2:30 – 2:40 reading questions
2:40 to 3:20 question 1 (if 10 and 10 marks then each 20 minutes then first portion till 3:00 and second to 3:20)
3:20 to 4:00 question 2 (if two 10 marks q then first to 3:40 second Q to 4:00)
4:00 to 4:40 question 3 ((if two 10 marks q then first to 4:20 second Q to 4:40)

Template 1: H could not pay mortgage and it was sold to wholly subsidiary

This is based on the facts of Latec Investment v Hotel Terrigal. The general rule is that

4Tutorial Question Module 2 (Mortgagee and Mortgagor)

Gram and Georgia they were original owner (Mortgagor) and they have obtained the loan from Fast Cash and the house is mortgage as a security for the loan

Mortgagor would repay according to the mortgage agreement. If the proper requirements under the Statute IE Land Title act and property Act are all met this would mean the memorandum of mortgage will be executed and the legal mortgage will be registered. (In QLD Department of Natural resources and mines). The mortgagee must register the mortgage with the Department of Natural Resources.
Fast Cash is the legal mortgagee. The legal interest in Gram and Georgia's home now vests with Mortgagee (fast cash) resuming that they had registered their legal mortgage which is why they could exercise their power of sale in relation to breaches of the mortgage agreement by gram and Georgia. Gram and Georgia had what is equitable proprietary interest which is the right to redeem the property by repaying the loan amount.

i. So **Gram and Georgia** had <u>equitable proprietary interest</u> in the form of an <u>equity of redemption</u> and this interest arose when they gave the Fast Cash the mortgage over the Samson Street home. Equity of redemption is an interest that a mortgagor has in relation to the mortgage.
ii. **Fast Property** has <u>legal interest</u> as it is the registered legal owner of the property and it happened with the registration as the legal owner and it acquired the legal interest of the property (full title)
iii. **Fast Finance** was given a mortgage while all to the documentation was complete but the mortgage was never registered therefore it is not the legal title never transferred and No legal interest was created. So what Fast Finance has <u>Equitable Proprietary</u> interest in the form of equitable mortgage and this interest arose when the mortgage was completed
iv. **Quick loan** they had <u>equitable proprietary interest</u> in the form of <u>equitable mortgage</u>. It was granted an equitable mortgage because they did not register their interest. They did not take steps towards a legal mortgage. They were happy with equitable mortgage. There would have been a loan documents and the property would have been charged to Quick loan and they left it at that without doing anything about it. In order to register a legal mortgage there must be the memorandum of mortgage and all those formalities under the legislation must be met so if the formalities are not met then it is equitable mortgage which is short of those formalities.

Where equities are equal the first in time prevails. The general rule is where there is legal interest it prevails over the equity unless the legal interest is not right. If we look at Fast Property they would be caught with Fraud exception. Because Fast Cash sold the property to its subsidiary at a lower price therefore we will not legal title the priority because it is not bona fide.

We left with three equitable proprietary interests. If we apply the first in time rule then Gram and Georgia equitable interest has to get the priority. But here the equities are not equal. Although gram and Georgia did not act in fraudulent way but here the principle of delay defeats the equity may be applied here. Fast finance was part of that fraudulent act so we can take out this company from priority and put them back in the queue. Is Quick loans **equitable darling: means a third party, bona fide, purchaser, for value, without notice**. Quick loan from the facts seems to be equitable darling.
Analyse facts
We have the assumption that it was a third party, bona fide purchaser for value and without notice. Based on these assumption then the equitable principle apply that delay defeats the equity and quick loan gets the priority.

If there is a third party in the picture then the normal proprietary interest becomes <u>mere equity</u> and then we look at the conduct of the third party. If the third party is not an innocent third party then that mere equity would revert to be equitable proprietary interest that it was. Grama and gorgia only can sue the fast cash they only have right to sue but they cannot have the property back because they don't have equitable proprietary interest anymore.

Template#3: two competing mortgagees (equitable interest) in relation to the same parcel of land

A four point approach is recommended for this type of problem:

a) What is the nature of the competing interests?
b) When were they created?
c) What is the general rule?
d) Does an exception apply?

the last point will require a detailed consideration of *Heid v Reliance Finance Copr* and the High Court approach to the postponement of prior equitable interests.

A will need to establish that his/her interest as mortgagor should take priority over the interest held by B as the property is unlikely to be sufficiently valuable to extinguish both mortgages upon exercise of a power of sale. To determine the priorities issue, four points should be addressed:

e) What is the nature of the competing interests?

It appears that the mortgage signed by A was never registered. It will therefore take effect as an equitable mortgage which is classifies as an equitable proprietary interest for the purpose of priority.

B also appear to hold an equitable mortgage as the appropriate paperwork has not yet registered, Therefore B also holds an equitable proprietary interest for the purpose of determining priority.

f) When were they created?

A's interest as equitable interest was created at the time the mortgage documents was signed by him, which on the facts would appear to be before the mortgage was given by B.

g) What is the general rule?

