

# INTERESTS IN LAND

## LEASES

- Lease = 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
  - The privities determine who can be sued by whom.

## Leases vs licences

- Licence = permission given by the occupier of the land to do something on the land that would otherwise be a trespass. The licensee can only enter and use the land to the extent that permission has been given.
- A licence is not an interest in land (in rem), it is a personal right (in personam)
- Can be revoked easily
- Formalities are very important in order to create a lease and not a mere licence. Licences don't have any specific formality requirements.
- Licences are not registrable
- Lessees also get various other rights and causes of action:
  - Lessees have the right to assign or sublet whereas a licensee cannot alienate their interest unless it's expressly permitted in the terms of the licence.
  - Lessees can sue against the world (in rem right) whereas licensees can only sue the other contracting party.
  - Lessees have statutory protection from eviction, but licensees don't.

*Fatac*

(CA, 2002)

### **Facts**

Puhinui owned land with a quarry on it. P granted Atlas the right to operate the quarry for 12 years, renewable for a further 3 years. P then entered into an agreement to sell the land to Mt Wellington, subject to what was described as A's "licence". Fatac needed to know if A's right was a licence or a lease, for GST purposes. HC finds the right is a licence. F appeals.

### **Principles**

#### *Exclusive possession*

- The key distinction between a licence and a lease is exclusive possession.
- For exclusive possession to be meaningful there must be a minimum finite term, whether fixed or periodic.
- The payment of rent suggests an intention to be legally bound, but the absence of rent does not negate tenancy by itself.
- Limitations/restrictions on what the occupier can do with the land do not necessarily negate exclusive possession (*Glenwood Lumber*)
- The labels used by the parties are immaterial except where they indicate an intention of exclusive possession.
- A tenant may still have exclusive possession where the landlord may enter and inspect the land at certain times, but only if this power is stipulated in the contract

#### *Factors negating exclusive possession & tenancy*

- Where there is no intention to be legally bound
- Where the occupier's right to possession may be terminated for reasons extraneous to the occupation of the land, eg. occupation pursuant to an employment relationship or the holding of an office

- Where you only have possession of a small section of a larger area, this may not = exclusive possession
- Where the occupier's use of the land is controlled by someone else
- Where the landlord may come and go at their discretion
- Where your portion of land is not designated and moves around according to the landlord
- Where statute forbids tenancy.

### Requirements for a valid lease

#### **1. A fixed or periodic term**

- The term of the lease must be fixed, or capable of being fixed.
- The date of termination may be specified, or there may be a specified event which signals the termination of the lease (the latter kind of lease cannot be registered and is an equitable lease only)
- Leases can be as long or as short as you want, but: leases which are less than one year are treated differently (s 207), and a lease cannot last forever (though you can have a perpetually renewable lease).

#### **2. Certain premises:** the extent/boundaries of the leased premises must be clearly identifiable.

#### **3. Exclusive possession:** to the exclusion of everyone including the owner of the land.

#### **4. Compliance with formalities**

- Leases which are longer than one year must be in writing to be enforceable
- Leases which are less than one year can be created orally and need not be in writing.
- Leases which are longer than one year must be registered to be a legal estate. Without registration it is only an equitable interest. Unregistered leases made be defeated by bona fide purchasers without notice.
- Leases which are less than one year create a legal interest even without registration (but may be defeated by bona fide purchasers without notice)

#### **5. Rent is not essential** (but lack of rent may = lack of intent to be legally bound)

### Privity of contract & privity of estate

*City of London v Fell*

(CA, 1993)

#### **Facts**

In 1976 F leases premises from CL for 10 years, with a rent review at the 5 year mark. The F promised to pay rent during the contractual term. In 1979 F assigned the lease to Grovebell. In 1981 the rent was reviewed and increased according to the original contract. In March 1986 the original lease expired, but G continued in possession until January 1987. CL regained possession. The period between 1986-1987 is called a "holding over" period. The relevant statute provided that in such a holding over period, the tenancy will continue after the expiry of the lease. G was in liquidation so did not pay rent. CL sued F for the outstanding rent. Issue = was F only liable to pay rent up until March 1986, or are they responsible until January 1987?

#### **Principles**

- Principles of privity of contract and privity of estate apply.
- F, as original lessee, is only bound by the original contract with CL = privity of contract.
- Grovebell, as assignee, is only liable for covenants in the original contract which "touch and concern" the land = privity of estate.
- A tenancy can exist independently of a contract: as here, the tenancy continued during the holdover period even though the contract between F and CL had expired.
- The original lessee is bound by the contract, but not by the tenancy relationship if that relationship goes beyond what the contract says. Here the tenancy after March 1986 was not for provided in the original contract between F and CL, it only exists because of the statute.

- F as original lessee promised only to pay rent during the contractual term. F is therefore not liable to pay rent after that term.
- = F only has to pay rent up until March 1986, the end of the contractual term.

### *Herbert Duncan v Cluttons*

#### **Facts**

HD leased a building to C. The lease was from 1985-1990. C had agreed to pay rent for the term of the contract, INCLUDING any period of holding over or statutory extension. In 1988 C assigned the lease to Warringtons. After the lease expired, W applied to the court for a new tenancy, and the court imposed an increased interim sum of rent. W then continued in possession until February 1991, and continued to pay only the original sum of rent, not the interim sum. HD sued C to recover the unpaid rent (the difference between the original sum and the interim sum).

