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# Fundamental Concepts in Land Law

## Doctrine of Tenure

- Began in feudal England, where bundles of rights to land were spatially divided so that several people could have proprietary interests in one piece of land.
  - One person (tenant) holds land of another person subject to performance of obligations (services and incidents). ie, citizens' titles can be traced to initial grant from King.
  - Technically, all land is held directly of the Crown (b/c all land titles originate in Crown grants): **Mabo**
  - The modern landlord – tenant relationship is similar to traditional tenure.
  - Traditional doctrine of tenure acted to obstruct recognition of native title until Mabo.
- NB: Land Acquisition (Just Terms Compensation) Act 1991 sets out how Crown can take its land back.**

## Doctrine of Estates

A doctrine that divided land up upon the basis of time, or 'temporally.'

Estates can be either freehold or leasehold. Leasehold estates are less than freehold estates.

## **Freehold Estates**

### **Fee Simple:**

- Full ownership of land, confers the lawful right to exercise over, upon, and in respect to, the land all rights of ownership save the extent that any such right has been abrogated, qualified or varied by statute, by the owner of the fee simple or by a predecessor in title: **Gumana v Northern Territory**
- Widest powers of enjoyment wrt all the advantages derived from the land itself and anything found on it: **Wik**
- Entitles the owner to possession of the land for an indefinite period

### **Life Estate**

- Created when an interest in land is given to a person for life and terminated on the death of the tenant.

## **Leasehold Estates**

**Fixed term lease:** lease for a term that expires immediately at the end of the period.

**Periodic tenancy:** this is similar to fixed term, but it does not expire until appropriate notice is given.

**Tenancy at will:** may be determined at any time by either party, subject to a 'packing up period' in some cases.

**Tenancy at sufferance:** when a tenant takes possession of the land lawfully pursuant to a lease, but continues wrongfully in possession after termination of the lease.

**Easement:** A right to do something on someone else's land. Easements always affect two pieces of land - the land benefited (the 'dominant tenement') and the land burdened, (the 'servient tenement'). Easements 'run with the land'.

**Restrictive (or freehold) covenants:** A right to stop someone doing something on their land, e.g. a right to prevent a neighbour building above two storeys and blocking our harbour view. Like easements, restrictive covenants affect more than one piece of land; they affect land that is benefited (ie doesn't have its view blocked) and land that is burdened (land that cannot have a building of more than two storeys).

## **Statutory Modifications to the Common Law**

- Presumption of disposal of the entire interest in land, (ie, the fee simple).

## Rights to Property

- Right to use or enjoy:
  - **Yanner v Eaton:** 'property' does not refer to a thing, it is a description of a legal relationship with a thing. Usually treated as a bundle of rights.
- Right to alienate, or assign
- Right to exclude: you have a private right to your property, exercisable against the general public.

## **Possession & Limitation of Action: Adverse Possession**

- Possession: A person with possession of land is in control of that land to use and occupy.

# Indefeasibility

## Real Property Act 1900 (NSW)

### **s 42 – Indefeasibility of title, Registration creates title**

The registered proprietor's interest will be 'absolutely free' of all other interests claimed in the land, except those registered. I.e., the registered owner has an 'undefeatable' interest.

Fraud will vitiate a registered title.

Registration creates or transfers legal title.

### **s 43 – Not impeded by notice,**

Notice of an unregistered interest is ineffective, except in cases of fraud. (Knlwlg of an unreg interest ≠ fraud)

Prospective purchases need not inquire about the previous reg prop's registration.

(s43 creates a new priority rule)

### **s 41 - Dealings not effective until recorded in Register**

Only instruments registered under this Act will be effective for interest in land.

### **s 42(1)(d) – Unregistered leases for terms of 3 yrs or less bind the registered proprietor.**

Short-term leases for < 3 yrs need not be registered.

- The Torrens register is conclusive wrt ownership of land.
- **Frazer v Walker [1967]** at [580]
  - > Indefeasibility of title describes 'the immunity from attack by adverse claim to the land or interest wrt which he is registered, which a registered proprietor enjoys.'
- Indefeasibility refers to "any estate or interest in land recorded" (incl mortgage, lease, easement, fee simple)
- The objectives of Torrens title are:
  - Provide a conclusive register encompassing all the facts relative to the title,
  - Ensure that purchaser's not adversely affected by any infirmities in the vendor's title which do not appear on the register; saving the time and expense of personally investigating the title,
  - Provide a guarantee by the State that the register folio is true and complete.
- Sections 42 and 43 RPA create a new priority rule:
  - **s42: Title only by registration. Registered title is indefeasible.**  
OLD: *nemo dat* rule (you cannot give what you haven't got; earlier legal interest prevails)
  - **s43: No purchaser is bound by notice of an unregistered interest.**  
OLD: bona fide purchaser rule

## Deferred / Immediate Indefeasibility?

*Applies where a person (the 'forger') forges the signature of the real registered proprietor on a transfer and sells the property to an innocent purchaser.*

### Immediate indefeasibility applies.

#### **s45 Real Property Act: Bona fide purchasers & mortgagees are protected irt fraudulent transactions**

- Protects BFPFV where the vendor's title was registered fraudulently.
- The defrauded party [orig owner] has an equitable interest & can cancel the reg title of the fraudulent party before the title is transferred to a bona fide purchaser.

