

LAWS2017/5012 REAL PROPERTY NOTES

A. COMPLETE DETAILED NOTES	3
1. Fundamentals of Land Ownership <ul style="list-style-type: none"> • Doctrine of tenure and doctrine of estates (fee simple and life estate) • Legal and Equitable interests • General law priority rules (competition between legal interests; equitable interests; and legal and equitable interests) • Systems of title: Old System, Crown Land Torrens • Torrens title in context 2. Torrens title <ul style="list-style-type: none"> • Torrens title – Title-by-Registration • Certificates of title and dealings • Electronic conveyancing (including procedures against fraud and elements of the regulatory framework electronic conveyancing system). • Indefeasibility of title • The nature of unregistered interests under the Torrens system • Caveats and priorities between unregistered interests • Priority Notices • Compensation for Loss of Interests in Land: The Assurance Fund • Statutory exceptions to indefeasibility • Personal equities/Rights in personam • Registrar-General's power of correction • Overriding statutes • Volunteers 	4
3. Co-ownership: Rights of co-owners; severance; sale and partition <ul style="list-style-type: none"> • Types of Co-ownership • Creation of Co-ownership • Rights between co-owners: Improvements • Rights between co-owners: Occupation fees • Rights between co-owners: Rights to an account for rent or profits received • Terminating the tenancy in common • Termination of the joint tenancy • Severance of joint tenancy: Alienation at Law to Another or Cross Transfer • Severance of joint tenancy: Mortgages and Leases • Severance of joint tenancy: Alienation to Self • Severance of joint tenancy: In Equity by Unilateral Transfer • Severance of joint tenancy: In Equity by Agreement or Course of Conduct • Sale and Partition 	40
4. Easements and Profits à Prendre <ul style="list-style-type: none"> • Characteristics of Easements • Creation of Easements • Section 42(1)(a1), Real Property Act • Extent of use • Extinguishment, variation, modification of Easements • Profits à prendre 	50
5. Covenants over freehold land <ul style="list-style-type: none"> • Running with the land: Burden and benefit at Common Law • Running with the land: Burden and benefit in Equity • Statutory requirements for creating covenants • Extinguishment 	68

6. Leases and Licences <ul style="list-style-type: none"> • The essential characteristics of leases • Leases and Licences compared • Types of Tenancies • Creation of Leases • Torrens Title Leases as Exceptions to Indefeasibility 	78
7. Mortgages <ul style="list-style-type: none"> • Nature of mortgages; redemption; the mortgagor's interest in the land equity of redemption • Rights and remedies of the mortgagee (and standard of care) • Priorities (with emphasis on tacking) 	90
B. EXAM SCAFFOLDS	98
High level scaffolds of the above detailed notes for applications in exams: <ol style="list-style-type: none"> 1. Fundamentals of Land Ownership 2. Torrens title 3. Co-ownership: Rights of co-owners; severance; sale and partition 4. Easements and Profits à Prendre 5. Covenants over freehold land 6. Leases and Licences 7. Mortgages 	
C. EXTRA DISCUSSION POINTS	132
Discussion points around the grey and contested areas of law, arranged by the above topics.	
D. QUICK REFERENCE LEGISLATION GUIDE	150
All relevant legislation and section numbers arranged by topic. Designed to be printed separately.	

SUMMARY OF PRIORITY RULES

➤ Registered v Registered

- The earlier interest takes priority as per **RPA s 42(1)(a)**

➤ Registered v Unregistered

- The registered interest is prima facie indefeasible as per **RPA s 42(1)**
- However, the registered proprietor will be bound by an unregistered interest if an exception to indefeasibility applies:
 1. ★**Fraud**★ [below]
 2. ★**In personam**★ [below]
 3. ★**Registered proprietor had notice of an RPA s 42(1)(d) lease**★ [below]

➤ Unregistered v Unregistered

- It is unlikely **RPA s 43A** would be applicable given the essentially simultaneous settlement and lodgement of transfers under the eConveyancing system.
- Therefore, the priority of unregistered interests can be determined by resort to general law equities:

1. Two equitable interests:

- ⇒ **First in time, subject to the merits**, i.e. ★**postponing conduct**★ [see below]
(*qui prior est tempore potior est jure*)