#### **Principles**

- Same principles of privity of estate and privity of contract applies.
- C had promised in the original contract to pay rent not only during the term of the lease but also during the period of extension.
- But C did not have to pay any amount of rent over and above the sum stipulated in the contract (ie. only had to pay the original rate, not the interim rate).
- = C not liable for the unpaid rent (as not liable for the interim rate imposed by the judge)

#### Assignment

- Assignment is done through registering a memorandum of transfer. Formalities must be complied with or the assignment will be merely equitable.
- Sublease
  - There is both 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 the original lease)
  - Thus a sublease can't transfer the whole of the leasehold (if it does, it is an assignment)
- Assignment
  - Privity of contract remains between the original lessor and the original lessee
  - But privity of estate will change, eg. 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.
- Original lessee's obligations
  - Common law: bound only by the terms stipulated in the original lease.
  - Statute: s 241 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: s 240(3) = assignees are now bound by all covenants in the original lease, both the benefit and burden.
- Transferee of the reversion/new lessor's obligations
  - Statute:
    - s 231(1) = transferees are bound by the covenants of the original lessor. assignees/current lessees can enforce these covenants against the transferee.
    - S 233 = transferees can also enforce the original lessee's covenants as against the assignee/new lessee.

### Covenants generally.

- Covenants are usually stipulated in the lease agreement
- Some may be inherent in the tenurial relationship, some are implied by the common law even where the agreement is silent (though many of these implied covenants are now in statute: s 218 PLA 2007).
- Examples of tenants' covenants: paying rent, yielding up vacant possession, not committing waste
- Examples of landlord's covenants: quiet enjoyment and non-derogation from grant
- Both parties also have an implied obligation to do all that is reasonable to secure performance of the contract.

### Quiet enjoyment and non-derogation from grant

#### **Quiet enjoyment**

1. Was there substantial interference with the tenant's possession?
  - a. A breach of covenant can occur without actual physical interference, it is sufficient that there is substantial interruption which prevents the lessee from enjoying its premises for the very purpose for which it was leased (*Kalmar*).
  - b. Substantial interference = interference with tenant's ability to use premises in the ordinary and lawful way, by the lessor or persons claiming under the lessor.
  - c. "Enjoyment" is not in the sense of obtaining pleasure from the property, but in the sense of having the full benefit of the right to the property (*Kalmar*)
  - d. In principle, excessive noise can qualify (*Southwark*)
2. Has the covenant been breached by the landlord, or those claiming under the landlord?
  - a. Traditionally a landlord is liable for their own wrongful actions and those who claim under them. You can sue the landlord for the wrongdoing of another party, for example another tenant in the same premises as in this fact situation
3. Is it attributable to the pre-existing condition of the premises?
  - a. A covenant is prospective. It does not create liability for disturbance attributable to the condition of the premises at the time the lease began (*Southwark*)
  - b. Disturbance can amount to a breach only if the unreasonable activity or a change in the structure of the building occurred after the lease began.
4. Is there a remedy available?
  - a. The remedy may be damages, an injunction, OR cancellation of the lease
  - b. *Nordern*: the breach of quiet enjoyment has different degrees of substantiality. Derogation from grant is always substantial enough to justify cancellation of the lease, but breach of quiet enjoyment may not be substantial enough to justify cancellation.

#### **Non-derogation from grant**

- = 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.
- A lessor can be liable for failing to intervene (as in *Nordern*)
- The court can imply a term in the grant which the lessor cannot derogate from (as in *Tram Lease*)
- Can overlap with quiet enjoyment: in most cases a breach of quiet enjoyment will also be a breach of non-derogation from the grant.

*Kalmar*

(CA, 1974)

#### **Facts**

Connelly owned a small shop inside a larger building. C leased the shop. The lease was eventually assigned to the DF. C then sold the shop to K. K knew DF was in possession of the shop, and wanted to

obtain possession from DF, but DF refused. K then began demolishing the rest of the building around the shop. DF sought an injunction stopping the demolition, claiming under breach of the covenants of quiet enjoyment and derogation from the grant

### **Principles**

#### *Quiet enjoyment*

- Breach of quiet enjoyment = an act on the lessor's part which prevents the enjoyment of the leased premises by the lessee for the purposes for which they were leased.
- "Enjoy" = the exercise and use of the right to the land, having its full benefit (not deriving pleasure from it)
- Breach of quiet enjoyment doesn't require physical interference, substantial interruption is enough
- Here there was substantial interruption caused by the demolition, which prevented DF from enjoying its premises for the very purpose for which they were leased.

#### *Non-derogation from grant*

- Court finds that the lease contained an implied covenant for the building to be maintained in its existing state throughout the term of the lease
- Thus in demolishing the surrounding building, C derogated from the grant.

#### *Nordern*

(HC, 1996)

### **Facts**

N was the lessor of a building. N leased one floor to B. Another floor's lease was assigned to a brothel company, with the consent of the lessor. Brothels at this time were illegal. Because of the brothel there was noise, smells, vomit and urine, and brothel clients accidentally going onto B's floor and propositioning the customers there. B eventually moved out of the building. N sued B for the unpaid rent. B alleged that N had breached the covenants of quiet enjoyment and non-derogation from the grant.

### **Principles**

#### *Non-derogation from grant*

- The covenant embodies common honesty and fair dealing.
- Requires "substantial interference". Mere interference with convenience or amenities is not enough.
- A breach must render the premises "materially less fit" for the purpose for which they were leased. Doesn't need to render the purpose of the lease impossible.
- Here there was definitely substantial interference. Elias CJ noted that the illegality of the brothel cast a stigma over B's business which could not be remedied.

#### *Quiet enjoyment*

- Here the derogation from the grant was also a breach of quiet enjoyment because there was "substantial interruption which prevents the lessee from enjoying its premises for the very purpose for which they were leased" (*Kalmar*)

#### *Tram Lease*

(CA, 2003)

### **Facts**

C had a lease over one site. KF had a lease over an adjacent site. There was a wall between the two. TL acquired a fee simple in both sites. It wanted to demolish the wall so that it could develop both sites as one. KF surrendered its lease, but C refused. TL brought proceedings seeking a declaration that C's right over the wall had ended. C argued that demolishing the wall was a derogation from the grant and a breach of quiet enjoyment.

