

TYPES OF INTERESTS:

1. Legal interest in Land/Interest in land at law/ interest in land at common law:

This is the BEST possible type of interest you can get and it is enforceable against the whole world.

- If a person has legal/common law interest in land – it cannot be defeated.
- Person may have legal interest in land as purchaser/registered mortgagee/registered easement holder/right of way holder: e.g. bank/legal mortgage – runs with the land and cannot be defeated.
- Runs with the land – owners may change but if a third party has an interest in land, that interest is maintained. E.g. if you buy mortgaged land, you're buying it subject to that mortgage.
- Unregistered interest – usually equitable interest.

To Create:

- **Old Law Interest** – must be created by way of deed (s 52 PLA)
- **Torrens** – to create a legal interest, that interest must be registered on the title (s 40 TLA).

2. Equitable interest in land/equity in land:

This is not as good as a legal interest. It is an interest that has not been registered or is incapable of being registered. It arises where formal legal requirements were not complied with.

- Doesn't have to be created by deed, but usually has to be in writing.
- Attaches to land/runs with land (like common law in rem) with an exception.
- **Exception:** good against the whole world except a bona fide purchaser of a legal interest for value without notice – *Latec Investments Ltd v Hotel Terrigal Pty Ltd*.
- Cannot enforce against a subsequent legal bona fide purchaser for value without notice – those that hold equitable interest in land cannot enforce against later interest holder where those holders are:
 - i. **Genuinely unaware of existence** of earlier interest and bona fide; and
 - ii. Later interest holders paid **valuable consideration** for their rights [thus volunteers will not be protected against prior equitable interest]; and
 - iii. **Acquired legal interest** – if they haven't obtained this, then they are subject to the earlier interest.
- An equitable interest in land may arise where expressly created, or where inferred or imposed by a court.
- Numerous identical equitable interests can arise over a single piece of land.

3. Mere Equity:

This is not a right in property; rather, it is a right to bring an action, which, if successful, will create an equitable interest in the property (note: courts are a bit confused).

E.g.:

- The right to set aside for fraudulent mortgagee sale. Right to have legal title re-conveyed to you.
- The equity of rectification – arises when a person is the subject of a fraud or deception of some kind – can arise to rectify the transaction and give

effect to the interest that the person should have received if not for fraud or deception.

4. Personal Equity/In Personam Action:

Right is personal between the parties. Personal equity incapable of attaching to land – the result is damages rather than an interest.

- If successful, the party has the right to simply obtain damages, rather than interest in land itself.
- *Latec Investments v Hotel Terrigal* – hotel was undersold at a shady auction, however to bona fide purchaser for value without notice therefore plaintiff only entitled to damages.

PRIOR INTEREST (FIRST)	SUBSEQUENT INTEREST (SECOND)	WHICH INTEREST GETS PRIORITY?
Legal Interest	Legal Interest	First in time gets given priority.
Legal Interest	Equitable Interest	Legal interest holder (prior interest) gets priority unless they are estopped, are a party to fraud (<i>Barry v Heider</i>), grossly negligent (<i>Whipp</i>) or allow another party to appear to be the true owner.
Equitable Interest	Legal Interest	Subsequent legal interest prevails as legal owner. <u>Torrens Land:</u> Registration will extinguish a subsequent inconsistent registration (<i>Legros</i>) unless indefeasibility exception applies (fraud, statutory exception, <i>in personam</i> , volunteer). <u>General Land Law:</u> Must have been acquired in good faith, for value, without notice – BFPFVWN (<i>Pilcher</i>)
Equitable Interest	Equitable Interest	Requires merit analysis → <i>Rice v Rice</i> ; <i>Heid v Reliance Finance Corporation</i> .
Mere Equity	Subsequent Equitable Interest	In principle, subsequent equitable interest gains priority however courts are divided on the issue (<i>Latec</i> , <i>Breskvar</i> , <i>Ruthol</i>).

PRIORITY RULES

Priority disputes arise in circumstances where two or more interests in land are recognised and those interests are either directly or partially in conflict. Here it becomes necessary to determine which interest is entitled to priority or, which interest gains precedence.

Priority rules only apply to disputes involving old title land or unregistered land interests. Any priority dispute arising between unregistered interests over Torrens title land may, however, be subject to general law priority rules.

Different Sources of Priority Rules:

- Land interests exist under common law, equity and statute –so do priority rules;
- General Law rules: common law and equity apply as base rules and the *Transfer of Land Act* superimposed on this.
- Torrens title priority rules are superimposed over general law rules where land interest is registered under Torrens system.

Priority Rules for Prior Legal and Subsequent Equitable Interest:

RULE 1: LEGAL INTEREST VS EQUITABLE INTEREST

LEGAL ESTATE HOLDER WILL ALWAYS TAKE PRIORITY IF BONA FIDE AND HAVE NOT CONTRIBUTED TO THE SUBSEQUENT CREATION OF EQUITABLE TITLE (*Northern Counties Fire Insurance v Whipp* (1884))

Where a prior legal interest is in conflict with a subsequent equitable interest, the general principle is that the legal estate holder will always take priority if it can be proven that the legal estate holder is bona fide and has not contributed to the subsequent creation of the equitable title.