- **Immediate** – Good indefeasible title is transferred to the bona fide Purchaser immediately on registration of forged instrument. (Protects purchasers.)

- **Deferred** – The title of a bona fide purchaser who registers a forged instrument is 'defeasible', (so can be set aside by a court) UNLESS the Purchaser has already passed title along to a subsequent purchaser, at which point the title becomes indefeasible.
- Immediate indefeasibility promotes '*dynamic security*' (or 'ease of transaction'), which protects the reasonable expectations of the of purchasers that they will acquire good title. Good dynamic security facilitates easy and cheap transfers (because the purchaser doesn't have to investigate) and thus encourages people to buy assets.
- Land title registration is meant to promote two forms of security – security of title (making existing property rights secure) and ease of transaction (making conveyancing quicker, easier and cheaper). Not having any indefeasibility would run contrary to the purposes of having torrens title.
  - **Assets Co v Mere Roihi [1905]** - Accepted the principle of immediate indefeasibility.
  - **Frazer v Walker [1967]** - [*authority*] Upheld the principle of immediate indefeasibility.
  - **s45 RPA**: NSW Parl endorsed *Frazer v Walker*; confirmed immediate indefeasibility.
    - Hence, a purchaser registered via a void instrument (eg, by fraud or error) nevertheless obtains indefeasible title immediately (as long as the purchaser didn't cause the fraud).
  - **Breskvar v Wall (1971)**

Facts: Fraudulent party filled in the blank transfer of title doc w the name of his grandson. Grandson registered the title, sold it to a BFPFV.

Held: Registration creates title [even if the vendor is fraudulent, but the purchaser is bona fide]. Orig owners lose; title of BFPFV is indefeasible.

    - Registration of a void instrument by a BFPFV is effective, creates indefeasible title.
    - Registration of title obtained by fraud by the fraudulent party is defeasible.
    - The title is subject to the defeasible title of the defrauded vendor.
    - The fraud creates an equitable interest on the part of the defrauded [orig owner], (the legislation allows an exception for fraud). They can thus cancel the registration of the fraud [who fraudulently registered the title].
    - Hw, once the [fraudulent party] transfers his title to a third party (bona fide, good consideration), it becomes a question of priorities:
      - If the third party completes registration entirely, than he obtains indefeasible title.
      - If the third party doesn't complete registration before the original vendor bring a claim, the vendor's earlier equitable interest prevails over the third party's later equitable interest.
        - UNLESS the orig vendor's conduct helped encourage the third party's false assumption that the title vested with the fraudulent party (eg, postponing conduct in handing over the blank transfer).
        - Note; **s43A RPA** would now settle the priorities dispute. (Protection as to notice of person purchasing land before registration. (See *Competing Equitable Interests.*))

### Instruments Void for Defects Other than Forgery

The effect of registration in rendering void instruments indefeasible is not confined to forgeries: **Story v Advance Australia Bank**. Other examples of void instruments leading to indefeasible title on registration are:

- **Morton v Black**: Unauthorised alteration by the mortgagor's solicitor did not affect the rights of the mortgagee
- **Broadlands International Finance v Sly**: Registration of a document purported to be executed under a power of attorney but before the power of attorney was signed
- **Spina v Conran Associates**: Registration of a mortgage executed by an attorney acting beyond the powers conferred by a power of attorney
- **Consolidated Development v Holt**: Registration of an instrument invalid at common law because of the rule against perpetuities

- *Horvath v Commonwealth Bank*: A mortgage given by a minor was indefeasible
- *Co-Operative Property Developments v Commonwealth Bank*: Registration of an invalidly executed mortgage gave the mortgagee an indefeasible title in the absence of fraud.

### Indefeasibility of the terms in a registered instrument

Covenants are an essential part of a registered lease (incorporated term).

The first in time takes priority / is indefeasible; bw a covenant/ leasehold interest + mortgage interest.

- *Karacomiakis v Big Country* affirmed *Mercantile Credits*: The court held that a covenant to pay rent is an essential and intimate part of the interest created upon registration.
  - *Mercantile Credits v Shell (1976)*

Facts: Tenant's lease agreement had a covenant w an option of renewal of their lease after 5 years. The landlord defaulted on payment of their mortgage. The mortgagee [lender] wished to claim their rights to sell the land.

