

## MLL325 LAND LAW NOTES

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## Topic 1: General Law Priorities

### General Law Priorities

There are two systems of land registration in Australia:

1. **General Law Land;** and
  - a. Land under the general law system of land title is referred to as 'general law' land, or 'old title' land or 'common law' land. For general law land, the only way legal title can be transferred from one person to another is by deed, called a 'deed of conveyance'. For the sale of an interest in land, the vendor must prove his/her title to the land to the purchaser. To do this, the purchaser traces the vendor's title to check for a good root of title by examining the chain of title.
2. **Torrens Title Land**
  - a. The Torrens system was introduced to Australia in the middle of the 19th Century (1860s), attributed to Sir Robert Torrens. Land under the Torrens title system is known as 'Torrens title' land. An interest in land is known as a registered interest in land. It can also be called a legal interest in land but should not be confused with a legal interest in General Law land.

General land law is evidenced by a chain of title. Torrens title land is evidenced by a CT. Chain of title dates back to original grant.

- Both general and Torrens title land may be unregistered. General law interests cannot be registered under Torrens until they are converted. Torrens title interests may be unregistered because holders choose not to register as the unregistered because holders choose not to register as the system is not compulsory
- Unregistered interests do not gain the protection of indefeasibility that registered holders of Torrens title land acquire.

### Legal Interests in Land

Legal interests in land are interest which the common law upholds.

In order for an interest to be legal it must be recognised by the doctrine of estates.

All legal interests over land must be in the form of a deed otherwise not legal, this is set out in s 52(1) PLA:

*"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."*

A deed for the purposes of s. 52(1) PLA will be a document which has been signed by both parties with the intention of operating as a deed. The document should be signed and witnessed by both parties

and it does not need to have a wax or wafer seal. There should be a printed indication where the seal would be affixed.

Exceptions to this are set out in s 52(2) (variety of orders) AND s 54(2) PLA sets out that leases not required to be in writing such as oral leases for 3 years and under.

Applies to all 'conveyances' of land. S18PLA defines conveyances broadly to include: 'mortgage, charge, lease, assent, declaration etc'.

Conveyance not restricted to formal deed or transfer.

### What is a Deed?

Deed: most solemn act a person can perform with respect to a particular property: *Manton*. Deeds are applied to conveyances, transfers, mortgages, charges and leases of land. In common law it requires a deed to be signed, sealed and delivered.

It must be executed by the grantor in presence of the prescribed number of witnesses, known as instrumentary witnesses. The seal must be affixed to it and the grantor and witnesses signatures are primary.

Statute reinforces this s73 PLA must sign or place mark- sealing alone insufficient. S73A PLA: if a deed expressed to be sealed shall have the same effect as if it has been.

Common law *Manton v Parabolic*: Ritual/Instrument to signify solemnity.

Electronic Conveyancing (Adoption of National Law Act) 2012 (NSW) Appendix s9(1) gives electronically lodged registry instruments the same effect as paper documents. Digital signature places written signature. Digital signature is different to electronic signature as it refers to security protocols.

### General Law (Old title) and Torrens Title Land: *What is the difference?*

General Law (Old Title) Land represents all land grants issued between 1838 and 1862 which have not been brought under the Torrens System.

General Law is the original form of land ownership. When land was sold or otherwise allocated by the government, a Crown Grant would state that the land described had been given to the person named in the Grant. Each time the property was sold a new deed would be added to the Grant. These would grow into a chain of deeds. To prove ownership, a vendor would have to produce the complete and unbroken chain of titles. These days are general law land that is transferred must be converted to modern Torrens title.

In Victoria the Torrens system first introduced in 1862 pursuant to the Real Property Act (Vic) which is now set out in the Transfer of Land Act 1958 (Vic). Land issued *after* 1862 was Torrens land OR land converted to Torrens under the 'conversion process' is Torrens land.

## General Law and Torrens Title Interests: *What is the difference?*

In Victoria today, most land is now Torrens title. Remaining old title land must, where transferred, be brought under the TLA so that eventually all land will be covered. General law land is evidenced by a 'chain of title'. Torrens title land is evidenced by a CT. Chain of title dates back to the original event.

### "Searching a Chain of Title"

- To verify general law title, s 44 PLA sets out only need to search back for the 'good root' of title.
- This amounts to documentary title apparent in the previous 30 years.
- Purchaser is not affected by any existing beyond this 30 year period (PLA s44(6)).
- Must be aware of titles existing within the 30 year period because will be affected by this.
- No guarantee of title with general law interests.

## Torrens Title Interests

The *Transfer of Land Act* provides for the Register to be in a variety of forms and on any medium, including parchment (old CT's) and a computer. The computer title information forms part of the Register and can be updated by registering new dealings on the computer database without having to update any paper title.

The folio is the original document in the titles office. The certificate of title is the duplicate of the folio (known as the duplicate certificate of title). For a computer title, the Certificate of Title is a computer printout.

Computer titles may be created in two ways:

1. Directly from newly registered plans of subdivision for lots, roads and reserves on those plans. In this situation there is no paper folio for the land, only the computer folio information.
2. Through the registration of a dealing affecting a paper folio (title) for which there is computer "search" data available. The registration transforms the data to computer folio data, which can be subsequently updated instead of the paper title.

Computer title do not contain the breadth of detail as the old paper titles. They only contain current information (i.e. not old registered proprietors etc) and they do not contain any detailed diagrams of easements etc.

Verified: Electronic Conveyancing (Adoption of National Law) Act 2012 (NSW) Appendix- Victorian Act- ss7 (documents may be lodged electronically and s12 (digital signature)).