Northern Counties of England Fire Insurance Co v Whipp (1884) 26 Ch D 482:

Facts:

- Crabtree was the manager of Northern Counties of England Fire Insurance Co. He borrowed money from the company in exchange for a legal mortgage over his fee simple estate. The title documents, including the legal mortgage, were given to the company and subsequently put in a safe.
- Crabtree held duplicate keys to the safe as a manager of the company. Crabtree subsequently opened the safe and removed the title documents, then removed the mortgage deed from the chain of title. He then handed this amended chain of title over to Whipp in exchange for another loan, with security over the same fee simple.
- The consequence of this transaction was that Whipp acquired an equitable mortgage. Whipp had no knowledge of the existence of the legal mortgage in favour of the company.

Issue:

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

Held:

- Fry LJ: the prior legal interest holder must have fraudulently contributed to the creation of the subsequent equity. Mere carelessness or negligence is not enough.
- Negligence implies duty of safe custody over title documents, and this does not exist. Carelessness or want of prudence is insufficient to postpone the prior legal mortgage.
- Decision was modified by Parker J in *Walker v Linom* [1907] who stated that:
“Any conduct on the part of the holder of the legal estate in relation to deed which would make it inequitable for him to rely on his legal estate against a prior equitable estate of which he had no notice ought also to be sufficient to postpone him to a subsequent equitable estate the creation of which has only been rendered possible by possession of deed which but for such conduct would have passed into the possession of the owner of legal estate.”

The categories where a subsequent equitable titleholder may take priority over a prior legal estate holder are summarised as follows:

- When the owner of the legal estate has him or herself created the subsequent equity by some assurance, declaration of trust, or agreement;
- Where the legal owner fraudulently connives at the creation of the subsequent equity;
- Where the legal owner fraudulently (as opposed to carelessly) failed to get in his or her title deeds from his or her conveyer and thereby enables the vendor to hold himself or herself out to a third party as the legal owner; and
- Where the legal owner has given authority to another to deal with a third party and such authority had been exceeded (*Barry v Heider*). It is this category where estoppel-based arguments may be raised. However if the legal owner does nothing more than vest the property in the name of a nominee or trustee, mere possession of the title documents will, in itself, be insufficient to base an estoppel argument: *Macmillan Inc. v Bishopsgate Investments Trust* [1995].

Barry v Heider (1914) 19 CLR 117:

Facts:

- Mr Barry was the RP of a fee simple in Torrens land. Barry was defrauded by Schmidt who tricked him into signing a transfer form saying that he would sell the property for much less than it was worth.
- Schmidt then used the transfer form/certificate of title to raise a couple of loans with Mrs Heider using the property as security.
- Nothing had been registered. Barry tried to argue that all the mortgagees had were unregistered mortgage instruments, those instruments could not create any interests in the land itself.

Held:

- The arming someone with the power to represent that they hold good and clear legal title can mean that the legal titleholder is estopped from denying the enforceability of the subsequent equitable title.
- Griffith CJ: "When...one person arms another with a symbol of property, he should be the sufferer, and not the person who gives credit to the operation and is misled by it" – suggests an estoppel foundation for this priority principle, although the courts in the past have been reluctant to endorse this.

RULE 2: PRIOR EQUITABLE INTEREST VS LATER LEGAL INTEREST (earlier unregistered interest vs. later registered interest)

IF SUBSEQUENT LEGAL INTEREST HOLDER IS A BONA FIDE PURCHASER FOR VALUE WITHOUT NOTICE THEY WILL TAKE PRIORITY (*Pilcher v Rawlins* (1872)).

The legal title holder is entitled to claim priority where it is established that the legal title holder is a bona fide purchaser of the estate, for good consideration and that the estate has been taken without any actual or constructive notice of the existence of any prior equitable interest.

If you have a situation where the first interest is equitable and the second interest is a legal interest, the legal interest holder will take priority if they are a bona fide purchaser for value without notice (innocent party who purchases the property without notice of the other party's claim to the property).

There are three fundamental elements to the bona fide purchaser for value without notice rule set out in *Pilcher v Rawlins*:

- *Is the subsequent legal titleholder bona fide?* This requires an examination of the overall circumstances in which the legal title was acquired and whether any equitable fraud was involved. If any unconscionable behaviour is involved, then the subsequent legal titleholder may not be characterised as bona fide.

- *Is the subsequent legal titleholder a purchaser?* The priority principle does not apply to volunteers so it must be established that the legal estate holder has given a recognised and acceptable consideration, which means money or something of equivalent value. Natural love and affection does not amount to value for the purposes of this rule.
- *Has the subsequent legal titleholder taken title without notice of the existence of the prior equitable interest?* Notice in this context will encompass both actual notice of the existence of the prior equitable title and constructive notice, where the subsequent legal titleholder is aware of the circumstances which should have put him or her on notice of the existence of the prior equity.

