

Priority Rules

- There are different Sources of Priority Rules
- Priority disputes over land are governed by two sets of principles:
 - (1) Principles/Priority Rules that were developed in common law and equity to resolve disputes between:
 - Two legal interests (prior in tempore potior in iure)
 - Prior legal interest and subsequent equitable interest (fraud principle)
 - Earlier equitable interest and subsequent legal interest (bona fide purchaser for value without notice)
 - Two equitable interests (merit and prior in tempore)
 - A mere equity and an equitable interest (higher equitable interest will prevail over a mere equity)
 - (2) The statutory scheme of registration of the instruments that has led to creation of particular interests:
 - Statutory scheme operates as a gloss on the former rules

Types of possible priority disputes

1. Two legal interests
2. Prior legal interest and subsequent equitable interest
3. Earlier equitable interest and subsequent legal interest (bona fide purchaser for value without notice)
4. Two equitable interests
5. A mere equity and an equitable interest

Priority Disputes – Legal interests v Legal interests – Nemo Dat Principle

- Two non-identical interest may be created in land
 - E.g. an easement followed by mortgage: earlier legal easement has priority over a later legal mortgage
 - E.g. a life estate and remainder interest is granted
- **Determined according to the priority of time (chronologically)** by which they are created: prior in tempore potior in iure (*Moffet v Dillon*).
- Not possible to confer two identical legal estates to persons over a single piece of land. Once a legal estate has been issued another identical estate cannot be granted: the grantor has no estate to give.
- When a person attempts to convey a legal estate which he or she no longer has, the **nemo dat quod non habet principle** applies
- As a result of the *nemo dat quod non habet* principle priority is given to the legal interest created first in time
- *Nemo dat quod non habet* is strictly speaking **a principle of invalidity rather than priority**
- *Nemo dat quod non habet* has two basic aspects:
 - A person cannot transfer a title which they no longer have
 - A person can only transfer a title which they actually have

Priority Disputes - Legal v Equitable Interests

- Priority will only be conferred to the extent of the interest.
- Once an interest has been satisfied any surplus interest in the land will pass to remaining interest holders.
 - E.g. A holds a legal mortgage over land securing \$50,000 and B holds an equitable mortgage over the land securing \$100,000. If the mortgagor defaults, the land is sold for \$ 120,000 and A has priority and will take \$ 50,000 from the sale to extinguish the mortgage debt and B will take the remaining money as the subsequent interest holder. A will only have priority to the extent of her mortgage interest
- Equitable interests
 - A 'right to compel the legal owner to hold and use the rights which the law gives him in accordance with the obligations which equity has imposed upon him' (DKLR Holdings)
 - An in personam right enforceable against the owner of land
 - May arise where expressly created, or where inferred or imposed by a court where fairness requires it
 - Numerous identical equitable interests can arise over a single piece of land
 - May exist;
 1. subsequent to the prior legal interest or
 2. prior to the subsequent legal interest

The basic priority rule → is that a bona fide purchaser of the legal estate for value without notice will take priority over the interest of an equitable interest holder

- Nemo dat not applicable to equitable interests as title and possession not conferred

(1) Prior Legal Interest v Subsequent Equitable Interest

- **Rule: → The legal estate holder will always take priority if the legal estate holder is bona fide and has not contributed to the subsequent creation of the equitable estate.**
- Legal estate holder will always take priority
- But the legal estate holder must prove that he/she;
 - Is bone fide; and
 - Did not contribute to the subsequent creation of the equitable interest
- E.g. of fraudulent conduct
 - A first mortgagee returns title deed to the mortgagor to enable him to raise money in a subsequent mortgage by depositing of title document with a new creditor (mortgagee) (equitable mortgage)
 - Holder of prior legal interest represents that he has no interest in property and another person acquires interest on faith of representation
- If the legal estate holder had assisted the in the creation of the subsequent equitable interest in favour of bona fide purchaser taking without notice of prior legal estate, the **prior legal estate will be postponed**

- Conduct of legal estate holder fitting to this category
 - legal estate holder is guilty of **fraud**;
 - legal estate holder is guilty of **gross negligence**; or
 - conduct of legal estate holder effectively results in him being **estopped** asserting his legal priority.
- **A court must decide** if sufficient reason exists to **displace** the **natural priority** enjoyed by earlier legal interest and thereby accord priority to later created equitable interest.
- This was discussed in *Northern Counties of England Fire Insurance Co v Whipp*

Northern Counties of England Fire Insurance Co v Whipp

Facts:

- Northern Counties of England Fire Insurance (NCFI) provided a loan to its manager Crabtree in exchange of a legal mortgage over his fee simple. Crabtree provided NCFI with title documents to his property, including the legal mortgage. NCFI placed the documents in a company safe for which Crabtree had duplicate keys. Crabtree accessed the safe and removed the title deeds and removed the mortgage bond from the chain of title. Crabtree then created another mortgage in favour of Mrs Whipp. Mrs Whipp acquired an equitable mortgage as the legal title was already passed to NCFI. Mrs Whipp obtained the title deeds without knowledge of the legal interest of the Company. Crabtree became bankrupt.

