

Land Law Supernotes

Topic 1 - Introduction

Intro

- *Cuius est solum* rule
 - 'Land' extends to the sky and down to the centre of the earth
 - Permanent intrusion of airspace constitutes trespass
 - Excavation underneath the surface can also constitute trespass
 - But statutes can limit ownership beyond a certain depth

Characterisation of Interests in Land: General Law

Legal Interests in Land: s 51(1) *Property Law Act 1958* (Vic)

- The only way old land legal title can be transferred is by a deed of conveyance
 - The vendor must prove their title to the land
- A legal interest is one which constitutes a recognisable common law estate
 - And which is created in accordance with the requisite formality requirements
 - The common law only recognises an interest in land if it has been registered on the title
 - The owners' name/s have to be on the title
- All conveyances or dispositions of legal interests in land must be made by formal deed (unless it's under a will)
 - PLA s 52(1)
 - Conveyances run with the legal interest
 - So if you sell your property and the bank has a mortgage on it, the purchaser of your land becomes the new mortgagor
- A conveyance includes (s 18 PLA)
 - A mortgage
 - Charge
 - Lease
 - Assent
 - Vesting declaration
 - Disclaimer
 - Release
 - Surrender
 - Extinguishment
 - Every other assurance of property or of an interest by any instrument except a will
- Exception: s 54(2)
 - Oral leases created for 3 years or less

Deed

- A deed is a document which has been signed by both parties with the intention of operating as a deed
- The deed must be signed and sealed
- Where land has been registered under the Torrens system, registration is deemed to have the same effect as a deed

Manton v Parabolic Pty Ltd (1985)

- ISSUE: Whether the document took effect as a valid deed
- HELD:

- The defining nature of the deed is some particular act, ritual or instrument by which a person can notify the community that they mean what they do to be binding
 - So the document must be properly signed and this must be attested by a witness who is not a party to the deed

Equitable Interests in Land: s 53

- (1) Subject to the provisions hereinafter contained with respect to the creation of interest in land by parol—
 - (a) no interest in land can be created or disposed of except by writing signed by the person creating or conveying the same, or by his agent thereunto lawfully authorized in writing, or by will, or by operation of law;
 - (b) a declaration of trust respecting any land or any interest therein must be manifested and proved by some writing signed by some person who is able to declare such trust or by his will;
 - (c) a disposition of an equitable interest or trust subsisting at the time of the disposition must be in writing signed by the person disposing of the same, or by his agent thereunto lawfully authorized in writing or by will.
- (2) This section shall not affect the creation or operation of resulting, implied or constructive trusts.
 - Does not have to occur by deed but does have to be in writing
 - Can recognise some interests that are not recognised at common law
 - Example: A buys a car from B. As soon as A gets the transfer and rego papers, he has an equitable interest
 - But he does not have a legal interest until he goes to VicRoads and registers the car in his name
 - Examples of equitable rights
 - Right of a purchaser under the contract for sale of land
 - Right of a mortgagee (bank) under an unregistered mortgage
 - Right of the owner of a charge over land
 - Right of a lien over land
 - Right under specific performance of a land contract
 - Right of a purchaser under part performance
 - Equitable interests attach to the land
 - Equitable interests are good against the whole world except the bona fide purchaser of a legal interest for value without notice

Trusts: s 53(2)

- Express trust
 - Grantor expressly intends to create a trust and transfer legal title to a third party (trustee) for benefit of a defined party (beneficiary)
- Resulting Trust

- An intention to create a trust is inferred from the circumstances and an act of performance supports the intention
- Constructive Trust
 - It is imposed at the discretion of the court where it is concluded that justice and fairness require it

s 126 *Instruments Act 1958* Vic

(1) An action must not be brought to charge a person upon a special promise to answer for the debt, default or miscarriage of another person or upon a contract for the sale or other disposition of an interest in land unless the agreement on which the action is brought, or a memorandum or note of the agreement, is in writing signed by the person to be charged or by a person lawfully authorised in writing by that person to sign such an agreement, memorandum or note.

