

PROPERTY LAW
EXAM NOTES

2018

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Week 1: Introduction to Property Rights

A property right at law (or a legal property right)

- A relationship between a person(s) and a thing recognised by the jurisdiction of the common law.
- In our context, it is a relationship between a person and land.
- Remedies:
 - 'in rem': enforceable against the world
 - i.e the remedy can be enforced against the land, or gives standing to a plaintiff because of her rights in the land.
 - 'in personam': enforceable against only the other person
 - Examples of remedies:
 - Action for possession or to remedy trespass or nuisance
 - Injunctions or specific performance (which are actions against the person but recognised in the jurisdiction of equity because of the connection with some property),
 - Statutory remedies of a mortgagee or lessor.
- Attributes of a property right (distinguish them from personal rights):
 - I. Exclusive use according to the content of the right
 - II. Assignability
 - III. Capacity to be binding against the whole world without more.

Working definitions of rights:

- a) **Estates**- exclusive use basic title right of ownership of land. Estates can be divided into freehold and leasehold, and the difference turns on whether the duration is for an ascertainable period. Only two freehold estates are common today: the fee simple - a grant to a person and their heirs generally (virtually perpetual): the life estate - a grant for one life only. Estates constitute the primary land title rights at law.
- b) **Leases** - a lease embodies the grant of exclusive possession of the land for certain duration measured by years or part of a year and is usually granted for a monetary rent. The landowner as lessor, grants exclusive possession to a lessee/tenant. Leasehold estates (leases) constitute a lesser land title right at law when compared to freehold (or fee simple).
- c) **Easements** - an easement embodies a definable right created for the benefit of land and allows the owner of the benefited land i) to do something over nearby land eg a right of way or ii) to stop the owner of the nearby land doing something eg a right of light. In other words, an easement contemplates two titles - the dominant land with the benefit, and the servient land with the burden.
- d) **Profits** - a profit is the grant of a definable right to take something off land which naturally occurs there, such as the right of hunting or shooting game or the right to quarry stone or soil. Profits are often coupled with a licence to enter the land, to render them useable.

- e) **Mortgages** - a mortgage is the grant of land (though there can be mortgages of other property than land) as security for the loan of a sum of money to be repaid: mortgages at common law worked by transfer (conveyance) of the fee simple of the secured land to the person lending the money, followed by a re-conveyance of the fee simple if and when the money was repaid: today, due to the intervention of statute, they work by imposing a 'charge' against the secured land – i.e the land is 'charged' with the debt and the mortgagee could enforce its remedies against the land, but no actual transfer of the estate takes place. (The *mortgagor* is the landowner securing their land and granting the mortgage; the *mortgagee* lends the money and receives the benefit of the mortgage).
- f) **Rentcharge** - a rentcharge is the grant of a charge against land as security for the periodic payment of a sum of money.

A property right in equity (or an equitable right)

- A relationship between persons in regard to the land in question, as is the case with legal ('in rem') rights.
- But an equitable right is a right *in personam* ... the property right exists wherever, *and because*, equity will protect the conscience inherent in the relationship by giving a specific remedy to be carried out on or in relation to the land in issue.
- Remedies:
 - The remedies are 'in personam': ordered against the defendant, acting upon her conscience (eg to enforce a promise or a representation relied upon).
 - But they are orders for the defendant to do something relating to the property, and often this is that the defendant must carry out the promise or expectation in relation to the legal title (eg enforcing the defendant's promise to transfer the legal title to the land).
 - Examples of equitable remedies:
 - The constructive trust
 - Injunction
 - Specific performance.
- Equitable right exists in:
 - The creation of trusts of land
 - The formation of contracts where those contracts concern one of the finite rights in land (estates or interests) known at law
 - The occurrence of 'equitable' fraud where there is designed cheating or unconscionable behaviour.
 - There are also some miscellaneous equitable rights not readily associated with these three cases.
- The formalities of common law do not apply.
 - Basically, an equitable right is assignable in writing: s. 29 (1) (c) LPA.
 - An equitable right in land binds others who take subsequent interests in the land, in circumstances where their conscience is affected through 'notice' of the interest – the equitable interest will thus bind all the world *except* 'equity's darling' - a bona fide purchaser without notice of the earlier equitable interest.

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General Structure:

- 1) Read the facts carefully and create a list of issues.
- 2) Identify the key parties and the disputes that may arise
 - State: ___ (A) may have a case against ___ (B) for his/her (state which action)
- 3) Identify each proprietary interest or estate that each party will be claiming:

Numerus Clausus

- a. **Fee Simple:** Granted to a person and their heirs for their lifetime.
 - i. Note words of limitation in notes below.
- b. **Life Estate:** A grant of estate for a person's life (*pur sa vie*). OR, if the receiver then grants the land to a third person, when the second person dies, the land will still return to the first grantor (*pur autre vie*).
 - i. Note words of limitation in notes below.
 - ii. Note doctrine of Waste in notes below on how the land may be used!
- c. **Fee Tail:** Granted to a person and the heirs of their body, still possible in SA,
 - i. Note words of limitation in notes below.
- d. **Leasehold Estate:**
 - i. Must have the following criteria, otherwise have a license:
 1. Parties – consider case analogies and apply to facts
 2. Premises – consider case analogies and apply to facts
 3. Exclusive possession – consider case analogies and apply to facts
 4. Term – consider case analogies and apply to facts
 5. Rent? – consider case analogies and apply to facts
 - ii. Also note rights and duties under residential leases – see below.
 - iii. Covenants must 'touch and concern' the land: *Gumland* below.
 - iv. Is one party bringing an action under a sub-lease? *Below!*
 - v. NOTE: rights of forfeiture for a breach and rights of re-entry.
- e. **Easement:**
 - i. Consider elements from *Ellenborough*, endorsed in *Pentilla* and *Westfield*. If any unfulfilled, it is a license.
 1. Must have a dominant and servient tenement
 2. Easement must benefit the dominant tenement i.e. touch and concern the land
 3. Must have separate ownership of the tenements
 4. Easement must be capable of forming the subject-matter if a grant.
 - ii. Consider how created:
 1. Via Statute?
 2. Express grant or reservation
 3. Implied: If exceptions to the general rule of: easement of necessity or if intended by parties.
 4. Quasi easement – *Wheeldon v Burrows* criteria below.
 5. General words in the conveyance per LPA s 36. THIS WILL TURN AN EQUITABLE EASEMENT INTO A LEGAL EASEMENT due to operation of the Statute.
 6. Prescription: 20 years of usage