2. Prior equitable v subsequent legal interest:

- ⇒ Legal interest prevails if the holder is **a bona fide purchaser of the legal estate for value without notice**
 - Bona fide = without fraud
 - Purchaser of the legal estate = holder of a legal interest
 - For value = consideration in money or money's worth
 - ★**Without notice**★ [below] = actual, constructive, imputed **CA s 164**
- ⇒ **Rule in Wilkes v Spooner**:
 - The priority enjoyed by a bona fide purchaser of the legal estate for value extends to persons claiming through that purchaser, even persons who take with notice of the earlier equitable interest or are mere volunteers

3. Two legal interests:

- ⇒ Earlier legal interest prevails to the extent it is inconsistent with the later legal interest (**nemo dat quod non habet**)

4. Prior legal v subsequent equitable interest (usually through part performance):

- ⇒ Earlier legal interest prevails to the extent it is inconsistent with the later legal interest (**nemo dat quod non habet**)
- ⇒ UNLESS there is evidence that the conduct of the earlier legal interest holder contributed to the creation of the equitable interest:
 - Fraud: where the owner of the legal estate has assisted in or connived at the fraud (**Northern Country v Whipp**)
 - Negligence: where the failure to procure the title deeds makes them guilty of negligence (**Walker v Linom** - failed to get deeds from the vendor allowing them to hold themselves out)
 - Also where earlier legal interest holder has made a declaration of trust or given authority to another person who then exceeded their authority.

5. Mere equities

- ⇒ Later equitable interest has priority over an earlier mere equity if the later equitable interest was taken: (**Latec Investments**)
 - **bona fide**;
 - **for value**; and
 - **without notice** of the earlier mere equity.
- ⇒ **Latec Investments**: A mere equity is a claim to have an equitable interest that can only be enforced by succeeding in court. Examples:
 - Claim for rectification (need to prove error in a document in court)
 - Claim to set aside a transfer on the basis of fraud (needs to prove fraud)
 - Claim to set aside a transfer on the basis of impropriety (e.g. mortgagee improperly exercised power of sale, need to prove it was improper)
 - Possibly a claim to enforce contract on the basis of part performance
 - **Double Bay Newspapers**: Party needs to establish sufficient acts of part performance in court to prove an agreement is enforceable, thus giving rise to an equitable interest. Whether acts of part performance should be treated as a mere equity is debateable.

➤ Notice as per **CA s 164**

⇒ Actual **CA s 164(1)(a)**

- Information they were told or discovered directly
- Includes wilful blinds (purposefully closed their mind or refused to acknowledge)

⇒ Imputed **CA s 164(1)(b)**

- Information acquired by an agent acting for the purchaser (imputed to principal)

⇒ Constructive **CA s 164(1)(a)**

- Information that would have been acquired if they had carried out 'searches as to instruments registered or deposited under any Act of Parliament, inquiries and inspections... as ought reasonably to have been made'

1. **Inspection of the land: Hunt v Luck**: Obligation to inspect the land to see if anyone is in possession of the land (e.g. tenant under a lease) or making use of it (e.g. holder of an easement)
2. **Search the register**: Obligation to search the register for Torrens Title land (**CA s 164(1)(a)**: searches as to instruments registered... under any Act of Parliament)

2. EXCEPTIONS TO INDEFEASIBILITY

Introductory lines (mechanism for getting around the **RPA s 41** problem)

While instruments cannot take effect until registration as per **RPA s 41**, it was made clear in **Barry v Heider** and **Chan v Cresdon** that equity can give effect to the rights that arise from transactions as evidenced by the instrument.

An equitable interest will arise where there is an enforceable transaction (e.g. formal requirements have been complied with – see full list in section one above).