- An action must not be brought to charge a person upon a special promise to answer for the debt, default or miscarriage of another person unless the agreement is in writing
 - It affects enforceability
 - So an interest arising under a contract for the sale of land or a disposition of land won't be enforceable unless the written agreement is produced
 - So an equitable interest can still be created orally, but not enforced in court until it is written down
- s 126 applies to both legal and equitable interests

Equitable Interests Arising from Specific Performance and Part Performance

- Equitable interests arising through part performance can be enforceable despite s 126
 - Despite any lack with formalities, there has to be a point where the parties have relied upon an agreement to such an extent that equity would consider it unfair and unconscionable to deny the existence of the interest
 - So in this situation, equity will enforce the interest in land despite the absence of the agreement in writing
- Preconditions to an award of specific performance
 - [There are 7]
- The basis of part performance is that where one party has been induced or allowed by the other party to alter their position on the faith of the contract, it would be fraud for the other party to set up the legal invalidity of the contract
- To establish part performance, the following must be shown:
 - The acts of part performance unequivocally relate to the agreement alleged
 - The act relied upon was done on the faith of the agreement and resulted in a change of position so that the person would be unfairly prejudiced

Scope and Range of Land Interests

- Boundaries of land interests are determined according to natural and artificial measures
 - If the land does not abut water
 - The boundaries are defined in accordance with the measurements in the certificate of title
 - If the land abuts water
 - The boundary will be natural
 - The high water mark is the boundary where tidal water is concerned

- Unless there is intention to the contrary
 - [3.17 in the textbook if they talk about this more in the lecture]
- It is important to measure the land and ensure that it matches exactly with the title
- The owner of lands has rights over all natural resources on the land
 - Subject to legislative regulation
 - Any encroaching building will vest in the owner of the adjoining land
- Fences
 - There is no common law obligation to keep and maintain a fence: *Churchill v Evans* (1809)
 - Statutory provisions now regulate it
 - *Fences Act 1984* (Vic)

Torrens System

- An interest in land is known as a registered interest in land
- Torrens title land includes:
 - Land alienated by the crown after commencement of Torrens legislation in a particular state
 - Old title land converted to Torrens title land
- It is a system of registration
 - So the title comes through registration of an instrument, not through a deed
 - Registration validates a defective title
 - Unlike general law

Topic 2 – Co-Ownership

Intro

- There are two primary forms of co-ownership: a joint tenancy and a tenancy in common
 - The determination of which co-ownership exists depends on:
 - The express word used upon conveyance
 - The intention of the parties
 - The characteristics of the relationship between the parties

Co-Ownership

- Refers to multiplicity of ownership over a single estate or interest in land rather than multiple land interests held in different capacities
 - Exists where multiple people hold an interest in the same estate
 - No single co-owner can be capable of excluding the other co-owners (if so, then it's not co-ownership)

Joint Tenancy



- Each joint tenant has a right jointly shared with others
 - But no individual right to any undivided share in it
- A joint tenant can dispose of their interest
- Each joint tenant holds an identical interest
- 2 crucial features:
 - Presence of the 4 unities
 - Possession
 - Interest
 - Title
 - Time
 - The right of survivorship
 - When one tenant dies, their interest passes to the remaining joint tenants
- When the last joint tenant dies, the land goes to the executor of their estate (because they have sole proprietorship at this point)
- If you can't determine when which of the last joint tenants dies first, you assume that the oldest dies first

Unity of Possession

- Requires every co-owner to be concurrently entitled to possess the whole of the co-owned land
 - But this must be extinguished from a right of exclusive possession

Unity of Interest

- Every joint tenant must hold an identical interest in nature, extent and duration to the other
 - A joint tenancy cannot exist if co-owners hold different interests
- Differences in terms of the type or degree of title conferred upon each co-owner is sufficient to preclude the relationship from satisfying the unity of interest requirement
 - Eg: if one person has a life estate in x and another person holds a fee simple remainder, the interests are different and it is therefore not a joint tenancy

Unity of Title

- Joint tenants must derive their interests from the same document and by virtue of the same act
 - Where they derive their title from different transactions, there is no unity of title

Unity of Time

- The title of every tenant must vest at the same time

The Right of Survivorship

- A right which confers the title of a deceased joint tenant upon the surviving joint tenants
 - When there is only one surviving joint tenant left, they gain full ownership

The Forfeiture Rule

- The property of a convicted felon is vested in the crown
 - Eg: a co-owner who kills another is stripped of his right of survivorship to the land: *Cleaver v Mutual Reserve Fund Life Association* (1892)

