

**LAW5018 – ADVANCED
PROPERTY LAW**

EXAM CHECKLIST

T1 2017

Indefeasibility

- Once registered, the reg'd prop's title is immediately indefeasible ([Barwick CJ](#) in *Breskvar*)
 - This makes their title free from any other claims
- S 40(1): No instrument is until reg'd shall be effective
- S 41: Folio is conclusive evidence
- S 43: Notice provision
- S 44: Protection of purchaser provision
 - BFP gets protection of indefeasibility

Scope of Indefeasibility

- Indefeasibility of registered lease (*Mercantile Credits*)
- Lease: what part of the lease is granted an indefeasible title (*Mercantile*)
 - Only parts that are effectively part of the estate or intimately connected with interest
 - Option to renew is indefeasible, if it is specifically enforceable ([Barwick CJ](#))
 - Option to purchase is not indefeasible as it is separate and independent from tenancy

Mortgages and Indefeasibility

- If mortgagee fails to properly verify the authority and identity of the mortgagor, they lose the benefit of indefeasibility
- S 74(5): If it's not enforceable at law, mortgagee must discharge the mortgage as soon as practicable
- S 87A verification of identity requirements
 - On/ after 24th September 2014
 - S 87D: Reg'd prop is entitled to be indemnified
 - S 87E: Caps interest mortgagee can charge

S 87A(1)

- Requires mortgagee to take reasonable steps to verify identity of borrower

S 87A(2)

- Reasonable steps are at the Registrar's determination
 - Determine diff requirements for individuals & companies
 - Individual: original docs and face-to-face interview
 - Company: company search, face-to-face interview with directors, cite documents
- Need current documents such as passport, drivers licence
- *Pyramid v Scorpion*: example of failed satisfaction of requirements

S 87A(3)

- Consequence of failing to take reasonable steps:
 - Registrar refuses to register mortgage
 - Registrar may remove mortgage from register
 - Discretionary
 - May be a valid in personam claim if the bank has failed to take reasonable steps, as it could create a breach of statutory duty
 - May mean *Mercantile Credits* is redundant
- Consider agency – distinguish from *Dollars & Sense*
- Also applies to variation of mortgages: s 87A(4)

Exceptions to Indefeasibility

1 Fraud

- Who is the reg'd prop? Write it down *
 - ✓ Who is acting fraudulent?
 - ✓ What type of fraud?
 - ✓ Can it be brought home to reg'd prop?
- ✓ S 42 TLA: fraud is an express exception to indefeasibility
- ✓ Fraud under TS is defined as: Actual fraud, that is, dishonesty of some sort, not what is called constructive or equitable fraud” or moral turpitude (**Lindley LJ** in *Assets v Mere Roihi*)
 - ‘Or willful blindness’
 - And the fraud must be brought home to the RP (*Schultz*)
 - This is to set aside the reg'd document, or mortgage
 - If agent involved, consider whether agent is acting within scope of authority/knowledge
- ✓ If mortgage (post 24/9/14), are VOI requirements met?
- ✓ S 44(2) TLA: No person can maintain an action to recover the land against the re'd prop except in particular named circumstances
 - ‘Protection of purchaser’ provision
- ✓ S 110(1) TLA doesn't mention fraud, have to claim compensation under (c) or (g)

Mistake by Registrar

- S 44H(1) TLA: Registrar may correct errors and omissions in Registrar
- S 103(2)(a): Rights accrued prior to the correction of errors are protected
 - ‘Slip rule’ from *Frazer v Walker*
 - Can't correct it if there was a minor mistake in transfer, due to slip rule (narrow)
- S 103: Can correct it if there was mistake in transfer spelling, as this was a mistake at the office
 - Correct it as if the error never occurred

Types of Fraud

- Fraud against the owner of an unregistered interest (*Loke Yew*)
- Supervening fraud (post registration) (*Bahr v Nicolay minority*)
- Wilful blindness (*Pyramid*)
- Agency (*Schultz; Dollars & Sense*)
- Impersonation (*Grgic*)
- False Attestation (*Russo; AGC v De Jager*)
- Collusion (*Breskvar v Wall*)

Fraud Against Holder of Prior Unregistered Interest

- S 43 TLA: No person is affected by actual/constructive notice of unregistered interests
 - Purchasing with notice of prior unregistered interest isn't fraudulent (*Loke Yew*)
- Requires some degree of actual dishonesty or moral turpitude (*Pyramid*)
- *Ferguson*: possible causal link required between fraud and loss by defrauded party – may overrule *Bahr*
 - Said there needs to be detrimental reliance in order to rely on fraud
- Pre-registration promise: *Loke Yew*
- Post-registration promise: *Bahr* (held not to be fraud, needs be pre)
- HC is split whether dishonesty after registration constitutes fraud (*Bahr v Nicolay*)

Equitable Interests Arising by Operation of Law

RT's and CT's are exempt from writing requirements: s 52(2)

- Trusts can convert into priority disputes

RESULTING TRUSTS

Arises when the legal title to property is transferred to someone, but that person isn't intended to be the beneficial owner of the property. They hold the legal title on a resulting trust for the purchaser

'Resulting trusts do not require written evidence'

