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TOPIC 1: FUNDAMENTALS OF LAND OWNERSHIP

1. Doctrine of Tenure/Estate

- **Doctrine of Tenure:** the land is ultimately owned by the **Crown**, with people holding their interests in the land directly/indirectly from the Crown
 - Person owns their house as a **tenant of the Crown**
 - A number of persons can have a proprietary interest in the land at same time
 - **Doctrine of Estates:** a person should be able to have an **interest in land** giving rise to a **present right to possession**, while at the same time other persons would also have **interests in the land** giving them **future rights to possession**; *WA v Ward (North J)*
 - The doctrine of estates allowed for the creation of **successive interests, present and future**, in the **same piece of land**
 - ie, a in a leasehold the tenant has a present right to possession whilst the landlord has a reversionary or future right to possession
 - The **owner of land owns an estate in the land** → Under the rules of equity, the legal estate could be held upon trust for some other person/persons or for some purpose; *Mabo v Qld (No 2)*
- a. **Words of Limitation**
- Previously, in common law there was a distinction of Words of Purchase (tells us who is the grantee) and Words of Limitation (quantum of grant → what was created)
 - to A and his heirs → only way to give fee simple in common law, if you use 'give fee simple' that would only mean life estate
 - to B and the heirs of her body → to create fee tail
 - to C for life → to create life estate
 - to D for the life of X → to create life estate
 - to E → this would create life estate
 - s 47 CA changed common law rule on words of limitation (deals with inter vivos transaction).
 - (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.
 - (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 in land unless a contrary intention appears by such conveyance.
 - Succession Act 2006 (NSW), s 38
 - (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.
 - Because of these statutes, there is less use of words of limitation, because there is a presumption of fee simple.

2. General Priority Rules

a. Legal vs Legal

- Prior legal interest takes **priority over later legal interest** → this is the standard view and it is virtually true in all cases

b. Prior Legal Interest vs Subsequent Equitable Interest

The prior legal estate is only postponed in four situations:

- 1. Where the legal owner themselves **creates the equitable interest** → obviously!
- 2. Where the legal owner '**fraudulently connives**' in the creation of the equitable interest; *Northern Counties of England Fire Insurance Company v Whipp (1884)*
 - Company granted Crabtree legal mortgage → deeds kept in safe, Crabtree had access → used deeds to grant to Whipp an equitable mortgage → Company retains priority!
 - Carelessness is NOT fraud → NOT fraud despite gross carelessness and negligence
 - There is no duty to the world to look after your own property
- 3. Where the legal owner **fails to get her documents in**; *Walker v Linom (1907)*
 - Trustees failed to 'get in' the title deeds – W retained one and used it to mortgage the land (equitable) → Mortgagee then sells land to L (equitable interest)
 - **Principle:** It is the conduct that matters!
 - Any conduct will **postpone an interest** if the **creation of the subsequent interest** has only been **rendered possible** by possession of the deeds which **but for such conduct** would have passed into the possession of the owner of the legal estate
 - If the solicitors noticed and tried to get them back → then possibly would not have been postponed

- There is a difference between
 - 1. Getting in the deeds and then losing custody of the deeds (must be guilty of fraud) vs.
 - 2. **Not getting the deeds** in in the **first place** (then, **any later holder** of an **equitable interest**)
- 4. Where the legal owner gives authority to deal with the property as security to an agent, and the **agent exceeds that authority**; *Northern Counties of England Fire Insurance Company v Whipp* (1884)
 - If owner has given apparent authority to his agent to raise money on the land and agent exceeds this authority by committing fraud/misconduct then the owner is bound but it.

c. Prior Equitable Interest vs Subsequent Legal Interest

- The equitable interest will take priority to the subsequent legal interest, i.e. the purchaser will take subject to the equitable interest, unless purchaser is a bona fide purchaser for value
- **Bona fide purchaser defence:**
 - 1. Must have legal title
 - 2. Act bona fide
 - 3. For value – for value does not mean the same in law as it does in equity, nominal consideration at law could be value in equity
 - 4. Without notice of the earlier equitable interest
- **Notice of Interest; s 164 CA**
 - (1)(a) **Actual notice + constructive notice** – you have constructive notice of a fact if you **would have had actual notice if you had made reasonable inquiries**
 - Searches, inquires, and inspections that ought reasonably to have been made by the purchaser
 - (1)(b) **Imputed notice**- actual/constructive knowledge of solicitor/agent is imputed to you, provided that actual/constructive knowledge of solicitor/agent is in same transaction
 - (2) In **land transactions**, omission to search the Australian Securities and Investments Commission shall not of itself affect a purchaser of land with notice of any mortgage or charge
 - Rule in *Hunt v Luck*
 - 1. **Search of the title documents**
 - **Old system land** → search of title deeds
 - **Torrens** → search the register
 - 2. AND, physical **inspection** of the **land** (before you take your interest), to **ascertain who is in possession/occupation** (e.g. a tenant) or **who is using it** (e.g. holder of an easement). If you see a person in occupation/using it, you must **ask them, are you asserting any interest in the land** (they might say yes, I am a tenant)?
 - If you do not inspect the land, you have constructive notice of any interest which you would have discovered had you inspected the land
 - Constructive notice elements of s 164 do not apply to the **exceptions** in the **SoGA provisions**
 - A deed conveying land as security for mortgage expressly noticed the trust – not sufficient notice; *Pilcher v Rawlins* (1872)

Wilkes v Spooner [1911]

Facts:

- Father ran two businesses under different landlords:
 - Premise #1 – only pork butchering allowed
 - Premise #2 – general butcher
- Father assigned the lease and sold the business at Premises #2 to his Apprentice
- Father granted to Apprentice a restrictive covenant
 - (Apprentice has an **equitable interest in Father's lease of Premises #1**) in respect of his lease of Premises #1 limiting the use to that of a pork butchery i.e. promise not to open general butcher
- Father negotiated with Landlord of Premises #1 a surrender of his existing lease and the grant of a new lease to Son, allowing use of the land as a general (and not just a pork) butchery
 - Landlord had not notice of the equitable interest and bought out Father's lease