Held: Tenant's right of renewal prevailed over mortgage as it was registered first in time.

    - Right of renewal is so intimately connected with the lease that it should be regarded as part of the lease and entitled to the same priority as the lease.
    - Does not extend to a personal right created by a covenant.
- Indefeasible interests (eg, option for renewal) will expire if the time for their exercise expires.

### What is indefeasible in a void mortgage?

- Is the borrower's covenant to pay enforceable on registration of void/forged mortgage (they didn't take out the mortgage, but their property is secured as security)?

#### THREE APPROACHES

- Full indefeasibility: The lender can hold the registered owner personally liable for the debt. The indefeasibility of a registered mortgage '*plainly*' extends to the borrower's covenant to pay: *Pyramid Building Society v Scorpion Hotels [1998] 1 VR 188*
- No indefeasibility: While the mortgagor's security interest is indefeasible, the covenant to pay is not: *Grgic v ANZ Banking Group (1994)*
  - HC indirectly supported this approach in *Gumland v Duffy Bros (2008)*, when they said that the mortgagor's covenant to pay does not touch and concern the land.
- Limited indefeasibility: The personal covenant to pay is made enforceable by registration only to the extent necessary to make the mortgagee's security interest effective: *Duncan*; not endorsed in NSW.

## Exceptions to Indefeasibility

→ Fraud, 'In personam' Rights, Short-term Tenancies, Overriding Statutes, Caveats.

### (Not) Volunteers

A Volunteer is one who does not give valuable consideration for their title (eg, a gift donee, a devisee under a will).

NSW: being a volunteer is not an exception to indefeasibility.

### **Immediate indefeasibility (s42) extends to volunteers in NSW: *Bogdanovic v Koteff***

- NSW, Prior to *Bogdanovic v Koteff*: indefeasibility provisions did not protect a volunteer.
  - The effect of denying indefeasibility: any equitable interests would survive registration of title and be enforceable against the volunteer.

Current law: ***Bogdanovic v Koteff (1988) NSW***

→ Immediate indefeasibility extends to protect volunteers. Registration creates title.

- A volunteer who registers their title (received under gift) will be protected from attack from prior unregistered equitable interests.
- Other states differ on whether volunteers enjoy indefeasibility (not in Victoria: *Rassmussen*).  
> The High Court has arguably resolved this issue through some obiter dicta in *Farrah Constructions v Say-Dee*, in which it indicated that volunteers do obtain indefeasibility, and no distinction is made between volunteers and purchasers.

## **Fraud**

**The title of a FRAUDULENT registered proprietor is defeasible. Their title cannot prevail against the interest of the person defrauded (ss 42, 43).**

- ***Waimiha Sawmilling Case***: “The term ‘*fraud*’... means dishonesty, a wilful and conscious disregard and violation of the rights of other persons.”
- There must be something in the nature of ‘personal dishonesty or moral turpitude’: *Butler v Fairclough*.
  - Blurring of distinction bw *the in personam* and fraud exceptions: *Bahr v Nicholay*. (as the *in personam* exception has expanded to include unconscionability.)
- ***Fraud must be operative***: Fraud will only be an exception to indefeasibility if the fraud is 'operative'.
  - Ie, if the fraud actually caused a person to act in a way that is detrimental to himself.
  - If the fraud resulted in no harm, it won't affect indefeasibility: *Bank of South Australia v Ferguson* (1998)
    - ***Bank of South Australia v Ferguson***
      - The document ‘*was not prepared for...used for the purpose of...[nor] have the effect of, harming, cheating or otherwise being dishonest*’.
      - The fraud must be ‘operative’ (ie, operate on the mind of the person said to be defrauded and to have induced detrimental action by that person).
- It is fraud to collude or trick someone into not registering their interest: *Waimiha Sawmilling*

## **Fraud against the Holder of a Prior Unregistered Interest**

Notice is effective if fraudulent purchaser is notified of prior unregistered interest)

- ***Loke Yew v Port Swettenham Rubber***
  - Facts: LY bought 58 acres of 322 acres from Eusope without registration. Eusope sold 322 acres to PS on condition that they not disturb LY's possession. PS offered LY money to surrender his rights. He refused. PS bought action for possession as registered prop of entire 322 acres.
  - Held: The verbal assurance PS gave to Eusope to induce the transfer of property was given fraudulently; PS went back on its promise. PS is guilty of fraud, their title is defeasible. [PS ordered to transfer 58 acres to LY.]
- It is not fraud for a registered proprietor to merely acquire title with notice of an existing unregistered interest, or to take a transfer knowing that its registration will defeat such an interest: *Bahr v Nicholay*

## **Fraud Distinguished from Carelessness**

Carelessness in examining a doc for fraud, or the failure of a party to make inquiries (even if they were R), will not make a registered proprietor guilty of fraud.

