

## **TOPIC ONE PART ONE – Introduction to General Law Land**

- Land
- Interests in land
- Formalities

### **“Land”**

-Land law deals with the acquisition, nature, exercise, transfer and termination of rights and interests in land

Common law meaning of land:

- Some part of the earth (as indicated by boundaries)
- A three-dimensional space
- Three-dimensional space refers to the surface, above the surface and below the surface
- Cuius est solum* rule: ownership of land extends up to heaven and down to centre of the earth (fanciful phrase subject to limitations)
- Including physical components: soil, minerals, vegetation and fixtures

“Land” may be defined for purpose of a statute:

**Section 4(1)** Transfer of Land Act 1958 (Vic): Land “includes any estate or interest in land but does not include:

- (a) An interest in land arising under the *Mineral Resources (Sustainable Development) Act 1990*; or
- (b) A carbon sequestration right or soil carbon right granted in relation to Crown land under a Carbon Sequestration Agreement within the meaning of the *Climate Change Act 2010*

### **General Law Land**

Two categories of land in Victoria:

- General law land or old title or common law land
- Torrens title land
- General law land is land alienated or granted by the Crown from 1837 to the commencement of Torrens legislation in 1862 in Victoria
- Legal title could only have been transferred by a deed of conveyance
- Parcels of general law are diminishing due to conversions
- General law land is governed by *Property Law Act 1958* (Vic)
- System of deeds registration
- Title was comprised of a series of deeds forming a chain of title representing the history of the land grant
- Vendor must prove title by searching each document in the chain to ensure that link to original Crown grant is unbroken
- Theory of relative dependent title applies, as each owner of an estate could acquire only such title as his predecessor held
- Searching the chain of title led to difficulties and costs
- Because of this, there are now statutory limitations of a statutory search:
  - Need only to search title back for 30 years, provided good title can be found during that period (**s 44(1)** of the PLA)
  - Purchaser not deemed to be affected by notice of interest prior to the 30-year period (**s 44(6)** of the PLA)
- Although registration not compulsory, registrations did take place
- Registrations were optional and only affects priorities

-Distinction between legal and equitable interests

Priority is given in the deeds registration system to a registered interest over unregistered interest and interest registered at a later date, provided it was acquired:

-Bona fide

-For valuable consideration

-Without actual or constructive knowledge (s 6 PLA)

-Registration does not validate a defective title and provides no guarantee of title

-Deeds, conveyances or other instruments may no longer be registered in the office of the Registrar-General (s 6(2) PLA)

-All dealings relating to old title land must now be registered under the Torrens system necessitating a conversion from old title to Torrens title

### **Relevance of General Law Land**

General law land remains relevant:

-Many of those titles have been converted over the intervening years but those that remain in the system are still valid proof of ownership

-A program to convert Victoria's remaining General Law titles to the Torrens system continues

-When application for conversions is made to bring general law land within the operation of the Torrens system, priorities between the conflicting interests are judged according to the rules of the old system

-Even with converted land provisions, the Property Law Act may still affect priorities

### **Torrens Title Land**

Torrens title land includes:

-Land alienated or granted by the Crown after commencement of Torrens legislation in a particular state (Victoria 1862); and

-Old title land converted to Torrens title land

-Transfer of Land Act 1958 (Vic) applies to Torrens title land

-Title to Torrens title land is evidenced by a Certificate of Title

-Interest is known as a registered interest

System of title by registration:

-Validates a defective title; and

-Guarantees protection of title

-Distinction between registered and unregistered interest

### **Characterisations of Interests in Land**

#### ***Legal and equitable interests (general law land):***

-A legal interest in land is one which constitutes a recognisable common law estate/interest and which is created in accordance with the requisite formality requirements

-Formalities for creation and conveyance of legal interests are set out in statutes of different states

-In Victoria, a legal interest in land is created or conveyed by state grant (s 51(1) of PLA) or execution of a deed (s 52(1))

-Creation of parol leases (taking effect for a term not exceeding three years) need not to be executed by deed to be valid (s 54(2) PLA)

-If formalities are not met, an equitable interest may exist

-An equitable interest is a right to compel the legal owner to hold and use the rights which the law gives him in accordance with the obligations which equity has imposed upon him

### ***Registered and unregistered interest (Torrens title land):***

- An estate, interest or encumbrance is created or transferred upon registration of an instrument (s 40(1) of TLA)
- Unregistered interests are interests that are not registered or rights or interests that cannot be registered

### **Formalities for Legal Interests (General Law Land)**

- Formality requirements existed since early times for the creation of legal interests in land
- ‘It seems to be a feature of every legal system that there must be some particular act or instrument by which a person can notify the community that he most solemnly means what he is doing as being binding on him’ - **Manton v Parabolic (1985)**

#### **Section 51** of Property Law Act:

-“All lands and all interests therein shall lie in grant and shall be incapable of being conveyed by livery or livery and seisin, or by feoffment, or by bargain and sale ...”

- Land/interest in land shall lie in grant
- Incapable of conveyance by livery, or livery and seisin or by feoffment (legal conveyancing public ceremony) or by bargain and sale
- Possession is passed by conveyance of an interest

#### **Section 52(1)** of Property Law Act:

-“All conveyances of land or of any interest therein are void for the purpose of conveying or creating a legal estate unless made by **deed**”

- Land/interest in land must be conveyed by deed
- Legal interest is a recognisable common law estate
- If a deed is executed, a legal interest is created which is enforceable in the common law

If no deed is executed:

- No legal interest is created
- An equitable interest may be created

#### **Section 52(2)** exceptions to conveyance by deed:

- Surrenders by operation of law (s 52(2)(c))
- Leases or tenancies not required by law to be made in writing (s 52(2)(d))
- Vesting orders by a court (s 52(2)(f))
- Conveyances taking place by operation of law (s 52(2)(g))

#### **Section 54(2):**

- “Nothing in the foregoing provisions of this Division shall affect the creation by parol of leases taking effect in possession for a term not exceeding three years (whether or not the lessee is given power to extend the term) at the best rent which can be reasonably obtained without taking a fine”
- Formalities of a deed do not apply to oral leases for three years or less

### **Deed**

- “A deed is a writing sealed and delivered by the parties”(Blackstone)
- Common law did not require signature
- Seal used for authentication purposes and to prove intention
- ‘A deed must be intended by the party who does it to be the most solemn indication to the community that he really means what he is doing. The solemn indication is given by sealing a deed which witnesses to what has been done’ - **Manton v Parabolic Pty Ltd**
- Later on, a deed became a document in writing that was signed, sealed and delivered

-Deed for purposes of the Property Law Act: document signed by both parties with intention of operating as a deed and witnessed

Statutory requirements:

-Person who executes a deed must sign or place mark on deed; sealing alone insufficient: s 73 of PLA;

