

Land Law Final Exam Notes

CASE LIST

- Important provisions: 42, 43 118 (1)(d)(ii) RPA, 129 CA, 127 CA, 111A CA, S 57,58 (RPA), s 66g CA, s 54A CA, 89 CA, 88 B,

Native Title

- Mabo v Queensland (No 2) (1992) 175 CLR 1
- Western Australia v Ward (2002) 213 CLR 1; (2002) 191 ALR 1
- Yorta Yorta Aboriginal Community v Victoria (2002) 214 CLR 422
- De Rose v South Australia (No 2) (2005) 145 FCR 290
- Fejo v Northern Territory (1998) 195 CLR 96
- Wik Peoples v Queensland (1996) 187 CLR 1
- Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth of Australia (2013) 250 CLR 209; [2013] HCA 33
- Queensland v Congoo (2015) 89 ALJR 538; [2015] HCA 17
- Western Australia v Brown (2014) 253 CLR 507; [2014] HCA 8

Indefeasibility

- Frazer v Walker [1967] 1 AC 569
- Breskvar v Wall (1971) 126 CLR 376
- Mercantile Credits v Shell (1976) 136 CLR 326
- Travinto Nominees v Vlattas (1973) 129 CLR 1

Exceptions to Indefeasibility

- Bogdanovic v Koteff (1988) 12 NSWLR 472
- Loke Yew v Port Swettenham Rubber [1913] AC 491
- Assets Co Ltd v Mere Roihi [1905] AC 176
- Schultz v Cornwill [1969] 2 NSW 576
- Westpac Banking Corporation v Sansom (1995) NSW ConvR 55-733
- Russo v Bendigo Bank [1999] 3 VR 376
- RM Hosking Properties v Barnes [1971] SASR 100
- Bahr v Nicolay (No 2) (1988) 164 CLR 604 (**Personal Equities Exception**)
- Cassegrain v Gerard Cassegrain (2014) 254 CLR 425; [2015] HCA 2
- Grgic v ANZ (1994) 33 NSWLR 202
- Pyramid Building Society v Scorpion Hotels [1988] 1 VR 188
- Vassos v State Bank of South Australia [1993] 2 VR 316 (**Element of Unconscionability**)
- Horvath v Commonwealth Bank [1999] 1 VR 643
- Hilpalm v Heaven's Door (2004) 220 CLR 472

Caveats + Priorities + Leases

- Bedford Properties v Surgo [1981] 1 NSWLR 106
- Abigail v Lapin [1934] AC 491
- J&H Just v Bank of NSW (1971) 125 CLR 546
- Perpetual Trustees v Smith (2010) 186 FCR 566
- Malyan Credit v Jack Chia [1986] 1 AC 549
- Corin v Patton (1990) 169 CLR 540

- Radaich v Smith (1959) 101 CLR 209 (**Equitable lease**)
- Leitz Leeholme Stud v Robinson (1977) 2 NSWLR 544
- Aussie Traveller v Marklea [1998] 1 Qd R 1

Assignment of lease

- Moule v Garrett (1872) LR 7 Ex 101
- Re Hunter's Lease [1942] 1 Ch 124
- Ashmore Developments v Eaton [1992] 2 Qd R 1

Lease remedies

- Stieper v Deviot (1977) 2 BPR 9602
- Progressive Mailing House v Tabali (1985) 157 CLR 17
[Remedies of landlord and tenant in contract]
- Gumland Property v Duffy Bros Fruit Market (2008) 234 CLR 237
- Marshall v Council of the Shire of Snowy River (1994) 7 BPR 14,447
- Batiste v Lenin (2002) 11 BPR 20, 403

Freehold Covenants

- Tulk v Moxhay (1848) 2 Ph 774; 41 ER 1143
- Clem Smith Nominees v Farrelly (1978) 20 SASR 227
- Levi v Spicer [2001] NSWSC 924
- Cumerlong Holdings Pty Ltd v Dalcross Properties Pty Ltd (2011) 243 CLR 492; [2011] HCA 27

Easements

- Hill v Tupper (1863) 2 H&C 121; 159 ER 51
- Re Ellenborough Park [1956] Ch 131
- Clos Farming Estates v Easton (2002) 11 BPR 20, 605
- Moncrieff v Jamieson [2007] 1 WLR 2620
- Ryan v Sutherland (2011) 16 BPR 30,101
- Perpetual Trustee v Westfield (2006) 12 BPR 23, 793
- Westfield Management Ltd v Perpetual Trustee Co Ltd (2007) 233 CLR 528; [2007] HCA 45
- Treeweke v 36 Wolseley Road (1972-73) 128 CLR 274

Mortgages

- Websdale v S&JD Investments (1991) 24 NSWLR 573
- Southern Goldfields v General Credits (1991) 4 WAR 138
- Westpac v Kingsland (1991) 26 NSWLR 700 (Timing of sale)
- Vasiliou v Westpac (2007) 19 VR 229; [2007] VSCA 113 (Statutory duties)
- Forsyth v Blundell (1973) 129 CLR 477 (Court ordered sales)