- ***Assets v Mere Roihi***
  - Failing to discover the fraud of another (by not making inquiries) is not fraud.
  - The fraud must be 'brought home' to the party – Ie, the party must be a part of the fraud to come within the exception.
  - Hw, wilful blindness (shutting one's eyes to avoid implications) is fraud. (Ie, Having suspicions of fraud, but not making inquiries so as to not find out.)
  - A person who honestly believes that a transfer is legitimate and free from fraud is not guilty of fraud. > Thus, ‘constructive knowledge’ (knowledge which should and could have been

discovered by making normal inquiries) does not apply to fraud. Actual knowledge of the fraud is necessary.

○ ***Pyramid Building Society v Scorpion Hotels***

Facts: A mortgage was fraudulently executed by an unauthorised employee. Lender had no knowledge of irregularity and mortgage was registered.

Held: Mortgagee [lender] was NOT guilty of fraud

- Fraud does not extend to negligent errors or 'reckless indifference' by a person.

## **False Attestation of Instruments**

Fraud: if an employee of the mortgagee [lender] falsely attests the signature of the transferor [borrower] on a transfer/mortgage.

Not fraud: if the mortgagee honestly believed the imposter to be the person they were impersonating.

○ ***Grgic v ANZ Banking Group, Russo v Bendigo Bank*** – False attestation was not fraud

Facts: Bank employees did not detect fraud in registering of mortgage (borrower was an imposter).

Held: Not fraud under s42.

- The bank officer honestly believed the imposter to be the person she was impersonating, and acted with no conscious knowledge of the truth or falsity of what he had done.
- If reasonable steps had been taken to check the identity of person purporting to be the registered proprietor, loss may have been prevented. BUT due to immediate indefeasibility and narrow scope of fraud exception, the loss fell on the registered proprietors not the mortgagees.

○ ***Westpac v Sansom*** – False attestation was fraud

Facts: Bank officer falsely attested husband's signature on mortgage even though they did not witness the husband sign.

- Was deemed fraud.

○ ***Russo v Bendigo Bank***

Facts: Clerk falsely attested the forged signature despite not seeing mother sign, and despite instructions never to attest a signature without seeing the person sign in front of her. Her superior registered the mortgage, not knowing of the false attestation.

Bank tried to sell property, mother argued that bank's interest was defeasible due to fraud.

Held: No fraud. Bank's title [mortgage] is indefeasible.

- Clerk knew she attested falsely, BUT her conduct was not dishonest (ie, not a *willful and conscious disregard and violation of the rights of other persons*).
- She did not know that the signature was forged, or that the Plaintiff did not want the mortgage.
- To be fraud, their conduct must be dishonest and of conscious moral turpitude.
- Considered whether the law clerk gained anything from the situation, their possible dishonesty, and knowledge of fraudulent signature on paperwork.

○ ***Davis v Williams***

Facts: A clerk improperly registered a property to help avoid stamp duty.

Held: Not fraud; She didn't understand the conseq of her actions, and was just trying to help.

○ ***Vella v Permanent Mortgages (NSW); Hilton v Gray; Royalene v Registrar of Titles.***

- Carelessness, incompetence or stupidity do not amount to fraud

- Original registered proprietor who loses through fraudulent registration of a forged document may be entitled to compensation from the state.

## **Fraud and Agency**

A party may be guilty of fraud if its agent acted fraudulently: ***Assets v Mere Roihi***

○ ***Schultz v Corwill Properties***

There are two possible agency situations:

1. The agent himself has acted fraudulently.
  - If the agent was 'acting within the scope of his actual or apparent authority' (given to him by the principal) then the principal will be guilty of fraud.
2. The agent has learned of the existence of fraud by another.
  - If the agent has actual knowledge of fraud (not constructive), then the agent will be presumed to have communicated to the principal all information that he gained 'in the course of carrying out the transaction'.

## Statutory Provisions to Impose a Duty on Mortgages

**s56C(1) Real Property Act:** A mortgagee [lender] must, before lodging a mortgage for registration, take reasonable steps to ensure that the mortgagor [person who, or on whose behalf, the mortgage was executed] is or will become the registered proprietor.

- Reasonable steps are deemed to be taken if the mortgagee complies with regulations: **s56C(2)**.
- Similar provision applies for the transfer of a mortgage: **s56C(8)**
- Compensation is not payable wrt any loss or damage suffered by a mortgagee [lender] or transferee arising from its failure to comply with s56C: **s129(2)(j)**.

## 'In personam' rights

A claim *in personam* (against a person) may arise from legal or equitable causes of action.

**Plaintiffs may bring a claim *in personam* against a registered proprietor: *Frazer v Walker* (per Wilberforce LJ).**

Claims 'in personam' arise from a dealing /relationship bw the plaintiff and registered proprietor.

