question of fact: nature of the alleged dominant tenement and nature of right granted.

Easement must be 'capable of forming the subject matter of a grant'

The court split the question into 3 smaller ones:

- 1) Whether the right conferred was too wide and vague > do we really know that it entails?

- a. No issue here. Straight forward what it means, grant provides for limited number of houses in uniform crescent or one single large and private garden. Not granted to everybody.
 - b. Would be the case if it was the general public's right, but that wasn't an issue here.
- 2) Whether inconsistent with the proprietorship or possession of the alleged servient owners
- a. Basically it must not be joint occupation. Cannot be an easement in that case.
 - b. It doesn't amount to joint occupation here or excludes the proprietorship of the park owners. Had not been pushed outside the right that was granted. Owners weren't pushed out of the picture and they would one day be able to own their own part as well.
- 3) Whether it was a mere right of recreation without utility or benefit
- a. Concept of *jus spatiantis*: *A-G v Antrobus*; *Duncan v Louch*
 - i. Means the right of walking about. It is a right of way, but for the public, for specific land and for right of recreation. IN CL this concept does not traditionally exist for private property. Not capable alone as being subject matter (*Antrobus*)
 - ii. Landowner: This is EXACTLY what we have here. It equates to a similar right the public have to use this park, enjoyment of it is just one of *jus spatiantis*.
 - iii. Court acknowledged that the right in this case had some elements of this principle. But if it has elements of that does this automatically mean it is not an easement? How can we join a line between this right, and a more narrower interest in land?
 - 1. *Duncan v Louch*: 180, courts accept judgement. **Right to use park** as pleasure ground able to be interpreted as representing a grant. More than just recreational benefit.
 - iv. For very similar reasons > this is linked to properties, smaller parts of land. Not just inviting everybody in to play golf on park. You have a limited group of people who have access.
 - b. Went through cases that address question > trying to define what is meant by utility or benefit, a mere right of recreation
 - i. *Duncan v Louch*.
 - ii. Talked about horse racing, playing golf.
 - iii. But here we are not talking about exercise and rest, you can also take children out in prams etc. Additional benefits.
 - c. Can be an easement for recreational purposes > new in the debate. This is where a lot of previous cases differed.
 - d. Right went beyond just mere *jus spatiantis*.

Bjorn's point about it being in the 1950s > today more likely to find cases which see park's as having an additional benefit.

Scope of the easement

- Courts will interpret very narrowly as they do not want to increase/charge the agreed burden on ST. Will endeavor to protect ST's property rights.

I don't think this is relevant. Talking about how we should interpret easements.

Re Ellenborough Park

Barry v Fenton

Peacock v Custins

Kingfish Lodge

Murray

Squally Cove

Harden v Collins

Covenants

- Basics: definitions, difference between covenant and easement
- Enforcement: How to enforce burdens and benefits > Common law, equity and statute (what NZ is mostly based on) > Modification and interpretation cases

PLA s4 (definitions): A covenant is a promise, express or implied in an instrument (= contract), regarding the use of land.

- Restrictive covenant: promise not to do something on your land
- Positive covenant: a promise to do something on your land.

Covenants and easements:

- Positive easement allows dominant owner to do some act over servient land e.g right of way
- Positive covenant is promise by servient owner to do some act affected servient land (with benefits for dominant land) e.g repair or maintenance.
- The key difference is form (can look at other years notes, table form)

Terminology

Servient land; covenantor – person bound

- I.e not allowed to build too many houses on property.

Dominant land; covenantee – person entitled

- I.e one who asks that not too many houses be built.

Benefit: Ability to sue, to not have the houses built, covenantee

Burden: To not build too many houses, covenantor

Enforcing covenants

The general historic rule was that covenants were not enforceable outside the contract between the original parties. But this has changed now and in New Zealand is largely covered by statute (see/insert summary notes)

The benefit

- Common law : benefit of covenant passes with the land but not the burden. Covenantee can transfer to successors. Conditions are:
 - The benefit of the covenant passes with the land, if the covenant “touches and concerns” the land.
 - The covenant must be connected to the enjoyment of the land. Personal covenant therefore cannot be transferred.
- **STATUTE INTERVENTION: Section 301 PLA 2007:** unless there is a contrary intention in the instrument, **all covenants** are enforceable by the covenantee, successors in title, and people claiming through them (which means including lessee’s).

