

LAWS4104

PROPERTY



SAMPLE EXTRACT

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PRIORITY DISPUTES

Inconsistencies:

- ❖ Total inconsistency = A leases land to B for 3 years & immediately after lease same to C for 3 years.
- ❖ Partial inconsistency = A lease land to B for three years & immediately sell it to C.
- ❖ Inconsistent interests over the same land give rise to a priority dispute.

Resolution Process:

1. Identify nature of competing interests.
2. (a) State priority dispute.
(b) State priority resolution rule.
(c) Apply rule to the facts.
3. Conclude.

Nature of General Law Mortgage:

- ❖ Operates as **conveyance of legal fee simple estate** from debtor (mortgagor) to creditor (mortgagee).
- ❖ Mortgagee bound to reconvey on repayment (usually term allowing mortgagor to keep possession).
- ❖ Default by mortgagor gives mortgagee right to possession & right to sell to recover outstanding debt.
- ❖ **Mortgagor's interest is a full equitable interest** (equity of redemption).
- ❖ Mortgagor can grant subsequent mortgages over land (**subsequent mortgages are equitable**).

Prior Legal Interest vs. Subsequent Legal Interest:

- ❖ **First in time prevails.**
- ❖ *Nemo dat quod non habet* (cannot convey that which you do not have – does not apply to equity).
- ❖ Subject to four exceptions.
 - Legal title holder creates later legal interest.
 - Legal title holder fraudulently connives at creation of legal interest.
 - Legal title holder fails to get in title deeds (enabling former title holder to appear as legal owner & create subsequent interests).
 - Legal title holder has authorised another to deal with property & authority has been exceeded.

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- ❖ Northern Counties Fire Insurance v Whipp (1884) – Crabtree land owner & manager of P, granted P legal mortgage, P took all title deeds & placed in a safe (Crabtree had key). Crabtree took deeds from safe to appear as unencumbered owner to D. D lent to Crabtree & granted equitable mortgage (unaware of prior legal). D obtained all deeds bar P's mortgage. Crabtree defaulted & P sought to foreclose.
 - Sufficient conduct by legal mortgagee to postpone in favour of subsequent equitable mortgage obtained without notice (Fry J):
 - **Where legal mortgagee (LM) has not obtained title deeds:**
 - If LM failed to make enquiries, then postponed.
 - If LM made enquiries & received reasonable excuse, then no priority loss.
 - If LM received part under reasonable belief of total, then no priority loss.
 - If LM left deeds with mortgagor to raise money on security, then postponed.
 - **Where legal mortgagee (LM) has obtained title deeds, but not retained them:**
 - If LM lent on reasonable representation to borrow, then no priority loss.
 - If LM returns to mortgagor for purpose of raising money, then postponed.
 - Two circumstances where court will postpone prior legal estate to subsequent equitable:
 - Where owner of legal estate has assisted in or connived in fraud which created a subsequent equitable estate without notice – evidenced by **omission to use ordinary care in inquiry after/keeping deeds** where conduct cannot be otherwise explained.
 - Where owner of legal estate has constituted mortgagor or agent with authority to raise money & the estate has been represented as the first estate by the fraud/misconduct of the agent.
 - Court will not postpone due to mere carelessness/lack of prudence by legal owner (Fry J).
- ❖ Walker v Linom [1907] – P conveyed fee simple to trustees for marriage settlement, P beneficiary of trust for life or until attempt to alienate estate, then to wife for life, P delivered chain of title to trustee's solicitors (but retained fee simple deed), P used deed to procure loan for mortgage, P defaulted & mortgagee sold property to D. P absconded. Held: legal trustee's interest postponed by D.
 - Sufficient conduct by prior legal interest holder to justify postponement (Parker J):
 - **Failure to make inquiry as to title deeds.**
 - **Failure to verify excuse for non-delivery.**

Prior Equitable Interest vs. Subsequent Legal Interest:

- ❖ **Subsequent legal interest BFPFVW has priority** (*Pilcher v Rawlins* (1872))
 - **Bona fide (honest).**
 - **Purchaser for value (needs to be consideration).**
 - More than merely nominal (but need not be whole purchase price).
 - Equity will not support a volunteer (i.e. party who has not provided consideration).
 - *Nisbet v Potts* (1906) – adverse possession not a purchaser for value.
 - **Without notice.**
 - Timing of notice (must be without notice at time full consideration provided, even if not in immediate possession of title deed).
 - Actual.
 - Constructive (facts that would be discovered if usual & proper inquiries occurred).
 - Duty to inspect the land.
 - If land in possession of someone other than vendor, then purchaser deemed to have constructive notice of their interest in the land.
 - Purchaser not deemed to have constructive notice of a partner (*Caunce v Caunce* (1969)).
 - If facts suggest purchaser should have made inquiries as to other possessor, then constructive notice (*Kingsworth v Tizard* (1986)).
 - Duty to inspect chain of title.
 - If document removed unbeknownst to purchaser, then no constructive notice (provided no grounds to check) – *Pilcher v Rawlins* (1872). Unless reasonable excuse provided.
 - *Sale of Land Act* s 22: purchaser only required to inspect chain of title up to 30 years prior; unless known by other means).
 - Imputed (where agent has knowledge of notice, then notice imputed to principal).

Prior Equitable Interest vs. Subsequent Equitable Interest:

- ❖ **Where equities are in all other respects equal, then the first in time prevails** (*Rice v Rice* (1853))
 - **Nature & condition of each interest.**
 - **Circumstance/manner of acquisition** (e.g. receipt of deeds – not required for lease or RC).
 - **Whole conduct of parties** (e.g. notice; endorsement of price without receipt – *Rice v Rice*).

Disputes involving Mere Equities:

1. Prior mere equity vs. subsequent equitable/legal.
 - *Latec Investments v Hotel Terrigal* – **BFPFVW has priority.**
2. Prior legal interest vs. subsequent mere equity.
 - **Prior legal prevails subject to the four exceptions.**
3. Prior equitable/mere equity vs. subsequent mere equity.
 - *Rice v Rice* – not equal (**consider three criteria**).

Registration of Deeds Act s 3 (RODA):

- ❖ Cannot register interest without instrument (therefore adverse possession cannot be registered).
- ❖ May register written contracts provided specifically enforceable (allows some equitable interests).
- ❖ Any instrument concerning an interest in land can be registered (s 2).
- ❖ **If priority dispute involves an unregistrable interest, then RODA does not apply.**
- ❖ **Priority to first interest registered (not first created).**
- ❖ **All unregistered interests shall be void if against unregistered BFPFV (otherwise general law).**
- ❖ Does not apply to Torren's system.

CO-OWNERSHIP

- ❖ Circumstances where persons have a right to simultaneous enjoyment/possession.
- ❖ Each co-owner has a right to possession of all the land.
- ❖ Not possible to draw an exact division between portions owned.

Joint Tenancy:

- ❖ **Four unities:**
 - Possession = each co-owner simultaneously entitled to possession of whole.
 - Interest = interest of each co-owner identical in nature, duration & extent.
 - Title = all co-owner's derive title from the same document/acts.
 - Time = interest of each co-owner vests at the same time.
- ❖ **Right of survivorship** (on death of joint tenant their interest automatically passes to remaining tenants).

Tenancy in Common:

- ❖ If > two persons simultaneously entitled to possession of whole of land & are not JT, then TIC.
- ❖ Hold distinct, yet undivided shares (can be devised at will).
- ❖ **Four unities apply, but no right of survivorship.**

Creation of Co-Ownership:

- ❖ **Co-ownership at law.**
 - Presumption – when land conveyed to > two persons as co-owners they are JTs unless:
 - One of the **four unities is absent**.
 - **Words of severance used** in the deed of conveyance (*Morely v Bird*).
 - Examples: “equally”, “between”, “to be divided between” etc.
 - If words are contradictory, then consider:
 - Intention of grantor (*Re Barbour* – farming land not intended to be split between many beneficiaries, therefore JT).
 - Rule of construction (first word prevails in a deed, last word in a will; *Forbes v Gitt*).