Pilcher v Rawlins (1972) 7 Ch App 259:

Facts:

- Trustees advanced trust money pursuant to a mortgage. They took security over real property and legal title was conveyed to them by the mortgagor. When only a part of the mortgage monies had been repaid, the surviving trustee reconveyed the title to the mortgagor.
- The trustee then appropriated the mortgage monies received and connived with the mortgagor to fraudulently convey the title to the new mortgagees, concealing the existence of the prior mortgage and its reconveyance.
- A priority dispute arose between the prior equitable beneficiaries under the trust who claimed title pursuant to the original mortgage and the subsequent legal mortgagees.

Held:

- The prior equitable beneficiaries were defeated by the subsequent legal mortgagees because the court found that those mortgagees were bona fides and that they had taken without notice of the existence of the equitable beneficiaries.
- Mellish LJ rationalised this conclusion by holding that where beneficiaries have trusted their property to a trustee "...who turns out to be a rogue, it stands to reason that you may lose it!"
- The beneficiaries bore the loss because in evaluating the circumstances, and in particular, where the loss should lie, the beneficiaries were less merit-worthy than the bona fide legal mortgagees.

Doctrine of Notice:

The doctrine of notice binds a subsequent legal titleholder to any equity, which he or she actually knew of or which he or she should have known about as a result of carrying out all of the usual inspections and enquiries. Your acquisition of property is *inherently uncertain*, there is always the possibility that you will be bound by a prior equity which you should've known about.

Timing:

It must be established that the legal titleholder has received notice of the previous equity prior to the acquisition of that title and not afterwards. Further, where the legal titleholder acquires a pre-emptive equitable title – for example, the equitable interest that is conferred under a contract for the sale of land – it must be established that the notice was acquired prior to the acquisition of that pre-emptive equitable title.

Equitable interest that you acquire effectively becomes a legal interest – it's a continuum – once you get the equitable interest, it is inevitable that you will acquire the legal interest – therefore you must find out if there is another equitable interest before you acquire the legal interest.

- Sale context: must receive notice before entering into a contract and acquiring antecedent equity: *Blackwood v London*.
- Will be taken to be aware of all interests reasonably apparent from inspection – does not include interests arising from oral conversations e.g. the right to rectify not in the document – *Smith v Jones*.

E.g. you purchase a legal interest in land prior to entering into the contract you discover that a husband and wife inhabit the property even though the agent indicated a single man owns the property. The court is likely to say you can constructive knowledge of a constructive trust issue of a wife who isn't on title and is living in the property. Court takes a reasonably rigorous approach where you have inspected and noticed a variation.

Effective of Notice:

- Once you receive notice, it cannot be removed: *Jared v Clements* [1902].
- Equitable interests arising from co-occupation may have 'constructive notice'.
- *Kingsnorth Finance Ltd v Tizard* [1986]– the purchaser or mortgagee must carry out such inspections as ought reasonably be made, and where they do not find anyone in occupation other than those who the mortgagor has referred to, they should not be fixed with notice of the claimant's rights.

Actual Notice:

Actual notice will arise where a purchaser received actual confirmation that the existence of a prior equitable title exists – *Eagle Trust Plc v SBC Securities Ltd* [1993]. Vinelott J held that a person would be regarded as having actual notice of a fact if that person had been supplied in the course of a conveyancing transaction with a document which he or she had not read, or which he or she had read some time ago and forgotten.

Constructive Notice:

Constructive notice may be raised where information comes to the knowledge of a purchaser or his or her legal practitioner following reasonable inspections and inquiries: *Royal Bank of Scotland v Etridge* [2001].

Imputed Notice:

Notice of that which is brought home to a principal in circumstances where an agent has received actual or constructive notice of a prior equitable interest. This has been modified in some jurisdictions so that imputed notice is restricted to information which related to the relevant transaction in issue and will only refer to information which has come to the attention of the agent, or, which would have come to the attention of the agent had all reasonable inspections and inquiries be made: *Property Law Act* 1958 (Vic) s 199(1)(b).

Smith v Jones [1954] 1 WLR 1089:

Facts:

- In 1946, Jones purchased at an auction a firm knowing Smith, who was the tenant, occupied it. Before the sale, Jones inspected Smith's tenancy agreement, forming the opinion that Jones was liable for structural repairs.
- Smith sought rectification of the agreement to impose repairs but Jones dispute the claim and also pleaded that even if a claim for rectification was made out against the original landlord, since he was a bona fide purchaser for value without notice he was not bound by the equity to rectify.
- Oral lease shifting liability for repairs to the landlord; new landlord seeks to enforce the original written agreement, which placed liability upon the new tenant.

Issue:

- Does the tenant's equity of rectification take priority over the new landlord's reversion?

Held:

- There are reasonable limits to the obligation of the purchaser to investigate title. The new landlord does not have actual notice and a purchaser will not be deemed to have constructive notice of an equity.
- Upjohn J: "the defendant is entitled and bound to rely on the terms of the document, and the document speaks for itself".
- The equity of rectification is not enforceable against the new landlord because he took without notice of it. The purchaser has no way to discover the existence of an oral variation, short of asking each of the parties whether the written agreement accurately reflects their actual agreement. The courts are willing to view sighting the written agreement as sufficient enquiries for the purpose of notice.