(unlike claims *in rem*, which are property rights that the plaintiff can assert against the world).

- ***Bahr v Nicolay (No 2)***

Facts: B had a contract with N for repurchase of their land. N sold land to T, who knew of and agreed to the repurchase clause (cl 4). Hw, T refused to sell to B when they tried to exercise the repurchase option.

Held: Contract between Bahrs and Nicholay gave rise to legal right.

  - Legal right enforceable against Thompson because he undertook to be bound by it. A trust relationship arose bw Thompson and Bahr, as T was not party to the original contract.
  - 'Indefeasibility provisions are designed to protect a purchaser from defects in the predecessor's title, not to free him from his own contractual promises (interests with which he has burdened his own title.)'
  - The registered proprietor is bound by obligations he agreed to as a basis for obtaining title.
  - An exception to indefeasibility is made for dishonest repudiation of a prior interest that the registered proprietor acknowledged or agreed to recognise.
- ***Gunns v Balani* [2011] FCA 431**
  - Followed ***Bahr v Nicolay***
  - Where a mortgagor [borrower] has expressly agreed to be bound by a contract with a purchaser, the registered mortgage is subject to the purchaser's prior unregistered interest.
- ***Valbirn v Powprop* [1991]:**
  - Where a purchaser contractually agrees to be bound by an existing unregistered lease, they are bound by this personal equity.
- ***Logue v Shoalhaven Shire Council***
  - In personam rights bind you both before and after registration.
- ***Mercantile Mutual Life Insurance v Gosper***

Facts: Husband forged wife's signature to vary mortgage. Bank registered mortgage using the CT (bank not authorised to use CT for this purpose).

Held: Wife had a personal equity against the bank, to deprive them of their interest acquired through the forged mortgage.

- Equity arose because the mortgagee [lender] breached its obligations to the wife as custodian of the CT (not because the instrument was forged). They were not authorised to use her CT to register the variation.

- The decision in ***Mercantile Mutual Credits*** has been seriously criticized. The bank had no knowledge of the forgery, so had no reason not to register the mortgage. – Eg, If husband had stolen the CT and given it to the bank, there would be no cause against the bank; so why is the bank liable if it already had the CT?

## Must be a Known Cause of Action

**A plaintiff can only bring an *in personam* claim if there is a known cause of action in law or equity (eg, breach of contract, misrepresentation etc): ***Grgic v ANZ Banking Group***.**

- ***Conlan v Registrar of Titles***

An *in personam* claim must be based on more than an innate sense of fairness. It must be a recognised legal or equitable case of action.

- An *in personam* exception can arise where:
  - A registered proprietor who has agreed to sell their property denies the agreement before registration is complete → constitutes breach of contract.
  - A trustee denies a beneficiary their interest and registers in another's name → breach of trust.
  - A purchaser who has bought a house under a contract affected by a vitiating factor → *in personam* claim based on misrepresentation /undue influence /duress.

## Must be an Element of Unconscionability

**A registered proprietor is not susceptible to a claim *in personam* unless he has acted unconscionably.**

- Whilst the court in ***Conlan*** held that mere unconscionability is not enough to support an *in personam* claim, and that a known cause of action must arise, there is some suggestion that unconscionability is a requirement (in addition to a known cause of action) of the *in personam* exception.
  - ***Vassos v State Bank of South Australia***

Facts: V's signature was forged by their co-owner on a mortgage doc. The bank had no knowledge of the forgery and registered the mortgage. Bank eventually tried to sell house. V objected.

Held: V lost, as the bank (reg prop of the mortgage) did not act unconscionably.

    - A registered proprietor is not susceptible to a claim *in personam* unless he has acted unconscionably.
    - (The bank's title as mortgagee is not defeated by the fact of forgery, as they were innocent of fraud or knowledge of the fraud.)
    - "The bare fact that a party has not assented to the transaction in an instrument registered under Torrens system legislation does not give that person a right enforceable by *in personam* action to have the transaction reversed."
- However, the Queensland Court of Appeal disputed this:
  - ***White v Tomasel [QLDCA]***

Facts: An auctioneer acted outside his authority by selling W's house to T for a price lower than specified. T completed registration, and W sued claiming rights *in personam*. T argued they did nothing unconscionable.

Held: Unconscionability is NOT a general requirement (McMurdo J).

- Whether this law applies in NSW has been debated – ***White v Tomasel*** was not followed in ***Battenberg v Union Club*** (for going 'too far'), but followed in ***Harris v Smith*** (ie, the plaintiff should not be required to prove unconscionability).

- It remains unclear exactly what the law is, but unconscionability and its importance should be noted.

- The expansion of the *in personam* exception to include unconscionability has blurred the distinction between the *in personam* and fraud exceptions: ***Bahr v Nicolay***.