Issue:

- Whether the legal mortgage of the company should take priority over the subsequent equitable mortgage in circumstances where their carelessness in letting Crabtree have access to the safe contributed to the creation of the subsequent title.

Held:

- To prove fraud on that part of legal mortgagee he must:
 - Have concurred in some project to enable the mortgagor to defraud a subsequent mortgagee; or
 - He was a party or privy to some other fraud in fact.
- In *Thatched House*: ‘if a man makes a mortgage and afterwards mortgages the same estate to another, and the first mortgagee is in combination to induct the second mortgage to lend his money, the fraud will without doubt in equity postpone his own mortgage. So, if such mortgagee stands by and sees another lending money on the same estate without giving him notice of his first mortgage, this is such a misprision as shall forfeit his priority.’
- Leading Authority: In *Evans v Bicknell*:
 - That the court will postpone the prior legal estate to a subsequent equitable estate
 - a. Where the owner of the legal estate has assisted in or connived at the fraud which has led to the creation of a subsequent equitable estate, without notice of the prior legal estate.
 - b. Where the owner of the legal estate/mortgagee has constituted the mortgagor his agent with authority to raise money, and the estate thus created has by the fraud or misconduct of the agent been represented as being the first estate.

- But the court will not postpone the prior legal estate to the subsequent equitable estate on the ground of any mere carelessness or want of prudence on the part of the legal owner.
- On facts, whilst there was a great carelessness on the part of the plaintiff company, the carelessness did not amount to a fraud which was sufficient to set aside the priority they retained under their prior legal mortgage.
- **Mere carelessness on the part of the legal estate holder will not warrant postponement**
- Gross negligence or want of prudence on the part of the legal mortgagee is not a sufficient ground to postpone its mortgage
- No general duty on an owner of land to keep title secure (like fierce dogs or destructive elements)
- **Held that the conduct of the company did not constitute fraud and did not warrant the postponement of the legal interest to that of the subsequent equitable interest.**
- From possession of the duplicate key to the safe one cannot imply authority for Crabtree to act as the agent of the Company

Walker v Linom

Facts:

- Walker, the holder of a legal fee simple conveyed it to trustees who then held the legal interest in trust. In handing the title deeds to the trustees Walker retained the most recent deed that provided him with title. Using this document Walker held himself out to be the legal owner of the property and procured a loan from X on security of the deed. X sold the loan to Linom.
- The court treated the dispute as one between a **prior legal interest of the trustees and a subsequent equitable interest in favour of Linom**

Issue:

- Issue: which interest has priority? the legal interest of the trustees or the equitable interest of Linom?

Held:

- Any conduct of the legal estate holder that would make it unequitable for him to rely on the estate against an holder of an equitable interest without notice of legal estate is sufficient to postpone legal estate
- Trustees guilty of gross negligence in not obtaining the title deeds in the chain of title
- Accordingly, the legal interest was postponed to the subsequently created equitable interest

Barry v Heider – Australian High Court

- Held: arming someone with the power to represent that they hold good and clear legal title can mean that the legal title holder is estopped from denying the enforceability of the subsequent equitable title.

(2) Prior Equitable Interest v Subsequent Legal Interest

- **Rule →** The legal title holder is entitled to claim priority where it is established;
 1. that the legal title holder is a bona fide purchaser of the estate; and
 2. the title was acquired for good consideration; and
 3. that the estate has been taken without any actual or constructive notice of the existence of any prior equitable interests

i.e. a bona fide purchaser for value without notice
- Where notice of the prior equitable interest can be established, the priority of the legal estate holder will be postponed
- **Meaning of Good faith**
 - A broad equitable concept which is based upon the principle of fair and proper conduct
 - Good faith, in the sense of not acting inequitably or unconscionably, is required
 - It includes an assessment of the conduct of the purchaser both prior to and upon receiving the estate and investigates motive and state of mind of purchaser
 - Where it can be proven that the transaction was a sham, fraudulently induced or morally reprehensible, the legal estate holder will generally be unable to establish his good faith
- **Meaning of Value**
 - 'For value' means you cannot be a volunteer receiving it as a gift. 'Equity will not assist a volunteer' – take land with all burdens
 - 'Value' includes good consideration (money or money's worth), although it does not need to be pecuniary in nature. Not love and affection.
 - Value also includes past consideration (pre-existing debt)
 - Value can be established where money or an equivalent worth for the transaction can be proven
- **Notice**
 - Actual: actual knowledge of relevant facts - Vague rumours are not enough
 - Constructive: notice of matters which the purchaser would have become aware of if he made all the usual enquiries or inspections
 - Imputed: i.e. notice acquired through an agent of the purchaser within scope of mandate such as conveyancer.
 - Actual or constructive notice of an agent is imputed to purchaser
- E.g. This type of priority dispute can often arise where a trustee, in breach of his duties as trustee, transfers the legal title to a bona fide purchaser who takes without any notice of the existence of the trust. In such a case the legal interest of the third party will defeat the prior equitable interests of the beneficiaries under the earlier trust, unless the third party had notice of the trust