FUNDAMENTALS

S 54A Conveyancing Act 1919 (NSW)

- Most important rule is that contracts for the sale of any interest in land must be in writing
- As long as there are written documents (even a letter, email) which contains all essential terms (the property, parties, purchase price) and they can be linked with each other + signature a court will generally enforce
- So basic contract principles PLUS s54A writing
- In general context of land, exchange of contracts shows intention to be legally bound

REGISTRATION

- Recordation on the register transfers or creates legal title to land
- Act of registration vests legal title
- Interests in land can still be created without registration but will only be equitable
- **S 42: registration = indefeasibility**
- **S 43: Purchaser from registered proprietor not affected by notice.** Except in case of fraud, P not required to investigate title. Even if you know there is someone else with a random lease not on register, it is not counted as fraud.

INDEFEASIBILITY

- **S 42 RPA** gives registered proprietor indefeasible title to land
- Bound by interests on the register not those that aren't.
- **S 42:** fraud will vitiate a registered interest on the part of the RP
- **S 43 RPA:** Basically, doesn't matter that new owner knew of an unregistered interest in land, they are not bound.
- **NSW S 40:** designed to assist proof of title
- **S 45 RPA:** Protects bona fide purchaser by providing that the Act shouldn't be interpreted to leave a BF purchaser open to action for damages etc on grounds that vendor may have been registered through fraud/error. Just gives indefeasibility to a BF purchaser.

S118 is under 'Proceedings for the possession or recovery of land' so basically saying that the registered proprietor is protected as per s 42, EXCEPT in cases of fraud by the RP (s 42 also supports this) but s 118 (1)(d)(ii) is saying that volunteers who have 'gained' their interest/land THROUGH a fraudulent RP is NOT protected (despite volunteers having indefeasibility in normal circumstances).

- **S 118 (1)(d): Registered proprietor is protected except in cases where:**
- Proceedings brought by a person deprived of land by fraud against: (i) a person who has been registered as proprietor of the land through fraud or (ii) a person deriving (otherwise than as a transferee bona fide for valuable consideration) from or through a person registered as proprietor of the land through fraud **[only applies to volunteers though]**

Good examples:

A → B 25 year registered lease

A then transfers legal fee simple by registration to C. C then transfers legal fee simply by registration to D.

D is STILL BOUND BY B's lease because it was already **registered**. S 42 means D is subject to such other estates/interests recorded in that folio. So D has to let B stay for 25 years.

Same example but B's lease is unregistered

- D is NOT bound by B's unregistered lease because S 42: not bound by things that aren't on the register + S 43, it makes no difference that D knew of B's unregistered interest.

IMMEDIATE INDEFEASIBILITY

- Where a purchaser or mortgagee, acting without fraud registers an interest to which the signature of the RP has been forged by a rogue.
- Frazer v Walker: immediate indefeasibility prevails, confirmed by **NSW s 45 RPA**
- Purchaser registered through fraud grants the purchaser indefeasible title immediately as long as the purchaser didn't cause the fraud.

Where first purchaser does use fraud: Breskvar v Wall

- Registration creates title even in situations of fraud; difference is that the title is subject to the rights of the defrauded vendor (title is defeasible)
- The **fraud** creates an equitable interest on the defrauded vendor. Vendor can then cancel the registration of the **purchaser**.
- **However, once purchaser transfers title to a third party: it becomes question of priorities**
- If third party completes registration, he obtains indefeasible title.
- If the third party doesn't register before original vendor brings a claim, the vendor's earlier equitable interest prevails over 3rd party later equitable interest **unless** the vendor's conduct encouraged the 3rd party's false assumption

- But now solved by S43 Notice. Purchasers not affected by notice of unregistered interests.

could be enforced bc a court couldn't grant specific performance on an illegal covenant

CASE SUMMARIES

Frazer v Walker

- Wife forged husband's signature.
- Property sold, neither party knowing signature was forged
- Husband refused to give up property bc of forged signature
- Immediate indefeasibility: registration = indefeasibility, so husband no claim.
- **[Indefeasibility; fraud]**

Breskvar v Wall

- Blank transfer document case—became question of competing equitable interests
- Breskvar had earlier interest but engaged in postponing conduct thus lost priority.
- **[Indefeasibility; priorities; postponing]**

Bogdanovic v Koteff

- Bogdanovic lived with 'S' and helped him a lot. He left the house in will to son (a gift to a volunteer). Father promised Bogdanovic an interest/ she stay in the house.
- Respondent tried to kick B out; she said she had equitable interest and that indefeasibility didn't apply to volunteers
- NO
- Son argued indefeasibility = immunity
- Even though the son was volunteer: immediate indefeasibility extends to volunteers so YES he won; he is NOT subject to any prior equitable or legal interests

Mercantile Credits v Shell

- Respondent was lessee and had a covenant on renewal
- After registration of lease, lessor executed mortgage with Appellant who then defaulted
- Appellant tried to power of sale
- Respondent claimed couldn't sell bc of covenant of renewal which was registered
- Lease registered before mortgage thus takes priority and is indefeasible. Covenant is part of the 'interest': depends on connection
- **[Indefeasibility; priority]**