- **Enforceable agreement** is (1) a contract to grant an interest in the land, (2) that is written and signed **CA s 54(1)** OR where there are sufficient acts of part performance **CA s 54A(2)** and (3) is capable of specific performance (land is unique **Lysaght v Edwards**).
- Check construction of specific terms of the lease:
 - In **Chan v Cresdon**, a **guarantor's obligation to cover rent** was **not enforceable** under an unregistered lease, even though the lease was binding under the in personam exception to indefeasibility.
 - The obligation to pay rent arose out of the specific enforceability of the transaction, rather than the lease document that evidenced that transaction.
 - Check the wording of the obligation:
 - ✗ **Obligations arising under the lease/document will not be enforceable** (in **Chan v Cresdon**: guarantor of lessee's obligations "under this lease" for non-payment of rent).
 - ✓ **Obligations arising under 'transactions between the lessor and lessee' more generally will be enforceable (unless the instrument is void for forgery, etc)**
 - **NB: Guarantor obligations under a lease are enforceable in equity. Where the lease is registered, guarantor agreements are considered collateral and do not attract indefeasibility. They will also be unenforceable if the lease agreement is void (see Karacominakis below)**

While the registered proprietor takes their interest free from unregistered interests as per **RPA s 42**, such interests will be binding on the registered proprietor if an exception to indefeasibility applies.

a) Extent of indefeasibility

i. Is the term or condition of the registered agreement covered by indefeasibility?

- **PT v Maradona**: Registration does not validate all the terms and conditions of the instrument which is registered. It **validates those which delimit or qualify the estate or interest or are otherwise necessary** to assure that estate or interest to the registered proprietor
- **Leases:**
 - ◊ **Karacominakis v Big Country Developments**
 - ⇒ **Facts**: Void lease was registered. Lessee not guilty of fraud and nor was the lessor.
 - ✓ **Terms protected by indefeasibility:**
 - ◆ Lessee's right to exclusive possession

- ◆ Lessor's right to receive rent
- ◆ Lessee's obligation to pay rent
- ✗ **Terms not protected by indefeasibility:**
 - ◆ Guarantor's obligation to guarantee payment of the rent: *Even though it was part of the registered agreement, the guarantee did not delimit or qualify the estate of the lessor. It was collateral to the lease interest.*
- ⇒ **Result:** under InD, the lessees had to pay the rent, but the guarantors were not required to guarantee the rent because the lease was void and it was not covered by InD.
- ◇ **Option to renew: not clear whether this term attracts indefeasibility, two conflicting cases:**
 - ⇒ **Travinto Nominees v Vlattas**
 - ◆ **Facts:** Option to renew was illegal under statute. Void lease registered. Argued that the unlawfulness of the option didn't matter, because the lease was indefeasible.
 - ◆ **Held:** Option to renew does not attract indefeasibility.
 - * There are statements in the decision that suggest InD doesn't attach to the option itself. But the better view is that the option can attract InD, but there is another statute that overrides the Real Property Act in this respect.
 - ⇒ **Mercantile Credits v Shell**
 - ◆ **Facts:** Option was valid, no question of fraud or unlawfulness to void the instrument. Question was about priorities.
 - * A grants B a lease containing an option. Lease is registered. A then mortgages the land to C. C has a registered mortgage over the land.
 - * B purports to exercise an option to renew after the mortgage has been granted. New lease is created. A defaults under the mortgage, mortgagee exercise power of sale. Is the land sold free of the renewed lease or subject to the renewed lease? i.e. does the renewed lease or the mortgage have priority?
 - ◆ **Held:** Even though the mortgage preceded the new lease, **the new lease arose out of the option to renew in the original lease which was registered prior to the mortgage, therefore it is indefeasible and has priority.**
 - * *That's the better view – the option to renew is protected by InD and the statements by the HCA to the contrary in Travinto should be disregarded – the decision in Travinto should be based on the fact that the other statute made the option unlawful and that overrode the provisions of the RPA.*
- **Mortgages**
 - ◇ Mortgages usually include a **security interest in the land** and **a personal covenant to repay** the entire loaned amount, so the mortgagor is personally liable if there is a shortfall following the exercise of a power of sale upon default.
 - ◇ If the mortgage is forged:
 - ⇒ Indefeasibility attaches to the mortgage if the mortgagee is:
 - ◆ Not guilty of fraud; and
 - ◆ Took reasonable steps to verify the identity of the mortgagor (**RPA s 56C**)
 - ⇒ Indefeasibility:
 - ◆ Definitely attaches to the security interest in the land (mortgagee can exercise power of sale)
 - ◆ Might attach to the mortgagor's personal covenant to repay the loan amount, but the better view is that it probably is NOT covered by indefeasibility.
 - ◇ **Traditional v All Moneys Mortgages**
 - ⇒ *Problem only arises when the mortgage and any collateral loan documents are forged.*
 - ◆ **traditional form of mortgage:** principal amount secured stated in registered instrument (e.g mortgage secures the repayment of \$1m plus interest and costs)
 - * **indefeasibility attaches** (eg **Provident Capital Ltd v Printy**)
 - ◆ **"all moneys"** mortgage; purports to secure money owing under unregistered collateral loan documents like personal loan, car loan, credit card debt, etc and does not state specific amount:
 - * **question of construction whether indefeasibility attaches**
 - * Collateral loan documents cannot be registered because they don't affect the land, they're just personal debts.
 - ◆ *Note: these issues only arise where loan documents are forged (void not voidable)*
 - * **RPA s 56C** requires mortgagees to take reasonable steps to verify identity of mortgagor executing the mortgage, which would mean the forgery would need to be very sophisticated to meet this requirement but still be forged.