Kingsnorth Finance Ltd v Tizard [1986] 2 All ER 54:

Facts:

- Mr Tizard, a husband separated from his wife, received £66,000 pursuant to a mortgage from Kingsnorth Trust Ltd, which was secured over land known as Willowdown.
- Willowdown was the matrimonial home of Mr Tizard and his estranged wife. Mrs Tizard lived in the spare room and sometimes slept at her sister's home. When the mortgagee visited the property for a physical inspection, Mr Tizard attempted to conceal the presence of his wife's occupation.
- Mr Marshall, the bank employee, inspected the property on a Sunday afternoon at the time Mr Tizard had arranged. Further, Mr Marshall had received notice of the existence of Mr Tizard's children who also lived at the property.

Held:

- Judge John Finlay QC held that the purchaser or mortgagee must carry out such inspections as ought reasonably be made and, where they do not find anyone in occupation other than those who the mortgagor has referred to, they should not be fixed with notice of the claimant's rights.
- It was noted that the inspection of Mr Marshall was not, in the circumstances, reasonable, and therefore the subsequent legal mortgagee took the interest with constructive notice of the equitable title of the wife arising from her 'substantial' occupation at the property.
- The court noted that the mortgagee should have been more diligent in physically inspecting the property, particularly given the fact that the husband had, when applying for the mortgage, described himself as a spouse and that children lived in the home. Both of these factors raised the possibility of another occupier holding equitable title.

Lloyds Bank v Rosset [1988] 3 WLR 1301:

Facts:

- Mr Rosset purchased a house in November 1982 in his name. He bought the property with money provided by a trust fund of which he was a beneficiary and the property became the matrimonial home. Mr Rosset charged the property to secure a £15,000 overdraft, which he arranged for the purpose of carrying out some renovation works.
- He and his wife were let into possession before completion of the purchase. Mr Rosset subsequently failed to make the loan repayments and the bank sought possession. Mrs Rosset resisted the claim. She had made no financial contribution to the purchase but claimed that she and her husband had agreed that it was to be jointly owned.
- Mrs Rosset also claimed that, in reliance on that agreement, she had made a sufficiently significant contribution to the acquisition of the house by the work she had done on it to give rise to a constructive trust under which she could assert a beneficial interest in the house.

Held:

- The trial judge rejected Mrs Rosset's case that there was any agreement, arrangement, or understanding between the spouses that she was to have an interest in the house. He did, however, find that her part in the renovation works was sufficient to give her a beneficial interest, the extent of which he referred to an inquiry.
- The English Court of Appeal in upholding the finding of a beneficial entitlement went on to consider where the bank had received 'constructive notice' of the beneficial entitlement of the wife because of the fact that she had visited the premises everyday during the renovation.

EXCEPTION: *Wiles v Spooner* [1911]

RULE: When a legal interest holder who has taken without notice of the existence of a pre-existing equitable title passes that a legal title on to a bona fide purchaser who does have notice of the equitable interest, the latter will take good title.

If a legal interest holder has taken without notice of the beneficiaries, and is transferring security onto another third party, the third party takes that security knowing that the beneficiary exists. The transferee from the bona fide estate holder can get the same rights as the bona fide estate holder. Rationale is that it is not fair that that punishes them – otherwise you wouldn't get the same value for the interest.

The rationale for this principle is that the restate holder who takes without notice should not be restricted in his or her attempts to sell the interest and obtain the best possible price.

Exceptions:

1. Where a trustee sells legal title in breach of trust to a purchaser who acquires without notice of a prior equity and the trustee subsequently purchases title from the purchaser with notice of the prior equity, the rule will not apply. In such situations, the trustee will hold the property on trust;
2. If the property is acquired from a bona fide purchaser for value who has taken title without notice of a prior equitable title, by a subsequent purchaser who takes with notice of the existence of the equity and the acquisition is a consequence of actual fraud, the *Wilkes v Spooner* exception cannot apply and the subsequent purchaser will be affected by notice: *Kettlewell v Watson* (1882).

Priorities Between Equitable Interests:

RULE: EQUITABLE INTEREST VS EQUITABLE INTEREST

THE INTEREST WHICH IS PRIOR IN TIME WILL TAKE PRIORITY IF BOTH INTERESTS ARE EQUAL IN MERIT: '*QUI PRIOR EST TEMPORE POTIOR EST JURE*': *Rice v Rice* (1854).

This maximum depends upon an initial evaluation of the merits of both interests, and this in turn depends on what is described as the 'better equity' valuation. If the merits are entirely equal, priority in time applies.

Rice v Rice (1854) 2 Drew 73; 161 ER 646:

Facts:

- Michael Rice, the defendant, purchased a leasehold property from George and Lydia Rice. Once the transfer was executed, Michael Rice transferred a portion of the purchase-money but the balance remained owing to George and Lydia Rice. George and Lydia allowed the money to stand over for a few days upon the promise by Michael to pay.
- However, the transfer recited the fact that the whole of the purchase-moneys had already been paid and receipts were endorsed upon it. Following the transfer, Michael deposited the transfer with Ede and Knight for the purpose of securing an advance.
- Michael then absconded without paying the balance to the vendor or the equitable mortgagees.