In a dispute between two competing equities the general rule is that where the equities are equal, the first in time prevails: *Latec Investments Ltd v Hotel Tarrigal (at 276 per Kitto) ,* the general rule is an application of the maxim: he who is first in time takes precedence.

h) Does an exception apply?

There are a number of exceptions, where the merits will not be considered to be equal and they can all be regarded as manifestations of a general principle: That equity will examine the conduct of the holder of the earlier interest to determine whether in all the circumstances, the prior interest should be postponed.

The question the court will need to consider in each case if: whether **conduct** of prior interest holder made it reasonably foreseeable that a later equitable interest would be created. If the earlier holder had prior notice or acted fraudulently*: Heid v Reliance Finance Corp Pty Ltd*

In *Heid* , the court considered it necessary to characterise the conduct of the holder of the earlier equitable interest: in order to determine whether in all the circumstances, that conduct was such that, in fairness and justice, the earlier interest should be postponed to the later interest.

Applying the court's analysis in that case to these facts the court would ask two questions:

1) Has there been act, neglect or default on the part of A?
2) What are the reasonably foreseeable consequences of such act or default?

In *Heid,* the judges identified two important aspects of the prior holder's conduct which were material to the priorities question. First, an acknowledgment that was contained in the transfer that said he had received the purchase money, when it was in fact unpaid. And second, the fact that the prior holder has handed over the signed transfer and authority to collect the certificate of title to a person acting for the purchaser and being an employee of the purchase, accepting without inquiry of such person was a solicitor and could act on his behalf. In those circumstances the court found (at345) that the first mortgagee had been reckless and that such negligence on the part of the appellant had led to an assumption by the subsequent mortgagee that the appellant's interest no longer existed. On that basis it was found that the subsequent holder had better equity.

Template# 4 – equitable estoppels (p126) D told P that the property yours. In her will did not mentioned P. P carried out and spent money in the property

Issue

Issue is whether P may sue upon the doctrine of proprietary estoppel in relation to seeking a remedy that is suitable and the proprietary estoppels is the appropriate doctrine because there is not a legally enforceable contract between the parties: Giumelli v Giumelli

or

P is seeking on the ground of estoppels, to have the real property transferred to her arising out of her agreement with A.

The first thing is whether there had been a legally enforceable contract between the parties. The question is in real property law

P is seeking a proprietary interest in XXX property based upon a promise which was made to her by D that she would give XXX property to P. P might have an action in estoppels.

A party will be prevented, or stopped, from enforcing its strict legal rights, or from resiling from a certain position, where it would be unconscionable: *Walton Stores v Maher*

In some cases, the estoppels will operate to give the innocent party a proprietary interest: *Ramsen v Dyson*

Equitable Estoppel

Historically, the other estoppels in equity were proprietary estoppels and promissory estoppels.

A **proprietary estoppel** operated to prevent detriment arising from reliance on legal owner's conduct or representation in relation to proprietary rights when there is not a legally enforceable contract between the parties: *Giumelli v Giumelli*. For example, a legal owner promising a party that the land would become theirs: *Giumelli v Giumelli* and *Riches v Hogben or* allowing a mistaken party to make improvements on the legal owner's land in the belief that the land was, or would become theirs: *Ramsden v Dyson.* It operated as a sword as well as a shield. The underlying if unconsionability: *shaw v applegate* and mistaken belief.

Here there is no enforceable contract as lease has not yet signed therefore it is proprietary estoppel

Promissory estoppels operated to prevent detriment from a contractual party resiling from a representation that the legal right would not be strictly enforced: *Legione v Hately.* Only operates as a shield. It operates in circumstances where there is a legally enforceable contract and pre-existing pre contractual relationship and the parties enter into renegotiations

Here there is no enforceable contract as lease has not yet signed therefore it is proprietary estoppel

The significance of the case of *Walton Stores v Maher* was that the court consolidated promissory and proprietary estoppel into the single, and broader, principle of equitable estoppel. In this case estoppels used as a sword and judicial basis is unconsionability. The three main features of equitable estoppels are:

a) It applies to promises and representations as to future conduct and rights
b) It created substantive rights or arises an equity in the innocent party
c) The relief granted is the minimum necessary to prevent the detriment resulting from the reliance: *Commonwealth v Verwayen*

Elements of equitable estoppels

Using the principle of *Walton v Maher* (Equitable Estoppel) to establish that P has equitable proprietary interest in the property and stop D from denying the existence of affair (XXX)

1- Was there a promise/representation (express/implied)?
   Yes there was, D promised a share in XXX …
2- Was there an assumption/expectation on P's part
   Yes there was, P expected share in XXX
3- Was there inducement by D as established in *Commonwealth v Verwayen*
   Yes there was because she said to P if you do all these she will do this
4- Was there reliance on the part of P (action/inaction)
   Yes P did all XXX that he/she was asked to do (action). Inaction is that P did not put aside anymoney to invest in any other property because he has used all his money in D's property
5- Was there Knowledge/intention on the part of D?
   Yes D Knew that P is doing all these and it was her intention that P contribute in XXX
6- Would it be detrimental to P if assumption/expectation not fulfilled? as in *Je Maintiendrai v Quaglia(* the court established there is a need of detriment)
   Yes because P had invested he is doing XXX

7- Has D failed to avoid such detriment as established in *Austotel v Franklins* the question to be asked is would it be unconsionable?

