

## PRESENTERS



### **Thomas Gibbons, Associate, McCaw Lewis Chapman, Hamilton**

Thomas Gibbons specialises in property development and commercial law, regularly advising on subdivisions, development projects, company share structures, shareholder agreements, securities law, general business matters and charitable trusts.

He has recently updated a student text on trusts and has written extensively on property and commercial topics for publications such as the NZ Law Journal, Butterworths Conveyancing Bulletin, the NZ Conveyancing and Property Reports, and the Waikato Law Review. Thomas has also taught property law in the legal executive programme at the Waikato Institute of Technology.



### **Kerry O'Donnell, Partner, Anderson Lloyd, Queenstown**

Kerry O'Donnell is a partner in Anderson Lloyd's commercial team in Queenstown. Kerry advises clients on commercial conveyancing, subdivisions, unit title developments, commercial leasing and due diligence for land acquisitions. She specialises in land-based projects and small to large scale residential developments.

# CONTENTS

<b>1. INTRODUCTION .....</b>	<b>1</b>
ACKNOWLEDGEMENTS.....	2
<b>2. THE NATURE OF EASEMENTS, COVENANTS, CONSENT NOTICES AND ENCUMBRANCES .....</b>	<b>3</b>
EASEMENTS .....	4
COVENANT .....	6
<i>Covenants</i> .....	6
<i>Building or development schemes</i> .....	7
<i>Consent notices</i> .....	8
<i>S 240 Covenant</i> .....	8
<i>S 108(2) Covenant</i> .....	9
<i>Encumbrances</i> .....	9
<b>PRACTICAL EXERCISE 2A: INTRODUCTION TO KIM JACKSON.....</b>	<b>11</b>
ATTACHMENT 2A(I).....	11
ATTACHMENT 2A(II).....	14
<b>3. TYPES OF EASEMENT AND ISSUES WITH COVENANTS.....</b>	<b>17</b>
POSITIVE AND NEGATIVE EASEMENTS .....	17
<i>Types of Easement</i> .....	17
RIGHTS OF WAY .....	18
ATTACHMENT 3(I).....	20
RIGHTS TO DRAIN WATER/CONVEY WATER.....	23
RIGHTS TO CONVEY ELECTRICITY AND TELECOMMUNICATIONS .....	24
PARTY WALL EASEMENTS .....	30
RIGHTS TO LIGHT AND AIR .....	30
LAND COVENANTS – STATUTORY ISSUES .....	32
<i>Positive and Restrictive Covenants: Definitions</i> .....	32
<i>Positive and Restrictive Covenants: Legal Effect</i> .....	33
LAND COVENANTS - GENERAL COMMENTS .....	34
LAND COVENANTS – CONCEPTUAL ISSUES .....	40
<i>Land Covenants vs Body Corporate Rules</i> .....	40
<i>Covenants vs the limits of the Unit Titles Act</i> .....	41
<i>Land Covenants vs Consent Notices</i> .....	42
<i>Covenants vs Grant of Resource Consent</i> .....	43
<b>PRACTICAL EXERCISE 3A: KIM AND COVENANTS.....</b>	<b>45</b>
ATTACHMENT 3A(I) - 1 .....	46
ATTACHMENT 3A(II) – 1 .....	49
ATTACHMENT 3A(III) – 1 .....	57
<b>PRACTICAL EXERCISE 3B: KIM AND THE E-SURVEY .....</b>	<b>65</b>
ATTACHMENT 3B(I) – 1 .....	66
<b>4. DRAFTING OF EASEMENTS AND COVENANTS .....</b>	<b>75</b>
PREPARATION OF EASEMENTS FOR REGISTRATION .....	77
PREPARATION OF COVENANTS FOR REGISTRATION.....	79
<i>Building Schemes</i> .....	80
<i>Background</i> .....	81
<i>Definition of terms</i> .....	81
<i>Referencing legislation</i> .....	82
<i>Dispute resolution clauses</i> .....	83
PREPARATION OF ENCUMBRANCES FOR REGISTRATION .....	83
<b>PRACTICAL EXERCISE 4B: KIM AND THE RESOURCE CONSENT .....</b>	<b>85</b>

ATTACHMENT 4A(I) – 1 .....	86
ATTACHMENT 4A(II) – 1 .....	92
ATTACHMENT 4B(III) – 1 .....	94
<b>5. INTERPRETATION OF COVENANTS.....</b>	<b>97</b>
INTERPRETING A CONTRACT .....	97
INTERPRETING A PUBLIC DOCUMENT.....	97
WHY THE DIFFERENCE IS IMPORTANT.....	98
<i>Congreve in the High Court</i> .....	98
<i>Bonnar v Summerland – a forgotten case?</i> .....	100
<i>Thompson in the High Court</i> .....	100
<i>Comment</i> .....	101
<i>The Australian Approach – Westfield</i> .....	102
<i>Comment</i> .....	102
<i>Congreve and Thompson in the Court of Appeal</i> .....	103
<i>A Case Example and Comment on the Interpretation of Easements</i> .....	105
<b>PRACTICAL EXERCISES 5A: KIM AND THE TITLE .....</b>	<b>109</b>
ATTACHMENT 5A – 1 .....	110
<b>6. MODIFICATION AND SURRENDER OF EASEMENTS AND COVENANTS.....</b>	<b>127</b>
VARIATION OF EASEMENTS AND COVENANTS.....	128
<i>Variation of easements and covenants by agreement between the parties</i> .....	128
<i>Modification of easements and covenants by the court</i> .....	129
SURRENDER OF EASEMENTS AND COVENANTS .....	129
<i>Surrender of easement or covenant by agreement between the parties</i> .....	130
<i>Surrender of easements and covenants by the court</i> .....	130
<i>Removal of easement from the Register</i> .....	132
<i>Additional extinguishing options</i> .....	134
<i>Merger</i> .....	134
<i>Abandonment</i> .....	134
<b>7. ENFORCEMENT.....</b>	<b>135</b>
ENFORCEMENT OF EASEMENTS .....	135
<i>Enforcement of Positive Covenants</i> .....	135
<i>Enforcement of Easements and Covenants</i> .....	135
<i>Abatement</i> .....	136