-Attested by witness not a party to deed; and

-Sealed: instrument which is expressed to be sealed shall operate as if sealed: s 73A of PLA

-Corporation executes a deed by affixing the common seal of corporation

-‘Conveyance’ includes: mortgage, charge, lease, assent, vesting declaration, disclaimer, release, extinguishment or assurance of property/interest by any instrument (except will)

-Delivery of title deed – changed from actual delivery to constructive delivery

-Once delivered, the delivering party cannot withdraw or resile (abandon) from it

-Delivery can be unconditional or conditional (‘escrow’: not effective until condition is fulfilled)

Formality of execution of a deed required for:

-*Inter vivos* transfer of an estate in general law land; and

Grant of a lesser interest such as:

-Lease (subject to s 54(2) exception)

-Mortgage

-Easement

### Formalities for Equitable Interests (General Law Land)

-As an interest in land, equitable interests must satisfy statutory requirements for (a) creation and (b) enforceability

-Provisions regarding creation of an equitable interest in land is s 53 Property Law Act

-Provisions regarding the enforceability of an equitable interest in land is s 126 Instruments Act

-Creation or disposition of an equitable interest has to occur in writing

-Need not to be created by deed

-Writing and signing are liberally interpreted

-Formalities are required to prevent fraud in creation and transfer of interests in land

Section 53 of the Property Law Act:

(1)(a) An **interest** in land can only be **created** or **disposed** by writing signed by the person creating or conveying the same, or by will, or operation of law

(b) A **declaration** of trust respecting any land or any interest therein must be manifested and proved by some writing signed by some person who is able to declare such trust or by his will;

(c) A **disposition** of an equitable interest or trust subsisting at the time of the disposition must be in writing and signed by the person disposing of the same or by will

(2) This section shall not affect the creation or operation of resulting, implied or constructive trusts

### Types of Trusts

-For purposes of s 53 the different trusts must be kept in mind

The following trusts are recognised:

Express trust:

-Grantor expressly intends to create a trust and transfer legal title to a third party (trustee) for benefit of a defined party (beneficiary)

Resulting trust:

- An intention to create a trust is inferred from the circumstances and an act of performance supports the intention

Constructive trust:

- It is imposed at the discretion of the court where it is concluded that justice and fairness require it

### **Section 53(1) of the Property Law Act**

- Section 53(1)** applies to the creation of all trusts and other express equitable interests but not to resulting trust or constructive trusts

- An express trust by transfer must be created in writing

- An express trust created by declaration rather than transfer needs only to be evidenced in writing and signed, not created in writing

- An express trust by declaration can be created orally and subsequently enforced by evidence in writing or the terms of the trust which have been signed by the settlor

- Section 53(1)(a)** does not overlap with oral trusts coming within the application of subsection (b)

- If a trust over land is orally declared, subsection (b) has independent operation

- Section 53(1)(c)** applies to transactions with pre-existing equitable interests

- Disposition: transfer/assignment or direction

- Disposition has to be in writing and signed by transferor or his agent

### **Section 126 of the Instruments Act 1958 (Vic)**

- An action must not be brought to charge a person upon a special promise to answer for the debt, default or miscarriage of another person or upon a contract for the sale or other disposition of an interest in land unless the agreement on which the action is brought, or a memorandum or note of the agreement, is in writing signed by the person to be charged or by a person lawfully authorised in writing by that person to sign such an agreement, memorandum or note

- This provision relates to the enforceability of all contracts or dispositions relating to land

- Written agreement creating interest, note or memorandum of agreement

- A contract for the sale/disposition of land/any interest in land is unenforceable unless it is in writing and signed by the party or representative

- Applies to legal and equitable interests**

- Not invalid but merely unenforceable

- Not enforceable in court, unless written agreement is produced

- Equitable interest can be created orally but to enforce interest it must be in writing

### **Equitable Interest Arising from Part Performance**

- Despite absence of writing/insufficient writing a contract may still be enforceable if there are sufficient acts of part performance by plaintiff

- Equitable interest may arise if a court is prepared to issue a decree for specific performance in circumstances where it would be inequitable not to do so

Preconditions for a decree for specific performance:

- Valid contract

- General requirements for contract of sale of land have been met

- Absence of adequate remedy at law in damages

- Party seeking enforcement must prove that he has performed or is ready and willing to perform the substance of his contract obligations

- Contract must be unconditional

- No bar to award of equitable remedy of specific performance. Relief is refused in case of undue influence, delay or acquiescence

- Vendor must prove good title or the purchaser has accepted such title as vendor has

- Doctrine of part performance allows for enforcement of an oral contract of sale of an interest in land when the contract has been sufficiently acted upon
- Basis: if a contracting party is induced to alter position on faith of contract it would be fraud on such party to set up the defence of invalidity of contract

### Approaches to Part Performance

Two perspectives as to what constitutes to part performance:

#### ***Stringent approach:***

- Acts relied upon must be unequivocally (leaving no doubt); and
- In their own nature referable to some agreement as that alleged - **Madison v Alderson**

#### ***Liberal approach:***

- An act constitutes part performance if on the balance of probabilities they indicate that a contract of some kind existed - **Steadman v Steadman**

### Australian Position

- Test in **Madison** represents the Australian position
- Steadman**, however, not rejected in **Regent v Millet** (was not necessary to consider **Steadman** because acts met stricter test)

### **Regent v Millet**

- Agreement to transfer property to daughter and partner if they paid deposit and loan off
- They took possession and made payments, sought an additional loan for renovations
- Father refused to transfer title

Acts relied upon:

- Taking of possession;
- Repairs and renovations; and
- Making of mortgage payments

- Court found that doctrine of part performance applied
- The court applied stringent requirement test
- Court found that granting and taking of possession constitutes part performance
- Found it unnecessary to consider other acts

Types of acts constituting part performance:

- Payment of purchase price;
- Depositing of title deeds; and
- Giving and taking of possession

- Combination of these acts (and not act per se) constitutes part performance

### Part Performance

Part performance is established by showing:

- That the acts of performance unequivocally relate to the agreement alleged; and
- That the act relied upon must:
  - Have been done on the faith of the agreement; and
  - Resulted in a change of position with respect to the subject matter of the contract such that the person would be unfairly prejudiced if the other party were to take advantage of the absence of any written evidence - **Madison v Alderson**

- Section 126 of the Instruments Act does not recognise part performance as an exception to the formality requirements
- Section 55(d) of the PLA acknowledges part performance as an exception to formality requirements as set out in s 53 of the PLA

## **TOPIC ONE PART TWO– Introduction to General Law Land**

- Boundaries
- Alluvio et Avulsio*
- Encroachments

### **Boundaries Abutting Water**

- Land may have artificial or natural boundaries
- If land does not abut water, it has artificial boundaries that are fixed
- Artificial boundaries are determined in accordance with reference to specific measurements in the certificate of title
- If land abuts water, the boundary is natural
- A natural boundary is not fixed and may shift from time to time by natural forces