### **Principles**

#### *Non-derogation from the grant in the context of leases: elements*

1. Activity which causes the derogation occurs on land which is also owned by the landlord

2. Activity is done/permitted by the landlord, or is something the landlord can control
3. Must be a substantial interference with the use of the premises
4. Must frustrate the purpose for which the landlord knows the lessee is taking the premises or is likely to use the premises.

#### *Implied obligations*

- Here the court implied a restriction on the use of neighbouring land.
- The question was whether the court should imply this restriction to avoid the purpose of the grant from being frustrated - the question was not whether such a restriction was agreed upon by the parties at the time of the grant.
- "the purpose of the lease was to afford the lessee of the shoe-repair shop throughout the term of the lease exclusive and secure possession of that land, including the building which is part of the land. This purpose would be frustrated by the lessor if the wall were pulled down and the building, in consequence, were to collapse"

#### Covenant to repair

- The standard of repair is negotiated between the parties and can differ between cases. "Good and tenantable repair" and "reasonable repair" are common phrases.
  - "Good and tenantable repair" = making the premises reasonably fit for the occupation of a reasonably minded tenant of the class who would be likely to take the land (*Proudfoot*)
- Generally not required to place the premises in a good condition if they weren't in a good condition at the start of the lease (s 223).
- However depending on the facts, a lessee *may* have an obligation to repair the land into a better state than it was originally in- the obligation may go beyond mere maintenance of the status quo at the time of signing the lease (*Mobil Oil*)
- But, doesn't require "transformative change" (*Mobil Oil*)
- "Reasonably minded tenant" = don't have to cater for every possible kind of tenant.

#### *Mobil Oil NZ*

(SC, 2017)

#### **Facts**

Reclaimed land in the Waitemata Harbour had been used to store oil for decades. MNZ took over a lease of the land in 1985. In the 1985 agreement MNZ covenanted to keep the land in good order and clean and tidy, during the tenancy and at the termination of the tenancy. In 2011 MNZ ended the lease. The land was heavily contaminated. The issue was whether the covenant for repair stipulated in the 1985 agreement extended to cleaning up contamination below the surface of the land.

#### **Principles**

- When the lease agreement was signed in 1985, the land had always been industrial land. No one envisaged it would later become a commercial or residential area in the future.
- The lessee had never complained about the contamination before 2011.
- It was uncertain where the contamination actually stemmed from
- The purpose of the lease was to use the land to store oil, and oil spillage was an anticipated consequence of this purpose.
- Here, "clean and tidy" did not extend to the subsurface of the land.
- *Proudfoot*: the obligation to keep in repair references the condition that would be required by "reasonably-minded tenants of the kind envisaged at the commencement of the lease". Here the envisaged tenants = oil companies storing oil in bulk. Not every possible tenant must be catered for.

## Renewal and termination

### **Renewal**

- Eg. where the lease grants the lessee a right to renew the term of the lease.
- May be a covenant (lessee can *definitely* renew) or an option (lessee may *choose* to renew), although there is little difference
- Renewals must comply with formality requirements

### **Termination**

- Expiry: term of lease ends
- Surrender: parties agree to terminate before expiry date
- Determining event: lease specified an event upon which the lease will terminate
- Break clause: clause giving a party the power to terminate the lease themselves
- Notice to quit: one party tells the other party according to law
- Cancellation: one party entitled to terminate because of the conduct of the other party
- Frustration: premature termination due to an unforeseen event (very rare)

### *Roman Catholic Bishop v RFD*

(HC, 2015)

### **Facts**

RFD own a building with multiple units. The Holy Cross Chapel occupies one unit, and the Bishop is the registered lessee. The leasehold is of a unit title. The lease was for 999 years and rent was \$1/year - the Bishop had given up a freehold estate elsewhere in exchange for the leasehold. The building was damaged in the 2011 earthquakes. Instead of repairing the building, RFD offered the building to the government. The Crown paid \$9m to acquire the premises. The Bishop brought proceedings seeking a share in the Crown payment.

### **Principles**

#### *Termination*

- Clause 25 of the lease agreement stated that if the premises were damaged/destroyed by an earthquake, the lessor would be obliged to repair the damage unless the cost outweighs the insurance payout. If repair is not possible the lessee must be paid part of the insurance payout.
- RFD argues the lease must have terminated because the purpose for which the premises were leased (ie. for worship) was rendered impossible by the earthquake. Court rejects this and find that termination cannot be implied.
- There could be other purposes of the lease aside from worship, and the purpose may change over time
- The Bishop's interest was not only in the unit/chapel itself, but in the common property. Even if the chapel had been completely destroyed, this interest in the common property would continue to exist.
- = lease continued to exist even after the insurance payout, no termination

#### *Frustration*

- Frustration only operates where the contract makes no provision for the event which occurred. It is used where the event renders performance of the contractual obligations fundamentally different from those the parties contracted for.
- Frustration of leases is very rare anyway.
- The purpose for which the lease was granted is very important. There must be a connection between the frustrating event and the impediment on the performance of the lease.
- The narrower the purpose, the easier it will be to frustrate the lease. But the longer the lease, the harder it will be to frustrate it (as short leases tend to be for a narrower purpose anyway).
- Here: to what extent did (a) the Crown's plan to acquire the land and (b) the lack of insurance funds meaning RFD could not repair the building after the earthquake, cause the performance/purpose of the lease to be impossible?

- Court finds the lease was not frustrated:
  - Crown acquisition hadn't actually happened yet so couldn't say whether the purpose was rendered impossible.
  - RFD's interest in the land was worth far less than the Bishop's perpetual lease = it would be unjust enrichment for RFD to take all the Crown money.