### Special Equity Cases

- An *in personam* (personal equity) exception which incorporates the element of unconscionability is the equity **where a wife has to set aside a surety given to a third party to secure the debts of her husband**.
  - ***Yerkey v Jones***: in some circumstances it may be appropriate to give special protection to a wife who gives a surety (confirmed in ***Garcia v NAB***, where the court left open the possibility of extending this principle to de-factos).

### Breach of Trust

A registered proprietor who obtains registration of property in breach of fiduciary duty to the transferor [purchaser] cannot rely on their registered title and claim indefeasibility to escape liability: ***Tataurangi Tairuakena v Mua Carr***.

- The same applies where the registered proprietor acquired title under circumstances giving rise to a constructive trust: ***Bahr v Nicolay***.
- Breaches of trust or fiduciary obligations contain the requisite element of unconscionability to bring an action against the registered owner *in personam*.
- This breach of trust has been brought as knowing receipt under the first limb of ***Barnes v Addy***.
  - ***Farah Constructions v Say-Dee***
    - 1<sup>st</sup> limb; knowing receipt of trust property does not give rise to a claim *in personam*. Consequence is gazumping, p 511.
    - 2<sup>nd</sup> limb; the breach of trust or fiduciary duty must be dishonest or fraudulent, then will be fraud as an exception to indefeasibility.

### Mistake

- In the absence of fraud, common mistake does not make a registered title indefeasible: ***Merrell Associates v HL Nominees***.
- In some circumstances, a personal equity (*in personam* right) may arise against a registered owner who has
  - Acted unconscionably in taking advantage of the transferors unilateral or mutual mistake: ***Majestic Homes v Wise***, or
  - Where a transferee unconscionably retains land transferred under mutual mistake: ***Lukacs v Wood***.

### Unlawful Action by Public Authorities

- ***Logue v Shoalhaven Shire Council [1979]***  
A council failed to observe the statutory requirements in selling land for overdue rates, and unlawfully bought the land itself. The irregularities did not invalidate the sale, and even if they did, the invalidity did not create a personal equity.

### Conclusion on the scope of the *in personam* (personal equities) exception

- The scope of the *in personam* exception has significantly narrowed recently. Although the HC in ***Bahr v Nicolay (no 2)*** envisaged personal equities as a broader in scope than the fraud exception, persons deprived of their land through forgery of a transfer or mortgage now have little chance of successfully asserting a personal equity against a careless transferee or mortgagee if there is no fraud: ***Pyramid Building Society v Scorpion, Vassos v State Bank of SA***.

### Short-term tenancies

- There is an exception to indefeasibility for short term tenancies in all Australian jurisdictions.
- The expense and inconvenience of registering short term leases (and the cost of their enforceability against third parties) outweighs the advantages.

# Competing equitable interests

LESSON: REGISTER / CAVEAT YOUR INTERESTS, PEOPLE!

**Priority rule:** the registered proprietor's title is only subject to those interests on the register, even if they had notice (ss 42, 43). BUT...

## RULES:

### Better Equity Rule

- Priority will go to 1<sup>st</sup> in time, UNLESS holder of 1<sup>st</sup> equity is guilty of postponing conduct: **Abigail v Lapin**
- If equities are equal in all other respects, priority goes to the first in time: **Rice v Rice**

### Notice Rule

- If the later equitable titleholder had notice of the prior equitable interest, the prior equitable interest wins:  
**Moffett v Dillon**

## Summary

Regards priority disputes bw multiple unregistered interest holders (who each have an equitable interest, s54A CA).

- Since the Torrens system provides a method for equitable interest holders to protect their interest by caveating, not caveating is significant when determining the "merits" of an equitable interest.
- The Torrens system provides mechanisms to notify others of the existence of interests in land. If someone cannot register their interest, they can caveat it. Caveating is encouraged to notify of an interest in land.

**It is good practice to lodge a caveat where you have an interest in land that has yet to be registered.**

- Failure to caveat is 'punished' by harsh measures (eg, in a dispute with a later equitable interest, the earlier uncaveated equitable interest will lose): **Abigail v Lapin**.
- Hw, a caveat may not be nec if the later equitable interest could have found out about the earlier.
- Also, it is not nec to caveat one's equitable interest under a contract for sale (s54A CA) in the 6wks bw signing the contract and registration. (But there is a risk that in the meantime the vendor could sell to another purchaser.) [Rule: 1<sup>st</sup> in time prevails unless there is postponing conduct].