- ✓ Are there unequal contributions to purchase price?
 - If yes – presumption of RT arises
- ✓ Can presumption be rebutted by advancement?
- ✓ Can presumption be rebutted by evidence of contrary intention?
- ✓ Implication

1. Voluntary transfer/Gift

'S is the reg'd prop, so at law he is the sole owner. But because he gifted the property to P, at equity it is presumed that P holds the property on RT for S (*Calverley*)'

- Intention to gift is at the time of transfer or purchase
- Must be actual intention, can be inferred from words/conduct

2. Purchase money

'S is the reg'd prop, so at law he is the sole owner. At equity, S and X can each hold a distinct share of their contribution to the price on trust'

- 'The parties contributions to the purchase are not reflected in the legal ownership as the property is only registered in X's name'
- Limited to time of transfer only
 - Contributions to purchase price: eg mortgage liability, cost price, legal fees, stamp duty (*Boumelhem*)
 - NOT: later expenses eg. mortgage repayments, living expenses, repairs
- Paid 76% of purchase price (*Cummins*)

Presumption: Equity presumes you don't intend to give away your equitable interest in the property

- Can this presumption be rebutted?

RT can be rebutted by presumption of advancement

- Law presumes the transferor intended to make a gift in certain relationships, gives away their title
 - This is an exhaustive list (*Nelson*)
 - Eg Husband to wife, parent to child
 - Only for family homes, not investment properties (*Cummins*)
 - **Gibbs CJ** argued in obiter it should be applied to de factos (*Calverley*)
 - **Mason & Brennan JJ** disagreed, de factos intend to be independent
- This can be rebutted by evidence of contrary intention (as in *Boumelhem*, parents rebutted it by showing they didn't intend to gift him the property)

Priority Disputes

- If all other things are equal, the first in time is accorded priority (*Rice v Rice*)
- Have to establish what the interests are and which is first in time
 - Actually establish an equitable interest has been created first

Legal v Legal

- S 34(1): Priority according to lodging
 - S 44E: Applies to electronic transactions

Legal v Equitable

- Legal prevails, even if legal owner had notice of equitable
- S 43: Notice/knowledge is not an exception to indefeasibility
 - Not if there's an exception to indefeasibility → consider fraud
 - Consider buying for under market value
 - Consider registering incredibly quickly
- However - bound by equitable interest if:
 - Promises (*Bahr v Nicolay*)
 - In personam

Equitable v Equitable

- Priority rules
 - Notice/merits test
 - Better equity/prima facie
 - Negligence/estoppel

Equitable v Equity

- Priority given to BFPFVWN (*Latec*)
- Examples of an equity:
 - Right to have transaction set aside for mistake and undue influence
 - Right arising from estoppel
 - Action to set aside a mortgagee sale (*Menzies J* in *Latec*)
 - Disagreement whether this is equity or equitable interest
 - Improper mortgagee sale: under market value

Examples

- Action to set aside a mortgagee sale vs. BFP purchaser from mortgagee sale
 - HC in *Latec* classifies as proprietary equity, or can be equitable interest vs equitable
- Estoppel claimant vs. holder of RT
 - Equity v equitable
- *Baumgartner* CT vs. purchaser from vendor
 - Equity or equitable vs equitable

If they have caveated their interest, it is NOT legal

- If not caveatable, can argue *TLA s 106(1)(a)(iii)*: Element of fraud

Equity v Equitable (p 66)

- Mere equity: Right enforceable in relation to property (*Swanston*)
- Priority rule: If dispute is between an equity and an equitable interest priority is given to BFPFVWN (*Latec*)
 - Notice includes actual, constructive and imputed
- Right to set aside a fraudulent sale is a mere equity (*Menzies J* in *Latec*, *Kitto J* agreeing and *Taylor J* in dissent, he said it was an equitable interest)
 - *Breskvar* held *Taylor J*'s line of reasoning, but *Latec* would prevail
 - This is because *Swanston* interpreted *Latec* as the right of a borrower to set aside a mortgage as a mere equity (not proprietary) and therefore not caveatable

Can Borrower Halt Purchaser of Mortgagee sale from Registering?

Priority dispute between mortgagor (Borrower from Bank) v Purchaser from Mortgagee (Bank sold to)

- Pre-registration: no right for borrower of mortgage to lodge a caveat, this is a mere equity (*Latec*)
 - Need a separate and distinct interest (*Swanston*)
 - Could get it set aside for fraud under s 106(1)(a)(iii) (*Latec*)
 - Possible *Swanston* was decided incorrectly, but we're bound by it (*Vasiliou*)
 - Can get an injunction (*Forsyth*)
- Post-registration: purchaser's title could be defeasible for fraud

Legislation

- S 76(1) TLA: If mortgagor defaults in payment and default continues for one month, the mortgagee can serve on the mortgagor a notice to pay
- S 77(1): If the default is not remedied within one month after the service of the notice, the mortgagee can exercise its power of sale
 - When selling, the mortgagee must act in good faith having regard to the interests of the mortgagor – s 77(1)
- S 77(4): If the mortgagee sells the land to a BFP, they obtain full fee simple title (which is indefeasible subject to exceptions)
 - Protects purchaser in absence of fraud and other exceptions once registered