## **EASEMENTS**

- Easement = a right of way, the ability to pass through someone else's land
- Servient tenement/owner = land/person with the burden of the easement
- Dominant tenement/owner = land/person with the benefit of the easement
- Positive easement = entitles the dominant owner to do something on the servient land
- Negative easement = prevents the servient owner from doing something on the servient land.
- Easements are interest in land/in rem.
- Can be passed on to successors
- Must comply with formalities (must be registered to create a legal interest, must be in writing to be enforceable)

### Requirements for an easement

*Re Ellenborough Park*

(CA, 1955)

#### **Facts**

Land surrounded Ellenborough Park. It was divided into plots. The purchasers of each plot were granted a right to use and enjoy the park. The park and plots then passed on to new owners. Issue = was the right granted by the original vendor to the original purchasers enforceable by the new plot owners against the new park owner?

#### **Principles**

*Requirements for an easement*

1. There must be a dominant and servient tenement
2. An easement must "accommodate" the dominant tenement
  - There must be a connection between the right granted and the use to which the dominant tenement is put.
  - Not sufficient to show that the right simply increases the value of the property.
  - The benefit of the easement attaches to the land, not the individual, and so can pass on to successors.
3. The dominant and servient owners must be different people
  - (in NZ they can be the same people though)
4. The right must be capable of forming the subject matter of a grant
  - The right cannot be too wide or vague
  - The right cannot be inconsistent with the proprietorship or possession of the alleged servient owners (can't be a claim of joint occupation)
  - The right cannot be a mere right of recreation, without utility or benefit

*Application to the facts*

- Court found that the right to use and enjoy the park attached to the plots of land, and could be passed on to subsequent purchasers
- Jus spatiandi (the right to walk about at pleasure on another's land) alone is not capable of being the subject matter of a grant (*Antrobus*), but here the right went beyond mere jus spatiandi.
- There can be an easement for recreational purposes, such as a right to wander over land
- Overall: this was an easement, and the benefit/burden passed onto the new owners

### Scope of easements

*Barry v Fenton*

(SC, 1952)

#### **Facts**

D had a legal easement giving him road access through P's land. The easement was specifically for "vehicular traffic only". D argued he could also use the easement to walk as well as drive. P sued seeking an injunction.

#### **Principles**

- D argued that the right for traffic to pass through is greater than the right for people to walk through, and so the greater right must encompass the lesser right.
- But the court must give effect to the terms of the grant = foot traffic would constitute a greater burden on the servient land than what the easement allowed.
- So D technically didn't have the right to walk through
- But, court refuses to grant the injunction. If D continued to walk through then an injunction could be determined in future proceedings.

*Peacock v Custins*

(CA, 2002)

**Facts**

C owns two plots of land. The red land has a right of way over P's land. The blue land does not. C's tenants use the right of way to farm the red land. But sometimes they use the right of way to access and farm the blue land as well. P seeks a declaration that C and his tenants cannot use the right of way to farm the blue land.

**Principles**

- The right of way is determined by the terms of the grant. Anything not provided for in the grant is a trespass.
- Court finds that C and his tenants cannot use the right of way to access and farm the blue land as well, as that is outside the scope of the grant and is therefore a trespass.
- A dominant owner cannot *intend* to take advantage of the easement and reach land which is not included in the terms of the grant. But, they may occasionally be able to use the easement to reach land not included in the grant so long as that is not their purpose/intention.
- Eg. wandering off the red land to have a picnic on the blue land would be okay, but here the tenants' very purpose was to use the red land to get to the blue land, which is not okay.

Landlocked land

**PLA 2007 Part 6 Subpart 3**

- "Landlocked" land is essentially land enclosed by other land, without access to the road
- S 329 PLA 2007/ s 129B PLA 1952: If land is landlocked, the owner/occupier can apply to the court for an order granting reasonable access to the land.
- "Reasonable access" = physical access of a kind that is reasonably necessary to enable the owner/occupier to use the land for the purposes granted (*Kingfish Lodge*)

*Kingfish Lodge*

(CA, 2000)

**Facts**

Archer lived next to a lodge. The lodge had always only had access by sea. KL purchased the lodge and wanted to develop it. This development would increase transport demands. They wanted to build a private road across A's property, to create road access. A refused. KL applied to the court under s 329 seeking reasonable access, arguing that the lodge was landlocked.

**Principles**

*"Landlocked"*

- "Reasonable access" = physical access of a kind that is reasonably necessary to enable the owner/occupier to use the land for the purposes granted.
- The focus is on physical access in fact BUT that access needs to be legal as well

*On the facts*

- Key fact was that KL, when applying for resource consent from the district council, expressly stated that sea access was sufficient access - and consent was granted on this basis. The court was entitled to take this fact into account.

*Court's discretion in granting reasonable access*

- One factor is the possible hardship caused to the applicant in refusing an order, compared with the hardship caused to the other person by the making of the order.
- Here, the hardship to A would be great: privacy concerns, security threat, increase in traffic, needing to negotiate
- = overall no order is made.

*Murray*

(CA, 2010)

**Facts**

The Murrays purchased a house in a hilly suburb. There was only pedestrian access via a footpath. They sought an order under s 329 granting vehicular access to the property along their neighbour's driveway, on the basis that the house was landlocked. They argued that the current access was dangerous and impractical, and was causing them health problems.

**Principles**

*Reasonable access*

- "Reasonable access" often, but not always, means vehicular access
- Contemporary transport requirements and the general topography/nature of the area is important
- Knowledge of access difficulties at the time of purchasing the property does not preclude an applicant from obtaining relief, BUT it may be evidence that there *is* reasonable access and so no relief will be granted.
- Access must be "reasonable" but need not be the best possible.

