

REAL PROPERTY EXAM SUMMARIES

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General information: types of estates

1. Freehold estates (uncertain duration)
 - Fee simple
 - Life estate
 - (and the abolished fee tail)
2. Leasehold estates (certain duration, a lease)
 - Key characteristic is that it has a certain duration.
 - Ends when it expires.

Remainders and reversions

Fee simple

- Fejo: An estate in fee simple is, "for almost all practical purposes, the equivalent of full ownership of the land" [44]
- An inheritable estate ('fee' indicates inheritable, simple means standard)
- Inheritability is indicated in the grant by the use of the term 'heirs'
- You get rights of ownership: eg alienable; exclusive possession. Not about physical stuff. 11 rights of ownership. Key characteristics of ownership in general: alienability – to dispose of your ownership interest eg sell, gift; exclusive possession – right to exclude all others. Trespass is the tort that protects exclusive possession. Everyone has an implied right to enter your property, until you revoke it. Emergency services are allowed by legislation. Contract with telstra to take away your right.
- Council has planning laws and can tell you what to do. Or state heritage listing legislation.
- General rule is that all land is alienable
- Permanent, keeps going.
- If die without a will, legislation gives next of kin. If no relative, the land goes back to the crown. Gov't now owns it and decides what to do with it, estate keeps going.
- When you sell land you write you are transacting an estate in fee simple.
- Most common estate.
- At common law you needed:
 - To A (any person) and his heirs (technical language, indicated inheritability)
 - Now changed by legislation – not technical language. In fee simple is easiest, cant be questioned.
- Now can be To A in fee simple / To A forever - *Conveyancing Act* s 47(1), (2)
- Also created by default if you attempt to create a fee tail - ss19 and 19A *Conveyancing Act* 1919 – NOW ABOLISHED. Was inheritable, and specified who could inherit, eg eldest male. Eg see *Pride and Prejudice*. Didn't make sense to have in Australia.

Life estate:

- Two types: 1. Life estate
 - No inheritable words in it. But still an uncertain duration because it is measured by someone's life and we don't know when they will die.
2. Life estate pur autre vie – to Tim, for the life of Camilla. Measured with respect to the life of another.
 - All rights of the holder of an estate in fee simple except inheritability and note doctrine of waste – cant fundamentally change the nature of the property eg knock the building down. Not repairs or changes.

▪ TORRENS TITLE

How to solve a torrens dispute:

- Establish the competing parties – who are you advising, who do they conflict with?
- Establish which parties are registered, and who are unregistered

Rules:

- Registration gives title (s41 RPA)
- Registration gives indefeasibility (s42 RPA)
- Registered party will have indefeasibility, except if there are any exceptions

Priorities:

Registered interests in second schedule will prevail over first schedule

As between two registered in second schedule, first in time prevails (s36(9) of RPA)

Reg v unreg: registered will prevail over unregistered **EXCEPT** if exceptions

Exceptions to indefeasibility:

- Fraud
- In personam (personal equity)
- Short tenancies exception
- Omitted easements exception
- Others: prior folio, profits a prendre, misdescribed parcels, overriding statute, possessory title

Unreg v unreg: who has the better equity? Who is postponed?

- Establish if they have legal or equitable unregistered interests.
- If legal, will prevail, **EXCEPT**, if postponing conduct
- Otherwise, first in time will prevail

Relevant to consider here:

- Caveats
- 'legal lease' – s23D Conveyancing Act
- s43A protection – creates a legal interest.

Postponing conduct:

- Failure to take title deeds; failure to keep possession of title deeds by gross negligence, premature release of title deeds, receipt of money when not received
- Failure to caveat

Other note:

- A forgery is void and ineffective pre-registration but indefeasible post registration:
Mayer v Coe

Exceptions to indefeasibility:

- **Prior folios:** s. 42 (1)(a) of the RPA – There was doubt about whether the registrar-general may make a mistake – two papers for the same property, different people saying are owners. The one first created would prevail, the prior folio. But other person has claim in damages against registrar.
- **Profits a prendre:** s. 42 (1)(b) of the RPA – profits to be taken from the land, eg you plant a crop, you cultivate it, you can take the profits on someone else's land. You have indefeasible right even though it isn't registered. Prove the right through the agreement you made. Prendre: from the Latin 'to take'
- **Misdescribed parcels:** s. 42 (1)(c) of the RPA – boundaries were misdescribed.

Omitted easements: s. 42 (1)(a1) of the RPA

An omitted easement can be either:

- Misdescribed: it is registered but it wasn't recorded accurately; or
- Omitted:
 - Easements subsisting immediately – created under Old System before land was converted to torrens (implied by necessity) **or** has been in continuous use for at least 20 years (prescriptive). These remain enforceable after the servient tenement is converted to torrens (*Beck v Auerbach*; *Dobbie v Davidson*)
 - Easements validly created – easements created over land that was always torrens: eg where it was lodged on the transfer form but for whatever reason, was not registered
 - Note: you cannot create a prescriptive easement under torrens.

Omitted easement:

- Interest in land, eg right of way through neighbours' property. Eg indefeasibility doesn't work for rows of terraces with shared walls and roof.
- Implying easements out of necessity.
- Omitted bc it was implied under old system or used for at least 20 years.
- Give rights to people who hadn't registered the rights of the easement bc so many of them.
- If you can prove you had an easement while it was old system, it will still be subject to the old system interest created. Either implied by necessity or after 20 years of continuous use.
- Benefit of easement: dominant tenement.
- Servient tenement is the serving block of land.

