

4 Priorities

- What type of interest is it?
- When was it created?
- *Perpetual Trustees Company Ltd v Smith* (2010)
 - when questions as to indefeasability arise—protection of statute removed—old rules waiting

4.1 Prior Legal v Subsequent Legal

- *nemo dat*—first in time prevails

4.2 Prior Legal v Subsequent Equitable

4.2.1 When will the legal interest be postponed?

✗ *Northern Counties Fire Insurance v Whipp* (1884)—**nothing but fraud and gross negligence**—Mrs Whipp argued that Northern had been fraudulent. It had taken legal mortgages over a number of properties and placed them in safe. Employee had key to the safe, and when he needed more money he took the title deeds to two of the properties, removed the documents and remortgaged them to Mrs Whipp, who knew nothing about the prior legal mortgages. **Argument:** Northern's gross negligence in not keeping the deeds safe was conduct sufficient to justify Whipp's equitable mortgage being given priority.

✓ *Walker v Linom* [1907] of what is gross negligence: suggestion of **such extreme negligence** that it almost constitutes fraud itself—Walker conveying some of his land to trustees but withholding the final title deed which held him as owner in order to obtain a second mortgage from Barnes who sold to Linom.

- * Trustees interest (prior legal) should be postponed to Linom (later equitable) on the basis that the trustees had acted inappropriately. The trustees were grossly negligent in not ensuring that they obtained 'all' the title deeds in the chain of title.

* "Such negligence as to make it inequitable for [the legal owner] to rely on his legal estate"—**Parker J**

- A legal mortgage could even allow the mortgagor to have the title deeds back and still **not suffer** postponement of their interest if their excuse for having them returned was reasonable enough:

✗ *Peter v Russell* (1716)—mortgagor asked his mortgagee for the return of the legal lease document as he wanted to rebuild and show the builder the dimensions of the house. The mortgagee went with him to the house where the mortgagor took the document into another room and showed it to two people who had insisted on seeing it before they lent him money.

- Held: if mortgagee been in some fraudulent plan with the mortgagor to induce the second mortgagee to lend the money, the legal interest would have been postponed. Had the mortgagee simply stood by and watched the second mortgagee lend the money without telling him of the first mortgage interest, it **would** be postponed. However in this case, there was no evidence at all the first mortgagee knew anything of the mortgagor's scheme to obtain the second mortgage.
- Postponement of priority where the owner of the legal interest gives the person the title deeds with permission to raise money on the land prevents the owner denying the priority of a second subsequent interest due to their apparent grant of authority: *Brockslesby v Temperance Permanent Building Society* [1895].
 - Father allowed son to have title deeds to house and gave permission to raise loan. Did not specify amount to be raised. Son raised in excess of authority. Father's legal interest was **postponed** to later equitable interest of mortgagee.

- *Transfer of Land Act 1958* s 42(1)—*in personam* exception as described in *Frazer v Walker* [1967]

4.3 Prior Equitable v Subsequent Legal

- ‘Equity’s darling’
- A bona fide purchaser of the legal estate for value without notice of the prior equitable interest will take the land free of the prior equitable interest.
 - *Jared v Clemens* (1902)—conduct of the party who has the legal interest—Clemens had notice prior to sale¹⁸—willful blindness¹⁹

4.3.1 Elements

bona fide

Genuine and honest absence of notice—investigation of the motives and state of mind of the purchaser *Midlands Bank Trust Co Ltd v Green* [1981]—difficult as intertwined motives²⁰

purchaser

A person who takes the land by means other than legislation

of the legal estate

Usually a gap in time between payment for the estate and the final completion by conveyance—problems occur when a person

¹⁸Although **Byrne J** noted that it was only that because of Clemens’ solicitor’s diligence that he had notice

¹⁹Taylor purchased two leasehold properties, obtaining necessary money from Jared. Transaction was facilitated by Taylor’s solicitor Parr. Taylor signed memorandum of deposit in favour of Jared for the money advanced and charged the houses in the title by means of an equitable mortgage. Title deeds remained with Parr. Later, Taylor contracted to sell two houses to Clements, the abstract of the title delivered to Clements did not disclose the equitable mortgage, a search however of the bankruptcy file discovered its existence since Taylor had been discovered bankrupt. Written request was made requiring it to be discharged. Parr handed over a signed receipt that Jared had been paid all the money owed. Purchase was completed, but subsequently found that Parr had forged Jared’s name, with money actually not being paid. Jared took legal action to establish the priority of his charge. **Issue:** Whether Clements who had deeds and legal estate (later legal interest) was entitled to hold the property free from the mortgage, or whether Jared, as equitable mortgagee, could uphold his security (prior equitable interest)?