Specific rules have developed to determine the boundary line of natural boundaries:

#### ***(a) Tidal water (land abuts sea-shore):***

- Boundary is the mean high water mark
- Averaging out of annual tidal level reached by spring and neaps
- Unless the boundary is expressly set out upon grant
- Land beyond the high water mark (foreshore) belongs to the Crown, unless contrary intention was set out in certificate of title
- Territorial sea is regulated by state and territory laws
- Subject to public's common law rights of navigation and fishing
- Giving an exhaustive list of common law rights of public to tidal waters and foreshore is not possible
- Rights of public may be abrogated/changed by legislation
- Private grant in respect of the foreshore is possible
- If the median high water mark changes over time due to gradual and imperceptible change so does the boundary

#### ***(b) Non-tidal water: centre of water/river (ad medium filum aquae rule) (unless abrogated by statute):***

- Non-tidal river running through centre of adjoining land is presumed to be divided down the centre of river by adjoining landowners
- Presumption may be rebutted by proving Crown did not intend equal division

Most Australian States have however, abrogated or modified the rule:

-Victoria: riverbed and bank of river remains property of Crown subject to the right of exercise of water rights by landowner: [section 327\(1\)](#) of the Water Act 1989 (Vic) and [section 385\(1\)](#) of the Land Act 1958 (Vic)

- Ownership of and entitlements to water is vested in the Crown: [section 7\(1\)](#) Water Act 1989
- Water rights are granted pursuant to licences

### **Alluvio et Avulsio**

- It is possible for owner of land to acquire land through a gradual process of alluvio by action of the sea/river
- If the adding of land is rapid and perceptible (avulsio) land is not acquired (**Williams v Booth**)

Roman law definition of alluvio and avulsion:

-"That," says Gaius, "appears to be added to our land by alluvio, which a river adds to our land (*ager*) so gradually that we cannot estimate how much is added in each moment of time; or, as it is commonly expressed, it is that which is added so gradually as to escape observation. But if a



river (at once) takes away a part of your land, and brings it to mine, this part still remains your property (*avulsio*)"

-*Alluvio et avulsio* take place in respect of tidal and non-tidal water

-Land can be acquired by *alluvio* but not *avulsio*

-Natural and imperceptible deposits by *alluvio* will pass in ownership to the adjoining owner

-“Imperceptible” refers to slowness of additions to the soil (**Williams v Booth**)

-Whether alluvio or avulsion has taken place is a question of fact

-Not restricted to action of water: accretion by windblown sand is possible – **Southern Centre of Theosophy v South Australia**

-Rapid and perceptible accretion (increase) by *avulsio* or flood will not result in passing of ownership to adjoining owner

-Gradual and imperceptible loss of land by erosion (decrease) to the sea will pass to the Crown; rapid and swift loss of land to the sea will not result in passing of ownership to the Crown

-Application of the doctrine may be excluded or modified by grant

## Surface of Land

Rights of owner above surface:

-Transient intrusion will not constitute trespass

-Permanent intrusion constitutes trespass

-Aviation laws

Rights of owner to surface:

-Encroachments

Rights of owner below the surface:

-Trespass can occur via excavations or tunnels

-Statutes can limit ownership beyond a certain depth

-In general, minerals belong to the Crown (in right of the State)

## Boundaries

-Common law meaning of land is a three-dimensional space

-*Cuius est solum eius est usque ad coelum et ad inferos* rule: Ownership of land extends upwards indefinitely and downwards to the centre of the earth in the shape of an open-ended inverted pyramid

-Ownership rights can only be exercised within the specific dimensions of the land

-Boundary of land title is defined according to survey lines in Victoria

-If survey lines have been moved, a fence/wall erected and requirements of adverse possession have been met the erected fence/wall will be the boundary

-Owner of land does not own minerals in soil

-Ownership of (unsevered) gold and silver vests in Crown by royal prerogative (**Cadia Holdings Pty Ltd v NSW**)

-In Victoria ownership of other (unsevered) minerals is vested in Crown

Mineral (Resources Development) Act 1990 s 9: “The Crown owns all minerals”, except when:

-A mineral exemption is current; or

-Minerals are separated from land in accordance with a statutory authorisation (licence or right) by an authorised person (s 11)

## Error in Title

-Error in description of land in old title which vendor and purchaser are unaware will result in acquisition of defective title

-If vendor is aware of defective title purchaser may set aside contract

-If Torrens title land the registered proprietor will not acquire indefeasible title if land is incorrectly described

- If land has been included by wrong description the proprietor cannot claim it
- If error is due to incorrect survey the proprietor will acquire indefeasible title
- Registrar may correct errors
- Correction or entry of Registrar may not prejudice new rights

### **Fence Boundaries**

- Fence usually upon boundary of land
- Upon purchase of land one must ensure that physical boundaries corresponds with legal boundaries set out in title
- No common law duty on adjoining owners to keep fence in reasonable condition
- Common law exceptions: (roaming livestock)
- Maintenance may be imposed by contract, covenant or easement

### ***Fences Act 1984 (Vic)***

- Regulated by statute
- Adjoining landowners must construct or jointly contribute to construction of a fence that is sufficient for both occupiers
- In absence of agreement a court may determine liability
- If contribution is sought a notice in writing must be served upon neighbour setting out the relevant area and type of fencing necessary

### **Encroaching Buildings Upon Land**

- Encroachment (intrusion) of surface, airspace or underground possible
- Encroaching buildings upon the land of another will vest in ownership in the other owner in terms of the doctrine of fixtures
- No compensation is available to encroaching owner

Other (aggrieved) owner may apply for:

- Removal
- Compensation
- Land transfer
- Lease

### **Encroachment of Airspace**

- Encroachment occurs via spatial interference (*cuius est solum* rule)
- Spatial interference may constitute an encroachment
- Legislation: Aviation laws
- Structural encroachment may constitute trespass entitling aggrieved owner to seek compensation (damage is not a necessary element of the tort)
- Injunction prohibiting further infringement
- In public interest to prohibit infringements

## **TOPIC ONE PART THREE– Priority Disputes Under General Law Land**

### **Different Interests to Land**

- Due to jurisdictional fragmentation of ownership of land a vast array of interests may exist in respect of land
- Disputes may arise between competing interests
- A 'priority dispute' is a dispute between two or more persons that have inconsistent proprietary interests in land, making it necessary to determine who has the superior right to the land
- Priority rules determine how a competition between interests is resolved
- Issue: which interest gains precedence against the land
- Resolution of dispute takes place by giving priority to one interest over the other

Relevant principles in priority analysis:

