

PRIORITIES – ANSWER GUIDE

1. Identify the parties to the priorities dispute.

“Resolving the competing interests

“A priorities dispute arises as X, Z, T and Y are all seeking to enforce their respective interests against A”

2. Work out whether their interests are legal or equitable

- a. “As X is the RP, he will enjoy indefeasible title under s184(1) LTA.
- b. “As Z has an unregistered mortgage/lease/transfer, then they hold equitable interest.
- c. “As Y has an unregistered mortgage/lease/transfer, then they hold equitable interest.
- d. “T’s right to set the transfer to A set aside on the basis of fraud under s184(3)(b) LTA may be a mere equity as per *Latec Investments*, or may be a full equitable interest as per *Breskvar v Wall*.
- e. An equitable mortgage can be created by depositing the certificate of title with the mortgagee (s 75 PLA)

3. “As between party X and party Y, there is a competition between (use appropriate rules below)

a. earlier legal vs later legal

- i. Under general law, the principle *nemo dat quod non habet* applies and the subsequent transfer will not be effective as the original title holder will have divested themselves of title.
- ii. “In regards to Torrens system land which is a system of title by registration (per Barwick CJ in *Breskvar v Wall*), a priority dispute is resolved by reference to ss184 & 185 of the LTA. The general rule is that the current RP (later legal title holder), will obtain indefeasible title subject to any earlier registered interests, but free from any unregistered interests, provided none of the exceptions to indefeasibility apply.”
- iii. Mortgagees are paid out according to priority of time (s 88 PLA)
 1. When mortgagee exercises a power of sale, the mortgagee’s interest is extinguished after the exercise of sale (s 79)

b. earlier legal vs later equitable

- i. Under common law, in a competition between the earlier legal interest and a subsequent equitable interest, the earlier legal interest will generally prevail where the merits of the case are equal.
- ii. However, the prior legal estate will be postponed if the holder of the prior estate is guilty of fraud (*Whipp*), negligence contributing to the creation of the subsequent equitable interest (*Walker v Linom*), or an estoppel may be established against him (*Barry v Heider*)
- iii. **“under s 184(1) LTA, a registered proprietor holds their interest free from any unregistered, that is, equitable, interests. This is the case save for when there is any fraud by that RP, or any of the other exceptions to indefeasibility apply, found in s 185 LTA. So in the absence of fraud or other exception, the earlier legal interest prevails. Where the RP has contributed by negligence etc, an *in personam* exception may apply”**

c. If earlier equitable vs later legal

- i. Under the general law, the resolution of the dispute will depend on whether the holder of the newer legal right is a BFPVCWN, in order to take free of the earlier equitable right: *Pilcher v Rawlins*