

Property Law Notes

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CO-OWNERSHIP

S100(1) RPA – Joint Tenant in law (Registered)

Delehunt v Carmody – where apportionment is equal (purchase price) , common law presumption is that a equitable JT arises for the proportion of contribution. Equity may impose a resulting trust if someone else contributed to the purchase price.

Calverley v Green – Unequal contribution to purchase price, equity may impose a resulting trust.

Co-ownership is when two or more people have rights in when the same property in the same time. The different forms of co-ownership and their relevant principles are as follows:

1. **Joint tenancy** - both of the parties hold everything together and nothing on their own. Features include:

The **four unities** - must have all of these for a joint-tenancy to exist:

1. Unity of **possession**: Each co-owner is entitled to enjoy possession of the whole of the property, not exclusively to himself/herself, but to be enjoyed together with the other joint tenants.
2. Unity of **Interest**: The interest of each joint tenant must be the same in nature, extent and duration.
3. Unity of **Title**: All the joint tenants must derive their interest from the same document or the same act of adverse possession.
4. Unity of **Time**: The interests of all joint tenants must vest at the same point in time.

The **right of survivorship** - a joint-tenant can't transfer his interest, it remains with the other joint-tenants upon his death, the last survivor receiving the whole property.

Severance - a tenant can 'sever' his joint-interest during his lifetime, thus creating a tenancy in common (which he will be able to pass through a will etc.).

2. **Tenancy in common** - each of the parties holds their own separate interests in the whole property. Features include:
 - There is **no right of survivorship**. On the death of a tenant in common, his/her share passes to beneficiaries by will.
 - The size of each tenant's share is fixed from the time of creation of the interest or by subsequent dealings.
 - Tenants in common hold 'undivided shares' of the property (i.e., they each hold an identifiable fraction of the interest which has not yet been formally divided up between them).

TORRENS TITLE INDEFEASIBILITY

A person who acquires a registered interest through fraud has a defeasible interest: **RPA ss 42, 43**
E.g. their interest can be set aside.

The requirements for setting aside such an interest are:

- the registered proprietor's interest must have been acquired through implication in the fraud; and
- the implication may be personal or through the acts of an agent.

Breskar v Wall (1971) – Torrens Title is not a system of registration of title but a system of title by registration. Register is complete record of all interests in torrens title land therefore without the need to search beyond the register. Registration confers indefeasibility.

Gibbs v Messer (1891) – Object of register is to 'save persons dealing with RP's from trouble and expense of going behind register to investigate the history of title and to satisfy them of the validity'. This case "fictitious person"- now s3 (1) RPA – fraud include fictitious persons.

S36(9) RPA – interest that first registered takes priority

S36(5) RPA – must be in registrable form

S3RPA- Folio held by RG is either manual or computer/electronic nb. Majority electronic now.

S38 RPA – RG may refuse to register a transfer if no CT produced

Indefeasibility s42 (1) must be read in conjunction with:

S40 (1) – folio held by RG conclusiveness evidence of title

S41 - Dealings not effectual until recorded in Register

S42 - Estate of registered proprietor paramount - title received at registration is immediately indefeasible

S43 - purchasers are not affected by notice of unregistered interests (nb. Still operates with competing unregistered interests). Even having notice does not amount to fraud. Section becomes operative upon registration, until that time purchaser is affected by notice (unregistered interest) - ***IAC (Finance) Pty Ltd v Courtenay***. Mere notice is not itself fraud (***Bahr, Mills***)

S43A - For the purpose only of protection against notice, the estate or interest in land under the provisions of this Act, taken by a person under a dealing registrable (e.g. At settlement), or which when appropriately signed by or on behalf of that person would be registrable under this Act shall, before registration of that dealing, be deemed to be a legal estate.

S45 (1) – protects BFPFVWN or bona fide mortgagee from fraud

S118 – protection for RP in relation to proceedings for possession/recovery of land

Under the Act, the Registrar-General shall cause a Register to be maintained for the purpose of the Act: **s 31B: o First schedule** – name of the current registered proprietor – vendors name

EASEMENTS

Definition: Easement: a right annexed to land (interest) to utilise land of another in a particular manner (positive easement – right of entry) OR to prevent another using their land in a particular manner (negative easement). Intangible and real property right. Easement **cannot have exclusive possession. Only passed thru a grant.** Must be precise and definable – not general/vague.

A profits a prendre = can be easement = is a right attached to land which is held by someone other than the owner of the land to enjoy part of the soil or the nature produce of the soil e.g. timber, wild animals.

Issues: Do the nature of the rights claimed meet the characteristics of an easement? See Re Ellensborough

Issue: Have formalities been met? Needs to be in writing and signed plus registration i.e. S23B (by deed) CA+ s46 RPA – registration in approved form. If not = equitable interest must be s23C CA in writing and signed/ s54A CA, oral agreement – IF NOT = part performance s23E (d) CA & s54A CA?

OR implied legal grant/implied reservation (equitable interests- McGrath v Campbell) (see Wheeldon v Burrows and Wilcox v Richardson):

Implied Legal grant (gives someone else a benefit) – equitable interest – What parties intended or if easement of necessity (see *Wheeldon v Burrows*) and (*Wilcox v Richardson* – *reasonably necessary to enjoyment of land means “needed or required” not “essential”*).
Wheeldon v Burrows – continuous and apparent easements: need to show:

Four elements necessary to show a W v B easement:

- There must be a grant of a part of the land (a severance);
- At the time of the grant, exercise of the quasi **easement must be continuous and apparent**;
- The quasi easement must be **necessary** for the reasonable enjoyment of the land granted;
- Just before the time of severance, the grantor must have been using the quasi easement for the benefit of the land granted

Presumed easement if continuous = i.e. not ‘occasional benefit’ **AND** apparent = via visual inspection/knowledge. E.g. Parking, driveway, pathways.

The common transferor intended one party to take the burden and another party to take the benefit of any *continuous and apparent easement* and that those parties who knew about the other transaction also intended that to happen – See *McGrath v Campbell [2006] NSWCA 180*