Issue:

- Which equitable title, the equitable lien for the unpaid purchaser price or the equitable mortgage, should, on the facts, take priority?

Held:

- The priority in time accorded to an interest will only be decisive in circumstances where, in all other respects, the merits of the interests are equal.
- Kindersley VC stated that the rule was as follows: "As between persons having on equitable interests, if their equities are in all other respects equal, priority of time gives the better equity; or *qui prior est tempore potior est jure*".
- In conducting a merit analysis, consideration must be given to a broad range of factors, including: whether the prior interest holder had armed the purchaser with the indicia of title and thereby contributing to the creation of the subsequent equitable interest: whether the holder of the first equitable interest has armed a third party to 'go into the world under false colours'; whether the subsequent equitable interest holder took with notice of the existence of the prior equitable interest holder; whether the prior interest holder has sufficiently protected their interest by retaining possession of title documents; have they lodged a caveat?

Factor's Relevant to Merit Assessment:

- Not protecting prior equity with any means available;
- Merit assessment based upon broad and flexible assessment – not rigid principles;

- No one factor should be prioritised over another;
- Notice can be relevant but not determinative in a merit assessment.
- First equitable interest holder not able to contribute.
- Whether they follow usual conveyancing practices.
- Must have done everything that you can.

Estoppel:

Arguably, the true basis for determining a priority dispute between competing equitable interests is grounded in estoppel. According to Farwell J in *Rimmer v Webster* [1902] “if the owner of property clothes a third person with the apparent ownership... he is estopped from asserting title as against a person to whom such third party has disposed of the property, and who took it in good faith and for value”.

According to this view, wherever a prior equitable interest holder does not retain possession of the title documents and confers the indicia of title, allowing a third party to represent to the rest of the world that they are the full and unencumbered legal title holders, the prior interest holder is estopped from asserting priority.

Heid v Reliance Finance Corporation (1983) 154 CLR 326:

Facts:

- Heid sold property to Connell and was defrauded of most of the proceeds of the sale. Connell took out a mortgage from Reliance Finance with the certificate of title and transferred Heid’s property as security.

Held:

- **Gibbs CJ (with Wilson J in agreeing):** Heid was estopped on the principle of estoppel by representation, the transfer having operated as a representation that Connell was the proprietor of the land. Heid was held to have failed in his duty to those who might subsequently deal with the documents by accepting without inquiry that he was dealing with a solicitor. Gibbs CJ suggested that such an estoppel would not arise where a person gave such indicia of title to his or her own solicitor, or even to an independent solicitor acting for both parties, in accordance with the common practice in conveyancing.
- **Mason and Deane JJ:** rejected estoppel as the basis for deciding the case and applied a more general and flexible principle that preference be given to the better equity in circumstances, a matter which would usually be determined by the conduct of the holder of the earlier interest to determine whether, in all the circumstances, his or her interest should be postponed – in particular whether that conduct made it reasonably foreseeable that a later equitable interest would be created. Heid’s conduct fell into this category.

ROADMAP:

1. In considering a question on equitable interest, the first issue to consider is whether or not an equitable interest exists, and if so, how. You must be aware of why the equitable interest exists. The following issues should be considered:
 - a. Has the equitable interest been expressly created?
 - b. If not, is there a justification for imposing a constructive trust? (e.g. common intention/detrimental reliance/remedial device for unconscionability)
 - c. A resulting trust (e.g. a failure to comply with procedures for establishing an express trust or unequal purchase price with no presumption of advancement); or
 - d. Equitable interest arising under part performance (e.g. acts of reliance referable to a clear contractual agreement).
2. Once it is established that an equitable interest exists, consideration should be given to whether or not that interest is in competition with any other interest. If a legal interest in the property exists, the equitable interest holder will only defeat it if it can be proven that the legal interest holder is not bona fide or had

notice of the existence of the equitable interest when acquiring the legal interest. If not then the legal interest will defeat the equitable interest under general priority rules.

3. If competition between two equitable interests exists, priority in time is the last consideration: courts will examine the circumstances first of all to try and determine whether both holders have acted fairly and have done everything they can to protect their interests. Where a subsequent equitable interest holder acquires that interest pursuant to a breach of trust, their interest will be automatically postponed if they dishonestly procured or assisted in the breach of trust.

Priority Rules: Mere Equity and Subsequent Equity:

RULE: MERE EQUITY DEFEATED BY A BONA FIDE PURCHASER FOR VALUE WITHOUT NOTICE: *Latec Investments v Hotel Terrigal Pty Ltd* (1965)

If you are seeking specific performance of a contract for the sale of land, it can end up with you as a purchaser acquiring an equitable lien. Sale would be improper because it was sold to a subsidiary (*Terrigal*), mortgagor is entitled to set that aside. Equitable rescission is the right to have that set aside – mortgagor goes back to the position they were in prior to the impropriety having occurred (re-assume the position of mortgagor and mortgagee).

