

## REAL PROPERTY

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## SHORT-TERM LEASES

- \*\*\* In order to satisfy the short-term leases exception to indefeasibility: (1) the term of the lease and any option to renew must not be for more than three years, (2) the tenant must either be in possession or be entitled to immediate possession, and (3) the purchaser (meaning any person taking for value) of the reversion must have taken his or her interest with notice of the tenant's interest
  - o The term of the lease and any option to renew must not be for more than three years
    - If a lease and an option together extend beyond three years, protection under s 42(1)(d) of the RPA is unavailable (*Alcova v Pandarlo*)
  - o The tenant must either be in possession or be entitled to immediate possession
  - o The purchaser (meaning any person taking for value) of the reversion must have taken his or her interest with notice of the tenant's interest
    - If the registered proprietor took without notice of the tenant's interest under the lease at the time of settlement, he or she will not be bound by that lease (*Austin Construction v Becketts Holdings*)
    - Either actual or constructive notice will be sufficient to burden the title of the purchaser (*Clyne v Lowe*)
    - If, up until settlement, the tenant is entitled to possession, but he or she is not in actual possession, the purchaser will be protected by s 43A(1) and will take free of the tenancy – unless he or she has received notice of the tenancy from some other source

## IN PERSONAM

- \*\*\* The *in personam* exception recognises that registration will not extinguish the personal obligations created by the registered proprietor (*Bahr v Nicolay*)
- \*\*\*A party seeking to demonstrate that he or she has an *in personam* right must establish two elements: (1) a legal or equitable cause of action, and (2) that it is unconscionable for the registered proprietor to 'obtain or retain' his or her registered interest (*Bahr v Nicolay; White v Tomasel*)
- An *in personam* right can only emerge if the registered proprietor's conscience is affected as the result of a **known legal or equitable cause of action** which is enforceable against him or her (*Barry v Heider*)
- The mere existence of a dealing registered on the basis of **forgery** has been held not to be a basis for a right *in personam* (*Grgic v ANZ*)
- **Mere neglect** by a registered proprietor cannot form the basis of an *in personam* right (*Vassos v State Bank of SA*)
- **Trustee/beneficiary**: A trustee cannot rely on the indefeasibility of title arising from registration to ignore obligations under the trust to hold the property on behalf of the

## PRIORITIES

- Examples of a **legal interest under the Torrens system** would include an unregistered oral lease that complies with **s 23D(2)** of the Conveyancing Act 1919 (NSW), an easement applied under the ***Wheeldon v Burrows*** doctrine, or an **implied tenancy at will** under s 127 of the Conveyancing Act
- Examples of **unregistered interests that are not legal** would include an equitable lease, an equitable mortgage by deposit of title deeds or a vendor's lien

### EARLIER LEGAL v LATER LEGAL

- \*\*\* **In a competition between two legal interests**, the *nemo dat quot non habet* rule applies (no one can give what they do not have)
  - o A is the holder of the legal fee simple. In 2010, A granted a legal lease to E for 10 years. In 2017, A completed the sale of the legal fee simple to B. Is B bound by E's lease? In 2017, A was not the holder of an unencumbered fee simple, but rather held a reversionary interest in the fee simple, falling into possession in 2020. Thus, B, as transferee of A's reversionary interest, is subject to E's lease until 2020. In a competition between B and E, E therefore prevails over B to the extent of his or her interest.
  - o A completed the sale of the unencumbered legal fee simple to B on 2 January, and later purported to complete the sale to C on 3 February. B would prevail in the 'competition' because, on 3 February, A had no interest to transfer to C. Although C in this circumstance has no interest, the language of priority is used to describe C's claim. At law, the *nemo dat* rule will prevail, with the result that B is holder of the legal title. However, this exception holds that if B had been guilty of 'postponing conduct', C's interest will prevail – in equity. Accordingly, B will hold the legal title on trust for C under this rule.

### EARLIER LEGAL v LATER EQUITABLE

- \*\*\* **The priority rule applied** between an earlier legal and later equitable interest is 'where the equities are equal, the law prevails' (*Bailey v Barnes*)
- Under this rule, equity will intervene to prevent a legal owner from taking a priority in circumstances where there has been inequitable conduct on his or her part
- \*\*\* **The requisite standard** has been described in subsequent cases as one of 'gross negligence' on the part of the legal interest holder (*Armitage v Nurse*), such as a mortgagee failing to request title deeds, thereby arming the interest holder to deal with the land (*Walker v Linom*)
- The legal interest holder will be postponed if he or she is party to some fraud by means of which the later *equitable interest* holder is deceived as to the existence of the legal interest: *Northern Counties Fire Insurance Co v Whipp* (1884)

## **ENFORCEMENT AGAINST A SUCCESSOR IN TITLE**

Here we are considering the situation in which the original covenantee or her successors in title wish to enforce the covenant against a successor in title to the original covenantor (e.g. A enters into an agreement with B, in which B covenants that he or she will not build a dwelling of more than one storey; B subsequently sells to B1; can A, or his or her successors in title, enforce the covenant against B1?)

\*\*\* Do the facts involve a subdivision/building scheme post-1964? If so, see next section.

### **AT LAW**

- \*\*\* When looking at whether the burden of a covenant can be enforced against successors-in-title to the covenantor, it must be asked whether the burden of the covenant 'runs with the land' of the covenantor
- \*\*\* A burden will never run with the land at law (RPA s 70A(1); *Austerberry*), therefore where the successor in title of the covenantor breaches the covenant, the covenantee or its successors in title have no remedy against the successor in title to the original covenantor at law
  - o However, the covenantor will remain contractually liable to the covenantee for any breaches by the covenantor's successors in title unless a contrary intention is expressed (RPA s 70A(1))
  - o It follows that the contract now must stipulate that a covenantor's obligations will cease on assignment for continuing liability to be avoided
  - o One exception to the principle that the burden cannot be enforced at law against successors in title of the original covenantor is the principle that the person who takes the benefit of a covenant must also shoulder the burden (e.g. a positive covenant, such as an obligation to pay for the upkeep of a common road, may run with the land of the covenantor where that covenantor's successor in title is trying to take advantage of an easement drafted in the covenantor's favour as the owner of the dominant tenement of that easement)
    - \*\*\* The burden will bind successors in title only so long as they elect to take the benefit of the covenant or a right into which the burden of the covenant is inextricably bound (*Halsall v Brizell*)
    - The rule is limited to cases where: (1) the obligation must be a condition of the exercise of the right, (2) the benefit claimed can be linked to a specific burden (in other words, they must be truly reciprocal obligations), and (3) the covenantor's successors in title are in a position to choose whether or not to take the benefit: *Rhone v Stephens*
    - In *Halsall v Brizell*, a covenant requiring a contribution to the upkeep of roads was held to bind the successor in title of the original covenantor because he continued to take advantage of the benefits the roads conferred on him
    - In *E R Ives Investment v High*, a landowner who acquired land was held to be subject to the burden of allowing access over his land as long as the foundations of his property encroached on the dominant land