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## Co-ownership

### 1: Characterise the co-ownership

#### 1.1: Joint tenancy

Each joint tenant owns the entire interest *per my et per tout*, subject only to the rights of all other joint tenants. No joint tenant holds an **aliquot** share of the property – *Wright v Gibbons (1949)*.

A tenant who wishes to transfer their entitlement to a co-tenant may do so via release – *Wright v Gibbons (1949)*

Joint proprietors = joint tenants – s 100(1) RPA

#### *Four unities*

To identify a tenancy in common, all four unities must be present – *Nullagine Investments Western*

#### **Unity of possession**

- Each co-owner must have the right to enjoy possession of the entire interest – *Thrift v Thrift*
- No co-owner can lawfully exclude the other co-owner/s from occupation of the entire property

#### **Unity of title**

- Each co-owner must have acquired their right to possess and their unity of interest via the same legal instrument or act of adverse possession (e.g. same transfer)
  - o If one JT purports to transfer their rights as JT to a third party, a tenancy in common with respect to that share is created: the JT is served as unity of title has been fractured

#### **Unity of time**

- Even where interests are received at the same time and in the same instrument, both interests must operate for the same duration
  - o If they don't = tenancy in common

#### **Unity of interest**

- All co-owners must possess the same type of interest
  - o If A has an estate in fee simply, and B has life estate = no joint tenancy
  - o BUT it is possible for joint interest in a leasehold to be a joint tenancy where only one party has reversion right at conclusion of lease

#### *Right of survivorship*

A key feature of a joint tenancy is the *jus accrescendi* i.e. the right of survivorship

Upon the death of a joint tenant, their interest in the property is automatically extinguished. Consequently, co-owners have their rights enlarged on the death of one of the co-joint tenants – *Corrin v Patton (1990)*; *Cummins v Cummins*

## Mortgages scaffold

### 1: Characterise the mortgage

A mortgage is a pledge of an interest in property for the purpose of securing a loan. The mortgagor borrows money and, in return, grants the mortgagee an interest in the property by way of, or as security for, the promise that the moneys lent by the mortgagee will be repaid by the mortgagor.

#### Creating a mortgage under TT

Registered TT mortgage = governed by RPA

- Under TT, a mortgage involves the mortgagee registering a charge on the CT via execution and registration of the approved form

The mortgagor of TT does not transfer/convey any estate or interest in the land to the mortgagee

- Rather, they remain on the title as the RP of the fee simple estate subject to the registered mortgage – s 57(1) RPA
- The interest of the RM operates as a separate interest in the nature of a statutory charge over the land – *English, Scottish & Australian Bank Ltd v Phillips (1937)*
- Under TT, the conceptual equivalent of a legal interest does not pass to the mortgagee until registration of the mortgage has occurred – s 41(1) RPA

Multiple legal mortgages of Torrens land can be granted because the mortgagor retains a legal interest in the property

#### Formalities under the RPA

**S 56(1):** must execute the mortgage in the approved form (identify the mortgagee, mortgagor and folio number)

**S 57:** procedure on default

- (1) A mortgage, charge or covenant charger under this Act has effect as security but does not operate as a transfer of the land mortgaged or charged
- (2) A RM, charge or covenant charge may, subject to this Act, exercise the powers conferred by s 58 if...

**S 58:** priorities of mortgages

- Proceeds distributed in accordance with the order of registration

**S 59:** registration of transfer by mortgagee – the RG shall for the purpose of a sale authorised by s 58

- (1) Register a transfer executed by a mortgagee, charge or covenant charge in the approved form and, upon that registration
- (2) The estate or interest in the mortgagor, charger of covenant charge in the land comprised in the transfer
- (3) Shall pass to and be vested in the transferee, freed and discharged from all liability on account of the mortgage, charge or covenant charge, or of any mortgage, charge of covenant charge registered subsequent thereto

**S 60:** equates a mortgage of TT land to a legal interest in land but only for the purposes of that section

## Easements scaffold

### 1: Creation

#### Express grant

Creation by express grant occurs when the owner of the fee simply of the ST expressly grants an easement to the owner of the fee simply of the DT

##### At law

- Proprietor must exercise a transfer in the approved form – s 46 RPA
- Easement gains indefeasibility upon registration – s 42 RPA

##### In equity

- An expressly created, but unregistered easement takes effect as an equitable interest

#### Express reservation

In TT the OST principles apply

- At law
  - o By reservation expressed in the conveyance – s 45A CA
- In equity
  - o Through the rule in *Walsh v Lonsdale*
    - An enforceable agreement to effect the reservation

