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*Power of Sale

s109(1) CA mortgagee is conferred power of an owner

s109(1)(a) gives details on how they can exercise power of sale

s111(2)(a) how to use power of sale, need a default e.g. failure to repay or breach of covenant

s111(3) need notice/other requirements before exercising power; must say it is a notice under *s111(2)(b)*; must require the mortgagor to repay the amount owing or to observe defaulted covenant within 1 month or longer if otherwise specified in the mortgage document which must also be mentioned in the notice. If notice is complied with, the default to which the notice relates to shall be deemed to not have occurred. If not complied, mortgagee may exercise power of sale.

s111(4) mortgagee may demand the costs of the notice be paid by the mortgagor or that the proceeds of the sale pay for the costs of the notice, but must be specified.

*Dispersal of Proceeds of Sale

1. Discharge of any prior mortgages to which the sale is not subject
2. Payment of the property incurred costs of the sale
3. Discharge of the debt secured by the mortgage in respect of which the power of sale is exercised
4. discharge of any subsequent mortgages
5. any surplus is paid to the mortgagor.

*Mortgagor's duty

Southern Goldfields v General Credits: cannot recklessly sacrifice the mortgagor's interest/made a bona fide endeavour to get the best price reasonably available, not an obligation to obtain fair and proper value = Good Faith. Mere setting of a low reserve price not enough (if it was not publicised), have to look at whether a higher bid that day, was sale properly conducted, advertised or held at an unpopular time so no one came.

Cuckmere Brick Co v Mutual Finance: Was not properly advertised (advertised potential construction of 35 houses and not the 100 flats) → mortgagees became aware of error but continued auction and asked auctioneer to mention it at auction → Breach. Duty of reasonable care → breach if poor attendance and low bid is due to improper advertising (right people not present).

Vasiliou v Westpac Banking: no advertising, V made offer = to valuation. Private sale. There was high valuation but it was outlier and uncertified and valuator didn't look at inside of premises. No breach, because sold for reasonable price.

-Failure to exercise power? **Westpac Banking v Kingsland:** No obligation to exercise power or to sell at any particular point or accept offer.

S111A CA (NSW): Defines duty as reasonable care. (1) mortgagee must ensure land is not sold for less than its market value, or instead must try to get best price that is reasonably attainable at the time. → remedy is only damages. **Guidance from Corps s420A:** only breached where market value has not been reached, even if reasonable care is not taken.

Farrar v Farrars Ltd: cannot sell to yourself (conflict of interests)

ANZ Bank v Bangadilly Pastoral Co: Can sell to related parties, but receive close scrutiny. In this case the Halls purchased mortgage (through Halco) and sold land to Bangadilly(SH) both of which are owned by Hall. Is there a desire to get best possible price over giving related party a bargain? Even if there is an unconscious bias to a buyer, may be breach. This case was in breach because of timing and lack of advertising. Also consider the fact that because they're selling to themselves, they will know the reserve price (buyer knowing the reserve price)

*Mortgagor's remedies - mere equity

Good faith: Mortgagor or other mortgagee can set aside sale. Sale is valid until mortgagor exercises remedy. Mortgagor loses equity of redemption during sale (replaced with mere equity) but gets it back if sale is set aside.

Latec Investments v Hotel Terrigal: Latec sold land to subsidiary which was improper exercise of power. HT exercised mere equity 5 years later but at that time, there was an equitable charge to MLC which included land. Priority → Mere equity v equitable charge (equitable interest) → MLC equitable charge took priority because it was acquired without notice of the mere equity (bona fide purchaser for value without notice) thus will be bound if there is notice. In order for there to be notice in this case, HT needed to bring action earlier and mere equity would be registered by court and reasonable person would enquire.

Mere Equity: different to equitable interest because it has to be exercised for there to be any relation back to the equitable interest established by the suit. But on the other hand, mere equity is a kind of property right (more than a right bring action) and mere equity can be transferred or left in will. So it is its own category of sorts.

S111A(4) CA: damages, if you want to set aside sale then rely on duty of good faith.

Allfox Building Pty Ltd v Bank of Melb: Can also get injunction to restrain mortgagee from exercising power. Can easily get one if basis of the exercise of PoS hasn't arisen yet e.g. mortgagor hasn't defaulted or defective notice (improper procedure). Difficult if based on bad faith of mortgagee or mess up advertising, selling to related company/person, set reserve price too low court will ask mortgagor if they are ready to do equity (repay debt) only then will injunction go through.