Held: The son was not bound by Fathers' restrictive covenant

- Landlord was a bona fide (no fraud) purchaser of that legal estate for value without notice
- The **protection afforded to a bona fide purchaser for value without notice** of an earlier equitable interest **can also be claimed** by someone taking a legal estate from such a person, **even if the successor had notice of the equitable interest** (or was a volunteer).
- **NOTE:** equitable interest of beneficiary that has been wiped by the defence - that interest is transferred into value used to buy legal title (money that trustee has received for sale of goods)
 - can sue for breach of trust + trace into proceeds of unlawful sale

d. Prior Equitable Interest vs Subsequent Equitable Interest

- **Default Rule:** Where the equities are equal, first in time prevails
- **When are equities not equal?**
 - 1. Postponing conduct of prior interest holder
 - 2. Mere equities vs full equitable interest

Abigail v Lapin [1934]

Facts:

- Mr and Mrs L executed a transfer of their land in favour of Mrs H → mortgage legal title transferred to H to secure payment by Ls of a debt → L had an equity of redemption in the land
- HOWEVER, did not put caveat on title → Mrs H granted an unregistered mortgage over the land to A
 - Tried for legal title however not possible since L woke up and put caveat on title, but A paid → thus equitable interest

Held: L Postponed to A

- **L is bound by the natural consequences of their acts in arming H with the power** to go into the world as the **absolute owner** of the lands
- First in time may lose priority by any **act or omission** which had or might have had **the effect of inducing** a claimant later in time **to act to his prejudice.**
 - Postponing conduct/postponement of earlier interest does not require a direct representation by the holder of that earlier equitable interest
 - All that is required is that the holder of the earlier equitable interest has allowed the misrepresentation to be made

Breskvar v Wall (1971)

Facts:

- Similar scenario to *Abigail v Lapin [1934]* → B is borrowing money from P, P wants security – secure by transferring legal title → B filled out form, purchaser name is blank, P writes in W's name (nephew of P)
- P sells land to A → A has only equitable interest since B managed to put caveat on title before legal title transferred

Held:

- Priority of earlier equitable interest **will only be lost by some conduct on the part of B which must have contributed to the assumption upon which the holder of the later equitable interest** acted when that equitable interest was created.
 - B's conduct (**transfer executed in blank**) has **allowed W to mislead A into thinking that B's prior interest did not exist**
 - By doing this, **B has allowed W to represent himself as the unencumbered owner of the land**, and

- When A deals with W (who is on the register), A thinks he is dealing with the unencumbered owner of the land, and
- A does not think that there is a party (like B) with a prior equitable interest

Heid v Reliance Finance Corporation pty Ltd (1983)

Facts:

- C purchased land from H → large part of payment was outstanding contrary to an acknowledgement of receipt in the transfer, and part was secured by an unregistered mortgage back from C to H.
 - Therefore, H has equitable interest in the land – equitable mortgage + lien
- C who acquired possession of the transfer and certificate of title from H used those documents to grant an unregistered mortgage to Reliance → R now has equitable interest

Held: H's interest were postponed to R's

Two Approaches:

- 1. Estoppel – Giving C certificate of title and the memorandum of transfer which acknowledged receipt of the purchase price armed C with the means of dealing with the land as absolute legal and equitable owner
 - there must have been a representation ... upon the faith of which the representee has acted to his detriment → no need to be direct; *Abigail v. Lapin*
 - When in these circumstances, R acted to its detriment on the assumption, to which H's conduct had contributed, that no adverse equitable interest existed, H is estopped from setting up his equitable interest.
- 2. General and flexible principle – examine the relevant circumstances
 - The overriding question is 'whose is the better equity, bearing in mind the conduct of both parties'
 - Consider negligence on the part of the prior claimant, the effect of any representation as possibly raising an estoppel and whether it can be said that the conduct of the prior owner has enabled such a representation to be made'
 - The delivery of the documents to I armed them with the capacity to represent itself to be the true owner of the property and to engage in fraudulent and deceptive conduct of the kind which took place. The risk of C engaging in that conduct was reasonably foreseeable. The inevitable conclusion therefore is that there was negligence of the part of H.

Dearle v Hall (1823) → ONLY APPLIES TO COMPETING EQUITABLE INTEREST IN PERSONAL PROPERTY NOT LAND

Facts:

- Money held on trust for B → B assigned interest to D and S as security → never gave notice to trustee
- B then sold whole interest (equitable) to H → H contacted trustee to ask about prior interest

Held: H has priority, since H was the first to give notice to the trustee

- Notice, then, is necessary to perfect the title – to give a complete right in rem, and not merely a right as against him who conveys his interest.
- **NOTE:**
 - s23C(1)(c) CA does not require notice to be given to trustee → land
 - s 12 CA does require notice to be given to trustee → choses in action

e. Mere Equities

Equitable Interest	Mere Equity
<ul style="list-style-type: none"> • It arises out of the facts • It is independent of any recognition by the Court/Court Order <ul style="list-style-type: none"> • Mere 'equity' – an in personam right in equity – which requires the intervention of the court to flower into a full equitable estate, and an equitable interest which does not because it already consists of such estate; <i>Westpac Banking Corporation v Ollis</i> [2008] • A mere equity does not participate in competitions of priorities with equitable interests which have been acquired in good faith, for valuable consideration; <i>Double Bay Newspapers</i> <ul style="list-style-type: none"> ○ Mere equities may prevail against equitable interests which are acquired with notice of them (although some people say mere equities are not proprietary interests at all, we know they are in the sense that they are binding against subsequent interest holders who take with notice of the mere equity) 	<ul style="list-style-type: none"> • Right to go to Court to seek equitable relief • If the relief is granted, a mere equity flows into a full equitable interest

- Examples:
 - Claim to rectify a deed: *Smith v Jones* [1954]
 - If a **deed**/other written instrument does **not reflect the true agreement between the parties**,
 - Thus, a **party to the deed/instrument** can go to **Court** to get the **deed/instrument corrected** so that it **reflects the true agreement**
 - Claim to set aside a transfer on the basis of fraud: *Latec Investments Ltd v Hotel Terrigal Pty Ltd* (1965)
 - i.e. L held mortgage over land, the mortgagor defaulted → L sells to subsidiary (both L and S guilty of fraud) → L then grants **equitable** mortgage to MLC (no notice)
 - T (mortgagor) has mere equity to set aside sale
 - MLC simply require permission to sell property as chargee whereas T required court's help to set aside an earlier transaction → thus T's interest is not competitive as a matter of strength
 - See **Menzies J** for argument that T's interest can be either proprietary right or a weaker interest depending on the context
 - Claim to enforce a contract based on part performance: *Double Bay Newspapers v AW Holdings*
 - Can be devised by will: *Stump v Gaby* (1852) 2 De GM&G 623 cited in *Latec Investments*.