Topic 3 [Co-ownership]

→ 1. Is it a joint tenancy or a tenancy in common?

Preliminary:

- How is the interest held at law?
 - **Interest is registered on the folio:** If the co-ownership is recorded on the folio of TT land as either TiC or Joint Tenancy, that is how the property is held at law under **RPA s 41**
 - Note: **Real Property Regulation 2014, reg 6(1)**: R-G will only register an if **proper terminology used** (i.e. JTs or TiC in particular shares)
 - **Before registration:** **CA s 26** applies before co-ownership is registered, for example:
 - Will leaving property to two or more parties
 - Transfer executed in return for consideration (enforceable transfer agreement), but transfer does not specify nature of the co-ownership
- Interest can be held differently in equity
- Miscellaneous supporting provisions:
 - **CA s 25** allows **corporations** to hold interest as JT (common law did not allow this because companies can't die, but this is on the basis that dissolution or winding up is the equivalent of death).
 - **CA s 35 Presumes order of death oldest to youngest** if two or more JTs die at the same time and court is unable to ascertain their order of death.

Key question in a will situation: *once the estate has been administered and we know who has legal title and beneficial title, how are those titles held?*

Outcomes:

- **Difference: Doctrine of survivorship:**
 - **JT:** Interest is extinguished when a party dies and interests of surviving JTs correspondingly expands
 - **TiC:** Interest falls into the estate of party upon their death
- **Similarity: Fraud of one joint tenant is not the fraud of another**
 - **Cassegrain:** For the purposes of the indefeasibility provisions of the RPA, fraud one one JT is not the fraud of another. Reasoning: fraud is a personal

A. Starting point: **CA s 26** Disposition presumed to be Tenants in Common, not Joint Tenants

- Applies to TT and OS land
- **CA s 26(1) Requirements:**
 - Disposition to two or more persons
 - Parties are taking the interest by instrument
 - Parties are taking a beneficial interest
 - With or without the legal estate
- **CA s 26(2) Exceptions:**
 - (1) Presumption does not apply to grantees who take the interest as:
 - Executors; or Administrators; or Trustees; or Mortgagees.
 - (2) Presumption does not apply where the instrument **expressly provides** that persons are to take as joint tenants or tenant by entireties.
 - **Expressly provide?**
 - **Hircock v Windsor:** 'Expressly provides' does not require the words 'joint' or 'joint tenants' to be used. Rather, it's a matter of construction as to whether a right of survivorship is intended.
 - Court considered it would be inconvenient/difficult for a **couple living together in a residence under a domestic lease** to have taken their interest as TiC.
 - **Hircock** is distinguishable on the basis of:
 - **Relationship:** parties aren't in domestic relationship (partners, spouses, etc)
 - **Property interest:** property interest is more than a right to exclusive possession for the purposes of domestic residence
 - **Words 'joint proprietorship' used:** **RPA s 100** gives parties registered as joint proprietors the same rights as JTs, so CA s 26 will not apply.
 - However, the R-G will not register an instrument that is silent or uses language other than JT or TiC in a particular share, so **RPA s 100** has limited operation.
 - Outcome of **CA s 26** consideration:
 - ✓ **If co-ownership is within CA s 26, a tenancy in common will be presumed at law**
 - **Position in equity if CA s 26 applies at law:**
 - **Delehunt v Carmody:** **Equity follows the law** and will also presume the interest is held as TiC if the co-ownership is within **CA s 26**.
 - × **If co-ownership is outside CA s 26, consider general law presumptions (Minter v Minter)**