The burden

- Common law: burden does not pass with the land
 - The covenant is enforceable only against the original covenantor, not their successors.
- Equity:
 - *Tulk v Moxhay* establishes that a covenant can in equity bind the conscience of a bona fide purchaser with notice. Can run with the land.
 - Requirements from Tulk:
 - The covenant must benefit the land
 - There must be a dominant (benefited) land, although the PLA allows for covenants in gross now.
 - The covenant must “touch and concern” the land, it must affect the land’s quality/nature/value/enjoyment.
 - The dominant land must sufficiently confined to receive the benefit.
 - There must be a common intention that the burden will run with the land, generally expressed in the deed (but now PLA s302(2))

- **STATUTE: But now Section 302(2) PLA:** The covenant binds the covenantor, his/her successors, and those claiming through the covenantor – unless the parties have agreed otherwise (also includes occupiers)
 - Be can implicit
- PLA S308 and LTA s116 allows for noting of covenants on the register. If noted, it is a discoverable interest and means people will nearly always have notice.
- S303 PLA: provides for enforcement of both positive and negative freehold covenants; burden runs with the servient land – if requirements are met.

Tulk v Moxhay

Facts: Promise to maintain square garden, give key to surrounding properties so they can use ground. Moxhay purchased with notice of promise, he argues the promise did not run with the land > CL tradition.

Question: Does a person who has notice of the covenant when they purchased be exempted from obligation to comply? I.e does the burden carry over?

Held: Court decided equity will enforce a promise against the bona fide purchaser who purchased with notice.

- Moxhay had knowledge of promise in contract. Not so concerned with covenant running with the land, purchaser bound by obligation for which they had knowledge.
- If covenantor can sell the land and the new owner can disregard, then the promise is pointless. The covenant would have impacted the purchase price. It would be inequitable to allow someone to get the benefit of a reduced price then refuse to comply with the covenant.
- The question is not whether the covenant runs with the land, but whether a party should be able to use the land in a manner inconsistent with the terms of the contract he/she entered into.

Jansen v Mansor

Modification of Covenants – found in PLA 1952 s126G > now **PLA 2007 s317**

Facts

- Covenant: not supposed to erect any building over 25 feet, 1 story.
- Jansen not aware (but it was on title – so should have been).
- Jansen wanted a second storey, could achieve building with second story which stays below 20 feet.

Issue: Can we have a modification of the covenant?

Held: Appeal dismissed, no modification of covenant

- 1) No medication due to change of circumstances under s126G / s317.

- a. Court looked to the rest of the neighborhood. Some apartment blocks. But not enough to qualify for a change and modification of the covenant.
- 2) Dual protection in covenant for dominant owner.
 - a. Disagreed with Jansen's argument that covenant was about protection of view above 25 feet.
 - b. Requirement of staying below 25 feet "not in substitution for the covenant not the build more than one storey"
 - c. 2 factors that need to be considered here. Jansen had violated one, therefore violated the covenant.

Big River Paradise Ltd v Congreve

- Interpretation case – both of covenant but also of interaction with other legislation
- Loophole way to get around covenant restricting to 3 subdivisions with 1 allotment on each. RMA defines subdivision as 35 year lease or more, made it 30 year lease.
- 'Mobile interpretation' – we don't want it to change the scope of underlying contract. We figure out what that scope is by looking at what a reasonable person would have interpreted it as.
- Held: subdivision not restricted to RMA. Reasonable person wouldn't have gone through it, would have thought it was limited to 3 dwellings.

Covenant's in Gross

Covenants where there is no dominant land.

Recognition:

- Not recognized in the UK.
- ANZCO found not recognized in NZ > law does not recognise the binding effect of the covenant beyond the contracting parties, the covenant will not run with the land.
 - Alternative mechanism to enforce them is to register a memorandum of encumbrance.
- **S242 LTA 2017**: now recognizes covenants in gross, amends PLA 2007.
 - Inserts ss307A to 307F to provide for covenants in gross
 - (see parts highlighted by Rhi)

Covenants in Gross vs Memorandum of Encumbrance

- Covenants in gross are equitable interests (although now the law has changed)
- Memorandum of encumbrance can be registered (functions as mortgage on land)
- Equity interests noted on title but not registered – lower protection.