Double Bay Newspapers Pty Ltd v AW Holdings Pty Ltd (1996)

Facts:

- Land mortgaged several times over → selling house – determine priority of interests
- Interests in land:
 - 1 registered legal mortgage - this had priority regardless of when it was created - it won
 - 3 equitable mortgages
- Equitable mortgages: in time order
 - 1. Easyfind: mortgage was not caveated i.e. did not put it in the registered. This goes to priority but not validity
 - 2. Double Bay Newspapers: DB searched registers and found nothing but legal - then caveated mortgage themselves
 - 3. Australian Postal Commission: did not search the registered, however did lodge caveat

Held: Easyfind won

- DB did not actually have equitable mortgage – the paperwork was defective, solicitor did not staple two pages together
- DB only had a mere equity:
 - An **equity of rectification** to go to court to get an order to have the document supplemented by enough information to reflect the true agreement between the parties, OR
 - **Part performance**: if interest is based on part performance then it will be mere equity, not full equitable interest

TOPIC 2: TORRENS TITLE

1. Elements of the Torrens System

- **s 3A – Application of Act to Electronic Form Plans and Other Documents**
 - Reference to plan, document includes reference to electronic plan/document
 - If plan is lodged electronically, all other documents with plan must also be lodged electronically except for CT and office copies of court orders and any other document exception by regulations or by R-G
- **s 31B – The Register**
 - R-G shall maintain the Register
 - The Register shall comprise of; folios, dealings registered, records required to be kept pursuant to s 32(7). Instruments of a prescribed class and records required by regulations
 - Can be maintained by any medium/combination of mediums
- **s 32 – Folios of the Register**
 - R-G creates a folio of the Register by making a record of: a description of the land and of the estate or interest in the land for which the folio is created; a description of the 'proprietor' of the estate/interest; and particulars of any other estates/interests affecting the land.
 - Folio has a '**distinctive reference**', quoted in all transactions affecting the land.

- **s 33 – Issue of Certificate of Title**
 - The R-G ‘may’ (or, when requested by the registered proprietor or a registered mortgagee/chargee, **must**) issue a ‘**certificate of title**’ for the land in an ‘approved form’ (s 33(2)). The CT is basically a copy of the folio of the Register for the land.
 - s 111: Replacement CTs may be issued if the original is lost.
 - R-G must cancel superseded Certificate of Title
- **s 33AAA – Cessation of Issue of Certificate of Title**
 - R-G may declare that R-G will cease to issue CT on a specified day
 - On and from the cessation day:
 - R-G no longer requires to issue CT and
 - R-G makes entry of the person who has the power to deal and
 - Previously issued CT has no force or effect and
 - A statutory requirement for lodgement/production of FT imposed for registration will be satisfied if person having right to deal provides consent to registration.
 - Consent must be in approved form and signed.
- **s 33AA – Non Issue of Certificate of Title**
 - (1) R-G has power to determine whether to issue CT
 - (2) If R-G does not issue CT, R-G must make entry in folio indicating CT has not been issued AND the name of the person who has control of the right to deal in land
 - (3) R-G may on request of holder of CT, cancel CT and make entry under (2)
 - (5) applies to both paper and electronic conveyancing
- **s 33AB – Alternative to Production of a Certificate of Title**
 - (1) If no CT is issued, any statutory requirement associated with registration, person who has right to deal must provide electronic consent to the registration of dealing
 - (2) Electronic consent must be in approved form and digitally signed by who has control of the right to deal in the land
- **s 36 – Lodgement and Registration of Documents**
 - Dealings (s 36): in a prescribed form
 - may be registered if in approved & registrable form & R-G has authority to use certificate of title: s 36(6)
 - given distinctive reference when lodged: s 36(1A), (1B)
 - registered when recorded in Register by R-G: s 36(6A)
 - priority given according to date of registration and not date of dealing: s 36(9)
 - when registered, has the effect of a deed duly executed by the parties who signed it: s 36 (11)
- **s 117 – Certificate of Correctness**
 - (1) R-G may reject to accept any dealing, caveat or priority notice unless it is certified – applies to both paper and eConveyancing
 - (2) R-G may reject to accept any dealing accompanied by a notice unless
 - the dealing is accompanied by **certificate in electronic form** to the effect that the notice has been lodged electronically in a form and in the manner approved by the R-G and the notice is correct
 - the dealing is accompanied by a **certification** to the effect that the notice has been lodged electronically in a form and in the manner approved by the R-G and that the notice is correct
 - in any other case--the notice bears a certificate in the form required by the conveyancing rules to the effect that the notice is correct.
 - (3) Certificate must be signed by person lodging the dealing or a party to the dealing or a solicitor or agent acting for the person lodging

2. Indefeasibility of Title

a. Real Property Act

- **Interest s 41:** No dealing, until registered shall be effectual to pass any estate or interest in any land. Upon the registration of any dealing the estate or interest specified in such dealing shall pass
- **Paramountcy – s 42:** 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 R-P recorded in a folio of the Register shall, **except in case of fraud (by the RP) hold absolutely free** from all other estates and interests **that are not so recorded** except (a)-(d)
 - **Two dimension:**
 - validation of defective instruments, when registered