❖ **Co-ownership at equity.**

- Three situations where equity presumes intention of co-owners to be TIC (unless rebutted).
 - Unequal contributions to purchase price.
 - Purchasers deemed to be TIC in proportion to contributions.
 - Also applies where > two contributors to purchase price, but legal estate conveyed only to one (*Bull v Bull* – mother considered TIC).
 - Mortgages.
 - Applies where persons un/equally advance money on security for mortgage.
 - Presumes that parties would not intend investment be lost upon death.
 - Partners (even if informal).
 - Where partners acquire land for the purposes of their partnership business.
 - *Lake v Craddock (1732)* – venture to drain land, D's father abandoned, other partners bought more, D beneficiary, held: TIC (no loss of father's interest).

Rights & Obligations:

❖ Duty to pay occupation rent.

- *Luke v Luke.*
- Co-owner in sole occupation generally not required to pay occupation rent to non-occupiers.
- Unless:
 - Sole occupier wrongfully excludes owners.
 - Express agreement to do so.
 - Sole occupier improved land & sought co-owners to pay contributions.

❖ Improvements & repairs.

- No requirement at law that co-owners who benefit from improvements should contribute.
- *Brickwood v Young* – improving co-owner **may claim contribution from other co-owners at the end of the co-ownership (has an equitable lien to secure payment)**, amount will be the lessor of the cost of improvements & the increase in property value.

❖ Rents & profits.

- *Statute of Anne (1705)* – a co-owner can bring an action for account against another co-owner if received unjust share/proportion from the land.
- *Henderson v Eason* – just share/proportion = where one receives money or other consideration that all co-owners are entitled to by reason of being co-owners (unless earned through sole expenditure/effort).

Severance of Joint Tenancy:

- ❖ By operation of the right of survivorship (where vested in last remaining tenant).
- ❖ By sale/partition.
- ❖ By severance.
- **Where a JT alienates their interest.**
 - Total alienation.
 - Legal = passing legal interest (*Wright v Gibbons*; PLA s 33(1) – deed).
 - Equity = specifically enforceable contract; valid declaration of trust (s 34(1)(b)), gift complete in equity (*Corin v Patton*).
 - Partial alienation.
 - May destroy unity of title or interest (must grant estate, not encumbrance).
 - *Frieze v Unger* – **lease does not sever but suspends JT** (if lessor dies then no survivorship until end of lease).
 - **Mortgage will sever JT** (only affects mortgagor; remainder remain JTs, but collectively are a TIC with the mortgagee – conveyance of fee simple).
- **Where JTs mutually agree to sever** (equity; *Lyons v Lyons*).
 - All JTs must be party to agreement.
 - Application of *Statute of Frauds* s 4?
 - If a clear agreement to sever, court may find constructive trust arises in equity (therefore no writing required under PLA s 34(2)).
- **Where there is a course of dealing sufficient to intimate intention of TIC.**
 - Mutual intention to sever might be implied.
 - Actions that indicate distinct shares & no right of survivorship.
 - Manner in which parties treat their interests in property in the course of negotiations.
 - Mere unilateral intention to sever not sufficient (dealings by all tenants required).
 - *Lyons v Lyons* – Torrens system (mortgage does not sever), letter in which both JTs agreed to sell land for reasonable sum not sufficient (agreement to sell, not sever).

Termination:

- ❖ Both types of co-ownership terminated by voluntary sale.
- ❖ Common law requires all JTs to agree.
- ❖ PLA (partition of land).
 - Co-owner/s alone/together > ½ share may request order (shall unless good reason) (s 126(1)).
 - Any party may seek court-ordered sale & court may order if benefit to all parties (s 126(2)).
 - Court may order valuation of land where party seeks to purchase another's share (s 126(3)).
 - Court may allow a party to bid at sale of property on terms reasonable by court (s 126(6)).
 - Proceeds to remove encumbrances affecting sold land & residue to parties IAW share (s 127).