

Topic 4: Assignment and Disposition of Interests

Assignment of Legal Interests

Legal assignment of real property – O/S

1. Transfer/creation of interest
 - a. Sale – historical passing on of chain of title. Transferee gets no better title than that of the transferor
 - b. **Deed** is required to transfer/create an interest in land – s 23B(1) CA
 - i. Written document on paper
 - ii. Signed, sealed and attested by 1 witness that isn't a party – s 38(1)
 - iii. Delivered – not necessarily physically
2. **Exceptions to deed requirement:**
 - a. **Tenancies** don't need to be in writing to be effective at law, subject to equity
 - b. **Lease** s 23B(2) are exempt. These are created by parole at will (s 23D(1)). Per s 23D(2), they must be:
 - i. a) at market rent
 - ii. b) give the lessee an immediate right to possession
 - iii. c) term plus option must not exceed 3 years. (so if exceed, must be in writing).
 - iv. Note: if landlord only has **equitable fee simple b/c property subject to OS mortgage**, then lessee can't have legal lease b/c *nemo dat*
 - c. **Possession:** possessors acquire a property right, enforceable against all except the someone w/ a better right to possession e.g the true owner s 23E
3. **Mortgage** = transfer of title/ownership/legal fee simple for security
 - a. As above, **deed** is required per s 23B(1)
 - b. There can only be 1 **legal** mortgage
 - c. Mortgagor's interest is transferred to mortgagee, on proviso that mortgagee will re-convey that interest when debt is repaid.
 - i. If it's not a legal mortgage, it may be equitable, which needs to be in writing and signed per s 23(C)(1)(a)
 - d. Mortgagor retains equity of redemption (*Figgins Holdings*)
 - i. If the mortgagor mortgages the equity of redemption:
 1. The 2nd mortgagee gets an equitable mortgage, if the 1st mortgage was legal
 2. But if the 1st mortgage wasn't legal, the mortgagor has a choice to mortgage the legal title or the equity of redemption

Legal assignment of real property – Torrens Title Land

1. Transfer/creation of interest
 - a. 'Title by registration, not registration by title' – *Breskvar v Wall*, Barwick CJ
 - b. Must be in writing – s 23C(1)
 - c. *Real Property Act 1900 NSW*
 - i. **S 41** – no legal interest passes/is created until registered. Once registered, has same legal effect as deed.
 - ii. **S 42** – registered interest is **indefeasible**, except if there is **fraud**

1. *Frazer v Walker* [1967]

a. Facts:

- i. Frazer's the registered proprietors of land. Mrs Frazer borrowed money from Radomskis. As security, she gave Radomskis mortgage over property. Mrs Frazer forged husband's signature. She didn't make payments so Radomskis exercised their power of sale under the mortgage and sold to Walker. Walker became registered proprietor + tried to obtain possession. Mr Frazer counterclaimed that mortgage to Radomskis was nullity + should be cancelled

b. Found:

- i. 'where any grant/certificate has been wrongfully obtained/retained, the registrar has power of cancellation + correction.'
- ii. Radomski obtained the legal interest through fraud by Mrs Frazer. But Walker didn't know about the fraud ('a bona fide purchaser for value w/o notice') so he has indefeasible title

- d. But unregistered interests can exist if they are enforceable via equity or contracts – (illegal) equitable interests

- i. E.g you have Certificate of Title but they're taking a long time to process the register

2. **Exceptions**

- a. **Leases** are effective even w/o registration as they are exempt – s 42(1)(d) RPA.

3. **Mortgages** (a Torrens mortgage is called a charge)

- a. S 57(1) - Lender gets a registered charge. Mortgagor keeps fee simple. No transfer of ownership
- b. **More than 1** registered/legal mortgage can exist in Torrens land (where as only 1 legal mortgage can exist on OS land b/c O/S mortgage involves transfer of ownership.)

Overcoming a lack of formalities – equity

1. **Constructive trust**

- a. Not set up intentionally by parties
- b. Imposed on by courts of equity
- c. A is **legal estate holder** + B is **equitable estate holder**
- d. *Lysaght v Edwards* – 'It is that the moment you have a valid contract for sale (of land, on the facts), the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser, in the absence of express contract as to the time of delivering possession.' = equitable conversion of ownership in the estate to equity until possession delivered
 - i. To prevent vendors from selling to someone else, after promising to sell to you. Now after they promise to sell to you **with a valid, enforceable, specifically performable contract** (*Lysaght v Edwards*), they hold it on trust for you.

2. **Express trust**

- a. Certainty of intention + subject matter + objects/beneficiaries (*Assoc Alloys*)
- 3. **Specific Performance** (rule in *Walsh v Lonsdale*) – writing required
 - a. If you don't have a legal interest, per equitable maxims such as 'equity looks on as done, that which ought to be done', there may be: (in order of strength)
 - i. 1) An equivalent **equitable property interest** (strongest equitable right – mirrors CL)
 - 1. E.g interest in OS land
 - 2. Interest in unregistered Torrens land
 - 3. Beneficiaries interest under a trust
 - ii. 2) **Mere equity**
 - 1. Right to seek relief. If relief granted by court, becomes full equitable interest
 - a. Claim to rectify incomplete/incorrect deed (*Smith v Jones*) or mortgage doc (*Double Bay*)
 - b. Claim to set aside due to fraud
 - c. Claim to enforce agreement to transfer interest on basis of part performance
 - iii. 3) **Personal equity**
 - 1. Equity enforceable against a specific person
 - 2. *Gill v Gill* – dad gave land son on proviso that he let sisters stay there. Found: sisters don't have interest in house, but they have equitable right attached to brother to live there. That is to say, they couldn't stay there when the brother sells it off.
 - b. **Where land is unique, and damages are inadequate, equity may order specific performance**
 - i. E.g you never formalised the lease as a deed, but you acted like there was one, and it was in writing per s23C + thus **enforceable** per s 54A (it needs to have been potentially enforceable for equity courts to enforce it – equity works under the law, not override it)
 - 1. → then court may say there was an equitable lease, b/c 'equity deems to be what ought to be'