

# T8 Disputes involving unregistered interests

\*\*NB the first 10 mins of this lect looks at the prior priority rules that we looked at earlier in the course.

- We have seen so far that unregistered interests do not get indefeasibility but are acknowledged in the Torrens system. Need to rely on common law, bc Torrens doesn't cater for unregistered interests
- They can be protected in the Torrens system by Caveat
  - o A person can lodge a caveat if you have an unregistered interest, and you are worried that a subsequent registered interest will extinguish your interest
- Today, we are going to see which unregistered interest receives priority
  - o This is done by a **merit analysis**
- Cases will illustrate how this works

## General priority rules

- the interest created first in time will have priority (not always the case though)
- look at the conduct of the parties
- consider the hierarchy of interests
  - Legal interests (top of the hierarchy)
  - Equitable interests (there are different types)
  - Mere equities (can they have a caveat?)
- a priority test should be done to ascertain whose interest will have priority – this is a **merit test**
  - ✓ IF the **merits are equal**- then the interest created **first in time** will be given priority (i.e. the prior unregistered interest will have priority)
  - ✓ IF the merits are unequal- the following test established in Rice will be applied-
    - o *'whether in fairness and justice the overall circumstances justify the priority of a prior holder and preference should be given to what is the better equity in an examination of the relevant circumstances'*.

How to answer-

## STEP 1 – Merit Analysis

Look at the merits of the interests of the two parties- are they the same/equal?

- **If yes**, equal- then apply the *prior in tempore maxim*- the interest that came first in time will have priority
  - **If no**, then proceed to next step for a merit analysis.
- A **MERIT ANALYSIS** is used to decipher the weight given to the rights/interests of the parties. To conduct a merit analysis the following factors must be considered-
    - **The nature of the unregistered interest-**
      - o If the purchase price has not been paid, the vendor will have a lien
      - o If a mortgage hasn't yet been registered but the documents/instruments were handed to m'ee, the lender will have an equitable mortgage interest
        - Sidenote- both lien and mortgage are a way to recover property, so they are arguably the same in nature. Both are created to secure payment of a debt by someone
    - **The circumstances under which interests were acquired**
      - o Did the owner allow someone to create certain impressions, and the holder of the subsequent interest looked at the set of facts and responded in a certain way according to the circumstances
    - **The date upon which the interest was created**
      - o Pertains to the *prior in tempore maxim*- the first in time is stronger in law. which interest was created first in time, and which was subsequently created.
    - **The conduct and equitable behaviour of the parties involved- was there contributory conduct?**
      - o did the first interest holder somehow contribute to the creation of the subsequent interest- eg should they have held on to the papers instead of handing them over? If they didn't hand them over, the subsequent interest may not have been created.
    - **Did the prior interest holder do anything to protect his interest? Was there protective conduct?**

- I.e. by lodging a caveat
- I.e. by holding onto the title documents
- **ADDITIONAL FACTORS to consider-** see cases
  - **Whether or not the prior unregistered interest holder has caveated their interest**
    - If not, consider the next point-
  - **Whether usual conveyancing practices involve lodging caveats**
  - **Retention of title documents in an effort to protect their interest**
  - **Whether documents have been lodged for registration-** this is a form of notice
  - **Whether the subsequent interest holder had notice of the prior unregistered interest holder**

## STEP 2 – Consider principles established in cases-

- Who has the **better equity** in the circumstances? Rice;
- Can also use this test established in Heid- should the interest of the prior interest holder be **postponed** against the interest of the subsequent interest holder?
  - *I.e. did conduct occur that justifies changing the priority general rule (that the first in time has priority), and giving priority to the subsequent interest holder instead? Whether a loss of priority of the first interest holder will depend on an overall assessment of all the circumstances, by considering the merit of each equitable interest.*
  - *NB applying the Rice and Heid tests, can arrive at the same outcome. End result will probably be the same.*
- It should be considered- did the unregistered interest holder lodge a caveat? If not, COULD/SHOULD they have? If they could have and didn't, it can count against them.
  - Courts have considered whether a caveat is 'notice' or a 'protective' measure
  - The mere failure to lodge a caveat in itself will not justify postponement of the interest: s43 TLA.
    - Look at cases.
    - Doctrine of notice applies to unregistered competing interests

## Situations where postponement will occur

An earlier equitable interest may be postponed in favour of the later (subsequent) interest where-

- ✓ **where holder of equitable claim only has a mere equity claim (and needs court's assistance to get equitable interest in the property)**
  - eg if you have a holder of a mere equity, that wants to go to court and ask that the Court set aside the ct of sale (eg. improper ct of sale by m'ee), bc a subsequent purchaser entered into a ct to buy- the mere equity will not receive preference to the subsequent purchaser who holds an equitable interest. **Mere equities are overridden by subsequent equitable interests.**
- ✓ **Waiver of prior equitable interest has taken place**
  - If a person decided to waive their right/interest, then they will lose it and the next interest will gain priority (bc the first right is essentially gone).
- ✓ **Where the prior equity is in favour of a volunteer, and the later purchaser gave value and had no notice of earlier claim**
  - Equity does not assist volunteers
- ✓ **Where holder of first unregistered equitable interest, has armed a 3<sup>rd</sup> party with indicia of ownership & this action has allowed the 3<sup>rd</sup> party to deal with the property as the apparent owner**
  - Indicia of ownership can be – certificate of title, contract, permission to get the certificate of title etc
  - This gave the subsequent person to give the impression that they are the owner
- ✓ **Where the first holder failed to lodge a caveat (together with other factors)**

## Great example of competing unregistered interests

When working out who has the better interest, apply the 3 perspectives-

Case	<b>Heid v Reliance Corp Pty Ltd (HCA)</b>
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