ANZCO v AFFCO (CA)

Facts

AFFCO is a meat company. Closed meat processing plant and sold land to Manawatu Foods including a covenant not to use meat processing for 20 years. AFFCO registered a memo of encumbrance. Ultimately, M leased to Riverlands and sold the reversion to ANZCO. ANZCO knew of the covenant but wanted to set up meat works through its subsidiary Itoham who processed meat.

Held: Does not recognise covenant in gross.

Contractual promises that restrict ability to use land and enforceable inter se (between the parties). This is the accepted position.

Normal restrictive covenants have a servient tenement and a dominant tenement, and the burden and benefit can run with the land and be enforced. Restrictive covenants in gross have no dominant tenement. These can be enforced between the parties, but debatable whether the burden runs with the land and can be enforced against the servient tenement.

- 1) One of the requirements of a covenant is that it must benefit the dominant land for the burden to run with it (s4 PLA). A covenant in gross, there is no benefitted land can therefore not pass. What we have is just a contractual right, not something which can be enforced by subsequent purchasers.
- 2) Looked at cases in England and Australia, no legal precedent for something like this.
 - a. But Staple v Corby (old NZ case) did hold that burden of a restrictive government in gross could run with the land.
- 3) Statute was silent and court not prepared to create something which doesn't exist.
 - a. LTA 1952 does not allow for noting covenants on the register. Indicates Parliament does not intend for them to run with the land.

Registration of the encumbrance means that **whoever owns the land is bound** i.e. ANZCO. Also responsible for people claiming under and through them i.e lessee likes Itoham.

- Conversely, Riverlands cannot be held accountable.
- Itoham has no direct relationship with AFFCO and so no direct action unless the Court pierces the corporate veil.
- Basically, it is just whoever owns the land who is bound.

NB: It decided under the LTA 2017, which recognizes covenants in gross, then AFFCO would have a direct action against Itoham and Riverlands.

Mortgages

- Some basics to know about what makes up a mortgage.
- Understand the difference between a fixed-sum and all-obligations mortgage
- Both parties have a bunch of implied covenants and powers (we're concerned with right to redeem and power of sale)

- Equity of redemption > Person needs to have a shot at owning their property. Understand why equity stepped in, what the clogs are.
- Re-opening of oppressive contracts

Key ideas:

A loan agreement that sets out the amount of the loan, the interest rate and the repayment dates. Mortgage document is signed and promise to repay the loan in time and ensure the house. If promise is not fulfilled then bank can resell the house and exercise powers off sale.

Two components in a mortgage (Duncan v Macdonald)

- 1) Covenant: a promise in a contract to repay money or perform certain obligations
 - a. Personal covenants which are owed to the bank who are often mortgagee
- 2) Security: security over property to secure the performance of the promise
 - a. Bank has a property interest in the mortgaged property.

If you owe 100k to the bank, default on payment. The bank has recourse to your property which is secured under the security aspect of a mortgage. If property is sold for only 80k, you will still owe the bank 20k personally and any interest accrued.

Terminology

- Mortgagor = borrower (i.e me)
- Mortgagee = lender (i.e bank)

Mortgages can be effected in two ways in New Zealand:

- 1) By transfer: through a deed of conveyance. The title to the legal estate in the land passes to the mortgagee, and the mortgagor retains only an equitable interest in the land.
- 2) By demise: through a lease, with the mortgagee promising to surrender the lease once the debt has been repaid.

Can apply to both real and personal property

Formalities > the mortgage instrument must be registered to be legal. Unregistered mortgages are only equitable interests, and can be defeated by bona fide purchasers without notice.

What obligations are secured by a mortgage:

- 1) Principal: amount which has been borrowed > two different forms when asking what is secured:
 - a. **Can be fixed sum** = specifies amount of debt which is owed and secured
 - b. **Or all-obligations** = conflates both personal obligation to repay specific amount of money as well as security. Mortgage secures all money which is owed to mortgagee both at the time or in the future.