Travinto Nominees v Vlattas

- Issue of misdescription
- Failure of vendor to state existence of option to renew; amount to an error/misdescription
- Where there was statutory illegality, registration couldn't 'cure'/ validate option.
- HC considered the effect of indefeasibility on a lease declared void/ illegal by statute
- Held that though the lease itself might claim benefit of indefeasibility, none of the covenants

VOLUNTEERS

- **Bogdanovic v Koteff**: In NSW volunteers have indefeasibility
- **S 118 (1)(d): Registered proprietor is protected except in cases where:**
- Proceedings brought by a person deprived of land by fraud against: (ii) a person deriving from or through a person registered as proprietor of the land through fraud **[only applies to volunteers though]**

EXCEPTIONS TO INDEFEASIBILITY

FRAUD

- Where registered proprietor/purchaser/ the person 'getting' the interest has been guilty of fraud
- Must be 'personal dishonesty or moral turpitude' (**Butler**)
- Title of the registered proprietor cannot prevail against the interest of the defrauded person.
- Effect = 'set aside'
- **S 42/43**
- **S 118 (1)(d)(ii)**: pretty much applies where volunteers are gifted property that has been obtained by fraud. They will have defeasible title (Felicity example)

S 56C RPA: Identity Provisions [on or after November 1 2011]

- A mortgagee must now take reasonable steps to confirm the identity of the mortgagor and confirm that he is indeed the registered proprietor of the land
- **Comply with Verification of Identity Standard Sch 8 NSW Participation for Electronic Conveyancing**
- Mortgagees don't have to comply with above if they think they have other means of taking reasonable steps to confirm identity: legal obligation is to take reasonable steps
- Effect: they will lose indefeasibility bc guilty of fraud

Rasmussen v Rasmussen

- Constructive trust issue
- No fraud

Loke Yew

- Fraud is exception to indefeasibility
- D made promise that the P's interest will be preserved but then went and registered anyway
- By going back on promise= fraud

- Had to transfer land back lol
- **[Fraud]**

Assets v Mere Roihi

- Sort of being an accomplice to another person;
- Carelessness in checking document is not fraud
- Knowledge is “brought home”
- If it can be shown that X’s suspicions were aroused and he abstained from making inquiries for fear of learning, fraud may be ascribed
- **[Fraud; brought home knowledge]**

Hosking v Barnes

- Barnes had unregistered lease + option to renew
- Hosking purchased property from landlord w/ knowledge of Barnes’ lease
- When B tried to exercise option, Hosking gave notice to quit property stating he was not bound by unregistered lease
- Hosking won yikes, knowledge was not enough o = fraud: no proven plan of dishonesty.
- **[Fraud]**

Schultz v Corwill

- Party can sometimes be guilty of fraud if agent was acting fraudulently
- Where: agent himself acted fraudulently within scope of authority given by principal
- Or: learned existence of fraud by another: if agent has **actual** knowledge of fraud then agent is presumed to have communicated to the principal all information gained
- **[Agent fraud]**

Sansom

- Wife mortgaged home but also forged husband’s signature
- Bank falsely attested that husband signed mortgage in presence and bank registered mortgage.
- Held: bank false attestation = fraud (S42)
- But the fraud erased validity of mortgage only for husband and was still enforceable against wife.
- **[Fraud; wife/husband split]**

Pyramid v Scorpion

- Mortgage fraudulently executed by bad affixing of seal by non-director
- Mortgagee had no knowledge of irregularity and registered mortgage
- Mortgagee not guilty of fraud
- **[Fraud]**

Russo v Bendigo Bank

- Russo’s son forged signature on a mortgage to secure a loan to company controlled by him + wife
- Law clerk falsely attested signature without actually witnessing; was unaware of forgery
- Lodged registration without knowledge of forgery
- She wasn’t personally dishonest; moral turpitude
- Decision: law clerk not ‘fraud’ no dishonesty; thus no fraud and title was indefeasible.

Grgic v ANZ Banking

- Son practiced forging, and signed father’s name on mortgage, witnessed by bank officer
- Re: bank officer- attestation could not be fraud unless could be shown that he knew that the person-signing mortgage was not RP or he was acting recklessly without caring whether or not it was being signed by true person.
- New rule now: s 56 RPA
- **[Fraud]**

Cassegrain v Cassegrain

- Cassegrain owned land
- Claude was director and in an act of fraud transferred title to wife for \$1 (thus not volunteer)
- Wife not aware of fraud
- Fraud on Claude’s part can’t be imputed on wife.
- Fraud for s 42/43 needs to be “brought home”
- If one of joint tenants not involved in fraud, tenant’s title can’t be challenged.
- Volunteers have indefeasible title, but if they’ve been given property from someone who has been fraudulent, it is defeasible.
- If you had no knowledge you aren’t tainted by fraud just bc you’re a joint tenant.
- If the person is your AGENT- you are automatically liable too (weird case; bc arguably Claude was her agent; but they said no)
- See S 118(1)(d)(ii) **[volunteers; fraud]**