- registered interests not subject to loss of priority in favour of an unregistered interest by virtue of the general law priority rules, even when taken with notice.
- **Notice – s 43:** Except in the case of fraud, no person shall be required or in any manner concerned to inquire or ascertain the circumstances in which the previous RP was registered, or shall be affected by notice direct or constructive of any trust or unregistered interest, and the **knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud.**
- **Protection – s 45**
 - (1) Protects purchaser or mortgagee bona fide for value from being deprived of their registered interest
 - (2) Prohibits recovery of land from registered purchaser or mortgagee for value merely because the vendor or mortgagor
 - (a) may have been registered as proprietor through fraud or error or
 - (b) may have procured the registration of the relevant transfer or mortgage to the purchaser or mortgagee through fraud or error or
 - (c) may have derived his or her right to registration as proprietor from or through a person who has been registered as proprietor through fraud or error.
- **Confirmation of Identity (Mortgagor) – s 56C:**
 - (1) mortgagee must take reasonable steps to ensure that the person who executed the mortgage as mortgagor is the same person who is, or is to become, the registered proprietor of the land that is security for the payment of the debt to which the mortgage relates.
 - (6) The R-G may cancel any recording in the Register with respect to a mortgage if the R-G is of the opinion:
 - (a) that the execution of the mortgage involved fraud against the RP of the mortgaged land, **and**
 - (b) that the mortgagee:
 - (i) has failed to comply with subsection (1), or
 - (ii) had actual or constructive notice that the mortgagor was not the same person as the person who was, or was about to become, the RP of the land that is security for the payment of the debt to which the mortgage relates
- **Ejectment – s 118:** Proceedings for the possession or recovery of land **do not lie** against the **registered proprietor of the land**, except as follows:
 - [(a)-(c), enforcement of mortgage, lease etc.]
 - (d) proceedings brought by a person **deprived of land by fraud** against:
 - (i) a person who has been **registered as proprietor** of the land **through fraud**, or
 - (ii) a person **deriving** (otherwise than as a transferee bona fide for valuable consideration) **from or through a person registered as proprietor of the land through fraud...**

b. Cases

- **Position in Australia - Immediate indefeasibility:** The purchaser obtains indefeasible title once he registers the transfer regardless of the fact that the document was invalid. He becomes immediately indefeasible; *Frazer v Walker; Breskvar v Wall*
 - The Torrens system is not a system of registration of title but a system of title by registration.
 - Registration from a void instrument is effective. It matters not what the cause or reason for which the instrument is void.
 - In the **absence of fraud on the part of the transferee**, or some other statutory ground for exception, an **indefeasible title can be acquired by virtue of a void transfer**.

Breskvar v Wall

Facts: B, RP of land obtained mortgage from P by transferring whole the land. The name of the purchaser on the memorandum of transfer was left blank. P fraudulently with W (P's nephew), put W's name on the form. W, now RP, completed sale to A (bona fide purchaser for value). A caveat was lodged by B prior to A's registration.

Held:

- As registration of W was completed – title vests in the RP, however the title is defeasible since RP engages in fraud
- Before W transfers to A, B could still have contested W's title and cancelled registration. This is because they had equitable interest in the land (because of fraud), which is not barred by legislation
- However, after A acquires the land, there is now another equitable interest on the part of A who is

bona fide purchaser without notice.

- Competition of equitable interests between B and A
 - Since B had earlier interest, law of property mean that they would prevail, unless there was postponing conduct.
 - Postponing conduct → B executed blank transfer document and handed over duplicate certificates of title, which encouraged A's false assumption
- Hence, B loses priority. A wins.

Forged Dealings and Contractual Obligations

- At CL, a forged instrument is void. But under the TT, registration 'cures' the nullity and creates an **indefeasible proprietary interest**.
- **Question:** Does registration of forged dealings '**cure**' **non-proprietary elements**, e.g. contractual rights and obligations that are expressed in the documentation that creates the proprietary interest?
 - 'Registration does not validate all the term 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; *PT Ltd v Maradona Pty Ltd* (1992) OR
 - have a 'direct application' to the registered interest OR
 - that are 'intimately connected with' that interest
- **Leases**
 - Covenant to pay rent? Yes; *Karacominakis v Big Country Developments* (2000)
 - Right to renew lease? Yes; *Mercantile Credits v Shell* (1976)
 - Becomes question of priority – Right of renewal is so intimately connected with the term granted to the lease, which it qualifies and defines, that it should be regarded as part of the interest which lessee obtains under the lease.
 - Option to renew which statute declares to be illegal and void does not validate the option; *Travinto Nominees Pty Ltd v Vlattas* (1973)
- **Mortgages**
 - Right to sell and preserve security from deterioration? Yes
 - Registration of guarantee by 3rd party? No, collateral to mortgage transaction, and does not directly or indirectly affect the land
 - **Personal covenant to repay? Two Views:** → see below
 - 1. Registration validates not only mortgagee's charge over land but also mortgagor's personal promise (covenant) to pay embodied in the forged mortgage; *Mercantile Credits v Shell Co; PT v Maradona; Conlan v Registrar of Titles*
 - Even though mortgagor did not sign and did not receive any money. Mortgagor must repay amount.
 - 2. Only the mortgagee's charge over the property is validated, entitling mortgagee to exercise its power of sale and recoup the debt from proceeds for sale. Cannot sue mortgagor in debt on personal covenant; *Chandra v Perpetual Trustees Victoria Ltd*

Forged Mortgages

- **Traditional:** Secures a single stated sum specified in the mortgage document which specifies the terms of repayment.
- **All Moneys/All Advances:** Secures advances made from time to time under a loan agreement and it is within this load agreement that contain the covenant to repay and the terms of repayment. **The load agreement themselves are NOT registered.** → **concerned personal covenant to pay**
 - The LA b/w the mortgagor and the mortgagee is void because the mortgagor's execution was forged → cannot enforce K to pay at law; *Chandra v PTV, Printy v Provident Capital Ltd*
 - **If both the MA and mortgage are forged** – If the **mortgage is registered**, the **mortgagee's charge is indefeasible** because it is in the registered mortgage itself.
 - But unless the mortgage effectively incorporates the LA that contain the personal covenant to repay, the charge secures nothing and the 'mortgagor' is entitled to an immediate discharge: *Chandra*
 - Incorporation is a **question of construction of the mortgage**.
 - Most of the time, the courts have held it to not be validly incorporated: *Chandra; Printy; Perpetual Trustees Victoria Ltd v English*. Though, it was held to be effectively incorporated in *Solak v Bank of Western Australia*.
 - **Power to Sell:** Under s 57(2)(a) RPA a mortgagee's **power to sell** depends upon the existence of a 'default' in the observance of a covenant '**in the mortgage**'. The SAME mortgage in s 41 under which registration of a mortgage renders the land liable as security.