When a vendor passes an equitable interest to one person, and then passes it again to another person, general rule:

- The earlier title only succeeds if the two equitable interests are equal in all respects. **If one has better equity to another, the time factor is immaterial.**

#### ○ **Rice v Rice**

The '**time**' of the equitable interest should only be used as a **last resort** to determine priorities between equitable interests. Instead, **the court examines the 'merits' of the interests.**

The merit is examined by looking at:

1. Nature and condition of the equitable interest, **s54A CA**,
2. Special circumstances of the interest in this case,
3. Entirety of a party's conduct (eg, failing to make proper inquiries, or not caveating an unregistered interest, will diminish a party's merit).

- There is a competing line of authority that **reverses the Rice v Rice order**:

**The first-created equity has priority, unless on the merits there are reasons why it should be postponed: Lapin v Abigail, confirmed in J&H Just v Bank of NSW.**

- An **exception** to the general rule is the concept is made in the instance of a **notice**:
  - If the later equitable titleholder had notice of the prior equitable interest, the prior equitable interest would win: **Moffett v Dillon**
- For unregistered titles (but have a contract for sale of land) see **s43A RPA**: Follow the priority rule (first in time prevails) > except where there is fraud.

## The importance of Notice in Equitable Priorities

Reversal of *Rice v Rice* – first in time will win unless there is some postponing conduct.

- ***Abigail v Lapin***

Facts: Lapins executed a signed transfer of title to Heavener as security for a loan (so H was the registered title holder). H mortgaged the land to Abigail. Abigail did not register the mortgage. Hence, A & L had competing unregistered interests.

Held: Abigail had priority.

- **Rule:** The first-created equity has priority, unless on the merits there are reasons why it should be postponed, (note, this reverses the order of *Rice v Rice*).
- Lapins demonstrated 'postponing' conduct: (L did not transact safely thru Torrens system!)
- The Lapins 'armed' Heavener with the CT and means of dealing with estate as the absolute legal owner – so they induced Abigail to believe H owned the land and act to his detriment. Lapins also failed to lodge a caveat, which would hve alerted Abigail/others to their interest.

- ***Butler v Fairclough***

Facts: Good [registered mortgagor] entered into an equitable mortgage with Butler [a charge], s54A CA. Butler did not lodge a caveat and failed to register until 7 days later. Hw, 2 days later, Good had sold the lease to Fairclough.

Held: Fairclough had better equity.

- *'The claimant who is first in time may lose priority by any act or omission which induces a claimant later in time to act to his prejudice.'*

- ***Heid v Reliance Finance Corp***

Facts: Heid gave transfer docs and CT to dodgy solicitor. Reliance [lender] advanced money on a mortgage to the solicitor, using the property as security. R did not register the mortgage.

Held: Reliance had priority.

- **Rule:** first in time prevails unless there is postponing conduct.
- Heid armed the solicitor with the ability to represent to third parties that Connell was the unencumbered owner of the land in fee simple, which was postponing conduct. Shouldn't have trusted solicitor!

- ***Just Holdings v Bank of NSW***

Facts: Bank did not lodge caveat or register its mortgage w Josephson (reg prop). Josephson executed 2<sup>nd</sup> mortgage w JH, also unregistered. Hence, competing unregistered interests.

Held: Bank had priority. Prima facie, applying the first in time rule, Bank of NSW wins.

- Failure to lodge caveat does not necessarily mean loss of priority. This does not constitute allowing subsequent persons to regard title as clear of equitable interests.
- Bank held CT, which was protection against a 2<sup>nd</sup> mortgage. (Bank holding CT is essentially equivalent to holding a caveat as no registration could occur without CT.)
- JH's postponing conduct: JH should have written to Bank requesting CT before executing mortgage!

- ***Moffett v Dillon***

Facts: M had an equitable charge (s54A CA) and lodged a caveat. Bank took mortgage without notice of equitable charge.

Held: Equitable charge had priority; Person taking w/ notice of earlier equity takes subject to it.

- Full actual knowledge of the existence of an earlier interest is fatal to the later equitable interest prevailing.
- If a later equitable interest knew of an earlier equitable interest, they have no grounds for complaint!

### s43A RPA

43A – *Protection as to notice of person contracting or dealing wrt land under this Act before registration.*

# Co-ownership

## Joint Tenancy

- JOINT TENANCY: Where two or more ppl simultaneously hold an interest in the same parcel of land.
- Joint tenants hold equal shares in the land.
- Must be noted on the CT; **Real Property Regulation 2008, reg 6.**
- 2 essential features: Right of Survivorship and the Four Unities.

### Right of Survivorship

- *Jus accrescendi* = when one tenant dies, the estate remains with the surviving joint tenants.
- The effect of the death is simply to free the property from the control of one of its owners, thus the interest of the deceased cannot be bequeathed or disposed of by will.
- A joint tenant can, hw, sever the joint tenancy during their lifetime, creating a tenancy in common which can then be passed on through a will.
- **s35 CA:** If there is uncertainty as to who died first, the older person is deemed to have died first; meaning the property flows to the younger and hence to their estate.
- **s25 CA:** A corporation can hold property as if it was an individual, and the dissolution of the company is equal to death with respect to determining survivorship.