Yes because D have not done XXX as promised

To conclude P will be established all the elements of estoppels and have a good cause of action in equitable estoppels.

Remedy

The relief granted is the minimum equity necessary to do justice; and there must be proportionality between the relief and the detriment to be avoided *Commonwealth v Verwayen*

The minimum equity necessary to do justice between the parties may extend to granting a proprietary interest or a financial remedy.

Difficulties arise in considering what amounts to the minimum equity necessary to do justice between the parties. This may not always extend to fulfilling the expectation. The interests of third parties may also be taken into account in shaping the remedy: *Giumelli v Giumelli*

If we look at the facts there is a third party here (equity darling) we make the assumption and the third party did not know about P's existence and surrounding facts. P only will be given equitable compensation and ensuring that there is proportionality between the relief and the detriment to be avoided as per *Commonwealth v Verwayen*

Conclusion

In this case the loss here will be 12 months' rent, $500 moving into storage and XXXX. Wasted expenses and reliance losses.

Remedies

Constructive trust (Tute Q&A)

The issue is whether or not A is successful in claiming the constructive trust.
All equitable remedies are discretionary therefore the court at the end of the day will weigh all the factors and apply the maxims and decide whether or not order a constructive trust.
A constructive trust is an equitable proprietary remedy imposed by the court: *Muschinski v Dods (defacto.* The parties don't have a say in relation to the outcome so the remedy is not dependent upon the intention of the parties but rather upon the circumstances of the relationship and breach of duty and obligations which is why the remedy is imposed by the court or in existence retrospectively.

The question is whether or not on the facts there is a unconscientious retention of benefit.
Apply similar cases. XXXX. If we apply XXXX cases
If we apply these cases involving employees *Warman International Ltd v Dwyer* **(Fiduciary)** *Ansel Robber v Allied Rubber* **(Employees).**

**Ex employees made a new business*
Whether or not court will impose the constructive trust is that the court will look at availability of other appropriate remedies that may be better suited: *Daly v Sydney Stock Exchange Ltd*
Here analyse facts. Here A can argue the entire of B's business is theirs and this is the strongest argument for a constructive trust.
Because what a constructive trust does in the business situation like this where the employees stole the trade secret and set up their own operations, what the principle is that all of that new business actually belongs to P. and P is interested in doing in that context is taking over that business as their own. It operates like a branch of P's business. Because D's business was set up on the funds that was stolen from P and therefore D's business is extension of P's business. Which is why P will go for constructive trust then it means that P will take over D's entire business.

In that context other appropriate remedies will not do justice in the same way as constructive trust as the closest to constructive trust in these circumstances in relation to confidential information being used in an authorised way will be account of profit or equitable compensation. If you go for account of profit or equitable compensation then you need to choose which one you are going for. So if P is not interested to take over the other business but just wants to be compensated then account of profit would be suitable. The account of profit is lesser remedy as P will allow D to continue with the business and want them to account and pay P whatever profit they made and the idea is to avoid is unjust enrichment.

For the account of profit, it is calculated on the basis of the net profit / net gain from breach; allowance may be possible for skill & effort (stealing of **trade secrets**): *Warman International Ltd v Dwyer*
In this case we can make that allowance as XXX
In *Timber Engineering v Anderson* the court did not grant an allowance to the ex employees for their possible skill and efforts. Because the court viewed the breach was fairly serious.
Analyse the case
In this case it is similar reasoning as they were working long hours however the profit that they made was based on P's business and premises and using P's assets (photocopiers, customer list, marketing plans, etc)

To conclude we have considered the appropriate remedies and the closest will be account of profit however it would not do justice in this particular case because of the nature of the breaches carries out by D.

The duty upon constructive trustee is to deliver up trust property to the beneficiary.
In this case the constructive trust is imposed upon D's business therefore P will become the new shareholder of the D' business.
And it Prevents the holder of legal title from inequitably retaining beneficial interest in property *Muschinski v Dods.*
Therefore D as directors of XXX business will only have legal rights but he/she will not enjoy the equitable interest. The equitable interest in the share holding and assets of the company would be held in trust for the benefit of P.
Generally requires identifiable trust property.
This is the company itself as a going concern

The constructive trust may have an impact on 3rd party rights and the court will look at the situation to see of there are any third parties (any other shareholders) involved: *Farah constructions, Barnes and eddy's principle*
If those third parties are also in breach in knowing assistance then the third parties are not equity's darling and will not be protected. However if they are bona fide, purchaser for value without notice like Timber Engineering v Anderson where the third parties was given allowances because they were innocent.