- As such, unless the LA is **incorporated** into the mortgage, the covenant to pay is found only in **collateral documents**, and **not 'in the mortgage'**: *Provident Capital Pty Ltd v Printy*
- And thus, the charge secures nothing and the 'mortgagor' is entitled to an immediate discharge → CANNOT exercise power of sale.

- **If there is a single borrower/mortgagor**

Provident Capital Pty Ltd v Printy (2008)

Facts: P bought a property. P moved to US for many years. Rouge obtained duplicate CT, which he then used to enter into two loans with the property as security. Mortgages were registered and NOT paid. PC exercised right to sell due to default and used proceeds to pay the two mortgages owing on the land.

- Mortgage 1: 'all monies' mortgage – secured payment for everything in memorandum
 - memo stated that the mortgagor must pay the money **secured in any related agreement**.
- Mortgage 2: traditional mortgage – secured payment for everything in memorandum
 - Memo stated mortgagor received \$X and was obligated to repay \$X with interest

Held:

Mortgage 2: exercise of power of sale NOT challenged

- s 57(2) – grants power of sale where there has been a 'default in the observation of a covenant express or implied in the mortgage' – default on personal covenant to repay
- The obligation to pay was **express in the covenant which was expressly incorporated into the mortgage**.

Mortgage 1:

- The right to sell could not come from the first limb of s 57(2).
 - The mortgage document referred to a memorandum with **did not, itself, contain the personal obligation to repay**.
- Second limb of s 57(2) – 'default has been made in the payment, in accordance with the terms of the mortgage...of the money the payment of which is secured by the mortgage'.
 - i.e. Can sell the land if there has been a default under the mortgage with respect to the payment of moneys secured by the mortgage.
 - Court held NO power of sale – loan agreement was not incorporated – and forged document = void
 - Provident has incorrectly exercised its power of sale and was thus liable to account to Mr P for all the proceeds of the sale.
- **If there are multiple borrowers/mortgagors** – generally one spouse executes mortgage and loan documentation and forges the signature of the other spouse.

Question: Does the mortgage bind to the defrauded spouse's share of the land? Depends on how the 'all monies' mortgage is drafted.

- **If mortgage defined a LA as one that exists** 'between mortgagee and **any one or more of the mortgagors**' → **liability is expressed as joint and several** and charge is effective over the whole property despite forgery AND even where the LA is collateral to the mortgage; *Van den Heuvel v Perpetual Trustees Victoria Ltd*
 - i.e. (1) a Loan Agreement imposes **several liability** on each borrower for the repayment of all of the advance;
 - (2) the Mortgage charges each mortgagor's share in the land with the repayment of the liability incurred by either borrower under a Loan Agreement; and
 - (3) the Mortgage defines a Loan Agreement as an agreement **between** the (a) mortgagee and (b) **any one or more of the mortgagors**.
- **If mortgage defined a LA as one that exists** 'between the mortgagee and **all the mortgagors**' → secures NOTHING; *Perpetual Trustees Victoria Ltd v English*
 - Loan agreement only exists b/w forger and mortgagee → the mortgage only catches agreements that both spouses accepted by signature
 - Mortgage is entitled to be discharged HOWEVER an equitable mortgage was enforceable husband's share in the land (based on an implied agreement or estoppel)

3. Unregistered Interest Under Torrens Title

- s 41(1) **does not** serve to deny any scope for unregistered interests in Torrens land.
 - Other provisions prove this – e.g. s 74F(1), which enables a person to lodge a caveat to protect an interest arising 'by virtue of any unregistered dealing'.

- s 41(1), while denying effect to an **instrument** (dealing) until registration, **does not touch the rights arising out of the transaction** that gave rise to the dealing: *Barry v Heider* (1914)
 - Those rights arise from the **agreement between the parties** to the transaction and, if enforceable in a court of equity, they entitle the parties to have an **equitable interest**: *Barry v Heider*
 - ‘unregistered instruments may confer equitable estates and interest’; *Barry v Heider*
- Since the equitable interest is created by the agreement or obligation **evidenced by the dealing, and not by the dealing itself**, ‘no violence is done to the statutory command in s 41(1)’: *Chan v Cresdon Pty Ltd* (1989) (for case details see Topic 4: Leases)

4. Caveats and Priorities

a. Caveats

- **Nature of caveats:** Provides protection for unregistered interests in Torrens title land by lodgement of a caveat with the R-G.
- **Who can lodge?**
 - Anyone who claims to be entitled to a ‘legal or equitable; interest in Torrens land by virtue of an **unregistered dealing** may lodge a caveat **prohibiting the recording of any dealing affecting the estate of interest claimed**; s 74F(1) RPA
 - Allows RP who have lost control of CT to caveat to protect their own interest; s 74F(2) RPA
- **When must be lodged?**
 - It must be lodged when person who grants interest is still the registered proprietor (i.e. when indefeasibility is still operating); *Leros Pty Ltd v Terara Pty Ltd* (1992)
 - Caveatable interest DOES NOT have to be registrable interests or in registrable form
- **‘caveatable’ interest?**
 - Must be a **proprietary interest in TTL**. A caveat cannot be lodged to protect a mere contractual/personal right, nor a statutory right that does not confer an interest in land.
 - Must be a **presently existing interest – concurrent interests are captured, but future interests are not**.
 - E.g. Interest of a purchaser under a contract for sale; interest of an equitable mortgagee; option to purchase land (a ‘call’ option); the interest of a chargee etc.

Coleman v Hart-Hughes (2017)

Facts: HH wanted to develop property however she had exhausted her borrowing capacity (2 mortgages). C decided to invest to clear the loan arrears and to develop the property for subdivision and sale.

Term in JV:

- The land owner acknowledged that the investor: *has a caveatable interest in the Land and will consent to the registration of a caveat on the title to the Land*.
 - link b/w debt and property?