Cases:

- *James v Stevenson* [1893] AC 162 – on appeal to privy council. Held that if you had an implied easement when the land was old system, it remains enforceable when the servient land got converted to torrens, bc it was omitted.
- *James v R-G* (1967) 69 SR (NSW) 361 – servient land was always torrens. That torrens land had an easement burdening the land. Later bc of error, they had got rid of easement on the register. Court said they had omitted easement if always there under torrens.

S43A: dealing registrable

- On completion of the contract for sale of land and before registration the purchaser has less rights than they would have under the old system as they only have an equitable interest which is subject to any earlier equitable interest (even though they may have taken the interest for value and without notice) – under old system they would have had the legal estate provided they took that estate without notice of earlier interests and for value.
- To remedy this defect in the RPA, s43A bestows upon such a purchaser of Torrens land the same rights as they would have under old system – **that is the section declares that they take a legal interest** after sale but prior to registration.
- Therefore s 43A allows a purchaser of an interest in land, who takes for value and without notice, to get a legal estate – thus protecting him or her against earlier equitable interests

Rules for a dealing registrable – s43A RPA

- Must be accompanied by the CT, or give a direction to the RG to use the CT if they already have it (s36(6) RPA: usually the only person who has CT would be purchaser or first mortgagee)
- Must be post settlement and pre registration
- Dealing must be stamped – *Stamp Duties Act*
- There must be no formal defects – eg wrong name, and it must not be **void** – s43A has no application to a forged dealing (*Mayer v Coe*; *Jonray v Partridge Bros*)
- Must be the next dealing to be registered (*IAC v Courtenay*)
- There must have been no notice at settlement of the unregistered interest (*IAC v Courtenay*)

Note: successive effect doctrine – if the next dealing to be registered party gets s43A protection, their bank as mortgagor, or other related party can then also get protection (*Jonray v Partridge*)

- Accompanied by the CT: s. 36 (6) of the RPA – to have a dealing registrable, that you can lodge, it must be accompanied by CT, or by a direction to the RG to use the CT if already in their possession. RG has every CT of every real property in NSW on a computer but additionally, there is a counter-part CT that is in community, printed out and given to them by RG. You have to produce the paper one so the RG can change it and give a new one. But the counter-part may already be with the RG if something recent had happened.
- Purchaser or first Mortgagee – only people who can have possession of CT are purchaser or first mortgagee. Don't get dealing registrable until after you settle, bc at settlement the vendor will hand CT and signed transfer.
- Post settlement and pre registration – once registered, no longer registrable.
- Dealing must be stamped: Stamp Duties Act – pay stamp duty.
- No formal defect: - errors that are fixable, but until fixed it is not a dealing registrable.
- Different name of vendor eg mary or maria; or
- Error re prior encumbrances

Postponing conduct – 6 scenarios where it is found

Postponing conduct: will stop an unregistered interest from succeeding over the other unregistered interest

- Failure to take possession of title deeds (*Walker v Linom*)
- Failure to retain possession of title deeds by an act of gross negligence (*Northern Counties v Whipp*)
- Premature release of title deeds
- Receipt clause when money not received – shouldn't sign saying you have received payment when you haven't: (*Reliance Finance v Heid*) – but differs to *Lloyd's Bank v Bullock* – may be signing in 'escrow'.
- Execution of a dealing that doesn't reflect the transaction, ie 'holding out': *Breskvar v Wall*
- Failure to caveat: *Butler v Fairclough* – should caveat your unregistered interest where possible. NSW case law suggests don't have to caveat if purchaser after exchanging contracts, but law isn't clear (*Black v Garnock*). If you don't have the CT (ie not first mortgagee, should caveat as no possession of CT)

Failure to take possession of title deeds

- *Walker v Linom* [1907] 2 Ch 104 – if someone who should've taken possession of title deeds failed to do so, this may be postponing.
- Conveyancing practice: if you are selling property to purchaser, you should have and retain title deeds until you've been paid in full. If you give before then, it may be postponing conduct.
- Purchaser should take the title deeds once they have paid in full.
- Case: purchaser who fails to take possession of title deeds at settlement will be guilty of postponing conduct.
- There was a man who owned multiple properties, decided to establish a family trust for wife and kids. Consulted solicitor, documents drafted, conveyed properties to his solicitor, solicitor was going to be trustee, holding for the wife and kids. He held back the title deeds to one of the properties, solicitor wasn't aware, failed to take possession of all the title deeds. This let the husband to sell the same property twice, now to a third party. Common law says nemo dat, bc the husband conveyed to P1, he cant convey to P2 again. But equity said it may be against conscience to deny P2 – P1 failed to take possession of the title deeds, was his failure which facilitated the fraud. He was postponed to the more innocent P2.

Failure to retain possession of title deeds by an act of gross negligence

- *Northern Counties v Whipp* (1884) 26 Ch D 482 – man was employee of insurance company, Northern Counties, borrowed money from employer, he created a mortgage in favour of the insurer. He was dishonest, had access to company safe, stole the title deeds from the company safe, mortgaged the property to someone else.
 - Only postponing where you act in a "grossly negligent manner". Not enough to be victim of stealing, has to be stealing by gross negligence.