In circumstances where a mere or personal equitable interest arises, which is antecedent to a full equitable title, and, subsequently, a full equitable interest arises over the same land, the dispute between the prior mere equity and the subsequent full equity may be characterised as a priority dispute. This is dependent upon the assumption that the mere equitable interest has proprietary characteristics of its own right. If the mere equity merely exists as an antecedent right to the creation of a full equity it may have no such proprietary characteristics and will therefore be incapable of generating a priority dispute. **There is no universal definition of a mere equity.**

Latec Investments Ltd v Hotel Terrigal Pty Ltd (in Liq) (1965) 113 CLR 265:

Facts:

- Latec was the mortgagee of land owned by Hotel Terrigal. Hotel Terrigal fell into arrears in repaying the loan and Latec, purporting to exercise its mortgagee's power of sale, sold the property. It conducted an action on an unfavourable day of the week with little time for property advertisement to ensure the property could not be sold.
- The highest bid was \$58,000 and Latec later sold the property to its wholly owned subsidiary, Southern Hotels, for \$60,000. Southern Hotels became the registered proprietor. Subsequently, Southern Hotels granted a floating charge over all its assets as security for the debenture issued to the public to the trustee of the debenture holders, MLC Nominee.
- The prospectus for the debentures offered explicitly stated that the Hotel Terrigal was owned by Southern Hotels. Five years later, Hotel Terrigal argued that Latec had fraudulently sold the property to Southern Hotels, giving rise to an equitable right to rescind and set aside the sale of the property.

Held:

- Kitto J: a priority dispute could occur with a prior mere equity because it was a form of title and the relevant priority principle must therefore be whether the subsequent full interest holder was a bona fide purchaser for value without notice.
- Menzies J: broadly agreed with Kitto J and concluded that the 'prior in time if both are equal' principle was inappropriate in this type of dispute.
- Taylor J: did not believe that the mere equity constituted an independent proprietary title and felt that it could not generate a priority dispute.

Ruthol v Mills (2003) 11 BPR 20, 793:

Facts:

- Ruthol leased land to Alphega for five years with an option to renew. Alphega found it difficult to keep up with rental payment and it was considered unlikely that they would exercise their renewal option. Hence, Ruthol granted Mr and Mr and Mrs Mills an option to purchase the property for \$490,000. The option to purchase had to be exercised within a specific time frame and was conditional on Alphega not exercising its option.
- Alphega then purported to exercise its option but never formally executed the lease. Hence the option was not actually carried out. Ruthol's solicitors fraudulently informed Mr and Mrs Mills that Alphega had exercised its option. Consequently Mr and Mrs Mills did not exercise their option to purchase within the requisite time period, believing that they were not entitled to do so.
- Ruthol then served a notice to quit on Alphega and leased the property to Tricon with an option to purchase. Tricon purported to exercise the option to purchase granted to it in the lease. The Mills claimed an equity against Ruthol on the basis of breach of contract, relying upon the fraudulent representations of Ruthol.

Issue:

- Competition between prior mere equity of Mr and Mrs Mills, and subsequent full equity of Tricon.

Held:

- Trial Judge, Palmer J: Ruthol could not take advantage of breaching its own contract. Palmer J classified the right of the Mills as a full equity – the general opinion is that this probably was not accurate. Right to claim an equity is very distinct from a full equity. What he seemed to do was to take an equitable maxim (you cannot take advantage of your own role).
- Court of Appeal: Sheller JA held Tricon did no wrong to Mills. Mills have a right to seek relief against Ruthol but the wrong itself hasn't been produced by Tricon. Problem seems to be Ruthol clearly did wrong to the Mills, they blatantly breached and sought to claim a remedy as soon as there was an issue, yet Ruthol is the one that generated the full equity, and the court said they really could not do anything about it. Tricon didn't know anything about the rights of the Mills, the behaviour of Ruthol isn't relevant to dispute between Tricon and Mills

HOW TO ANSWER QUESTION:

STEP 1:

Consider the hierarchical nature of interests:

- **Legal Interest:**
 - Legal interest is the highest possible type of interest a person can have in land.
 - In OLD LAW LAND it is created by deed: s 52 of the *Property Law Act 1958* (Vic).
 - In TORRENS LAND the interest is legal if it is registered on title: s 40 of the *Transfer of Land Act 1958* (Vic).
 - Legal interest is a right *in rem* and confers in defeasibility.
- **Equitable Interest:**
 - An equitable interest in land is an interest, which **has not been registered** or is **incapable** of being registered
 - Equitable interests in land are good against the whole world **EXCEPT** those who are **BONE FIDE PURCHASERS FOR VALUE WITHOUT NOTICE**
- **Mere Equity:**
 - A mere equity is not an interest in property, it is a right to bring an action which if successful will create an equitable interest in property
 - A mere equity may evolve or be elevated into full equitable ownership when and if appropriate relief is granted
- **Personal Equity:**
 - A personal right between parties which is incapable of attaching to land
 - Relief is damages rather than creation of interest in land

STEP 2:

Identify the **PARTIES WITH AN INTEREST** and **CHARACTERISE THE INTEREST THEN**

Determine **WHO HAS PRIORITY** in accordance with the **PRIORITY RULES**

STEP 3:

- **PRIORITY RULE ONE**
 - **LEGAL INTEREST v LEGAL INTEREST**
 - Priority is given to the legal interest created **FIRST IN TIME** due to the *nemo dat quod non habet rule* (one cannot convey an interest in land which he or she does not have)
 - *This rule only applies to old law land*
- **PRIORITY RULE TWO**
 - **PRIOR LEGAL INTEREST v LATER EQUITABLE INTEREST**
 - As a general rule priority is given to the **PRIOR LEGAL INTEREST** because it is higher up the tree and has priority in time.
 - The legal interest holder will always take priority if it can be proven the legal interest holder is bone fide and **DID NOT** contribute to the subsequent creation of the equitable interest
 - **EXCEPTIONS TO THIS RULE**
 - Legal interest holder has been party to **FRAUD**
 - Legal interest holder has been **GROSSLY NEGLIGENT** with respect to possession of title documents
 - *Northern Counties of England Fire Insurance Company v Whipp (1884) 26 Ch D 482*
 - Mere carelessness will not amount to negligence sufficient enough to defeat the prior legal interest
 - Legal interest holder allows another party to appear to be the **TRUE OWNER** of the property
- **PRIORITY RULE THREE**
 - **PRIOR EQUITABLE INTEREST v LATER LEGAL INTEREST**
 - Priority will be given to the **LEGAL INTEREST IF** it can be proven he or she is a **BONE FIDE PURCHASER FOR VALUE WITHOUT NOTICE**
 - *Pilcher v Rawlins (1872) 7 Ch App 259*
- **PRIORITY RULE FOUR**
 - **EQUITABLE INTEREST v EQUITABLE INTEREST**
 - The interest **PRIOR IN TIME** will **TAKE PRIORITY** if both interests are **EQUAL IN MERIT**
 - *Rice v Rice (1854) 2 Drew 73*
 - The court looks at the **OVERALL CIRCUMSTANCES** of the **CASE** including **CONDUCT** and **BEHAVIOUR** of the parties to decide **WHO HAS PRIORITY**
 - A **MERIT ANALYSIS** may include: -

- Whether the first equitable interest holder armed a third party to '*go into the world under false colours*' thus creating or contributing to creating the subsequent equitable interest
- Whether the subsequent equitable interest holder took with **NOTICE** of the prior equitable interest holder
- Whether the prior interest holder has sufficiently **PROTECTED** their interest by retaining possession of title documents
- Whether parties have followed **USUAL CONVEYANCEING** practices (ie carried out property enquiries)
- Whether the parties **LODGED A CAVEAT**
- **PRIORITY RULE FIVE**
 - **PRIOR MERE EQUITY v SUBSEQUENT EQUITABLE INTEREST**
 - Until mere equity becomes equitable interest there is **NO CONFLICT** between a mere equity and an equity
 - **HOWEVER** the true status of mere equity is **UNCERTAIN** with the courts being **UNCONVINCING** in this regard
 - *Latec Investments Ltd v Hotel Terrigal Pty Ltd (in liq)* (1965) 113 CLR 265
 - Right to set aside sale was **MERE EQUITY** which will prevail if **PRIOR IN TIME**
 - **EXCEPT** for a good faith purchaser of equitable interest **WITHOUT** notice of equity
 - *Breskvar v Wall*
 - Right to have a sale set of for fraud is a **FULL EQUITABLE INTEREST**
 - *Ruthol v Mills* (2003) 11 BPR 20,793
 - A bone fide purchaser will not lose priority even if registered proprietor is guilty of **WRONG DOING**
 - The priority rule that a mere equity will lose priority to a bona fide purchaser without notice is to be applied rather than the principle emanating from *Rice v Rice* as it would not be until a full equity is created that a court could undertake consideration of the conduct of parties
 - **NOTE** there is a state of confusion in relation to mere equities
 - '*Unless and until this mere equity matures into an equitable interest it remains subordinate to an equitable interest – Rice v Rice does not apply*'

STEP 4:

- If the interest in an **UNREGISTERED INTEREST** in **TORRENS TITLE LAND** all the points above are relevant
 - *Barry v Heider* (1914) 19 CLR 197

- **Section 40** of the *Transfer of Land Act 1958 (Vic)* does not preclude the existence of equitable interests in land but merely sets out what where capable of being registered the benefits of registration will not be conferred until the instrument is actually registered

HOWEVER

- One must consider whether a **CAVEAT** has been lodged pursuant to **s 89** of the *Transfer of Land Act 1958 (Vic)*
 - Lodging a **CAVEAT** prevents the registration of any other interest which conflicts with yours **AND** gives notice to the whole world that a party, person has an interest in the land

STEP 5:

- Consider what is the **NATURE OF A CAVEATABLE INTEREST?**
 - *Swanston v Trepan Investments Pty Ltd* [1994] 1 VR 672
 - A right to have a sale set aside was a mere equity therefore he was not entitled to lodge a caveat.
 - A caveat should only support a definable and more proprietary form of interest in land – an interest which ‘attached to the land’
 - *Sinclair v Hope* [1982] 2 NSWLR 870
 - The right to have a transaction set aside was caveatable
 - *Wichniewicz v Registrar or Titles* [2014] WASC 18
 - Followed *Sinclair v Hope*
 - *Classic Height Pty Ltd v Black Hole Enterprises Pty Ltd* (1994) V Conv R 54-506
 - Before a person can have a caveatable interest in the land, the caveatable interest must be evidenced in writing
 - *Composite Buyers Ltd v Soong* [1995] 38 NSWLR 286
 - Caveatable interest did exist even though it arose or was based on a document which was not registerable
 - All that is require before a caveat be lodged is that the interest is one based in land