Held: implied equitable charge over land – caveatable interest

- Deed supported implication of an intention that the plaintiff have an equitable charge to secure repayment of the monies he advanced → no indication to the contrary
- Must interpret agreement between parties – does it support conclusion that really what the parties were doing was granting a charge?
 - There might be a requisite link by identifying property that could be sold to realise the debt and provide source of fund to pay it
 - Here, moneys advanced would be paid out of revenue of the project and sale prices from the projects → sufficient connection

• Formalities

- The caveat must specify the **‘prescribed particulars’** of the interest claimed i.e. must explicitly state the claim that the RP must meet; s 74F(5) RPA
- Once R-G is satisfied the required particulars are filled in, he will enter the particulars on the Folio (s 74G RPA) and notify the registered proprietor of the lodgment of the caveat (s 74F(6) RPA).
 - However, strict compliance with formal requirements no longer mandatory in NSW (s 74L RPA). Court is required to disregard a caveat’s failure to comply strictly with requirements.
- However, there must be clear description of nature of estate or interest claimed in the caveat. E.g. cannot claim merely ‘an equitable interest’; *Vandyke v Vandyke*
- Registrar has duty to ensure that caveat apparently complies on its face (s 74Q RPA) and may refuse to accept caveats that do not comply (s 36(1C) RPA).

- **Effect of Caveat**

- R-G is prohibited from recording any dealing which would affect the estate or interest claimed by the caveator, unless the dealing was lodged before the caveat was lodged; s74H
 - The only way to stop dealings lodged before the caveat from being registered is by an injunction in the Supreme Court: *Re Rush and Hazell and the Real Property Act*
 - Caveats **freeze the Register, preserving the status quo** – until the caveator has been given the opportunity to pursue remedies against the person who lodged the dealing for registration: *J and H Just (Holdings) Pty Ltd v The Bank of NSW*

- **Exceptions to effect:**

- Where caveator consents in writing to registration of the dealing; s 74H(1)(a)
- Does not stop concurrent interest, only conflicting one, e.g. later easement can be registered even if there is a caveat for a lease on the folio; s 74H(1)(b)
- Does not stop certain specified dealings including applications by executors, administrators and surviving joint tenants for a deceased RP etc (s 74H(5)(a)) and authorized transactions pursuant to registered mortgage, charge, covenant, lease (s 74H(5)(g)(h)(i))
- Where dealing (in registrable form) lodged prior to lodgement of caveat: s 74H(4)
 - In which case → injunction from court. Whether the injunction will be granted depends on whether P can prove they have priority in an unregistered v unregistered priority dispute: *Public Trustee v Murray*
 - Note: lodging caveat itself does not prevent contemporaneous application for an injunction to enforce caveator's interest in land s 74R(b)

- **Removing Caveats** – There are three ways to remove a caveat from the Register:

- 1. s 74I(1): Lapsing notice with dealing (new dealing inconsistent with caveat) served on caveator – the caveat will lapse within 21 days of service unless caveator obtains a SC order extending its operation.
 - If did not extend, the caveat will partially lapse (expire) to the extent that the new interest is prohibited and the new dealing will get registered/recorded.
- 2. s 74J(1): RP who has caveat affecting their land → can go straight to SC to resolve issue within 21days (don't have to wait for applicant to register new dealing in land) by serving notice on caveator who then have 21 days to persuade SC to extend the caveat or the whole caveat will lapse.
- 3. s 74MA(1): Any person claiming an interest in the land described in the caveat may apply to the SC for an order that the caveat be withdrawn – no notice; no dealing.

- **Wrongful Lodgement:** If a caveator is found to have wrongfully lodged a caveat they are liable to compensate the person sustaining a pecuniary loss; s 74P

- **Further Caveats – s 74O:** Once a caveat has lapsed by the above procedures, any further caveat lodged by the same caveator in respect of the same interest and based on the same facts has no effect – unless SC gives leave or consent of RP

b. Priorities

- **Registered vs Unregistered**

- Unregistered interests are extinguished by later registered interests unless protected by **caveat** or preserved as an **exception to indefeasibility**: *Leros Pty Ltd v Terara Pty Ltd*
- Once extinguished, does not revive to be enforceable against later RP → UNLESS later RP have agreed in advance to honour interest → SEE in personam exceptions

- **Unregistered vs Unregistered**

- Essentially the same as the principles for resolving priority contests between **equitable interests in land** – i.e. *qui prior est tempore, potior est jure*
- **HOWEVER caveat provisions** important as they affect general principles for resolving priorities between competing unregistered interests.

Searching for the Better Equity: Traditionally, the courts began with the maxim 'qui prior tempore potior est jure' – but the modern approach is to discern **where the 'better equity' lies**: *Heid* Priority in time of creation is of course a factor, which favours the earlier interest, but it is not determinative. First in time applies only applies where the merits are equal and there are no sufficient grounds for preferring one over the other: *Lapin v Abigail*

- **Postponing conduct:** Mason and Deane JJ in *Heid v Reliance Finance*

- The overriding question is '**whose is the better equity, bearing in mind the conduct of both parties'**

- Consider negligence on the part of the prior claimant, the effect of any representation as possibly raising an estoppel and whether it can be said that the conduct of the prior owner has enabled such a representation to be made'
- Failure to Caveat: *Butler v Fairclough; J & H Just*
 - Mere failure to caveat to protect an unregistered interest does not postpone that interest to a later one.
 - Failure to caveat only results in postponement where:
 - the failure considered in the circumstances, allows another person to acquire a later unregistered interest in the land on the mistaken assumption the earlier interest does not exist; *Abigail v Lapin* OR
 - it is 'reasonably foreseeable' that a later interest will be created and that the holder of that later interest will assume the non-existence of an earlier interest: *Heid*
 - HOWEVER no provision in the RPA requires a caveat to be lodged; nor can a caveat improve the priority an unregistered interest would otherwise have: *Butler v Fairclough*
- Relevance of failure to search register (purchaser): Overall uncertain
 - Unless the purchaser searched the register, they would not be misled by the first equitable interest and therefore the first equitable interest would retain priority; *Finlay v R & A Bank of Western Australia* (1993)
 - *Butler v Fairclough* supports this view – by placing emphasis on F's reliance on the search, court seems to suggest that if she did not do so the absence of the caveat could not have contributed to the second interest.
 - C.f. *Abigail v Lapin* suggests that failure to caveat is more blameworthy than failure to search title.
 - Purchaser is only required to search the Torrens register – s 43A(2) RPA negates any requirement to search registered under other
- **Cavea**
- Arming Conduct/ Defective Chain of Title Cases
 - In the following cases, the decisive factor for postponing was because the defrauded parties personally armed the rogue with the means to do the fraud.
 - The failure to caveat didn't play a direct role for postponing and was treated as just another factor in justifying the postponement.