- Whether land is General law title or Torrens title

Categorisation of interest in land as:

- Either legal or equitable in General law land
- Either registered or unregistered in Torrens title land; and
- Application of the applicable priority rule
- Priority rules apply to old title land or unregistered interests in Torrens land

### **Hierarchy of Interests**

#### ***(a) Legal interests***

- Estates and remainder interests
- Certain leases
- Mortgages
- Easements

#### ***(b) Equitable interests***

- Interest of beneficiary under a trust
- Equitable interest of purchaser who has paid a deposit
- Equitable interest of vendor for balance of purchase price
- Equitable leases
- Equitable mortgages
- Equitable easements
- Restrictive covenants

#### ***(c) Mere equities (ancillary to property interests)***

- Right to have a contract set aside (due to mistake or misrepresentation)
- Equities arising out of estoppel
- Right to a remedy for an unconscious dealing

### **Priority Rules**

Priority disputes over old title land are governed by two sets of principles:

(a) Principles (priority rules) have developed in common law and equity to resolve disputes between:

1. Two legal interests (*prior in tempore potior in iure*)
2. Prior legal interest and subsequent equitable interest (fraud principle)
3. Earlier equitable interest and subsequent legal interest (bona fide purchaser for value without notice)
4. Two equitable interests (merit and *prior in tempore*)

5. A mere equity and an equitable interest (higher equitable interest will prevail over a mere equity)

(b) The statutory scheme of registration of the instruments that has led to creation of particular interests:

-Statutory scheme operates as a gloss on the former rules

## 1. Priority Disputes Between Legal Interests

### a) Non-identical interests:

-Two non-identical interests may be created in land

-Example: an easement followed by a mortgage; earlier legal easement has priority over a later legal mortgage

-Dispute between two legal interests is determined according to the priority of time by which they are created: *prior in tempore potior in iure* (**Moffet v Dillon**)

-Interests operate chronologically

### b) Identical interests:

-It is, however, not possible to confer two identical legal estates to persons over a single piece of land

-Once a legal estate has been issued, another identical estate cannot be granted, as the grantor has no estate to give

-When a person attempts to convey a legal estate which he or she no longer has, the *nemo dat quod non habet* principle applies

-Literally, it means no person can give what he or she does not have

-As a result of the *nemo dat quod non habet* principle, priority is given to the legal interest created first in time

-*Nemo dat quod non habet* is strictly speaking a principle of invalidity rather than priority

### Examples of *Nemo dat quod non habet*

The *nemo dat* principle may arise in a number of ways:

(a) If A transfers to B her entire legal interest in land and it turns out that she does not own any land then clearly B cannot and does not obtain any legal estate

(b) A transfers to B her entire legal interest in land and then B transfers his legal interest to C. If A did not have any interest in land then neither B nor C can acquire a legal estate

(c) If A does hold a fee simple in land and effectively conveys this to B through a properly executed deed and then later conveys it to C also, C will receive no interest in land. A does not have any estate to pass because it has already been effectively conveyed to B

(d) If A holds a fee simple estate in land and purports to create a legal leasehold in favour of B for a period of five years, and subsequently purports to execute a deed of conveyance of the fee simple to C, the interests of B and C may co-exist. Whilst the *nemo dat* principle would prevent C from receiving a fee simple with a current right of possession, the conveyance will be deemed to transfer the fee simple reversion, the title of which A is capable of passing to C

Two basic aspects of *nemo dat quod non habet* principle:

a) One can only transfer title you **actually have**, namely a vested title (cannot transfer a fee simple if you only have a leasehold estate)

b) One cannot transfer title which you **no longer have**

-The *nemo dat* rule is infringed if a person transfers an estate they no longer have or where a person transfers a greater estate than which they have

-Transfer of an estate which is encumbered by easement when title is transferred remains subject to easement, unless easement is properly extinguished

- The *nemo dat* rule has been changed by Torrens legislation: title is created by registration rather than conveyance from one owner to another (person registered first has indefeasibility of title). Therefore the principle does not apply to Torrens title as registration means there is no defect
- Nemo dat only finds application under the old title system

### Legal and Equitable Interests

- Priority disputes between legal and equitable interests will arise where legal and equitable interests relate to the same piece of land and the rights conferred under these interests are inconsistent
- An equitable interest is a 'right to compel the legal owner to hold and use the rights which the law gives him in accordance with the obligations which equity has imposed upon him' (**DKLR Holdings**)
- It is an *in personam* right enforceable against the owner of land
- An equitable interest in land may arise where expressly created, or where inferred or imposed by a court where fairness requires it
- Numerous identical equitable interests can arise over a single piece of land
- The equitable interest may either exist subsequent to the prior legal interest or prior to the subsequent legal interest
- Whether the legal interests arises prior, or is subsequent to an equitable interest, the basic priority rule is that a bona fide purchaser of the legal estate for value without notice will take priority over the interest of an equitable interest holder

### 2. Prior Legal Interest and Subsequent Equitable Interest

- A prior legal right will prevail against a later equitable interest
- Given the hierarchy of interests, the legal estate holder will always take priority unless the holder of the legal estate has fraudulently assisted in the creation of the subsequent created equitable interest

Examples of fraudulent conduct:

- A first mortgagee (lender) returns title deed to the mortgagor (borrower) to enable him to raise money in a subsequent mortgage by depositing of title document with a new creditor (mortgagee)(equitable mortgage)
- Holder of prior legal interest represents that he has no interest in property and another person acquires interest on faith of representation
- Prior legal estate will be postponed where the legal estate holder has assisted or connived in some scheme resulting in the creation of a subsequent equitable interest in favour of bona fide purchaser taking without notice of prior legal estate

### Northern Counties of England Fire Insurance Company v Whipp

- NCFI Co provided a loan to its manager, Crabtree, in exchange for a legal mortgage over his fee simple estate
- Crabtree provided the NCFI Co with title documents to his property, including the legal mortgage
- The NCFI Co placed the title deeds in the office safe
- Crabtree, making use of his access to the safe by having duplicate keys, removed the title deeds, removed the mortgage bond from the chain of title and purported to create another mortgage in favour of Mrs Whipp
- Mrs Whipp acquired an **equitable mortgage** as the **legal title** had already passed to NCFI Co
- Whipp obtained the title deeds without knowledge of the legal interest of the company
- Crabtree became bankrupt
- Issue: whether the **legal interest** of the company (mortgage) should be postponed to the **equitable interest** of Whipp (equitable mortgage) where their alleged **carelessness** led to the creation of the subsequent title

Court will **postpone** prior legal estate to subsequent equitable estate where:

(a) The holder of the legal estate (mortgagee) has **assisted** or **connived** in the **fraud** which had led to the creation of the subsequent equitable estate in favour of a holder (of equitable mortgage) without notice of the prior legal estate

