

# Fundamentals of Land Ownership

## Doctrine of tenure and doctrine of estates (fee simple and life estate)

- Butt, [3.10] – [3.60], [3.120] – [3.160].
- Common law only allowed a limited range of rights over land - they fell into three distinct categories (estates; lesser interests such as easements and profits a prendre; and security interests of which the mortgage is the most common)
- Estates are the most ample of the various bundles of rights over land - they refer to the right to "hold" the land or to have possession of it, to the exclusion of others. Estates are therefore differentiated from the other interests in that they are the rights one holds over one's own land opposed to rights over the land of another
- Estates are usually referred to as "ownership" although the pure concept of ownership sat uneasily with the common law's concept of an estate
- The English doctrine of tenure was reconfigured in the 17th century to confer on the Crown the title of Lord Paramount - the Crown was conceived as the owner of all land which means the most someone could do was have an estate in the land, to be held "of the Crown". The estate in land was a bundle of rights always less than ownership because the rights of the tenant were limited: they were subject to service obligations
- In the Australian context, as decided by the High Court in *Mabo v Queensland (No 2)*, all the Crown only possesses "radical title". The reconfiguration of the fundamental doctrine of tenure, calls into question the doctrine of estates for the reason that tenure is inexplicably linked to the doctrine of estates - any modification to the former has implications for the latter
- *Wik Peoples v Queensland (Brennan CJ)*: "by the interlocking doctrines of tenure and estates, the land law provides for the orderly enjoyment in succession of any parcel of land. The doctrine of tenure create a single devolving chain of title and the doctrine of estates provided for the enjoyment of land during successive periods"
- The "interlocking" referred to in this context has ultimately come to mean "mutually supporting" in light of recent Australian caselaw.
- The register rights over the land that the new doctrine of tenure gives the Crown, confirms the Crown's right to create beneficial title in itself or in its grantees. The doctrine of estate, by contrast, governs the ways in which the title can be fragmented along temporal lines. "Estate" in the land, refers to the duration for which possession of the land may be enjoyed - the land itself is one thing, the estate in the land is another (*Walsingham's Case*)
- The full description of an "owner" under the Torrens title: he or she is the "registered proprietor" of an estate in fee simple/entitled to possess the land unlimited in time
- English law recognised three freehold estates in land:
  - Fee simple (unrestricted) - The largest known estate to the law. It is 'for almost all practical purposes the equivalent of full ownership of land'. Two characteristics have traditionally distinguished the free simple from other freehold estates - on death of the holder, without leaving a will, the fee simple would descent to the holder's heirs. The second, alienability - the tenant of a fee simple came to be able to dispose of the fee simple, either in life (Inter vivos) or by will.
  - Fee tail - tailed estates (restricted) (extinct in NSW: *Conveyancing Act 1919*, ss 19, 19A) to allow families to take land rather than giving land to individuals. This meant that land could be given for example 'you will keep the land if you continue to give birth to males and keep the bloodline going etc'. The estate could still be enjoyed as long as the family kept going/expanding which was often given to male children
  - Life Estate - An estate that ends on the holder's death. Not an estate of inheritance. It is, however, an estate of freehold, because it entitled the holder to seisin of the land when it vests in possession. By its very nature, a life estate assumes that the grantee is capable of 'dying'. A corporation cannot hold a life estate since corporations do not 'die'
- *Conveyancing Act 1919 (NSW)*, s 47

## 47 Words of limitation in fee

(1) In a deed it shall be sufficient in the limitation of an estate in fee simple to use the words in fee or fee simple without the word heirs, or in the case of a corporation sole without the word successors, or to use the words in tail or in tail male or in tail female, without the words heirs of the body, or heirs male of the body, or heirs female of the body.

(2) Where land is conveyed to or to the use of any person without words of limitation, such conveyance shall be construed to pass the fee simple or other the whole estate or interest the person conveying had power to dispose of by deed in such land unless a contrary intention appears by such conveyance.

(3) This section applies only to deeds executed after the commencement of this Act.

- *Succession Act 2006 (NSW), s 38*

### **38 Effect of devise of real property without words of limitation**

(cf WPA 24 and 26)

(1) A disposition of real property to a person without words of limitation is to be construed as passing the whole estate or interest of the testator in that property to that person.

(2) This section does not apply if a contrary intention appears in the will.