Abigail v Lapin (1934)

Facts: L were RP of TT land. L filled out transfer form + CT and handed them to H as security for a mortgage, only to be executed if L defaulted. L did not lodge caveat. H became the RP and granted mortgage to A. A searched the Register and found nothing.

Held: L's interest was postponed to A

- L is bound by the natural consequences of their acts in arming H with the power to go into the world as the absolute legal and equitable owner of the lands + did not lodge caveat
 - This led to a loss of priority regardless of whether or not A searched and relied on the state of the register.
- First in time may lose priority by any act or omission which had or might have had the effect of inducing a claimant later in time to act to his prejudice.
 - Postponing conduct/postponement of earlier interest does not require a direct representation by the holder of that earlier equitable interest
 - All that is required is that the holder of the earlier equitable interest has allowed the misrepresentation to be made

Breskvar v Wall (1972)

Facts: → see above

Held:

- Applies *Abigail v Lapin* test to conclude that B armed P with the means of placing himself or his nominee on the register and therefore lose priority.
- Moreover, though a failure to caveat is not to be regarded as of itself a reason for loss of priority in this case, the Bs could have put a s 74F(2) kind of caveat from day 1, but they didn't.
 - It is at least true to say that B at least has the ability to prevent the later interest.

Heid v Reliance Finance (1983)

- C purchased land from H → large part of payment was outstanding contrary to an acknowledgement of receipt in the transfer, and part was secured by an unregistered mortgage back from C to H.
 - Therefore, H has equitable interest in the land – equitable mortgage + lien
- C and H used the same lawyer (G) – but the lawyer was technically an employee of C

- C who acquired possession of the transfer and certificate of title from H used those documents to grant an unregistered mortgage to Reliance → R now has equitable interest

Held: H's interest were postponed to R's

- The overriding question is '**whose is the better equity, bearing in mind the conduct of both parties'**
 - Must consider those acts during the carrying out of which it is **reasonably foreseeable that a later equitable interest will be created** and that the holder of that later interest will assume the non-existence of the earlier interest
- Two significant conduct elements:
 - (i) that the instrument of transfer signed by H contained an acknowledgement of the receipt of the purchase money which was unpaid and at the heart of his vendor's lien; and
 - (ii) that Heid left the signed instrument of transfer and the authority to collect the CT with G.
 - The risk of deceptive use of the documents by the solicitor is not, in the ordinary case, a reasonably foreseeable consequence of entrusting the solicitor with the documents'.
 - H's interest is postponed since they did not investigate whether G was an independent lawyer. If G was an independent solicitor, and not a servant of the purchaser, then Heid may have been entitled to retain his priority.
- The risk of the purchaser engaging in that conduct was **reasonably foreseeable**.
- Failure to lodge any caveat in respect of H's vendor's lien was not in itself fatal to his case – but if he did he could have alerted R to his equitable interest.
- '**Common Grantor**' Cases
 - In the following cases, the defrauded unregistered party did not arm the rough with anything – the only thing they did was not lodge a caveat

Butler v Fairclough (1917)

Facts: RP = Good. G had already granted on mortgage (on register). G enters another mortgage with B. 2 days later G enters K to sell land to F. B has not cavedated – F searches Register. 7 days after K, B lodges caveat. F then lodges registration to become RP – blocked by caveat.

Held: F holds as RP free of B's unregistered charge.

- The failure to caveat is a postponing conduct. They place emphasis that fact that F searched title and relied on the search of register to take the sale
- Although not expressly said, this case seems to suggest that there is a duty to caveat or you will lose priority. The decision was criticised in *J & H Just holdings*.

J. & H. Just (Holdings) Pty Ltd v Bank of New South Wales (1971)

Facts:

- 1961: RP deposited cert of title with bank to secure an overdraft – gave bank equitable mortgage
- 1964: RP then went and created further equitable mortgage in favour of J & H Just
 - RP made representation that Bank of NSW held CT not as security but safekeeping
 - J & H Just search register and see no mortgage – J & H Just cavedated, could not register since no CT
- Bank of NSW tries to register mortgage – blocked by caveat

Held: Bank of NSW retained priority

- In general an earlier equity is not to be postponed to a later one unless because of some act or neglect of the prior equitable owner.
- The failure to lodge a protective caveat **cannot** properly be said necessarily to be such an act or default
 - **The purpose of the caveat is protective: it is not to give notice.** Real Purpose = allow people to have to go to court to protect interest
 - **THUS** holder of the subsequent equity could not properly rely upon the absence of any notification in the register
- BUT this case DID NOT overrule *Butler v Fairclough* → differentiated by saying there is no postponing conduct here due to factual difference of who has the CT.
 - Here Bank of NSW always had the CT → protected themselves by keeping custody of the CT, preventing any registrations
 - no reason for them to caveat as no prudent person would acquire an interest in the land without making careful inquiries about where the CT was and the circumstances under it was held.
 - Whilst in *Butler v Fairclough* → first registered mortgagee has CT NOT Butler

Jacobs v Platt Nominees [1990]

Facts: Mr and Mrs P were directors of PN which owned a motel. P entered into K with daughter J in which she had an option to purchase the motel = equitable, caveatable interest.

- J did not lodge caveat because she thought any subsequent interest would be approved by her mother, who would not allow it, and J did not want to antagonise her father.
- PN entered into K selling motel to Perpetual Trustees → need both Mrs and Mr P to sign, however Mr P used son as Mrs P's agent (who had previous signed authority).
- No knowledge of J or Mrs P → J found out about the contract after exchange, but before settlement – she lodged a caveat.

Held: No postponing conduct by J.