- 2) Interest: the interest incurred on the principal
- 3) Expenses e.g the bank's expenses in enforcing the mortgage.

Westpac v Clark

- **If loan agreement refers to someone not registered proprietor or property, then technically the mortgage does not secure anything.**
- Westpac sued lawyer for negligence > had mortgage been registered, W would have obtained indefeasible title as mortgagee under LTA.
- Held: But nope > decided situation would not have changed even had it been registered.
 - o If mortgage had been registered what would it have secured:
 - Fixed sum: Sum of money specified in mortgage instrument, no issues. Imposter has to pay, innocent party (RP) cannot be sued for shortfall on covenants in the mortgage.
 - All-obligations mortgage:
 - It is the imposters debt – so he'll owe the money.
 - But this cannot be tied to the security > which refers only to the real proprietary/true owner.
 - Therefore the charge secures nothing.

Implied covenants, powers and conditions

S 95: sch 2 PLA 2009: Lists implied covenants. If you haven't written anything about them, they kick in > safeguards to secure mortgagee's interest in the land:

Mortgagor's implied covenants:

- 1) Repaying principal, interest, and pay other amount
- 2) Paying rent and tax
- 3) Complying with any statutory requirements
- 4) Keeping the property in good and substantial repair
- 5) Not allowing any building on the land to be removed/altered

Mortgagee's implied powers:

- 1) Remedying defaults
- 2) Taking physical possession
- 3) Appointing a manager
- 4) Applying to the court for an order for possession
- 5) Power of Sale
 - a. Most important and effective remedy against a mortgagor's default
 - b. But certain duties in exercising this power: s176 PLA 2007
 - i. Mortgagee owes reasonable care (=negligence) to obtain the best price reasonably obtainable at the time of sale.

Contractual Right to Redeem > mortgagor has contractual right to redeem (pay off) mortgage.

- Typically starts within 6 months. Can pay off if you say win lottery within 6 months. Have right to pay off mortgage sooner than what was originally claimed. But you need to pay it off in full before you can redeem your property.
- Why is this important?
 - o If you are behind payment schedule, if you don't pay up i.e 1 day late, can lose property. Historically this is what would happen, a mortgage was a real estate by transfer not just a security.
 - o Equity kicked in with the **Equity of Redemption** > make the law more fair, soften the harshness of the common law. Demonstrates that mortgage is a security only.
 - Mortgagor gets an equitable right to redeem

Mortgagors Equity of Redemption: An Equitable Right

Compels the mortgagee/lender > should give mortgagee right to pay his/her debt even after due date, after that payment can be full owner. You are not losing your property automatically. A mortgage is a security.

Core characteristic of any mortgage: The right to redeem regarding mortgages is so important that Equity will not allow a mortgage to be made irredeemable. You cannot create a mortgage agreement that makes the deal irredeemable.

The right to redemption cannot be 'clogged' i.e hindered or prevented (Bjorn says, whenever the redemption becomes unrealistic).

Types of Clogs:

- 1) **Where the right to redemption is illusory:** it doesn't actually exist
- 2) **If the right to redeem is postponed:** this depends on the circumstances. If the right is postponed for such a long time that it renders the equity of redemption illusory, it is a clog
 - a. *Fairclough:* only possibility of redeeming 1 month before end of mortgage, found to be postponement.
 - b. *Knightsbridge:* Long postponement not a clog if parties are on equal standing and there is no oppressive or unconscionable conduct.
- 3) **Doctrine of restraint of trade:** if a contract places an unreasonable restraint on the liberty of the borrower to carry on their trade, it may be a clog. Postponement + restraint of trade is more likely to be a clog.
- 4) **Mortgagee's option to purchase the mortgaged property:** the mortgage contract cannot give the mortgagee an option to purchase the mortgaged property, effectively making the property irredeemable.

- a. *Jones v Morgan*: Such option can be included in separate agreement. Question is whether agreements are in substance a single and undivided contract or two distinct contracts?
- 5) **Collateral advantages** = where a mortgage secures advantages for the mortgagee beyond the repayment of the debt/interests/costs. A collateral advantage may be a clog if its effect is to render the right of redemption illusory.
 - a. Not okay if it is binding for a period longer than the period of the mortgage. After debt is fully repaid, a collateral advantage will be regarded as a clog. Whole point of mortgage is that once you repay debt, security is supposed to cease. Full ownership without any obligations.