(b) The mortgagee constituted the mortgagor as its **agent** to raise money and fraud was committed through representation by agent as being the first estate holder

-A subsequent equitable interest will succeed over a prior legal interest where the earlier interest holder has somehow assisted the fraud

To prove fraud on the part of legal mortgagee he must:

-Have concurred in some project to enable the mortgagor to defraud a subsequent mortgagee; or  
-Have been a party or privy to some other fraud in fact

-In other words: What conduct on part of the holder of the legal interest is sufficient to postpone such mortgagee in favour of a subsequent equitable mortgagee who has obtained the title deeds without the knowledge of the legal mortgagee

-Mere **carelessness** on the part of the legal estate holder will not warrant postponement

-**Gross negligence** or **want of prudence** on the part of the legal mortgagee is not a sufficient ground to postpone its mortgage

-No general **duty** on an owner of land to keep title secure (like fierce dogs or destructive elements)

Court found: great **carelessness** on the part of the NCFI Co through its directors. However, found no evidence of fraud:

-They did not know Whipp was lending money to Crabtree; and  
-They did not connive (secretly allow) with Crabtree to induce Whipp to lend money

-Held that the conduct of the company did not constitute fraud and did not warrant the postponement of the legal interest to that of the subsequent equitable interest

-From possession of the duplicate key to the safe one cannot imply authority for Crabtree to act as the agent of the Company

### **Walker v Linom**

-Walker, the holder of a legal fee simple conveyed it to trustees who then held the legal interest in trust

-In handing the title deeds to the trustees, Walker retained the most recent deed that provided him with title

-Using this document, Walker held himself out to be the legal owner of the property and procured a loan from X on security of the deed

-X sold the loan to Linom

-The court treated the dispute as one between a prior legal interest of the trustees and a subsequent equitable interest in favour of Linom

-Issue: which interest has priority: the legal interest of the trustees or the equitable interest of Linom

-Any conduct of the legal estate holder that would make it unequitable for him to rely on the estate against a holder of an equitable interest without notice of legal estate is sufficient to postpone legal estate

-Held: Trustees guilty of **gross negligence** in not obtaining the title deeds in the chain of title

-Accordingly the legal interest was postponed to the subsequently created equitable interest

### **Prior Legal Interest and Subsequent Equitable Interest**

-Rule has its origin in equity

- An equitable right is only enforceable against a legal right where it would be unfair of the legal estate holder to deny knowledge of existence because his inequitable behaviour has contributed to the creation of the equitable title
- Would arise if it can be proven that the prior legal estate holder has contributed to the creation of the subsequent equitable interest, without the subsequent interest holder being aware of the prior legal estate
- The legal interest will prevail unless there are extenuating circumstances
- A court has to decide whether sufficient reason exist to displace the natural priority enjoyed by the earlier legal interest and thereby accord priority to the later created equitable interest

The holder of the legal estate must be able to prove that he/she:

- Is *bona fide*; and
- Did not contribute to the subsequent creation of the equitable title

-A grantee of a prior legal estate will have his interest postponed in the circumstances where the conduct of the legal estate holder cannot be described as *bona fide*

Conduct fitting into this category would include circumstances where:

- (a) The legal estate holder is guilty of **fraud**;
- (b) The legal estate holder is guilty of **gross negligence**; or
- (c) The conduct of the legal estate holder effectively results in him being **estopped** for asserting his legal priority

**-Barry v Heider:** arming someone with the power to represent that they hold good title can mean that legal titleholder is estopped from denying the enforceability of the subsequent equitable title

- For example, a legal mortgagee may place in the hands of the mortgagor a document which implies that the mortgage has been paid of
- Courts are reluctant to apply estoppel in priority disputes if the holder of the legal interest is unaware of the subsequent equitable interest

### **Categories of Priority of Subsequent Equitable Holder over Legal Title Holder**

- Where the legal estate holder has himself created the subsequent equity by some assurance, declaration of trust or agreement
- Where the legal estate holder fraudulently connives at the creation of the subsequent equity
- Where the legal estate holder fraudulently (as apposed to carelessly) failed to get his title deeds from his vendor and thereby allows the vendor to hold himself out to a third party as the legal owner
- Where the legal owner has given authority to another to deal with a third party and such authority has been exceeded, estoppel may be raised

It would, however, not be sufficient to raise estoppel argument:

- Mere possession of title deeds by another; or
- Mere vesting of title in name of trustee

### **3. Prior Equitable Interest and Subsequent Legal Interest**

-Where a legal estate is created subsequent to a pre-existing equitable interest, the holder of a legal estate has priority over a prior equitable estate

The holder of the legal estate must, however, prove that:

- (a) The legal title has been acquired by him/her in **good faith**;
- (b) The legal title has been acquired for **value**; and
- (c) The legal title has been acquired **without knowledge** of the existence of the prior equity

-Polar star of equity: a bona fide purchaser of a legal estate for value without notice of prior equitable interests takes free of the prior equitable interest

-Where, however, notice of the prior equitable interest can be established, the priority of the legal estate holder will be postponed

### **Meaning**

#### ***Good faith***

- Good faith is a broad equitable concept which is based upon the principle of fair and proper conduct
- Good faith, in the sense of not acting inequitably or unconscionably, is required
- It includes an assessment of the conduct of the purchaser both prior to and upon receiving the estate
- Investigates motive and state of mind of purchaser
- Where it can be proven that the transaction was a sham, fraudulently induced or morally reprehensible, the legal estate holder will generally be unable to establish his good faith

#### ***Purchaser***

- ‘Purchaser’ is a grantee of a legal estate (fee simple/mortgage/lease)
- Any person who is named by the grantor of the estate as the purchaser and who will acquire a legal interest in the property or a mortgagee (lender) or lessee (tenant) of the legal estate
- Purchaser also includes a person who acquires a minor interest like an easement

#### ***Value***

- ‘For value’ means you cannot be a volunteer receiving it as a gift
- Equity will not assist a volunteer
- ‘Value’ includes good consideration (money or moneys worth), although it does not need to be pecuniary in nature
- Value cannot be love and affection
- Value also includes past consideration (pre-existing debt)
- Value can be established where money or an equivalent worth for the transaction can be proven

#### ***Notice***

- A purchaser cannot have notice of the prior equity

Notice can be:

- a) Actual: actual knowledge of relevant facts
- Vague rumours are not enough

b) Constructive: notice of matters which the purchaser would have become aware of it if he made all the usual enquiries or inspections

c) Imputed: notice acquired through an agent of the purchaser within scope of mandate such as a conveyancer

- Actual or constructive notice of an agent is applied to the purchaser

#### **Example**

- This type of priority dispute can often arise where a trustee, in breach of his duties as trustee, transfers the legal title to a bona fide purchaser who takes without any notice of the existence of the trust
- In such a case the legal interest of the third party will defeat the prior equitable interests of the beneficiaries under the earlier trust, unless the third party had notice of the trust