### **Legal and Equitable interests**

- Butt, [12.120], [4.80] – [4.140], [4.210] – [4.220].
- An equitable interest in property is one that will be enforced by a court exercising equitable jurisdiction. The practical effect is that all major courts in our legal system recognize, characterize and enforce equitable interests.
- The trustee is the legal "owner" of the land, holding the legal estate - this ownership is subject to the ordinary common law rules for creating and limiting legal estates, as modified by statute
- Where trustees hold as joint tenants and one dies, the legal estate vests in the survivors who are empowered by s 57 of the *Trustee Act 1925* to continue to exercise all powers of all the trustees. A transfer in a breach of trust will still pass the legal estate
- *Conveyancing Act 1919* s23C(1)(b) - the creation of an express trust over land requires an instrument signed by the settlor if in the form of a settlement or a signed declaration - the requirement for writing is normally satisfied by a single trust deed but equally may be satisfied by a combination of documents capable of being read together
- Where a person holds the totality of ownership, it is unnecessary to 'split' the ownership into legal and equitable aspects - the owner does not have two estates and a person cannot transfer to another the 'bare' legal fee simple while purporting to retain the equitable fee simple. Equitable interests are 'impressed upon' the legal estate, not carved out of it i.e. when land is vested in trustees to hold on behalf of one or more beneficiaries. In the eyes of the common law, trustees have all the rights of the absolute owner; but equity requires them to observe their responsibilities under the trust
- *Comptroller of Stamps v Howard Smith* - there are three ways in which equitable interests may be voluntarily transferred: the owner of an existing equitable interest may declare that they hold the interest in trust for a beneficiary; the holder may transfer that interest to a third party; the equitable interest holder may direct his or her trustee to hold the interest for a nominee. In each instance, the transfer must be in writing, signed by the transferor or by his or her agent, authorised in writing to do so, or by will (s 23C)
- Another example of equitable interest is the interest of a purchaser under a contract for an interest in land - the vendor retains legal title until completion of the transaction and, in entry into a valid and binding contract for sale, equity treats the purchaser as the beneficial owner. A contract for the sale of land differs from a conveyance or transfer by virtue of the fact that it is a promise to transfer the interest at some time after the formation of the contract - i.e. when the balance of the agreed purchase price is tendered. Until this time, the vendor retains the legal title to the land

**S 54A:** (1) No action or proceedings may be brought upon any contract for the sale or other disposition of land or any interest in land, unless the agreement upon which such action or proceedings is brought, or some memorandum or note thereof, **is in writing**, and signed by the party to be charged or by some other person thereunto lawfully authorised by the party to be charged.

(2) This section ... does not affect the law relating to part performance ...

(3) This section applies ... to land under the provisions of the *Real Property Act 1900*.

- *ANZ Banking Group Ltd v Widdin (1990)* - sufficiency is established if the memorandum of agreement contains a description of the land, identification of parties and reference to the transaction. Where the parties executed a mortgage document which did not include any details of the title, the memorandum was held to be an

insufficient memorandum for the purposes of section 54A. If signed document makes reference to another document which contains the relevant details, they can be read together.

- A special rule exists in relation to auction sales - at the moment the hammer falls, the contract remains unsigned and the consideration is not included. There is no part performance at this time, so it might be argued that no equitable interest is conferred on the successful bidder
  - s 54A applies to auction sales in the same manner as other sales of land. The statutory requirements are met by an implied authority bestowed on the auctioneer to sign on behalf of either the vendors or purchaser
  - In *Scott v Southern Pacific Mortgages Ltd* [2015], the court held that until the contract is completed, and the legal estate transferred, "a purchaser of land cannot create a proprietary interest in the land" for he or she does not have a proprietary interest to confer. However, such a notion is at odds with the substantial body of Australian caselaw. The traditional position that a purchaser under a specifically enforceable contract of sale has an equitable interest in the property capable of assignment, was affirmed most recently in *Fuentes v Bondi Beachside Pty Ltd* (2016)
  - The purchaser's "interest" is said to be dependent on the purchaser's ability to obtain an order for specific performance of the contract - only if equity would deny protection in this sense is the purchaser denied the status of beneficial owner
  - The totality of the purchaser's rights comprise four distinct rights:
    - The purchaser can assert priority of their interest over the purchasers of later competing interests over the land. He or she has "entire" equitable ownership, as if the purchaser's equitable interest were commensurate in extent with the vendor's legal ownership. To the extent that this is a fully fledged equitable interest, it can be alienated like other proprietary interests in land
    - The second right is reflected in the purchaser's equitable rights that are commensurate with the amount of the purchase price paid: the purchaser acquires the beneficial interest only "to an extent" - if the purchaser has only paid a 10% deposit, the value of the purchaser's equitable interest is only 10% of the value of the property. So, while the purchaser's interest is protected in equity as soon as binding contract is made, the purchaser's right does not become the "full" beneficial value until the full purchase price is paid
    - This is reflected in the vendor's obligation to protect the property as a trustee would before possession is granted to the purchaser. So, a vendor is liable to the purchaser if a trespasser enters and removes a large amount of topsoil prior to settlement. The vendor's obligations are not like those of the trustee under an express trust - the vendor commonly retains some rights of enjoyment of the land as well as the formal legal title
    - A right to rent and profits received by the vendor between the agreed date for completion of the contract and actual completion
- \*\*\* only the first two of the purchaser's rights are in rem

Kinds of equitable interests include:

- Beneficiary's right under a trust.
- Right of purchaser under a valid agreement for sale of land.
- Right of mortgagee/lessee under a valid agreement (not a deed) to grant mortgage/lease.
- Right of a mortgagor in the mortgaged land which is Old System title (equity of redemption).
- Right of a second or subsequent mortgagee.
- Right of mortgagee under mortgage by deposit of deeds (principle of part performance). However, the creation of such an interest appears to be impossible under the e-conveyancing system).
- Grantee of an option (general approach).
- Unpaid vendor (vendor's lien).
- Purchase price resulting trust.
- A profit à prendre which is in writing but not registered (taking into account the e-conveyancing system).

#### **General law priority rules (competition between legal interests; equitable interests; and legal and equitable interests)**

- Butt, [10.810], [12.130], [12.140]
- For land under old system title, a bona fide purchaser of legal interest in the burdened land, taking for value and without notice of the covenant, takes free of the covenant - so too does any person (even with notice) claiming through that purchaser. However, in practice it is difficult for a purchaser to avoid notice of a covenant affecting the land, because the covenant will be referred to in the title deeds which the purchaser has (or should have) inspected