²⁰**Lord Wilberforce**

discovers an equitable interest after payment but before they receive legal title. The normal rule is that if they discover the equitable right at this point and before they take the legal title they are still bound by it: *Wigg v Wigg* (1739)

for value

Essentially consideration as in contract law *Midlands Bank Trust Co Ltd v Green* [1981]

without notice

Actual, imputed and constructive notice, as defined in statute: *Property Law Act 1958* (Vic) s 199—see 4.3.2

Actual notice:

Where knowledge exists, the purchaser will be bound by the interest unless they take all reasonable care to ensure that the interest has been extinguished. Just accepting an assurance from the person who created it that it has been extinguished is not enough: *Jared v Clemens* (1903)

Imputed notice:

If agents receive actual or constructive knowledge of a prior equitable interest, that knowledge is imputed to the purchaser: *Jared v Clemens* (1903)

- Except for fraud on the part of the agent: *Chultz v Corwill Properties Pty Ltd* (1969)
- Except if the agent gets notice of an interest while they are in the course of their own independent activities: *R v Biggin; ex parte Fry* [1955]

Constructive notice

Usual and proper inspections: *Baily v Barnes* [1894]

- Inspect land and title documents, and search any general law deeds register.
 - * How far should the title search go back? *Property Law Act 1958* s 44()—thirty years from **18 March 1959**—deemed to have **constructive notice** of the title that is able to be demanded s 44(6)²¹

²¹ s 44(6) *Property Law Act* A purchaser shall not be deemed to be or ever to have been affected with notice of any matter or thing

- Inspect the land will determine if anybody is in possession, e.g. adverse or a tenant under a lease
- * Purchaser is under constructive notice of tenant's proprietary rights but not any rights that cannot be found in the lease: *Hunt v Luck* [1902]
- * If the vendor is in possession with another person? *Caunce v Caunce* [1969], considered in *Platzer v Commonwealth Bank of Australia* [1997]—courts willing to hunt for the smallest piece of evidence of **inconsistency** to affix a purchaser with constructive notice

4.3.2 s 199 *Property Law Act*—Restrictions on Constructive Notice

- (1) A purchaser shall not be prejudicially affected by notice of any instrument, fact or thing unless—
 - (a) it is within his own knowledge, or would have come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him; or
 - (b) in the same transaction with respect to which a question of notice to the purchaser arises, it has come to the knowledge of his legal practitioner or other agent, as such, or would have come to the knowledge of his legal practitioner or other agent, as such, if such inquiries and inspections had been made as ought reasonably to have been made by the legal practitioner or other agent.
- (2) This section shall not exempt a purchaser from any liability under, or any obligation to perform or observe, any covenant condition, provision or restriction contained in any instrument under which his title is derived, mediately or immediately; and such liability or obligation may be enforced in the same manner and to the same extent as if this section had not been passed.

of which, if he had investigated the title or made inquiries in regard to matters prior to the period of commencement of title fixed by this Act, or by any other Act, or by any rule of law, he might have had notice, unless he actually makes such investigation or inquiries.

- (3) A purchaser shall not by reason of anything in this section be affected by notice in any case where he would not have been so affected if this section had not been passed.
- (4) This section shall apply to purchases made either before or after the commencement²² of this Act.

4.4 Prior Equitable v Subsequent Equitable

- Determine first if merits of equity are equal: *Heid v Reliance Finance Corp Pty Ltd* (1983)
- **Priority of time** gives better equity if nature is same: *Rice v Rice* (1853)—however if they are not the same, then the following are considered
 1. The nature and condition of the respective equitable interest
 2. The circumstances and manner of their acquisition
 3. The whole conduct of the parties
 - What type of conduct postpones the priority?
 - Some act or omission by the first interest holder that contributes in some way to the second interest hold acquiring their interest without realisation of the earlier interest
 - Revolves around possession of title deeds.
 - * Failure of the first mortgagee to take the title deeds allows the landowner to use them again. Almost inevitably lead to postponement of the first equitable mortgage: *Cash Resources Australia Pty Ltd v BT Securities Ltd* [1990]
- Still applies to Torrens system land: *Barry v Heider* (1914)—reasons why interests might be unregistered—during the period where all interests are equitable (i.e. before registration)
 - *Heid v Reliance Finance Corp Pty Ltd* (1983)—Heid's conduct in handing over the completed memorandum of transfer containing an acknowledgment of payment allowed third party, Connell Investments to represent itself as the true owner

²² 18 March 1959