## Pilcher v Rawlins

- Trustees advanced trust moneys pursuant to a mortgage
- Mortgagor (borrower) conveyed legal title to trustees
- Trustees reconveyed title to mortgagor before full payment of the loan and appropriated money
- Trustees connived with mortgagor to fraudulently convey title to new mortgagees
- A beneficiary under a trust (equitable interest holder) challenged the fraudulent conveyance by the previous mortgagee to new mortgagees which fraudulent conveyance took place with assistance of trustees
- Dispute between prior **equitable beneficiaries** under trust who claimed title pursuant to original mortgage and the subsequent **legal mortgagees**
- Decided that the good faith purchaser for valuable consideration of a legal estate without notice of the equitable interest **overrides** earlier created equitable interest
  
- A court will not take away an estate from a bona fide purchaser who has bought it for valuable consideration without notice
- If a trustee in breach of trust conveys a legal estate which comes in the hands of a purchaser for valuable consideration and without notice the purchaser can hold the property against the trust beneficiaries who were defrauded by the conveyance of the trustee
- Prior equitable interests of beneficiaries were defeated by subsequent legal mortgagees who were bona fide and took without notice of the equitable beneficiaries
- Ratio: 'If you trust your property to a man who turns out to be a rogue it stands to reason that you may lose it'
- The beneficiaries bore the loss because they were less merit worthy than the bona fide legal mortgagees

## Elements

There are three elements to the bona fide purchaser for value without notice-rule:

1. Is the subsequent legal title holder **bona fide**? Examination of overall circumstances in which title was acquired and whether equitable fraud was involved
2. Is the subsequent legal title holder a **purchaser**? Principle does not apply to volunteers. Legal estate holder must have given recognised and acceptable consideration
3. Has the subsequent legal title holder taken title **without notice** of the existence of the prior equitable interest? Notice will encompass actual or constructive notice

## Doctrine of Notice

- In terms of the doctrine of notice a legal estate holder is bound to a prior equity which he knew or should have known about
- A legal estate will only be set aside where it can be proven that the legal estate holder took with actual or constructive notice of the prior equitable interest either before or at the time of acquiring the legal estate
- Actual notice refers to the situation where a subsequent interest holder is directly and positively aware of the existence of the prior equitable interest
- Constructive notice is where the purchaser is not actually aware of the existence of a prior equitable interest but should have been aware and would have discovered it if he or she made the proper enquiries about and inspections over the title
- Whether or not a subsequent interest holder is affected by constructive notice is a question of fact depending on the individual circumstances
- Imputed notice is where the purchaser engages an agent who is affected by actual or constructive notice while in the course of acting as an agent
- Under the principle of imputed notice, the law regards the principal as having all the knowledge as that of his agent

## Section 199 Property Law Act

Scope of doctrine:

**S 199(1)** A purchaser shall not be prejudicially affected by notice of any instrument, fact or thing unless-

- (a) It is within his own knowledge, or would have come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him; or
- (b) In the same transaction with respect to which a question of notice to the purchaser arises, it has come to the knowledge of his legal practitioner or other agent, as such, or would have come to the knowledge of his legal practitioner or other agent, as such, if such inquiries and inspections had been made as ought reasonably to have been made by the legal practitioner or other agent

### Obligations on Purchaser

-The doctrine of notice requires a purchaser to be aware of all of the interests which he would reasonably be likely to come across in the course of conducting all of the usual searches and checks of title

-Inquiries reasonably to be made are **‘those which a prudent man of business would make in the circumstances which obtain’**

Obligations of purchaser include:

- (a) Checking obligations and clauses of an agreement
- (b) Checking title documents
- (c) Physically inspecting property

(a): A purchaser will have notification of terms of document which speaks for itself and not of disputes not immediately apparent from express terms of agreement (**Smith v Jones**)

-Purchaser not taken to have received notification of disputes not immediately apparent from an agreement

(b): Where a purchaser is purchasing old title land all the documents in a chain of title must be searched

-The purchaser should be searching back for a good root of title and checking the accuracy of the abstract of titles

-In Victoria the search is limited to 30 years search if a good root of title is found (**s 44(1)** of the Property law Act)

-If a possible problem is discovered, the purchaser can only be exempted from the notification of any interest which may arise from this problem in circumstances where the vendor provides a reasonable and satisfactory explanation

-A purchaser will have constructive notice of any equitable interest which he would have discovered from the search

-In a conveyance of old title land, a failure to check the register will affect the purchaser with constructive notice of all interests which may have been lodged

(c): The obligation to inspect requires a physical inspection of the land to determine whether an equitable interest may arise based upon the character of the land or any possessory occupation

-A purchaser has constructive notice of equitable rights if it was reasonably apparent from a physical inspection of land

-Possession of land by person other than vendor is notice of interest as possessor (for instance a tenant)

-A purchaser has constructive notice of the right of everyone in possession of the land (the precise scope of doctrine is still in doubt)

-Timing of a notice is important

-Notice of previous equity must have been received by the legal titleholder before or at the time of acquiring the legal estate

-Notice after acquiring the legal estate is not notice

-If a purchaser is a corporation, notice to one director will effectively constitute notice to all members

## Effect of Notice

- If a purchaser takes with notice the effect of notice cannot be removed
- Once a purchaser is affected by actual or constructive notice, it cannot be extinguished even if it is alleged to have been forgotten
- Notice will bind all purchasers, even where the purchaser is mistakenly led to believe that the interest has been extinguished
- Jared v Clements**: the mortgagees had notice of prior mortgage but due to fraud of solicitor they believed mortgage had been discharged: could not escape the consequences of notice; their legal interest was still postponed. Cannot rely on assurance of solicitor

## Doctrine of Notice Under the Torrens System

- Doctrine of notice has been abolished in relation to registered (legal) interests under the Torrens system (see for instance s 43 of the Transfer of Land Act (Vic))
- Doctrine of notice still applies to unregistered (equitable) interests

## 4. Priorities between Competing Equitable Interests

- An equitable interest is created if it would be against the conscience of the court to deny the existence of interest

Equitable interests include:

- Where there is a trust, the beneficiary holds an equitable interest
- A person can gain an equitable interest where they enter into a contract
- When a person has sold land but has not yet received full payment (equitable lien)
- Trustees on the other hand hold a legal interest
- For example 'double sale' of land to different purchasers: both purchasers have equitable interests
- Prima facie it seems that priority to take effect according to their dates of creation: *qui prior est tempore potior est jure*
- Equity has taken a broader view to determine priorities by searching for the better equity having regard to the circumstances of the case
- Initially the merits of both interests are evaluated
- It requires an overall merit analysis of each equitable title
- The interest with most merit will prevail ("better equity evaluation")
- The interest which is prior in time will take priority if both interests are equal in merit