- iii. *Cast an analogy or have a case illustration of the easement.*
- f. **Profit a prendre:** A license coupled with a proprietary interest to access someone's land and take natural produce.
- g. **Mortgage:** Must have a security relationship (language of RPA s 128).
 - i. Also, must have per *Campbell v Holyland or Gurfinkel v Bentley*, an intention of the parties to create the mortgage.
 - 1. If above aren't met, and it isn't legal or equitable, then it is merely an unsecured loan! – *cast analogies wherever possible!!*
 - 2. Also consider special priority rules for mortgages *below*.
 - *All other dealings of land, even if by a deed, do not constitute property rights at law and create merely personal rights – Thomas v Sorrell. So, is it a license:*

4) Are the interests legal or equitable?

- a. **If legal:** MUST BE REGISTERED via undergoing the two-stage process of registration.
 - ii. **If a lease**, also note if residential or commercial. Must be registered if above one year – ss 116, 69H or 119.
- h. **If equitable:** s 249 RPA states that equity is not abolished by the Torrens System. Can arise due to:
 - i. The miscreation of a legal right, so that the equitable right will mirror the legal one! See *Walsh v Lonsdale, part performance and estoppel below*.
 - ii. The creation of Trusts in land: express, resulting or constructive.
 - iii. Contract - The doctrine of conversion (a contract is signed within 30 days; pending settlement, the purchaser obtains an equitable interest)
 - iv. Fraud (i.e. designed cheating or unconscionable behaviour) which excludes someone's legal right.
 - v. *Note other special ways an equitable mortgage can be created!*

NOTE: after establish a trust, part performance or estoppel, go to Torrens system exception to indefeasibility as these could be the in personal exception

5) Who was the first person to hold the easement, who was the second?

6) Priority dispute: There are three kinds of disputes – which interest will prevail?

- **Legal v Legal**
 - Section's 56 (2) & (3) *Real Property Act 1886* (SA).
 - Priority of time
- **Legal v Equitable**
 - Exceptions to indefeasibility listed in sections 69 & 71 of the *Real Property Act 1886* (SA). Further exceptions in equity (*in personam*).
- **Equitable v Equitable**
 - All being equal, priority of time- *Rice v Rice/Breskvar*
 - Courts look for the better equitable interest, having regard to time and the circumstances in the case.

- 7) Is one of the people a third party purchaser?
- If so, are they a **Bona fide purchaser for value**? Is there a proviso that they can use as a defence from 69(a), 69(b), 69(c), 71(f) or 249(2)?
 - Found in various sections of the RPA: 69 a & b, 71 and 249.
 1. Registered proprietor;
 2. Bona Fide
 - ▶ Section 72 *Real Property Act 1886* (SA).
 3. Valuable consideration
- 8) Make an argument supported by the legislation and case law.
- How does case law support/confirm any relevant statutory provision?
- 9) Does the problem question raise other issues unrelated to the immediate priority dispute i.e. possession, personal property security, or fixture?
- 10) **Remedies** – Damages or enforcement of interest through specific performance? – consider *Jaggard v Sawyer*
- Or compensation under the Torrens Statute.

Estates:

Freehold Estates: For an indefinite period of time.

1. **Fee Simple:** Closest thing to absolute ownership, and will continue for a person and their heir's lifetimes. – Note principle of escheat
 - a. **Words of limitation:** If between living persons must say (*inter vivos*) “to A and his heirs”. If wrong, turns into a life estate. If by Will, per *Wills Act 1936* (SA) s 31, it is more flexible, an assumption exists that a person will pass a fee simple estate unless contrary intention is shown.

Example:

Here ... LOOK TO FACTS seems to have a fee simple over...LOOK TO FACTS. A fee simple is the closest thing to absolute ownership (*Gumana v Northern Territory*), and will continue throughout...LOOK TO FACTS and their heir's lifetime.

2. **Fee Tail:** An estate of inheritance. A person grants land to a tenant and the heir of his or her body. It has been abolished in all states, besides SA (where it can be removed).
 - a. **Words of limitation:** If between living persons by grant, must say “to A and the (male/female) heirs of his body”. If stuff up, turns into a Fee Simple. If by will, clear words must be show an intention (s31).
3. **Life Estate:** A grant of estate for a person's life (*pur sa vie*). When the receiver dies, the land returns to the grantor. OR, if the receiver then grants the land to a third person, when the second person dies, the land will still return to the first grantor (*pur autre vie*).
 - a. **Words of limitation:** If between living persons by grant, must say to “A for life”, or if given to a third person “to C for the life of B”. If wrong, then transfer will not be valid! If by a will, need to say “A for life” otherwise the default is fee simple per *Wills Act 1936* (SA) s 31.