REAL PROPERTY – DISCUSSION POINTS

TOPICS 1-2.1: PRIORITY RULES AND EXCEPTIONS TO INDEFEASIBILITY

Taking effect in possession	1
Exceptions to indefeasibility – introductory lines	1
Void or voidable transactions (usually forgery)	1
Extent of indefeasibility (leases and all moneys mortgages)	1
Fraud by current RP against former RP	2
Fraud by current RP against R-G	2
Fraud and agency	3
Can proceedings be brought for possession or recovery of the land on the basis of fraud?	3
Does in personam include negligence?	3
Undertaking to be bound: grey area	4
Effect of breach of undertaking to be bound	4
Outcome of exception to indefeasibility	4
Exam application of postponing conduct : estoppel v negligence based	5

TOPIC 2.3: MISCELLANEOUS EXCEPTIONS TO INDEFEASIBILITY

Can a statute impliedly override RPA s 42?	6
Can a volunteer assert indefeasibility of title?	6

TOPIC 3: CO-OWNERSHIP

Exception to equitable presumption of purchase price resulting trust: spouses or de facto	7
Can JTs assert a claim to prevent registration of a transfer to self or another act of severance?	7
Transfer to self not effective in equity	7
Can interests be adjusted before the end of a co-ownership relationship?	7
Overlap between rents and profits and occupation rent	8
Consider degree of possession when calculating period of co-owner exclusion for occupation rent	8
Rule of convenience where no occupation rent payable (co-owner not out of possession)	8
Court inherent jurisdiction to order account of rents and profits following repeal of Statute of Anne?	8

TOPIC 4: EASEMENTS AND PROFITS A PRENDRE

Can subdivided parcel of land physically receive the benefit?	9
Courts becoming more generous with subject matter of positive easements	9
Reciprocal relationship between dominant and servient land holders	9
Court-imposed easements: CA s 88K policy background of economic model of property rights	9
In personam exception to enforceability of non-registered, implied easement	9
Court can assume abandonment if not used for 20 years, but probably would still need intention	10
Pieper v Edwards summary of reasoning in relation to agreement to extinguish an easement	10

TOPIC 5: COVENANTS

Does CA s 88(3)(b) (no greater validity than under dealing) cure defects or fraud?	11
Equity and law should be separate if both the benefit and burden need to run	11
Some cases have opposite presumption about covenants benefiting the whole land only	11
Are words of annexation required for the benefit of a covenant to run in equity?	11
Issues with equitable remedies where benefit or burden have run in equity	11

TOPIC 6: LEASES

Implied year-to-year leases: reference to aliquot part of year required for informal as opposed to non-binding lease agreements	12
Terms from informal, non-binding or void year-to-year lease agreements imported to CA s 127 leases	12
Criticism of non-estate leases that don't grant proprietary interest, but still a lease for statutory purposes	12
Unregistered lease where equity would not decree specific performance	12
Unregistered leases that could arise in either equity or law?	13
RPA s 42(1)(d) lease three year maximum: can option be severed to protect initial term?	14
Vulnerability of registration of leases over TT land	14
Pretence doctrine unlikely to be part of the common law	14
Distinguishing point from Bruton – if Council had purported to grant an ultra vires lease?	14
AirBNB use of one bedroom in cohabitation – grant of exclusive possession?	14

TOPIC 7: MORTGAGES

Use of the term equity of redemption in regard to TT mortgages	15
Advantages of exercising power of sale rather than foreclosure	15
Does CA s 111A duty of reasonable care negate need for independent bargain?	15
Inherent jurisdiction of the court to order judicial sale where mortgagor won't exercise power of sale	15
Does CA s 111A(4) prevent injunction when contracts have been exchanged?	15
Is an obligation to grant further advances an independent exception to tacking without notice rule?	16
Expenditure under building mortgages and tacking	16