More requirements on page 101

#### Plan for subdivision

##### S 88B CA

- Under this section, a plan of subdivision can be lodged for TT land
- This plan creates all easements referred to in the plan of subdivision and vests in the owner of the land benefitted by the easement

More requirements on page 102

#### Implied

General rule: terms will be construed against the grantor – *Williams v Jones*

Can be created by:

- Rule in *Wheeldon v Burrows*
  - o There is a severance or a grant of the grantor's land
  - o At the time of severance, the exercise of the quasi-easement is continuous and apparent
    - 'Continuous' no longer required – *Borman v Griffith*
    - Apparent means capable of discovery by careful inspection – *Ward v Kirkland*
  - o The quasi-easement is necessary for the reasonable enjoyment of the land granted

## Covenants scaffold

Covenants create an obligation upon an owner of property to do something or to refrain from doing something specified on their property

### 1: Is there a validly created covenant?

#### At law

A covenant is recorded, not registered. Hence, it does not attain indefeasibility per s 42 RPA

- It must still meet the substantive requirements of a covenant to burden a successor in title – s 88(3) CA
- The land benefited and burdened, and the persons who have the right to release, vary or modify the covenant **must** be identified for enforcing it – s 88(1) CA
- Must be evidenced in writing
  - o Only exception is through part performance – *Walsh v Lonsdale (1882)*

#### Section 88(1) CA:

- Must clearly indicate
  - o Meaning: 'point to, or make known without entanglement, confusion, or uncertainty' e.g. specifically identify the transfer – *Papadopoulos v Goodwin*
  - o Extrinsic evidence (written and unwritten) admissible to determine – *Margil v Stegul Pastoral*
- Land benefited: s 88(1)(a)
- Land burdened: s 88(1)(b)
  - o Only necessary to indicate the approx. location on a plan for easements relating to:
    - Existing tunnel, pipes, conduits, wires or other similar objects
    - Which are underground or which are beneath an existing building – s 88(1)(c)
- Any persons with the right to release, vary or modify the easement/restriction: s 88(1)(c)
  - o Any persons whose consent for those actions is stipulated: s 88(1)(d)
  - o Other than persons with those rights by law: s 88(1)(c)
- Indefeasible upon registration if the substantive requirements are met: s 42 RPA, *Bursill Enterprises*

#### Section 46A RPA:

- Validly created despite common ownership: s 46A(1)
- Registration must be in the approved form: s 46A(2)
- Must adequately identify the boundaries of the land burdened: s 46A(3)
- RG record the covenant: s 46A(4)
- Must be executed by RPs of land burdened and benefited and RP mortgagees: s 46A(5)(a) and (b)
- RG may refuse to record without written consent of any lessee or caveator: s 46A(6)(a)

In NSW, covenants are not 'registered' as such

- Rather, the RG can make a recording of a covenant on the Register – RPA s 47(1)
- This provides notice to subsequent purchasers that the land is affected by a covenant- *JEA Holdings (Aust) Pty Ltd v RG (NSW) (2013)*

Provision will be made for covenants to be made by way of registered plans of subdivision – CA s 88B

## Leases scaffold

### 1: Is there a lease?

#### Substantive requirements

- The grantor of the leasehold interest (the lessor) must have given to the grantee (the lessee) the right of **exclusive possession** of the leased premises to the lessee, and
  - o A lease does not exist unless the lessee has been granted the right of exclusive possession in the leased premises by the lessor – *Radiach v Smith (1959)*
  - o May need to look at whether it is a lease or a license – page 144
- That right must have been granted to the lessee for a defined period, or for a period that is capable of being defined ('the term')
- The lease must be created in the appropriate form

#### The premises

- Must be identified

Because leases are interests in land, they lie 'in grant'

#### Dual nature of lease: contract and demise

- If L and T enter into a lease or agreement for lease, two interests are created:
  - o Contract: gives exclusive possession for property in return for rent (consideration) for a fixed period
  - o Property interest: a lease complying with relevant formalities creates a legal leasehold estate

### 2: What kind of lease is it?

Lease type	Arises when	Key features
<b><i>Fixed-term lease</i></b>	Expressly created (orally or in writing) Maximum duration of lease ascertainable	Automatically expires at end of term Might convert to one of the other three forms of lease at the end of the lease term Can be terminated prior to end of lease period only if lease provides or where there is a fundamental breach Is an interest in land Is assignable
<b><i>Periodic lease</i></b>	Expressly created and pursuant to agreement lessee enters into possession and pays rent by reference to a period, or By implication where a lessee enters into possession and	Does not end until one of the parties provides notice Notice required corresponds to the length of the period of the lease At common law, 6 months notice is required to terminate a yearly period lease