

TOPIC OVERVIEW

1	EQUITABLE INTERESTS ARISING BY OPERATION OF LAW Includes resulting trusts, constructive trusts and estoppel
2	MORTGAGES The main focus is on the remedies available to registered Torrens System mortgagees upon default
3	AN INTRODUCTION TO THE ENFORCEMENT OF PROPRIETARY INTERESTS AND THE TORRENS SYSTEM Includes a brief overview of priority disputes under the general law, the deeds registration system and an introduction to the Torrens System
4	THE PRINCIPLE OF INDEFEASIBILITY OF TITLE Defines the principle of indefeasibility and delineates its scope
5	EXCEPTIONS TO INDEFEASIBILITY OF TITLE Includes fraud, in personam and other exceptions
6	UNREGISTERED INTERESTS UNDER THE TORRENS SYSTEM Includes the basis for recognition of equitable interests under the Torrens system; the caveat system and priority disputes between unregistered interests
7	CO-OWNERSHIP Includes joint tenancy and tenancy in common, rights and duties of co-owners, severance and termination of co-ownership

OVERVIEW

IN READING TIME:

- Ask which parties are competing
- Which parties are registered/unregistered
- What are their interests?

DON'T FORGET:

- Implied things:
 - Compensation
 - Caveats
 - Priority notices
 - S.87A – verification of identity requirements (for fraud)
 - Objectives of the Torrens system
- Bring back to Q (so client can understand) - e.g. indefeasibility of title means they can assert their right against the RP

TOPIC 1- EQUITABLE INTERESTS ARISING BY OPERATION OF LAW

RESULTING TRUSTS

Resulting Trusts (RT)

- They need not be in writing (s 53(2) PLA)
- Equity will presume that the transferor intended for some or all of the equitable title to be retained by themselves
- Timing: arises at the time of the purchase/transfer

[1] RT: Voluntary transfer

- Automatically arises where property is transferred to [defendant] for **no consideration**

A. There is a presumption that there is a RT.

B. *However*, this presumption may be **displaced** by a *presumption of advancement* if the transfer involves the following relationship:

- Parent to child (*Boumelhem*)
- Husband to wife
- Male fiancé to female fiancé
- **But not** de facto (cf. Gibbs J view in *Calverley*)

[If the presumption is displaced, the presumption will now be that there is **no RT**, and the **onus** will be on the claimant (seeking the trust to prove otherwise). Likewise, if no displacement, the presumption of RT remains.]

C. Evidence of contrary intention

- Look at conduct & evidence pointing to the parties' intentions to deduce the **objective** intentions — not the subjective or imputed ones — at the **time of the transfer**
- Is it enough to rebut the presumption?

D. Conclusion

- Would *illegality* prevent the parties from being rewarded?
- If presumption + no evidence of contrary intention (or vice versa) — trust gives a **proprietary interest** or where not appropriate, damages in its place

[2] RT: Purchase in the name of another

- Automatically arises where the *actual* contributions to the purchase price do not reflect legal title

- **Relevant contributions:** liability under mortgage; but not mortgage *repayments* (as they are made post-purchase) (*Calverley*)

A. Presumption:

- That (the person without legal title who did contribute) retains an interest in the property, reflective of how much they paid (*Calverley*)
- Examples
 - A & B both pay equal amounts to purchase price, under B's name only: presumption that B holds a portion of the property on trust for both A & B
 - A pays 60%, B pays 20% and C pays 20%: presumption that A actually owns 60%, B owns 20% and C owns 20%

B. Presumption of advancement? See above.

C. Evidence of contrary intention

See above + **specific examples via case law** (*Cummins*; *Muschinski*; *Boumelhem*)

D. Conclusion

- If RT found, interest reflects the amount they pay (*Calverley*)
- That is, if A has full legal title, but B made contribution X% to the purchase price, then B has a beneficial interest in that property of X%

TOPIC 2 – MORTGAGES

OVERVIEW

THE NATURE AND TYPES OF MORTGAGES

MORTGAGES VERSUS TERMS CONTRACTS

EQUITY'S PROTECTION OF THE MORTGAGOR

- CLOGS ON THE EQUITY OF REDEMPTION
- UNCONSCIONABILITY

STATUTORY PROTECTION OF THE MORTGAGOR

- NATIONAL CREDIT CODE

RIGHTS OF MORTGAGEES ON DEFAULT

- RIGHT TO SUE ON THE PERSONAL COVENANT
- POSSESSION
- SALE OF THE PROPERTY
 - NOTICE PROVISIONS
 - POWER OF SALE PROVISIONS
 - APPLICATION OF THE PROCEEDS OF SALE
 - WHAT INTEREST IS ACQUIRED BY A REGISTERED PURCHASER FROM THE MORTGAGE?

PRIORITY DISPUTES INVOLVING MORTGAGES

THE NATURE AND TYPES OF MORTGAGES

Creation of Unregistered Mortgages

Creation of mortgages - General

- RP can mortgage land by instrument of mortgage in an approved, appropriate form (TLA s 74(1)).
 - Mortgage acts as security interest over land - fee simple remains with RP (s 74(2)).

Legal vs unregistered mortgage creation

- Only legal if registered.
- Unregistered mortgages only take effect in equity.
 - Equivalent to conveyance of fee simple to mortgagee.
 - Mortgagor has equity of redemption to recover land upon payment of debt.
- Not registered doesn't mean invalid - will simply be unregistered mortgage.

How to create unregistered mortgages?

- To be valid in equity, minimum requirements:
 - Be in writing, or specific part performance.
 - Enforceable against all but bona fide purchaser for value without notice.
- However, is the mortgage subject to the NCC? Code applies if (NCC s 7):
 - Secures under a credit contract/related guarantee (contract under which credit may be provided - s 4); **and**
 - Mortgagor is a natural person or strata (owner's) corporation (mortgage for personal/residential/domestic/renovation for investment purposes - s 5(1)).

EQUITY'S PROTECTION OF THE MORTGAGOR

- CLOGS ON THE EQUITY OF REDEMPTION
- UNCONSCIONABILITY

RIGHTS OF MORTGAGORS

- In equity:
 - There are clogs on equity of redemption (more important for GLL)
 - Unconscionability (*Amadio*)

STATUTORY PROTECTION OF THE MORTGAGOR

- NATIONAL CREDIT CODE

If NCC applies...

- Writing must be in form of written contract document with signatures of both debtor and credit provider (*s 14; 42*).
 - Copy of mortgage must be given to mortgagor (*s 43*).
- Credit provider has additional duties to provide full disclosure to debtor (*ss 14-22*).
 - Includes *inter alia*: details of contract, info of debtor's rights/duties, money being credited, rates of interest.
 - Cannot contract out of Code (*s 191*) – otherwise it will be void (*s.42(4)*).
- Court has powers under NCC as well:
 - Can extend terms of contract/postpone payments if debtor unable to meet obligations due to illness/unemployment/other reasonable cause (*ss 72-4*).
 - Can re-open unjust cases if debtor requests, can set aside/vary contracts (*ss 76-7*).
 - Can review unconscionable interest, fees and charges and alter them (*ss 78-9*).