Two approaches:

- Traditional rule: equity will first consider the facts of the case to determine which is the better equity. If entirely equal, priority in time applies (**Rice v Rice**)
- Whether prior equitable interest, as first in time, should be postponed to the latter equitable interest (**Heid v Reliance**)

### Rice v Rice

- Rice and Rice, the holders of a legal estate, conveyed it to X by execution of a deed, but did not receive full purchase monies
- X received title deeds
- The deed of transfer recited that whole of the purchase price had been received
- According to the receipt the purchase price had been paid in full
- X deposited the transfer documents with E to secure an advance
- X absconded without paying balance to Rice and Rice (vendors) or E (equitable mortgagee)
- Issue: whether **equitable lien** of unpaid purchase price of Rice and Rice as vendors or the **equitable mortgage** of E should take priority
- A lien is a right to keep possession of property belonging to another person until a debt owed by that person is discharged

- The rule "as between persons having only equitable interests, *qui prior est tempore potior est jure*" is incorrect
- Rule** should be stated: "As between persons having only equitable interests, if their equities are in all respect equal, priority of time gives the better equity"
- In the context of persons having only equitable interests, if one has a better equity than the other, priority of time is immaterial
- Priority of time is the ground of preference last resorted to if the equities are equal
- The significant issue to determine is whether the equities are equal

Three matters are relevant:

- (a) Nature and condition of the respective equitable interests;
- (b) Circumstances and manner of acquisition of equitable interests; and
- (c) The whole conduct of each party with respect thereto

-In examining these points, a court must apply the same broad principles of right and justice which a Court of Equity applies universally to deciding upon contested rights

(a): A vendor's lien and equitable mortgage arises out of forbearance by a party of money owed to him

- Vendor's lien is created by special contract (not a sufficient ground for preference)
- Found that rights are equitable interests of equal worth in respect of their abstract nature and quality

(b): Are there special circumstances which gives one a better equity than the other?

- Equitable mortgagee has the possession of title deed
- Possession of deed gives a better equity
- Possession of deeds will not in all instances give a better equity

(c): In a contest of equitable interest the conduct of the parties and all the circumstances must be taken into account

Seems to favour equitable mortgagee:

- Vendors left part of the purchase price unpaid
- Nonetheless executed and delivered a deed and a receipt by which they declared that the whole of the purchase money had been paid
- The vendors decided not to hold on to the title deeds as security for the balance of the unpaid purchase price, despite the fact they were in a position to require this
- They voluntarily armed the purchaser with the means of dealing with the estate as legal and equitable owner free from any shadow of encumbrance or adverse equity
- Vendors contributed to the creation of the equitable interest
- Equitable mortgagee was not guilty of negligence
- The equitable mortgagees gave good consideration for the mortgage
- The equitable mortgagees obtained bona fide possession of the title without any wrong done to the vendors

-Court found on the basis of the conduct of the parties, circumstances and bona fide acquisition and possession of the deeds by mortgagee the equity of the mortgagee is better than the equity of vendor, and ought to prevail

-Postponing conduct found by the court: holder of first equitable interest armed a third party 'to go into the world under false colours'

-Held that the subsequently created interest should have priority

-Approach to be followed: 'But if after a close examination of all these matters, there appears nothing to give to the one a better equity than the other, then and then only, must resort be had to the maxim *qui prior in tempore potior est jure*, and the priority of time then gives the better equity'

### Merit Analysis Approach – **Rice v Rice**

-Priority in time will only be decisive in circumstances where in all other respects the interests are equal in merit

Merit analyses involves a comprehensive examination of a broad range of factors:

- Whether the prior interest holder has armed the purchaser with indicia of title and thereby contributed to the creation of the subsequent equitable interest
- Whether the prior equitable interest holder has sufficiently protected itself by retaining possession of title documents
- Whether the prior equitable interest holders were beneficiaries
- Whether prior unregistered equitable interest holder has availed himself of protection under the caveat system and what impact, if any, a failure to seek such protection might have upon the overall merit analysis (Torrens title land)
- Whether the subsequent equitable interest holder took with notice of the existence of the prior equitable interest holder: **Moffett v Dillon**

- You must do everything to protect your interest
- Determine which of interests is the “better equity” under the circumstances
- If the merits of the claim are equal, priority in time of creation is considered to give the better equity

### Postponement Approach – **Heid v Reliance Finance Corp**

- Consider whether the prior equitable interest, as first in time, should be postponed to the later equitable interest
- The earlier interest will be postponed to the later interest (despite its priority in time) where the conduct of the earlier interest holder has been such that it has **induced** that subsequent interest holder to believe that no prior interest exists
- Whichever approach is taken, the important point is to conduct a merits analysis to determine if the interests are equal

### Estoppel

- The foundation for setting aside the priority of a prior equitable estate is said to be estoppel
- ‘If the owner of property clothes a third person with apparent ownership ... he is estopped from asserting his title as against a person to whom such third party has disposed of the property, and who took it in good faith and for value’ (**Rimmer v Webster**)
- Thus, the owner is estopped from claiming priority
- If a prior equitable interest holder does not retain possession of title documents and allows a third party to represent to the world that they are full unencumbered legal title holders, a subsequent equitable interest will take priority
- Detriment caused to subsequent interest holder is the foundation of estoppel
- Estoppel approach rejected in **Cappel v Winter**; “better equity” approach preferred
- There are cases which do not constitute estoppel
- Difficult/impossible to accommodate all the cases of postponement under the umbrella of estoppel (**Heid v Reliance Finance Corp**)

Estoppel analysis may be inappropriate to such priority disputes:

- Estoppel by representation requires proof of a clear and positive representation
- In many instances it is difficult to infer representation from the behaviour of a prior interest holder
- It is often the third party (for instance X) who receives the unencumbered estate who fraudulently pretends that he holds an absolute legal title to an unsuspecting third party, who is responsible for the direct representation, not the prior estate holder (for instance Rice and Rice)
- The merit analysis incorporates a broad range of factors under its umbrella and should not be limited to estoppel argument
- Inappropriate to prioritise just one factor

-Merit analysis is preferred in the case of competing equitable interests: better equity in the examination of all circumstances

### **Merit Analysis and the Doctrine of Notice**

- The possibility of introduction of a narrower test, focusing more upon the issue of notice of subsequent equitable interest holder has been raised a number of times by earlier courts
- The majority of the court in **Moffett v Dillon** concluded that the existence of notice in a subsequent interest holder automatically negates any further priority analysis
- Reasoned that subsequent equitable interest cannot prevail over an earlier interest if the holder of the latter interest had notice of the earlier interest
- A person who acquires an interest in property with notice of an earlier interest, is bound by the earlier interest
- The court found that notice of an earlier equitable mortgage by a later mortgagee guaranteed priority of the first mortgage
- Ormiston JA, however preferred the traditional view that notice was one of the matters to be considered
- Majority approach is attractive in its simplicity for the ease of application