OS FORMAL REQUIREMENTS

- **CA s 23B**: legal interests in land by **deed**
- **CA s 23C**: equitable interests in land in writing and signed
- **CA s 23E**: part performance exception to **CA ss 23B and 23C**
- **CA s 54A**: future interests (enforceable agreements) in writing and signed or part performance

Notice as per **CA s 164**:

- **CA s 164(1)(a) Actual**: information told or discovered directly (includes wilful blindness – purposefully closing their mind or refusing to acknowledge – high bar)
- **CA s 164(1)(b) Imputed**: information acquired by an agent acting for the purchaser
- **CA s 164(1)(a) Constructive**: Information that would've been acquired if they had done '*searches as to instruments registered or deposited under any Act of Parliament, inquiries and inspections... as ought reasonably to have been made*'
 - **Inspection of the land: Hunt v Luck**: Obligation to inspect the land to see if anyone is in possession of the land (e.g. tenant under a lease) or making use of it (e.g. holder of an easement)
 - **Search the register**: Obligation to search register for Torrens Title land (**CA s 164(1)(a)**: *searches as to instruments registered... under any Act of Parliament*)

R-G POWER TO CORRECT THE REGISTER

RPA s 12A

- (1) The Registrar-General may, before taking any action that alters the Register, give notice of the proposed action to any person that the Registrar-General considers should be notified of it.
- (3) No action lies against R-G if person who receives notice doesn't take respond or seek a court order restraining R-G within specified timeframe.

RPA s 12(1)(d) Power to correct errors or omissions

RPA s 122: Applications for judicial review of R-G decision by Supreme Court - person must be aggrieved

RPA s 121 – R-G must provide reasons

RPA s 138: Court may direct cancellations and other actions related to folios

RPA s 136: Wrongful retention of certain instruments

RPA s 137: Failure to comply with order to deliver up certain instruments

OVERRIDING LEGISLATION

RPA s 42(3) Allows statutes to expressly override indefeasibility in **RPA s 42**

RPA s 41: Interest takes effect by registration

RPA s 42 [INDEFEASIBILITY]

ESTATE OF REGISTERED PROPRIETOR PARAMOUNT

(1) Notwithstanding the existence in any other person of any estate or interest which but for this Act might be held to be paramount or to have priority, the registered proprietor for the time being of any estate or interest in land recorded in a folio of the Register shall, except in case of fraud, hold the same, subject to such other estates and interests and such entries, if any, as are recorded in that folio, but **absolutely free from all other estates and interests** that are not so recorded except:

(a) the estate or interest recorded in a prior folio of the Register by reason of which another proprietor claims the same land,

(a1) in the case of the **omission or misdescription of an easement** subsisting immediately before the land was brought under the provisions of this Act or validly created at or after that time under this or any other Act or a Commonwealth Act,

(b) in the case of the **omission or misdescription of any profit à prendre** created in or existing upon any land,

(c) as to any portion of land that may by wrong description of parcels or of boundaries be included in the folio of the Register or registered dealing evidencing the title of such registered proprietor, not being a purchaser or mortgagee thereof for value, or deriving from or through a purchaser or mortgagee thereof for value, and

(d) a **tenancy** whereunder the tenant is in possession or entitled to immediate possession, and an agreement or option for the acquisition by such a tenant of a further term to commence at the expiration of such a tenancy, of which in either case the registered proprietor before he or she became registered as proprietor had notice against which he or she was not protected:

Provided that:

(i) The term for which the tenancy was created does not exceed three years, and

(ii) in the case of such an agreement or option, the additional term for which it provides would not, when added to the original term, exceed three years.

(2) In subsection (1), a reference to an estate or interest in land recorded in a folio of the Register includes a reference to an estate or interest recorded in a registered mortgage, charge or lease that may be directly or indirectly identified from a distinctive reference in that folio.

(3) This section **prevails over any inconsistent provision of any other Act or law unless the inconsistent provision expressly provides** that it is to have effect despite anything contained in this section.

RPA s 45(1) Except to the extent to which this Act otherwise expressly provides, nothing in this Act is to be construed so as to **deprive any purchaser or mortgagee bona fide for valuable consideration** of any estate or interest in land under the provisions of this Act in respect of which the person is the registered proprietor.