

Torrens Title [Equine Problem Question]

Intro – PARTNERS V OATS

- Torrens Title is a system of title by registration (ss 41-43 RPA).
 - Assumptions
 - Interests in the second schedule prevail over interests in the first schedule (ss 41, 42 RPA and *Mayer v Coe*), and
 - The 'first in time' rule applies (s 36(9) RPA).
 - Registered interests gain indefeasibility of title unless there is some exception:
 - Statutory exceptions (s 42 RPA), and/or
 - Equitable or *in personam* exception.
 - Old System Title is a system of registering title and comparing equities.
 - Where the equities are equal, the assumptions are:
 - The first legal interest prevails over subsequent legal interests ('*nemo dat*' rule),
 - Legal interests prevail over equitable interests,
 - The first equitable interest prevails over subsequent legal interests ('*qui priori*' rule), and
 - Both legal and equitable interests prevail over a party with no interest.
 - Unless there is postponing conduct.
- Oats has title to the Torrens Title property by registration (s41 RPA / *Breskvar v Wall* (1971) 126 CLR 376). Oats is a registered proprietor in the first schedule and thus his title is indefeasible (s42 RPA / *Mayer v Coe* (1968) 88 WN (NSW) (pt 1) 549). Oats' title was immediately indefeasible upon registration (*Black v Garnock* [2007] HCA 31; *Mayer v Coe*). Oats' interest will prevail over any unregistered interest, unless there is an exception to indefeasibility. Thus the court will need to consider whether the unregistered interest of the partners may prevail over Oats' registered interest due to a fraud or personal equity exception.

Issue 1: Will Oats be subject to the fraud exception to indefeasibility?

Rules

- ss 42-43 RPA: A person who acquires a registered interest through fraud has a defeasible interest.
- *Marsden v Campbell* (1897) 18 LR (NSW); s 164 CA: Constructive notice is what someone ought to have known if all the inquiries a reasonable person in their position would have made. Constructive notice demands that the purchaser should have made all the reasonable inquiries
- *Wicks v Bennett* (1921) 30 CLR 80 / *Leros v Terara* (1992) 174 CLR 407: Notice of itself is not fraud
- *Stuart v Kingston* (1923) 32 CLR 309: for something to be considered fraudulent, there must be some personal dishonesty or moral turpitude involved. Notice is not enough.
- *Bahr v Nicolay (No 2)* (1988) 164 CLR 604 (Wilson, Brennan and Toohey): There will only be equitable fraud on the part of the registered person where they form the dishonest intention to renege on an agreement before registration.
- Add to application if relevant → (Mason and Dawson): There will be equitable fraud on the part of the registered person where they decide to renege on an agreement, regardless of the point in time at which his dishonest intent to renege was formed. This is because it would be against conscience and thus fraud for the registered person to renege on the basis that they took the property.

Application

- Prior to settlement, Oats had been advised by one of the partners that they would shortly be moving their practice to Brownacre. While Oats may not have actually known about the breach of trust, Oats would be deemed to at least have had constructive notice of the partner's interest because he would have known about the breach had he made all the inquiries that a reasonable person in his position would have made (*Marsden v Campbell*; s164 CA)

- However, Oats' constructive notice of the fraud is not enough to bring about a fraud exception to indefeasibility (**Wicks v Bennett**/ **Leros v Terara**) because there must have been some personal dishonesty or moral turpitude involved on the part of Oats (**Stuart v Kingston**). Oats may be able to argue that his behaviour did not amount to fraud because he was only aware of an inconsistent interest at the time he registered. Had Oats instead been aware of the breach of trust at the time he registered, the court would most likely deem that there was personal dishonesty or moral turpitude because this would be a lot more serious than merely having notice of an inconsistent interest.
- Furthermore, the partners may be able to argue that Oats' conduct will amount to equitable fraud because he formed a dishonest intention to renege on an agreement that he was constructively aware of prior to his registration (**Bahr v Nicolay**).
- However, Oats had never expressly agreed with Equine to be subject to the interest of the partners and thus this argument would most likely fail.

Conclusion

- In weighing up the facts, Oats would most likely not be subject to the fraud exception to indefeasibility as the court is unlikely to find that his conduct amounted to personal dishonesty or moral turpitude.

Issue 2: Will Oats be subject to the personal equity exception to indefeasibility?

Rules

- **Barry v Heider (1914)** 19 CLR 197: it would be against conscience and thus a personal equity exception to indefeasibility where the registered person creates the unregistered interest – sale, mortgage, lease etc
- if the registered person's conduct caused or contributed to the creation of the unregistered interest
- **Bahr v Nicolay (No 2)** (1988) 164 CLR 604 (Wilson, Brennan and Toohey): it would be against conscience and thus a personal equity exception to indefeasibility where a registered person agrees with second person to be subject to third person, and the registered person then reneges on third person, despite that being the basis on which they took the property.

Application

- While the partners may be able to claim that there is a personal equity exception to Oats' indefeasibility, they are unlikely to succeed because Oats does not come within any of the situations that amount to a personal equity exception.
- Firstly, Oats did not create the unregistered interest of the partners (**Barry v Heider**).
- Secondly, Oats' conduct did not cause or contribute to the creation of the unregistered interest (**Barry v Heider**).
- Thirdly, Oats had never expressly agreed with Equine to be subject to the interest of the partners because in fact, Oats only became aware of the unregistered interest after the exchange of contracts (**Bahr v Nicolay**)

Conclusion

In summary, it is likely that Oats' registered interest will prevail over the partners' unregistered interest because the court would be unlikely to find a fraud or personal equity exception to indefeasibility.

EXTRA

Intro – DR FIXIT V OATS

- Dr Fixit as an unregistered tenant and he could argue the short tenancy exception to try and defeat Oats' indefeasibility.

Issue: Short tenancy exception?

Rules

- **s42(1)(d) Real Property Act** – Estate of registered proprietor paramount
- Period of lease + option to renew lease is 3 years or less; and
- Registered person acquired interest (lease) with notice

- *Clyne v Lowe* (1968) 69 SR (NSW) 433: knowing the vendor doesn't live there imputes notice to you that there is a tenant.

Oats is not subject to Dr Fixit because Oats did not have notice of Fixit when he exchanged contracts. !

Intro – NEIGHBOUR V OATS

Issue: Omitted (misdescribed) Easement exception (s42(1)(a1)?

- Will have a registered right at ground level, and will have a registered right to occupy, demolish and re-build: *Bursill Enterprises v Berger Bros* (1971) 124 CLR 73
- Under OST, you could also create an easement by implication or by prescription. While you cannot get it done this way under TT, you can get an easement enforced by implication or prescription if the easement was created under OST.
- *James v Stevenson* [1893] AC 162 → PC decision on appeal from NSW
- Relevance: When land is converted from OST to TT and easements are not recorded, they are passed on and they are indefeasible so long as they pass certain requirements (generally as long as the easement existed at the time the land was converted). → If an easement was created under OST, that easement will most likely remain enforceable and indefeasible even if the land is now under TT