-Moffett is authority if holder of second interest had notice of first interest a merit analysis is not necessary because the first interest holder will prevail regardless of merits of the later equitable interest

Criticism:

- The conclusion of the majority of the court severely undermines the apparent breadth of the equitable merit analysis test
- What constitutes notice is sometimes difficult to determine

### **5. Prior Mere Equity and Subsequent Equitable Interest**

-A mere equity gives the holder of a personal right the right to bring an action to obtain equitable remedies against the defendant, with that right having proprietary consequences

Examples:

(a) Right to have a contract/conveyance set aside for:

- Mistake
- Misrepresentation
- Fraud (**Breskvar v Wall**)
- Undue influence

(b) Equities arising out of estoppel

(c) Right to a remedy for unconscionable dealing

(d) Right of a beneficiary under an administered estate to ensure that all of the assets are treated in accordance with the executor's duties

(e) The equity of rectification (if a written agreement does not reflect the actual agreement between the parties to it, the right of the parties to have the document rectified is an equity)

-The exact proprietary character or mere equities remains unclear

Two conflicting approaches:

(a) If it is assumed that a mere equity has a proprietary status prior to its enforcement: where the competition is between a prior mere equity and a subsequent full equitable interest, the holder of the mere equity will lose priority to a bona fide purchaser of the subsequent equitable estate for value without notice. Capable of generating a priority dispute

(b) If it is assumed that a mere equity has no proprietary status prior to its enforcement: The priority principle is not applied because it is felt that, as the prior mere equity holder does not have a full equitable interest, there can never be a balance between the interests. Incapable of generating a priority dispute

## **Latec Investment v Hotel Terrigal Pty Ltd**

- Hotel Terrigal granted a mortgage to Latec Investments
- Hotel Terrigal fell into arrears and Latec sought to exercise its power of sale
- Property was sold to wholly owned subsidiary of Latec, namely Southern Hotels, at a sale for less than the reserve price. Southern became the registered proprietor
- Southern gave MLC Nominees a **floating charge** over its assets which created an **equitable interest** in MLC
- Hotel Terrigal sought to set aside the contract of sale on the basis that power of sale had been exercised fraudulently
- This was recognised by the High Court giving rise to a **mere equity**
- Issue** before the court: who had the **priority**, the prior mere equity of Hotel Terrigal to have the sale set aside or the full equitable interest (charge) of MLC Nominees

Kitto J:

- Mere equity does not have proprietary consequences until it is exercised – Hotel Terrigal did exercise their right
- Must determine whether the subsequent equitable interest holder was a bona fide purchaser for value without notice
- MLC's subsequent equitable interest received priority over the prior mere equity because MLC was a purchaser for valuable consideration, in good faith and without notice of the prior mere equity

Menzies J:

- Agreed with Kitto J and added that the merit analysis rule is not applicable

Taylor J:

- Believed that a mere equity was not an independent proprietary title and therefore there was no need to consider a priority rule, as an equitable interest will beat something that does not exist

Rule: a mere equity is defeated by a bona fide purchaser for value without notice

## **Ruthol Pty Ltd v Mills**

- Ruthol was the registered proprietor of land
- Property was leased by Alphega with an option to renew the lease
- It was unlikely that Alphega would renew, so Ruthol granted an option to the Mills' to purchase the property, conditional on option to renew the lease by Alphega not being exercised
- Ruthol **falsely** said that the option to extend the lease was exercised by Alphega
- Mills did not exercise their option to purchase therefore (**mere equity**)
- Tricon leased the property after Alphega, with an option to purchase
- Tricon exercised its option which provided an **equitable interest**
- The Mills argued that their mere equity (based upon breach of contract, relying on the fraudulent misrepresentations of Ruthol) prevailed over the equitable interest of Tricon
- There was therefore a competition between the prior mere equity of the Mills' and the subsequent equitable interest of Tricon
- The Court of Appeal disagreed with the trial judge that the Mills' had an equitable interest and not a mere equity on the grounds that a party may not take advantage of its own wrong to maintain that the Mills' did not exercise the option in time and did not need assistance of court
- The Court of Appeal held that the equitable interest of Tricon, purchased for value without notice, took priority over the mere equity of the Mills' to proceed against Ruthol for breach of contract
- The maxim that a party may not take advantage of its own wrong will not apply to affect the right of an innocent third party who acquired from a wrongdoer

## Effects of Registration on Priority

- The unsatisfactory nature of the common law rules of priority lead to the legislative enactment of a deeds registration system in the various Australian states
- The priority rules apply in the deeds registration system, but the system may alter the priority of interests
- Generally instruments affecting an interest in land may be registered
- The deeds registration system provides that a registered interest will prevail over an unregistered interest or a subsequently registered interest provided the former instrument is made and executed bona fide and for valuable consideration and registered in conformity with provisions of the appropriate Act
- Benefit of registration only conferred upon a person who has given consideration
- A volunteer should nevertheless register to constitute notice to someone who wants to register subsequently (absence of bona fides on part of person who registers subsequently)
- Bona fides must be established at time of execution of instrument

## Section 6 of the Property Law Act 1958 (Vic)

6(1) 'All deeds, conveyances and other instruments in writing (except leases for less than three years) of or relating to or in any manner affecting any lands tenements or hereditaments situated lying and being in Victoria may be entered and registered in the office of the Registrar-General in the manner hereinafter directed and all such deeds conveyances and other instruments in writing as aforesaid, if made and executed bona fide and for a valuable consideration and registered in conformity with the provisions of this Act, shall have and be allowed priority over every other deed conveyance or other instrument in writing ...'

6(2) No deed of conveyance or other instrument may be registered in the office of the Registrar-General under 6(1) since 1999

- Deeds registry has been deactivated

## Deeds Registration System

Registration affects application of *nemo dat* rule:

- “The intention of the ‘Registration Acts’ is to give priority to the registered owner over the unregistered owner; in other words, in the case of two conveyances, either of which would be valid if the other was removed, to give, by virtue of the registration of one them, priority to it over the unregistered conveyance”(Andrews v Taylor)
- Registration does not cure a defect in an inherently invalid instrument: void document due to forgery is of no greater effect because it is registered
- Registration of an invalid document does not give it priority over a subsequently registered but inherently valid instrument
- Certain instruments and interests in land cannot be registered
- Interests in land can be created without writing – equitable interests – such interests are not defeated by registration of an inconsistent instrument
- Deeds registration system is gradually being replaced by Torrens system
- Resolution of priority disputes under the Torrens system is of more significance