*On the facts*

- The pedestrian footpath access was typical of hilly Wellington suburbs
- The Murrays knew about the access and clearly thought it was reasonable at the time of purchase
- Footpath had been used for decades
- = no relief granted

*Squally Cove*

(CA, 2013)

**Facts**

Several property owners have road access through other land, but there is no legal easement and the access depends on the goodwill of the other landowners. SC wants the property owners to use the yellow road for access instead, and proposes to grant them a legal right of way in return for a payment and contribution to maintenance of the road. The property owners don't want to use the yellow road. They apply under s 329 seeking an order for reasonable access, so they can obtain road access through the road they have always been using. The properties technically have legal access through another road, but it is in reality impassable.

**Principles**

*Three step approach*

1. Is the land landlocked?
  - a. "Landlocked" is defined in s 326 PLA 2007.
  - b. Reasonable access focuses on physical access in fact, not legal access (*Kingfish Lodge*). BUT legal access is still relevant (if your access isn't legal then it can't be reasonable either).
  - c. Question of present fact, not whether access may be possible in the future.
  - d. Access at the whim of an adjoining owner, or dependent on the goodwill of the adjoining owner, is not reasonable access.
  - e. If the access meets the *current* need/uses, it is reasonable access. Not concerned with future or potential uses/needs.
  - f. Reasonable access need not be the "best" access (*Murray*)

- g. Reasonable access is a value judgment, including considering the characteristics of the locality (residential, commercial, mixed), topography, and contemporary transport requirements.
  - h. Reasonable access does not invariably mean vehicular access. But, non-vehicular access is only going to be reasonable access in rare cases.
  - i. No presumption in favour of non-interference with another title (rights in neighbouring property over which the reasonable access may be granted are not considered)
2. If so, should an order for reasonable access be made? (criteria under s 329)
    - a. Nature and quality of access at the time of acquiring the land
    - b. Circumstances in which the land became landlocked (eg, if it was actually due to the applicant's neglect)
    - c. Conduct of the parties (eg. intentions, attempts to negotiate reasonable access)
    - d. The hardship caused to the applicant by refusing the order vs. hardship caused to the any other person by making the order
    - e. Any other relevant matters
  3. If so, what conditions should be placed upon this reasonable access, under s 330

*On the facts*

- Court finds an order cannot be made because it doesn't have jurisdiction: granting the legal right of way would not in fact "unlock" the landlocked properties
- Court finds that SC's offer for access through the yellow road is on reasonable terms, so no alternative relief needs to be granted.

Modification and extinguishment

- Easements may be modified by the parties, but must comply with formalities
- **Rectification**: a court can rectify an easement where the instrument does not reflect the true agreement between the parties (eg. where the right conferred is described incorrectly)
- **Extinguishment**
  - Surrender: the dominant owner can surrender the easement
  - Merger: if the owner of one easement acquires other land with an easement, the easement is merged.
  - Occurrence of event: the instrument may specify an event upon which the easement will be extinguished.
  - Redundancy: eg. where an easement is abandoned/no longer needed, the registrar may remove the easement from the register.
  - Order of the court to modify or extinguish: s 316 and 317.

*Harden v Collins*

(HC, 2010)

**Facts**

C owned some land which was divided into plots. An easement ran through the plots, providing access to a reserve. H owned one of the plots. He applied to the court seeking modification of the easement under s 317, alleging that the easement was impassable at certain points due to a wall that C had built.

**Principles**

*S 316 & s 317*

- "Modify" under s 317 includes the power to enlarge an easement over servient land
- S 317 should be read broadly so it can serve its remedial purpose. A court may make an order even if it will cause some detriment to other parties.
- It is a matter of fact and degree what kind of modification will be legitimate
- Only servient owners may apply under s 316 (because the compensation is payable only to the dominant owner).

*On the facts*

- The plots were very interconnected. H and the other 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 applicants were applying in their capacity as dominant, not servient owners. Thus they could not bring the application themselves under s 316, and the court has no jurisdiction to make an order under s 317.

*Davey v Baker*

(CA, 2016)

### **Facts**

P's land has a farm track on it. D and P agree to transfer some of D's land to P, in return for P granting an easement over the farm track for the benefit of D. P then sold the land to B. B later wanted to construct a proper road over the farm track. However, the registered easement was actually in a different location to what everyone had thought. D applied to the court to rectify the registered easement, or modify the easement under ss 316 and 317.

### **Principles**

#### *Rectification*

- Requires that the parties had a common intention that is inconsistent with what the registered instrument says.
- Here there was no such common intention. The location of the easement had always been unclear.
- Rectification is an equitable remedy and is discretionary. It will not be granted where it would prejudice the position of a party who has acted innocently and provided consideration.
- Here, B was a bona fide purchaser without notice. To rectify the instrument would be to intrude upon B's indefeasible title. It would therefore be inequitable to make an order.

#### *Modification*

- D was applying as the dominant, not the servient owner. He is not bound by the easement. Therefore he could not apply for modification under s 316.
- D alternatively makes an argument about covenants, but the court rejects this because the application is to modify the easement not any covenant.
- While the courts' power to modify has widened over the years, caution should be taken against widening it too far.
- Here, modifying the easement would be an intrusion into B's indefeasible title. It would be unjust and inequitable to grant a modification here, because D didn't check registered instrument and B didn't do anything to cause their trouble, they were bona fide purchasers.
- In any case, D still has the legal right of way where the trees are- D's position is not unreasonable or impossible.

## COVENANTS

- Covenant = a promise, expressed or implied in an instrument (= contract), regarding the use of land.
- Restrictive covenant = a promise *not* to do something on your land
- Positive covenant = a promise *to do* something on your land

### Enforcing covenants

#### **The benefit**

- Common law
  - 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 covenants therefore cannot be transferred.
  - The covenantee must have a legal estate in the land in order to reap the benefit.
- 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 the covenantee.

