

PART I - Summarised Land Law Exam Notes – Legal Steps

SECTION 1 – Who has the best Title? – Indefeasibility and Competing Equitable Interests

STEP 1: Is the proprietary interest registered?

Legislation

- **S42 RPA: The registered proprietor has indefeasible title, subject only to the encumbrances written on the register, with some exceptions:**
 - (i) It states that fraud will vitiate a registered title
 - (ii) Misdescription or omission of any part of the land
 - (iii) Any portion of land that is by wrong description included in the register, when it was not purchased/shouldn't be there
 - (iv) A tenancy that does not exceed 3 years (including options) – 42(1)(d)
- **S43** – Except in the case of fraud, notice of an unregistered interest does not affect the purchaser's interest in property

Case Law

- ***Frazer v Walker***: Otherwise invalid documents (eg – if they were forged), once registered (as long as the registered proprietor is not implicated in the fraud) will be valid
- ***Breskvar v Wall***: A forged court document creates a *defeasible* title if registered (by someone implicated in the fraud).
 - If a defeasible title is sold to someone else, and a caveat is lodged before it is registered, then there are two competing equitable interests
 - The interest created earlier in time will only be lost if the appellant created an assumption upon which the holder of the competing equity acted: *Rice v Rice* (giving a blank memorandum of transfer did this)
- ***Mercantile Credits***: A right of renewal is so intimately connected to the lease itself, that if the lease is registered but the right of renewal is not, on registration the lease and the option are both indefeasible

STEP 2: If registered → Does it fall within any of the exceptions to indefeasibility?

1. **Volunteers**: Volunteers are not an exception to indefeasibility – s 43 RPA applies to volunteers as well as bona fide purchasers: ***Bogdanovic v Koteff***
2. **Fraud**
 - 1: Fraud is an exception to s 42 and s 43
 - 2: What are the requirements for fraud?
 - (1) Fraud is a question of fact: ***Loke Yew***

- (2) Fraud must involve dishonesty – a willful and conscious disregard of other people's rights: ***Russo v Bendigo Bank***
- (3) The fraud must be operative – ie must have induced detrimental action: ***Bank of South Australia v Ferguson***
- (4) Reckless indifference and willful blindness is not fraud: ***Pyramid Building Society***
- (5) A wrongdoer cannot shelter themselves in registration: ***Lok Yew***

3: Special situations of fraud

- (1) Agency. **Test for fraud and Agency:** can the fraud be brought home to the person whose registered title is impeached or their agents? (***Schultz v Corwill Properties***).

Two situations:

- a. Where fraud is actually committed by the person whose title is impeached or their agent: this binds the principal
- b. Where the principal or their agents have knowledge that a fraud has been committed, **and** if the agent has knowledge, there must be additional circumstances so that the agent's knowledge of fraud is imputed to the principal

- (2) False attestation of instruments

- ***Grgic v ANZ Banking Group***: A bank officer witnessed the signature to a mortgage and certified to personal knowledge of the identity of a person – this was not fraud
- ***Davis v Williams***: there is a mental element required to establish fraud on the part of registration clerks – must know for it to be false in a material respect, and intending that the Registrar-General be induced by the representation to act in a way materially different
 - The clerk did not understand that the misrepresentation was material → not fraud
- ***J Wright Enterprises***: the solicitor knowingly altered the documents after they were executed – but the court said it would have been a simple matter to have them re-executed, therefore not fraud

- 3. **S 56C RPA**: From 2011 onwards, a mortgagee must take reasonable steps to confirm the identity of the mortgagor

4. Rights *in personam*

- (i) **In personam exception:** the principle of indefeasibility does not deny the right of a plaintiff to bring an action against a registered proprietor *in personam*
 - ***Bahr v Nicolay*:** If the registered proprietor has personally behaved in such a way that makes it unconscionable to claim they are not bound by the other person's interest, the court will not make their interest indefeasible
- (ii) Only for known causes of actions at law or equity: ***Grgic v ANZ Banking Group***
- (iii) Requires an element of unconscionability: ***Vassoss*** (although this is not always true)
 - EG – *Yerkey v Jones exception* – a wife has an equity to set aside a surety given to a third person to secure the debts of her husband
- (iv) Personal equity and breach of trust: A registered proprietor who obtains registration of a transfer in breach of a fiduciary duty cannot set up his or her registered title to escape liability: ***Tataurangi Tairuakena v Mua Carr***

5. Short Term Tenancies

- **NSW: s42(1)(d)** – If it is a lease that is not exceeding three years (including options – as long as it and any options do not exceed 3 years), then the title of the land will not be indefeasible

6. Overriding Statutes

- The indefeasibility of registered titles derives from provisions of the Torrens statutes which can be repealed, in whole or in part, by a later statute
- Parliament is presumed not to contradict themselves, but if the two statutes can't be reconciled, the later statute prevails

- 7. **Caveats** – used to protect unregistered interests in land. Prevent the registration of other interests which would defeat the unregistered interests
 - (i) Must be in relation to land
 - (ii) The registered proprietor can apply to the court for the removal of a caveat → court will do this when the prohibitions on dealings is stated too widely, or considering whether there is a serious question to be tried and whether the balance of convenience favours the removal
 - (iii) S74 RPA – if you lodge a caveat without reasonable cause, you can be liable for the loss that the caveat caused

- Must have **reasonable grounds to believe that you had an interest**: *Bedford Properties v Surgo* [1981]

STEP 3: If no interests are registered → Competing Equitable Interest

- EG – a person with an equitable interest caveats before a new purchaser can register

Priority rule: In a case of contest between two equitable claimants, the first in time (all other things being equal) has priority: ***Rice v Rice***

Exception: The claimant who is first in time may lose their priority by an act or omission which might have had the effect of inducing a claimant later in time to act to their prejudice

- ***Abigail v Lapin***: The Lapins transferred the land to the Heaveners, who then mortgaged it to Abigail. The Lapins said that they only transferred the land as security for a loan in respect of another transaction. Abigail had priority because the Lapins armed Heavener with the power to go into the world as the absolute owner of the land
- ***Butler v Fairclough***: Failure to lodge a caveat, in the circumstances, sufficed as 'postponing conduct' that meant the later equitable interest was given priority – but this is just one of the circumstances that should be considered: ***Heid***
- ***Heid***: Gave the CT, and a signed contract and transfer, with the solicitors, who then committed fraud and mortgaged and sold the land. This was postponing conduct
- ***J&H Just Holdings***: failing to lodge a caveat by itself is insufficient to lose priority → it must contribute to a later interest being acquired in the supposition that an earlier interest does not exist
- ***J & H Just Holdings***: The second mortgagee was never given the CT, so could have never expected that their mortgage was superior (even though they were told there was no first mortgage)
- ***Perpetual Trustees Co v Smith***: It did not matter that the retirees did not caveat their leases for life, because they gave notice in other ways: (i) The tenants were in possession, and (ii) it was clear what the MFPL's business model was → they bought houses from retirees and elderly people, in exchange for a lease for life over the property