### The Four Unities

The following 4 unities must be present for a joint tenancy to exist:

- *Unity of Possession:* Each owner is entitled to possession of the whole property, not exclusively for themselves but to be enjoyed together with the other tenants.
- *Unity of Interest:* The interest of each joint tenant must be the same in nature, extent and duration.
- *Unity of Title:* All joint tenants must derive their interests from the same document or act.
- *Unity of Time:* All of the joint tenants' interests must vest at the same point in time.

## Tenancy in Common

- In a Tenancy in Common, each tenant has a distinct yet undivided share in the property (no distinct boundaries are drawn), which can be dealt with at their liberty.
- Can be gifted or sold. There is no right of survivorship, interest passes through his/her will.
- Only unity of possession must exist for a tenancy in common.

### Presumption: Tenancy in Common

- [Outdated] CL presumption is that an interest given to two or more persons either is joint (co-ownership) unless there are words of severance: **Morley v Bird (1793)**
  - This presumption has been overridden by legislation = **s26 CA** (p 602)
    - S26 – Construction of conveyance of any property beneficially to two or more persons together**
      - (1) *In the construction of any instrument coming into operation after the commencement of this Act a disposition of the beneficial interest in any property whether with or without the legal estate to or for two or more persons together beneficially shall be deemed to be made to or for them as tenants in common, and not as joint tenants.*
      - (2) *This section does not apply to persons who by the terms or by the tenor of the instrument are executors, administrators, trustees, or mortgagees, nor in any case where the instrument expressly provides that persons are to take as joint tenants or tenant by entireties.*
- **At law**, the presumption is that tenants are tenants in common, (not joint tenants): **s26 CA**.

- Registration of ppl as joint tenants conclusively determines the nature of their interest. Hw, this does not prevent joint tenants establishing that they are tenants in common in equity: **Re Foley; Calverley v Green**.
- **In EQUITY**, tenants in common is also presumed: **Delehunt v Carmody**.  
**There are 3 situations where there will be a presumed tenancy in common at equity** (even if there is a joint tenancy (co-ownership) at law).
  - Business partners: **Lake v Craddock (1732)**,  
 - TiC presumed, otherwise person who died first would lose all of his investment.
  - Money advanced on a mortgage: **Re Jackson (1887)**,  
 - TiC presumed where 2+ ppl advance money on a mortgage (in equal shares or not), otherwise ppl would forgo their money if they should die before it was repaid.
  - Unequal contributions to the purchase price: **Robinson v Preston (1858)**,  
 - TiC presumed; Equity will consider hold the contributors as TiC in proportion to their respective contributions for ownership.  
 - Held as TiC; son cannot evict mother if she contributed: **Bull v Bull**  
 - TiC presumption has been extended to joint liability under a mortgage: **Ingram v Ingram**
    - If equal contributions: joint tenancy is presumed,
    - If a conveyance expressly declares beneficial interests: joint T: **Goodman v Gallant**
- **Malayan Credit v Jack Chia-MPH (1986) Privy Council**  
 Facts: Jack Chia and Malayan Credit leased a property together off the landlord. Bw them, they allocated floor space, apportioned the rent and were separately invoiced. They were joint tenants at law.  
 Held: Tenancy in common presumed in equity.
  - The 3 est categories [above] presuming a TiC are not closed; it is circumstantial.
  - Six features pointed towards the arrangement being one of tenants in common:
    - The lease was taken to serve the separate interests of both parties
    - Prior to lease the parties had determined who would occupy which area
    - The parties divided rent and charges in proportions corresponding to their sections.
    - They paid stamp duty and survey fees in unequal shares corresponding to their part.
    - The rent and service charges were paid in unequal shares

## Rights of Enjoyment of Co-Owners

### Right of Occupation

- Each co-owner has the right to possess and enjoy the whole of the land. Consequently, one co-owner can't sue another for trespass, except where a co-owner is excluded another from possession: **Stedman v Smith**.
- The right to possess and enjoy includes the right to invite someone to live on the premises: **Thrift v Thrift**

### Occupation Rent

- A Co-owner who elects not to exercise their right of possession is not entitled to claim compensation from occupying co-owners: **Luke v Luke**
- A co-owner who is in sole occupation is (usually) not liable for occupation rent.

- **Exceptions** to this rule:
  - Ouster by another co-owner.
  - If the parties agree on payment of occupation rent: **Leigh v Dickeson (1884)**
  - A defensive equity: Rent may be payable if the occupying co-owner seeks to charge the non-occupying co-owner compensation for improvements the occupying co-owner has made.
  - Where a domestic relationship has broken down, rendering the departure of one party reasonable in the circums: **Callow v Rupchev**