#### **The burden**

- Common law
  - The burden of the covenant does not pass with the land.
  - The covenant is enforceable only as against the original covenantor, not their successors.
- Equity
  - *Tulk v Moxhay* establish that a covenant can in equity bind the conscience of a bona fide purchaser with notice.
  - 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
- Section 302(2) PLA: the covenant binds the covenantor, his/her successors, and those claiming through the covenantor - unless the parties have agreed otherwise.

### *Tulk v Moxhay*

(1848)

#### **Facts**

T owned some vacant land. T sold the land to E. E covenanted to maintain the land, and allow occupants to use the garden on the land. The land was then sold to M. M wanted to build on the land.

#### **Principles**

- Equity will enforce a covenant against a bona fide purchaser with notice of the covenant.
- Here, if the covenant didn’t pass with the land, it would diminish the monetary value of the land. M can’t pay a lesser price and then expect to be free from 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.

### Contrast with easements

- An easement is a right over *someone else’s* land, while a covenant is a promise regarding one’s *own* land.

- A positive easement allows the dominant owner to do some act over the servient land. A positive covenant is a promise by the servient owner to do some act affecting the servient land.
- Easements are created through a grant, covenants are created through a promise in a deed/instrument.
- Easements can become legal interests if registered. Covenants exist only as equitable interests.
- Easements may be registered, covenants can only be noted on the register under s 307 PLA 2007 (ie. so a purchaser may have notice).
- Negative easements and negative covenants are similar
  - They both serve to restrict the right of the servient owner.
  - Negative easements are customarily used only for certain rights, eg. the right to light and fresh air
  - Negative covenants are therefore used for all other rights, eg. the right to a view.
- Modern statutes treat covenants and easements quite similarly

### Covenants in gross

- = covenants where there is no dominant land
- Not recognised in the UK
- *ANZCO* found they are not recognised in NZ either: the law does not recognise the binding effect of the covenant beyond the contracting parties - the covenant will not run with the land.
  - An alternative mechanism to enforce covenants is to register a memorandum of encumbrance.
- But regardless, now section 242 LTA 2017 *does* recognise covenants in gross.

### *ANZCO v AFFCO*

(CA, 2006)

#### **Facts**

AFFCO is a meat processing company. It closed its processing plant and sold it to MF. AFFCO registered an encumbrance against the title to the land, restricting using the land to process meat for 20 years (this was a covenant in gross as there was no dominant land). MF then leased the property to Riverlands, which used the land to process meat. MF then sold the land to ANZCO for meat processing as well. AFFCO refused to consent to the sale but ANZCO purchased anyway, knowing about the encumbrance. ANZCO then proposed to lease the land to Itoham, also to process meat. AFFCO sued ANZCO, Riverlands and Itoham.

#### **Principles**

- ANZCO is liable to AFFCO because there is a contract between them, so the restraint of trade binds ANZO directly.
- Can it bind parties outside the contract- Itoham and Riverlands? Does the covenant run with the land?
  - *Staple v Corby*: covenants in gross can run with the land.
  - The CA departs from *Staple*, finding that NZ does not recognise covenants in gross.
  - ANZCO is liable for Itoham, because Itoham is ANZCO's lessee.
  - ANZCO is not liable for Riverlands, because Riverlands is *MF's* lessee.
  - But, AFFCO has no *direct* action against Itoham or Riverlands, because covenants in gross do not run with the land.
  - Note: if decided under the LTA 2017, which recognises covenants in gross, then AFFCO *would* have a direct action against Itoham and Riverlands.

## **MORTGAGES**

- Two components in a mortgages:
  - a. Covenant: a promise in a contract to repay money or perform certain obligations
  - b. Security: security over property to secure the performance of the promise.
- Mortgagor = borrower
- Mortgagee = lender
- Mortgages must be registered to be legally valid
- Mortgages can be effected in two ways in NZ:
  - a. By transfer: through a deed of conveyance. Title to the legal estate in the land passes to the mortgagee, and the mortgagor retains only an equitable interest in the land.
  - b. By demise: through a lease, with the mortgagee promising to surrender the lease once the debt has been repaid.
- Mortgages 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?
  - a. Principal: the amount which has been borrowed. This can be fixed some or all-obligations.
  - b. Interest: the interest incurred on the principal
  - c. Expenses: eg. the bank's expenses in enforcing the mortgage.

### Covenant & security

*Duncan v McDonald*

(CA, 1997)

#### **Facts**

Via a Nigerian fraud scheme, some Kiwis are tricked into paying a large sum of money. The money is borrowed from a family estate, with the security over a commercial property owned by the McDonalds. The money is lost in Nigeria.

#### **Principles**

- Key question = if the mortgage was valid, what would it be securing?
- A registered mortgage is a legal charge on the land. The mortgagee obtains an interest in the land, but only for the particular purpose of securing repayment of the loan.
- Where registration renders an otherwise void document valid (here the mortgage was void because it was fraudulent), any covenants will be enforceable to the extent that they are needed to repay the loan - the charge over the land is effective.
- But, covenants will not be enforceable against the mortgagor (ie. the RP of the property) personally: the mortgagor will not be personally liable to pay off the debt if the property is not valuable enough to secure the full amount. This is because it is not the mortgagor's loan.
- The covenant to pay and the security are distinct.

*Westpac v Clark*

(SC, 2010)

#### **Facts**

W was induced by an imposter to loan money, with security over a property. The mortgage was all-obligations. The property was owned by the true owner/RP, whose identity the imposter had assumed. The loan document was forged. C, a lawyer, forgot to register the mortgage. W sued C under negligence, arguing that had the mortgage been registered, W would have obtained indefeasible title as mortgagee.