Tenancy in Common (TIC)

- Arises where 2 or more co-owners hold an interest in land in proportionate shares
 - There is an equal right of possession to every part of the subject matter of the tenancy
 - So when a TIC dies, their interest passes on to their estate

Creation of Co-Ownership

- Where the interest can be either TIC or joint, the intention of the parties must be considered
 - Words indicating an intention to apportion are the words of severance
 - The intention is derived from the express they have used in the transfer documents
- Any express intention for either kind of co-ownership is paramount and overrides any other presumption

Robertson v Fraser

- ISSUE: Did the language of the will indicate that the 3 tenants should hold the interest as TICs or jointly?
- HELD:
 - The ordinary meaning of the words used by the testator should be used
- RULE: Where there is even a slight indication of an intention to sever, it will be sufficient to presume that a TIC was intended
 - So if you want a joint tenancy, you need to show a clear intention in favour of it
 - Common words of severance include
 - Sharing
 - Amongst
 - Equally
 - Alike
 - Each
 - Respectively

Common Law Presumption of a Joint Tenancy

- Where there is no express or implied intention to the contrary and the 4 unities have been satisfied (along with the right of survivorship) the common law presumes a joint tenancy
 - This presumption can be rebutted when:
 - One of the four unities are absent

- The grant of land contains words of severance
- Equity applies

Public Trustee v Pfeiffle (1991)

- ISSUE: Did the parties, by their agreement, rebut the presumption of a joint tenancy?
- HELD: The presumption was successfully rebutted
 - They agreed that their respective interests should be divided and held on trust
 - This is indicative of a TIC
- RULE: Where a transfer or agreement indicates that the parties are to acquire equal and concurrent interests in land, the transaction is a TIC

Cummins

- HELD: There was a presumption of a joint tenancy because the parties were in a domestic relationship (husband and wife)

Statutory Presumption of a Joint Tenancy

- May be applicable in the absence of any evidence proving an intention to the contrary
- 2 or more person who are registered as joint proprietors shall be deemed to hold as joint tenants: s 30(2) *Transfer of Land Act 1958* (Vic)
 - Unless there is an intention to the contrary

Aoun Investments Ltd v Chief Commissioner of State Revenues (NSW Case)

- FACTS:

Equitable Presumption of a TIC

- Where an intention to distribute individualised ownership is apparent from the circumstances, equity may presume that the parties intended to hold their beneficial interests as TICs
- Assumptions applies where
 - Parties purchased property in unequal shares (*Delehunt*)
 - Parties buy the land in mortgage
 - Parties buy as business partners
 - Plus others

Unequal Contribution to Purchase Price

- Where two parties contribute to the purchase price unequally, they are presumed in equity to hold their interest in proportion to their contribution
 - So in TIC
- If they contribute in equal shares, a joint tenancy will be presumed

Delehunt v Carmody

- FACTS: A separated couple contributed equally to the purchase price
 - They said that the house would be owned in equal shares
 - The man died intestate (ie without a will) and the woman claimed that the house should be in a joint tenancy
- HELD: He had held the land before he died on resulting trust for himself and the woman in equal shares as TICs
 - The property was split between the old and current wife
 - Had there been no statute that put the land on trust, the common law would have deemed the co-ownership as a JT

- Because they contributed equally to the price
- RULE: The equitable jurisdiction follows the rules of law in their current form

Mortgagees

- Where 2 or more people advance money on the security of a mortgage, equity will presume the application of a TIC
 - Whether or not the money was contributed equally or unequally
- The TIC reflects the commercial nature of the transaction

Business Partners

- People acquiring land for a business enterprise and as part of partnership assets are presumed to do so in equity as TICs

Other Circumstances Where Beneficial Entitlement is Intended

Malayan Credit v Jack Chia Ltd (1986)

- FACTS: The floor of a building was leased to the 2 parties
 - There were no words of severance in the lease
- ISSUE: Could the common law presumption to joint tenancy (when there are no words of severance) be rebutted?
- HELD: There was a TIC
 - No words in the lease, but other factors lead to indication of an intended TIC
 - The parties had divided up the floor into their respective spaces
- RULE: The circumstances in which equity will presume a tenancy in common are not limited to prescribed categories
 - Equity is not restricted to the traditional 3 categories
 - Equity can be invoked in other circumstances