STEP 6:

- Consider the **PRIORITY RULES**
 - **UNREGISTERED INTEREST v REGISTERED INTEREST**
 - The registered interest is superior
 - A registered interest will **EXTINGUISH** a **SUBSEQUENT INCONSISTENT REGISTRATION**
 - *Leros Pty Ltd v Terara Pty Ltd* (1992) 174 CLR 407
 - Once an unregistered interest in defeated by registration of a subsequent inconsistent dealing, the first interest is extinguished for all purposes and **CANNOT BE REVIVED**

- It is an incident of the **INDEFEASIBILITY OF TITLE** that registration will confer **ABSOLUTENESS**
- In this case, failure to lodge a caveat allowed a subsequent inconsistent registration thus destroying the prior equitable interest
- **UNREGISTERED INTEREST v UNREGISTERED INTEREST**
 - Return to principles of old law land
 - First conduct a **MERITS ANALYSIS** then only if the interest are of **EQUAL MERIT** will **FIRST IN TIME** take priority
 - *Heid v Reliance Finance Corporation (1983) 154 CLR 326*
 - Mason and Deane JJ:
 - The court conducts a *Rice v Rice* merit analysis looking at:-
 - All the circumstances of the case
 - Any representations that may have been made by the prior interest holder
 - Conduct of the parties
 - Which party is more **blameworthy**?
 - In this case, Heid (prior unregistered interest holder) contributed to the creation of the subsequent unregistered interest
 - Heid created a belief in the subsequent unregistered interest holder that no previous interest existed **THEREFORE** his interest was **POSTPONED**
 - *Circuit Finance Australia Ltd (in liq) v Panella [2011] NSWSC 311*
 - In a **PRIORITY DISPUTE** the search is for **CONDUCT** which is both **BLAMEWORTHY** and **CAUSATIVE**
 - *Abigail v Lapin [1934] AC 491*
 - Highlighted the principles set out in *Heid v Reliance Finance Corporation*
 - In this case, Lapin's conduct in providing titles to Heavener represented Heavener was the registered proprietor and that no prior interest existed. This constituted postponing conduct
 - '*Lapin armed Heavener to go out into the world with false title colours*'

STEP 7:

- Consider whether there has been a **FAILURE TO LODGE A CAVEAT**
 - This will not itself effect validity of an unregistered or equitable interest in land **HOWEVER** it may leave the interest **VULNERABLE TO EXTINGUISHMENT** or **POSTPONEMENT**
- Consider whether failure to lodge a caveat amounts to **BLAMEWORTHY CONDUCT?**

- **SITUATION ONE:**
 - **The prior interest holder is aware of the fact that he or she holds an unregistered interest in land. He or she is in a position to protect that interest in land by lodging a caveat against the title but they fail to do so**
 - *Black v Garnock (2007) 230 CLR 438*
 - Garnock's failure to lodge a caveat was blameworthy conduct. He failed to protect his interest. If Garnock had lodged a caveat his interest would have been protected
 - Garnock's prior interest was postponed to the Sheriff's interest
 - **NOTE:** The registration of the Writ of Execution would have cured any defect in the title therefore extinguishing Garnock's interest
- **SITUATION TWO:**
 - **Prior interest holder is aware of the fact that they hold an equitable interest and are in a position to protect that interest and do so by retaining possession of title documents**
 - *J & H Just Holdings v Bank of New South Wales (1971) 125 CLR 546*
 - If the prior interest holder, in order to **PROTECT ITS INTEREST**, keeps the title in its possession as opposed to lodging a caveat, their interest **WILL NOT BE POSTPONED**
 - A failure to lodge a caveat is one relevant factor amongst many others which the court considers in determining which interest had priority
 - Whether a failure to lodge a caveat constitutes postponing behaviour will depend upon the circumstances of the particular case and this **QUESTION:-**
 - **Has the failure by the holder of the first interest in the land to lodge a caveat contributed to a belief on the part of the subsequent interest holder that the prior interest did not exist?**
 - *Person to Person Financial Services Pty Ltd v Sharari [1984] 1 NSWLR 745*
 - Sharari's failure to caveat his interest, contributed to the subsequent creation of the mortgage to Person to Person Financial Services and this amounted to postponing conduct
- **SITUATION THREE:**

- It is **ONE FACTOR** to be considered with all other factors as set out by Mason and Deane JJ in *Heid v Reliance Finance Corporation*
 - *Moffett v Dillon* [1999] 2 VR 480
 - Brooking J
 - Once the second interest holder has notice of a prior interest that is the end of the matter.
 - **HOWEVER**
 - Ormiston J
 - Brooking J judgment was attractive **BUT** you cannot displace the holistic approach of the merits analysis referred to by Mason and Deane JJ
 - Notice will be a **FACTOR** within the merits analysis