#### **Principles**

*Blanchard J*

- The forged mortgage would have been validated through registration (*Frazer v Walker*)
- But the key question = hypothetically if the mortgage had been registered, what would it have secured?
- Fixed sum mortgage: the debt owed is the debt secured, because the sum of money is specified in the mortgage instrument. There would be no issues.
- All-obligations mortgage (as here)
  - Whoever signs the loan agreement (covenant), it is their loan. Here, it was the imposter who signed the agreement and so the debt is the imposter's debt.
  - But the mortgage instrument refers only to the RP/true owner of the property. The mortgage therefore secures only the RP's debt - and here the RP has no debt as it was the imposter who executed the loan agreement.
  - Thus: the charge secures nothing.
- Had the mortgage instrument referred to the imposter instead of the RP, there would be no problems (for the imposter at least lol)

### Section 95/Schedule 2 PLA 2007

#### **Mortgagor's implied covenants**

1. Repaying principal, interest, and any 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 = most important remedy against default

### Equity of redemption

#### **What is it?**

- Under the common law, a borrower needs to repay the debt in full by the due date stipulated in the deed of transfer, before they can redeem their property. Technically if they don't make the due date, they lose the property forever.
- Equity therefore steps in to soften the harshness of the common law. Equity compels the mortgagee to give the property back to the mortgagor once the principal/interest/costs has been repaid - even if after the due date.
- The mortgagor gets an equitable right to redeem = equity of redemption.
- The right of redemption is the core characteristic of any mortgage. It is so fundamental that equity will not allow a mortgage to be made irredeemable: the mortgagor's right to redeem cannot be taken away.
- The right of redemption cannot be "clogged", ie. hindered or prevented
- Overall: equity of redemption protects the mortgagor.

#### **Types of clogs**

1. Where the right of 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. (see *Knightsbridge*)
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 + a 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. But, such an option can be included in a separate agreement (*Jones v Morgan*).
5. Collateral advantages = where a mortgage secures advantages for the mortgagee beyond the repayment of the debt/interest/costs. A collateral advantage may be a clog if its effect is to render the right of redemption illusory. After the debt is repaid, a collateral advantage automatically becomes a clog and is unenforceable.

**Equity of redemption in statute: PLA 2007**

- Section 97: the mortgagor has the right to redeem at any time before the mortgaged property is sold under the mortgagee sale (this extends the mortgagor's rights even beyond what was found in *Knightsbridge*).
- Section 98: where the mortgagor repays the debt, interest, and performs all obligations **before** the due date, they still have to pay interest for the remainder of the term of the mortgage.

*Fairclough v Swan Brewery*

(HoL, 1912)

**Facts**

F leases a brewery. F borrows money from SB and mortgages the lease. Under the terms of the mortgage, F is not allowed to repay the debt early & can only sell SB's beer during the term of the mortgage. At some point during the term F starts selling a different brand of beer. SB sues, F counterclaims seeking redemption.

**Principles**

- A mortgage cannot be made irredeemable.
- The court will not allow the right of redemption to be hampered or crippled.
- The mortgage here was in effect irredeemable. The due date/end of the mortgage was only one month before the lease ended. This means that by the time F can redeem the property, he only has one month of the lease left.
- Thus in effect the mortgage is irredeemable & a clog on the equity of redemption.

*Knightsbridge Estates Trust v Byrne*

(CA, 1989)

**Facts**

KET had a mortgage, but didn't like its terms and started looking for a better deal. In 1931 they entered into a mortgage with B. The loan was to be repaid over 40 years. 6 years later KET wanted to pay off the full sum of the debt and redeem the property. It came to court claiming that the postponement of 40 years was a clog.

**Principles**

- Equity will grant relief against the terms of a mortgage if they are oppressive or unconscionable.
- But, equity does not interfere with contracts which are merely unreasonable: it does not interrupt freedom of contract.
- The question is whether the right of redemption is real or illusory.
- Here, the mortgage was between two competent parties acting under the expert advice. The court should not interfere with this freedom of contract by altering its terms
- The business realities were that KET was trying to get out of its previous mortgage. This was a commercial agreement and there was competition between lenders. The parties were at arm's length and on equal footing.
- In such circumstances, even though the postponement is long, there is no reason why the court should allow the mortgagor to escape from the contract.
- Overall: a long postponement is not a clog if the parties are on equal standing and there is no oppressive or unconscionable conduct.

*Jones v Morgan*

(CA, 2001)

### **Facts**

William Morgan and John Morgan are the trustees of a farm and also own some shares in the farm. WM wanted to develop the farm as a nursing home. In 1994 he borrowed money from Jones, mortgaging the farm. He also agreed to transfer 50% of some shares in a company (this never eventuated). Later WM changed his mind and entered into a different agreement with Jones. Under this agreement WM promised to sell part of the farm and use the proceeds to repay most of the debt. He also agreed to transfer half his share of the rest of the farm to Jones. It was ambiguous whether WM was still obliged to repay the outstanding debt. WM then repaid the outstanding debt anyway. Jones sued for the half-share of the farm.

### **Principles**

*When will a collateral advantage be unenforceable?*

- The half-share of the farm is a collateral advantage.
- *Kreglinger*: a collateral advantage will be fine unless it is:
  - a. Unfair or unconscionable
  - b. A clog on the equity of redemption
  - c. Inconsistent with or repugnant to the right to redeem

*Unconscionability & duress*

- A bargain will only be unconscionable if one of the parties "has imposed the objectionable terms in a morally reprehensible way".
- There must be impropriety in the conduct of the party and in the terms of the contract.
- Duress must amount to coercion so as to violate consent. Ordinary commercial pressure is not enough.
- WM had independent legal advice and the agreement was drafted by his lawyer
- = no duress.

*Clog on the equity of redemption*

- The agreement to transfer 50% of the farm to Jones = the right to acquire an interest in the mortgaged property.
- *Kreglinger*: "a mortgagee cannot as a term of the mortgage enter into a contract to purchase, or stipulate for an option to purchase, any part or interest in the mortgaged premises".
- But, an agreement or option to purchase will be fine if it is contained in a separate agreement, independent of the original mortgage agreement.
- The question is not whether the two contracts were made at the same time or in the same instrument, but whether they are in substance a single and undivided contract or two distinct contracts.
- Here the majority find that the agreement to transfer 50% of the farm to Jones is part of the original mortgage agreement = it is a clog.