Fairclough v Swan Brewery

- Postponement on right to redeem
- Under agreement not allowed to pay debt off early, end of mortgage was one month before end of lease. By the time it could be redeemed, F only has 1 month left.
- Property in effect irredeemable. A clog on redemption.

Knightsbridge Estates Trust

- Postponement on right to redeem
- Not all postponements will be a clog.

Difference between Fairclough and Knightbridge:

- Point about two businesses engaging in *commercial contract* in one case, and a commercial contract about partners who are not on the same level between power etc. can be argued.
- What also came through in judgement is:
 - Knightsbridge: property was freehold land
 - At the end of 40 year period, borrower would get back no less than what they had mortgaged in the first place.
 - In Fairclough: it was a mortgage leasehold
 - Because borrower was prevented from redeeming mortgage until lease was about to come to an end, the borrower would have nothing to recover.
 - Would have to return property to landlord soon after paying off mortgage.
- They also do not contradict each other. Just add layers on top of one another.

Re Knightsbridge: Commercial purpose of early redemption of commercial mortgage:

general rule that early redemption of commercial mortgage can be prevented may appear punitive to borrowers, but there is a commercial purpose here.

- We are protecting redemption in equity, but also limiting it by strengthening the rights of the lenders as well. We are trying to strike a balance.
- Why do we do this? Why is it a problem to have something who wants to pay debt back early and not wait until the end?
 - Market for mortgage loans vast and buyers of mortgage loans purchase them on basis of receiving a particular yield
 - When mortgages are redeemed prior to maturity, corresponding yield is reduced.
 - Resulting in the buyer of the mortgage having overpaid for investment
 - IN absence of general rule preventing early redemption, market for mortgage loans would be uncertain.
- Now we have equity of redemption in **PLA 2007 Part 3 Subpart 4 (ss 97,98)**.

Jones v Morgan

- Collateral advantage > test from *Kreglinger*
- Mortgagee's option to purchase mortgaged property.

Reopening Oppressive Contracts

Power of the court to re-open oppressive mortgage is an important protection for mortgages. Courts have actual jurisdiction to do that. If there is an oppressive contract the courts can step in, remedy the oppressive.

Credit Contracts and Consumer Finance Act 2003

- S120: Courts Power to Reopen Oppressive Mortgages
 - A) Contract, lease, or transaction is oppressive; or
 - B) A party has exercised, or intends to exercise, a right or power conferred by the contract, lease or transaction in an oppressive manner; or
 - C) A party has induced another party to enter into the contract, lease, or transaction by oppressive means
- S118: Meaning of 'Oppressive'
 - 'oppressive, harsh, unjustly burdensome, unconscionable, or in breach of reasonable standards of commercial practice'
 - *GE Custodians*: includes where a transaction or its terms are in breach of reasonable standards o commercial practice
 - *GE Custodians*: Can only find oppressive if lender has knowledge of the matter which gives rise to oppression or knew something which should have made them inquire further.
 - **So you have to look at what lender knew**

GE Custodians v Bartle

- Old couple get out dodgy money agreement with Blue Chip, take out loan from bank (GE) using a mortgage broker (TML) > Blue Chip goes bankrupt, couple cannot repay loan on their own > want mortgage reopened under s120 of CCCFA
- Issue: Is the mortgage oppressive?
- Held: Mortgage not oppressive
 - Did GE/TML know the mortgage was oppressive indicating they were not complying with reasonable standards of commercial practice?
 - No > Had very little knowledge, B purported they were in stable financial position, lender need not make inquiries if they know the borrower has independent legal advice. Allowed to assume that advice is sound and competent.
 - Policy Grounds: Can't get lenders to take responsibility for what they neither knew nor should have known.

Mortgagee's Power of Sale

S176: Basically that mortgagor needs to make sure they're getting a reasonable price.

Apple Fields Ltd v Damesh Holdings Ltd (CA, 2001)

- See case brief.