Rights and Duties of Co-Owners

Right to Payment for Improvements and Repairs

Common Law

- A co-owner who improves or repairs the property without the consent of the other co-owners has no claim to recover that amount
 - Improvements refers to the expenditure to improve the property as opposed to mere repairs or maintenance

Equity

- Sometimes allows these payments to be taken into account upon partition or sale of co-owned property
 - *Boulter v Boulter* (1898)
- But he who seeks equity must do equity

s 233 Property Law Act

- If the property is improved, VCAT can make an order of compensation to be paid by one co-owner to other co-owner/s
 - In making the order, VCAT takes into account expenditure put into the land

Ryan v Dries (2003)

- FACTS:
- ISSUES:
 - Whether a claim for contribution to mortgage payments should be treated as a claim for expenditure
 - If so, how should the occupation rent be calculated?

- RULES: Occupation rent can be offset against mortgage repayments where the contributing co-owner seeks to recover the expense under the equitable principles of account
 - So equity has jurisdiction to deal with accounting in this context

Right to Occupy and Occupation Rent

Common Law

- If one co-owner is in sole occupation of the land, they have no obligation to pay occupation rent to the non-occupying co-owners
- 3 exceptions:
 - There is wrongful exclusion of a co-owner by another co-owner
 - The wrongfully excluded co-owner may claim rent and/or mesne profits (an occupation fee)
 - Temporary exclusion is not an ouster
 - Acting violently to force others to leave is an ouster
 - If the other co-owner gets a court order to exclude this violent co-owner, it will not be wrongful exclusion
 - There is an express agreement between the co-owners that occupation rent is payable
 - *Leigh v Dickeson* (1884)
 - A co-owner in sole occupation claims from the others an allowance for improvements he or she has made to the land
 - A set off
 - The rent cannot exceed the amount claimed for improvements or repairs
 - So the one making repairs pays a bit less on rent based on the cost for repairs
- Where occupational rent is payable, it is calculated by reference to the proportionate share and the open market for the property
- VCAT may order occupational rent when (PLA s 233(3)):
 - An occupying co-owner is seeking compensation, reimbursement or an accounting for expenses incurred
 - A claimant co-owner has been excluded from occupation
 - It was impracticable for the claimant co-owner to occupy the land and the claimant suffered detriment as a result
- s 234 PLA

Right to Rents Received from Occupation or Use of Land

- Equity enforces an obligation to give the other co-owners a proportion of the profits from the rent
 - If the rent exceeds their proportion of the ownership
- But this obligation does not exist at common law

Right to Encumber or Alienate the Interest of a Co-owner

- A co-owner may transfer their interest to another person, provided that it doesn't interfere with the right of the other co-owners to possession
- Each co-owner (both joint tenants and tenants in common) has a right to deal with their interest by way of:
 - Sale
 - Lease
 - Mortgage
 - Easement
 - Any other encumbrance

- But the encumbrance must not interfere with the possession of the remaining co-owners
- If a co-owner grants a lease of their interest, then the lessee stands in the position of the co-owner and has a right to enjoy possession of every part of the land

Hedley v Roberts (1977)

- FACTS: A neighbour was permitted to build a toilet on the co-owned land by one of the other co-owners
- ISSUE: What is the effect of an easement encumbrance on a co-owned property?
 - Did the easement bind the other co-owner?
- HELD: The toilet did not interfere with the right of the 2nd co-owner to possess the land
 - It was on a piece of land that wasn't being used anyway
- RULE: A joint tenant or TIC can encumber his interest in the land and compel the co-owner to submit to the encumbrance
 - So long as it does not interfere with the right of that other co-owner to possession of the land
 - When a joint tenant dies, any encumbrance they held is extinguished along with their interest
 - It is not split up to the remaining co-owners
- If the co-owner who died was a TIC, any encumbrance that they held will pass on to their beneficiary

Biviano v Natoli (1998)

- FACTS: A de facto partner was kept away from the property that he co-owned as a TIC
 - Someone else obtained an apprehended violence order against him which kept him away
- ISSUE: Did these actions amount to an 'ousting' of the co-owner?
- HELD:
- RULE: There can be no ouster or exclusion where one co-owner excludes another pursuant to a court order allowed under statute