*lease -exclusive possession

Radaich v Smith: deed stated for a term of 5 years R gets exclusive and sole license to sell refreshments to public admitted to the theatre. R was given rooms which were indicated on a map and well defined, which could be locked and R had the keys. HC found that because R can exclude people from and had control of the area and could preclude S and others for 5 years. Milk bar by its nature needed exclusive possession to carry out business, in substance this agreement was lease. If for example she was just allowed to sell in foyer of theatre, probably not a lease.

*Lease- certainty of duration

lease for term of years or periodic tenancy (no agreed time period, but pay rent regularly e.g. monthly rent = monthly tenancy). Cannot say lease duration will be until a future event which may or may not happen but lease until tenant dies is fine because it is definite.

Exception: Tenancy at will: implied tenancy when there's no agreement, term or systemic basis where rent is paid. This tenancy can be terminated by either party at any time, but terminating party must give reasonable notice. Also terminates when tenant dies.

Can't grant lease longer than lessor's interest in land (not a problem if have fee simple) but if they have life estate in land, lessor can't grant a lease longer than lessor's life.

*Lease-creation

s23B CA- can't create legal interest in land without deed (applies to leases) but with exception,

s23D(2)-can create lease for term of 3 years or less orally and they are legal leases

s23D(1) - oral agreements create tenancy at will

*Lease - equitable lease (agreement to grant lease and that agreement is capable of specific performance)

Leitz Leeholme Stud Pty Ltd v Robinson: No legal lease + >3yrs. Lease was agreed to be registered and lodged with RG but never registered. Tenant left before 3 years, can landlord hold tenant accountable for 6 years lease? Yes, there was memorandum of lease that was registered. This acted as agreement to create lease which was enforceable → equitable lease.

No written contract → Part Performance - s54A(2) CA- must show 1) past performance: **Regent v Millet:** unequivocally referable **Oglivie v Ryan:** not unequivocally referable, could have been done out of love or for reward **Steadman v Steadman:** more likely than not, contract doesn't have to be only explanation **Madison v Alderson** must be unequivocally referable 2) possible specific performance.

Written Contract → Specific performance - Tanwar Enterprises v Cauchi: If specific performance not possible no equitable interest; in this case purchaser breached important term in contract (time was of essence) so no equitable interest

***Specific Performance → Constructive trust: Bunny Industries:** constructive trust arises from specific performance but in **Obiter Tanwar:** dislike the concept, because it conceals its true relationship which is of a contractual nature rather than one between beneficiary and trustee

***Implied tenancies** - for when there's no agreement to the term of the lease and is not susceptible to part performance.

Periodic tenancies Turner v York Motors: - implies tenancy when someone is paying rent periodically (pattern). Terminate by giving notice for however often u pay rent e.g. monthly tenancy, month's notice. PT may arise when parties are negotiating terms of document and actual term, before finishing nego landlord may allow tenant to go into possession and starts paying rent. Alt could be because prior lease ended and it's been agreed tenant continues to stay but new terms not agreed yet (holding over). **In this** case document never signed, tenants continued to pay rent for longer than intended but owner accepted money and allowed them to occupy more land and increased rent accordingly. Owner sold land and new owners accepted rent, but then refused rent and ejected tenants, notice wasn't good enough. Has to be a month's notice corresponding with a complete month of tenancy where a month's rent has been paid i.e. notice must be at the same time rent is being paid.

Tenancy at will Dockrill v Cavanagh:, can be terminated by giving 1 month's notice expiring at any time.

s127(1) CA: overrides common law, no tenancy to be implied from year to year payment of rent.

*** indefeasibility** (estate/interest of RP is paramount, free from all encumbrances)-s42 RPA

S43 RPA: Purchaser/RP is not bound to unregistered interest regardless of whether they would be subject to that interest under common law or equity.

s45(2) RPA : even if u know about fraud or error from vendor will still be protected from ejectment, only need bona fide purchaser for value however, if as a purchaser you commit fraud, no protection.

Frazer v Walker: Mrs F forged Mr Fs signature and gets mortgage but doesn't repay. Mortgagee sells land to W and wants to eject Mr F (neither party know about fraud), Mr F wanted to claim forgery but lose because the land was already sold by mortgagee thus no deferred indefeasibility.

Breskvar v Wall: B borrowed money from Petrie (mortgage by deposit of title) and asked P not to transfer unless defaulted. B did not default, P transferred to W who was part of the fraud. W sold to Alban but before interest could be registered, B stopped with caveat, but Alban got property in the end. Because B armed W

***Exceptions to indefeasibility**

1. Estates and interests in land recorded in a folio

Mercantile Credits Ltd v Shell Co of Aus: MC (mortgagee) exercised PoS and said S(lessee) not subject to renewal because not in folio in register (but documented in registered documents)MC acknowledge existence of lease. Renew interest was enforceable because it was integral to