- MUST to take into account the fact that J is the daughter of Mr and Mrs F
- Question: has J done anything that contributed to the later interest being created?
- J had secured the option from her parents in such a way that it was inconceivable that her mother and father would join together to sell the motel in breach of the option.
 - It was, in short, not reasonably foreseeable that her failure to lodge a caveat exposed herself or others to a risk of a later sale.
 - No reason for J had to believe she had to caveat to protect herself

Black v Garnock (2007)

Facts: RP contracted to sell land to B. On the day of settlement B's solicitor searched register – folio was clear. Two hours before settlement a writ of execution was recorded against the folio in favour of the judgment debtor (X). B's solicitors advised of X's claim. The purchase was settled, but registration of B's transfer was blocked by writ: RPA s 105A(2).

Held:

- The writ defeated the interests of the purchasers. Even though the purchasers had paid the balance of the price to the vendor, they were not able to be registered.
- However, the majority of the Court clearly envisaged that a caveat lodged by the purchaser, although unable to prevent the writ being recorded in the Register, would have precluded the registration of any transfer by the Sheriff in execution of the writ.

5. Priority Notices

• Caveat and Priority notices

- A Caveat prohibits the registration of certain dealings pending the perfection of a claimed estate or interest in land, whereas a Priority Notice gives priority to the registration of specified unregistered dealing(s) for a limited period of time.
- A priority notice can be lodged under s74T RPA with respect to a proposed dealing; s 74T CA
 - (2) Must in approved form
 - (3) Cannot lodge another priority notice regarding same dealing and
- R-G must register PN i.e. will appear on any search of the relevant title and gives notification to the world of an intended dealing; s 74U CA
- PN has effect for 60 days from recording of the PN on the Register; s74V CA
 - can be extended once only for a period of 30 days by lodgement of documents
- Effect: A PN will give priority to the registration of the intended dealing(s) identified in the PN; s74W
 - Any dealing(s) lodged after the Priority Notice, but before the dealing(s) set out in the PN will be processed after the dealing(s) set out in the PN
- Person who lodged PN can withdraw PN; s 74X CA
- Any person who has interest in land can apply to SC (full discretion) to withdraw PN; s 74Y CA
- Compensation: Any person who, without reasonable cause: (a) lodges a priority notice, or (b) refuses or fails to withdraw a priority notice after being requested to do so, is liable to pay compensation to any person who sustains pecuniary loss that is attributable to the lodgment, refusal or failure; s 74Z CA

6. Compensation – The Assurance Fund

s 29 RPA – Circumstances in which compensation payable

(1) Any person who suffers loss or damage as a result of the operation of this Act in respect of any land, where the loss or damage arises from:

- (a) any act or omission of the R-G in the execution or performance of his or her functions or duties under this Act in relation to the land (including any such act or omission of the authorised operator), or
- (b) the registration (otherwise than under section 45E) of some other person as proprietor of the land, or of any estate or interest in the land, or

- (c) any **error, misdescription or omission** in the Register in relation to the land, or
- (d) the land having been brought under the provisions of this Act, or
- (e) the person having been deprived of the land, or of any estate or interest in the land, as a **consequence of fraud**, or
 - Partial extinguishment is compensable even if fraudster does not get on the register; *Diemasters v Meadowcorp*
 - partial depravation can include emcumbered by mortgage or mortgage has been wiped from the register
- (f) an **error or omission in an official search** in relation to the land, or
- (g) any error of the Registrar-General in recording details supplied in the notice referred to in section 39 (1B),

is entitled to payment of compensation from the Torrens Assurance Fund.

(2) Compensation is not payable in relation to any loss or damage suffered by any person:

- (a) to the extent to which the loss or damage is a consequence of **any act or omission** by that person, or
- (b) to the extent to which the **loss or damage**:
 - (i) is a consequence of any **fraudulent, wilful or negligent act or omission by any solicitor**, licensed conveyancer, real estate agent or information broker, and
 - (ii) is **compensable** under an indemnity given by a professional **indemnity insurer**, or
- (c) to the extent to which that person has **failed to mitigate the loss or damage**, or
- (d) to the extent to which the **loss or damage has been offset by some other benefit** to that person that has arisen from substantially the same circumstances as those from which the loss or damage has arisen, or
- (e) where the loss or damage arises because of an **error or miscalculation in the measurement of land**, or
- (f) where the loss or damage arises from:
 - (i) the breach by a registered proprietor of any trust (whether express, implied or constructive), or
 - (ii) the inclusion of the same land in two or more grants, or
- (j) where the **loss or damage** arises from the person's failure, as mortgagee or transferee of a mortgage, to comply with **section 56C** or from the cancellation of a recording with respect to a mortgage in accordance with section 56C (6), or
- (k) where the loss or damage arises from the recording of a Registrar-General's **caveat** in the Register under section 12 (1) (e) or (f) or the removal of such a caveat by the R-G, or
- (m) where the loss or damage is the result of an **easement not being recorded** in the Register (except where the easement is not recorded in the Register due to an error of the Registrar-General), or
- (n) where the loss or damage arises from the **improper exercise of a power of sale**, or

s 129A CA – Limits on amount recoverable generally

Limited to the market value of the land at the date on which compensation is awarded to that person plus any legal, valuation or other professional costs reasonably incurred by the person in making the claim.

s 129B CA – Limits on amount recoverable in respect of mortgage obtained by fraud

(1) This section applies only in circumstances where:

- (a) a claim for compensation is made as a result of the registration of a mortgage, in the opinion of the R-G, fraud against a registered proprietor of the mortgaged land, and
- (b) a person would be entitled to compensation under this Part and
- (c) as a result of the registration of the mortgage, the mortgagee is entitled to exercise a power of sale in respect of the land mortgaged.

(2) **Section 129A does not apply** in the circumstances in which this section applies.

(3) The total compensation that is payable to a mortgagee is limited to the market value of the land at the date on which compensation is awarded to the mortgagee less the amount secured by any other mortgage affecting the same land (including a mortgage that is registered as a result of fraud) that has, or would have had, more priority.

7. Exceptions to Indefeasibility

a. Fraud; s 42(1) RPA

- **General principle:** Unless the fraud can be brought home to the RP, registration will confer indefeasibility → the fraud must be 'sheeted home'