Re-opening oppressive contracts

### **Section 120 Credit Contracts and Consumer Finance Act**

- This codifies the courts' equitable jurisdiction to reopen oppressive contracts and make appropriate orders to remedy the oppression.
- A credit contract = a contract under which credit is provided.
- Under s 120 the court can reopen an oppressive mortgage if one of the following applies:
  - a. The mortgage is oppressive
  - b. A party has exercised/intends to exercise a right or power conferred by the contract in an oppressive manner
  - c. A party has induced the other party to enter into the contract by oppressive means.
- Section 118 defines "oppressive" as: oppressive, harsh, unjustly burdensome, in breach of reasonable standards of commercial practice.

*GE Custodians v Bartle*  
(SC, 2011)

### **Facts**

The Bs are superannuants with limited income. They decided to invest in the property market. They entered into a scheme with Blue Chip. They purchased a property for \$500,000. To do this they borrowed from a bank (GE), using a mortgage broker (TML). The loan was secured against their family home and the new property. To repay the loan the Bs had an arrangement with BC where BC would subsidise the repayments. It was a very risky scheme. The property market fell and BC went bankrupt. The Bs could not repay the loan on its own. The new property was sold as a mortgagee sale at a big undervalue, meaning that the family home was at risk. The Bs applied to the court to have the mortgage reopened under s 120 of the CCCFA.

### **Principles**

#### *Meaning of "oppressive"*

- "Oppression" is a broader concept than unconscionable conduct. Something may be oppressive even where it would not be set aside as unconscionable under equity.
- For the purposes of the CCFA, "oppressive" includes where a transaction or its terms are in breach of reasonable standards of commercial practice.
- This is an objective standard decided by the court.
- The court can only find oppression if the lender has knowledge of the matter which gives rise to oppression, or knew something which should have made them inquire further.

#### *High Court*

- B had independent legal advice.
- GE had no reason to inquire into the BC scheme
- The BC scheme was risky independent of the loan, the loan shouldn't be seen as oppressive just because of that riskiness.
- B signed a declaration that they could repay the loan in full
- TML's knowledge (if any) cannot be imputed to GE
- = mortgage not oppressive

#### *Court of Appeal*

- BC scheme was defective & B had not ability to repay the loan.
- TML had knowledge of this and that knowledge can be imputed to GE.
- GE therefore should have made further inquiry
- = mortgage oppressive

#### *Supreme Court*

- The mortgage won't be oppressive if the lender complied with reasonable standards of commercial practice.
- The question is whether, in light of what GE/TML knew, the mortgage was oppressive.
- Here TML had very little knowledge, and GE knew about the same (therefore we don't need to ask whether TML was GE's agent)
- B had purported that they were in a stable financial position, and overall GE had no reason to think B couldn't repay the full loan.
- A lender need not make inquiries if they know the borrower has independent legal advice. The lender may assume that the advice is sound and competent.
- On policy grounds, lenders should not have to take responsibility for matters for which they neither knew nor should have known. Otherwise they will have to make lots of inquiries, which are inefficient and waste time.
- Neither TML or GE knew anything which meant they were acting in breach of reasonable standards of commercial practice, and nor did they need to make further inquiries based on what they *did* know.
- = mortgage not oppressive.

### Mortgagee's power of sale

- = the most important and effective remedy against mortgagor's default
- A mortgagee who exercises the power of sale has certain duties
- Section 176 PLA 2007: a mortgagee owes a duty of reasonable care (= negligence) to obtain the best price reasonably obtainable as at the time of sale.

### *Downsview v First City*

(PC, 1993)

#### **Principles**

- Powers conferred on the mortgagee (including the power of sale) must be exercised in good faith for the purpose of getting the loan money back.
- But, subject to the above, the powers may be exercised by the mortgagee even if the consequences are disadvantageous for the mortgagor.

### *Apple Fields v Damesh*

(CA, 2001)

#### **Facts**

AF had some land. The land was mortgaged to Damesh and ANZ. ANZ was pressuring AF to sell the land. AF agreed with D to conduct a mortgagee sale, selling the land to H. AF eventually sued D claiming it had breached its duty to take reasonable care to obtain the best price reasonably obtainable at the time of sale (s 176), AND its equitable duty to exercise its power of sale in good faith for the purpose of realising its security. AF was arguing that (1) D didn't seek the best price over a period of time, and (2) D had an interest in the company purchasing the land, H.

#### **Principles**

##### *A mortgagee's duties*

- Section 176 is a legislative affirmation of the scope of the duty of care in negligence owed by a mortgagee who has decided to sell.
- It coexists, but is more onerous than, the equitable duty to act in good faith.

##### *When does the duty arise?*

- The duty does not limit a mortgagee's right to decide if and when to sell.
- It is only after that decision that the duty arises.

##### *What is "reasonable care"?*

- It turns on the facts of each case
- Where a mortgagee has decided to sell and wants to sell to a party in which he has an interest (as here), so long as they take all reasonable steps to obtain the best price reasonably obtainable at the time they will be fine.
- The burden of proof lies with the mortgagee.

##### *What is the "best price"?*

- Note that the duty is not to actually obtain the best price, but to take reasonable care to obtain the best price
- The "best price" should be assessed with regard to the purpose of s 176, which is to protect the vulnerability of the mortgagor (and other parties to whom the duty is owed).

##### *On the facts*

- It was AF who decided to sell and on those terms.
- D did not conduct the sale in bad faith
- Having decided to sell, AF discharged D's duties as mortgagee.