## Registered and Unregistered Interests in Land

Both general and Torrens title land may be unregistered. General law interest cannot be registered under Torrens until they are converted. Torrens title interests may be unregistered because holders

choose not to register as the system is not compulsory. Unregistered interests do not gain the protection of indefeasibility that registered holders of Torrens title land acquire.

### Equitable Interests in Land

Legal Interest at Settlement BUT equitable interest when enforceable contract entered. Settlement period necessary to organise finance; investigate title. Contract will generate equitable interest (constructive trust/equitable lien) if specifically enforceable. Specific performance available if damages inadequate and parties ready and willing and the contract is valid.

Orthodox type of equitable interest: constructive trust: vendor qualified trustee and purchaser holds beneficial title. Vendors trusteeship qualified by vendors lien (*Lysaght v Edwards*).

Tanwar dicta revises this: suggests no constructive trust but purchaser holds equitable lien over deposit bc description of purchaser as constructive trustee conceals the contractual relationship and this analysis is 'bedevilled by circularity.'

### Equitable Interests in Land: The Statute of Frauds

The creation of equitable interests in land does not have to occur by deed but it does usually have to be in writing/signed: s 126 Instruments Act (to enforce any contract for sale of land or any interest in land) and s53 PLA (to create an equitable interest in land). This is to prevent fraud in the creation and transfer of interests in land. Equitable interests need to comply with the Statute of Frauds, as outlined in S 53 PLA:

- (1) Subject to the provisions hereinafter contained with respect to the creation of interest in land by parole-
- a) no interest in land can be created or disposed of except by writing signed by the person creating or conveying the same, or by his agent thereunto lawfully authorized in writing, or by will, or by 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 signed by the person disposing of the same, or by his agent thereunto lawfully authorized in writing or by will.
- (2) This section shall not affect the creation or operation of resulting, implied or constructive trusts.

Exception to formality requirement: Oral contract which are specifically enforceable may be valid if satisfies doctrine of part performance: s 55(d) PLA:

*Nothing in the last two preceding sections shall-*  
*(d) affect the operation of the law relating to part performance.*

These provisions derived from Statute of Frauds which will render a non-compliant contract or interest in land unenforceable (note that unenforceable does not mean that the interest is extinguished).

### The Doctrine of Part Performance

Part Performance: The Australian position is the strict test as set out in *Maddison v Alderson*: must prove acts unequivocally referable to agreement was endorsed in *Millet v Regent*. It was recently unanimously upheld by the High Court in *Pipikos v Trayans* [2018] HCA 39:

#### Pipikos v Trayans [2018] HCA 39

##### Facts:

- Respondent and her then Husband purchased a property (the “Clark Road Property”) and made improvements.
- The respondent was the sole registered proprietor.
- The respondent and her husband later jointly purchased a second property with the appellant (also the respondent’s brother) and his wife, financed by both couples and a bank loan.
- The couples then bought a third property (the Penfield Road Property”) financed in part by bank loan.
- The appellant and his wife paid the deposit and the balance for the third property.
- Each couple held a half share in the property.
- Appellant argued that he and the respondent had agreed that he would acquire the respondents share in the Clark Road property.
- This was to be financed by the appellant funding the share of the respondent and her husband in the Penfield Road property.
- The only evidence of the agreement was a handwritten note non-compliant with *Law of Property Act 1936* (SA). The appellant argued part performance.

##### Arguments by Appellant:

- Argued that unequivocally referable acts should be replaced with an approach akin to equitable estoppel. The court should therefore be focused on “whether a contracting party has knowingly been induced or allowed by the counterparty to alter his or her position on the faith of the contract”.

##### Held:

- **Kiefel CJ, Bell, Gageler and Keane JJ jointly; Nettle and Gordon JJ jointly concurring; Edelman J separately concurring.** After review of the authorities, the Court unanimously rejected the appellants argument and affirmed the requirement of unequivocal referability. In this case, the bargain did not meet that requirement (which the appellant had conceded).
- **Kiefel CJ, Bell, Gageler and Keane JJ held at [72]-[74]:**
- “It should not be thought, as the submissions advanced on behalf of the appellant appear to assume, that part performance is, like equitable estoppel, the original and unconstrained creation of the courts of equity, the elements of which can be reformulated at large to “do justice against a defaulting defendant. In particular, the argument advanced on the appellant’s behalf fails to appreciate that Lord Selborne’s articulation of the law of part performance was driven by the conscious need to reconcile the decisions of the courts of equity with the clear words of s 4 of the Statute of Frauds.”

- The doctrine of part performance requires that the plaintiff must be able to show that he or she has made a substantial commitment to the contract so that it would be unconscionable to allow the defence.

- Note that it must be the acts of the *plaintiff*.
- The doctrine is based on the idea of unconscionability generated by the plaintiff's reliance on the existence of a contract. Acts of the defendant which show that there is a contract therefore do not count.
- What acts of part performance will suffice: generally the taking of money alone is insufficient.
- However, it is not necessary for the entire contract to be performed and generally, taking possession of land will raise a part of performance action.

## Boundaries of Land Ownership

- **Physical Measurements:** Boundary defined according to survey lines. If survey lines removed may establish boundary lines according to adverse possession (where proven).
- Own up to the heavens and down to hell: *cuius est solum maxim* BUT Crown reserves certain rights which include minerals and now- regulation of bore water.
- If measurements incorrect: General law land will result in defective title. Torrens title land no indefeasibility for registered holder of land 'wrongly described' unless can prove are a bona fide purchaser for value.

## Boundaries abutting water

- **Tidal Waters:** High Water mark is the boundary subject to public rights to fish and navigate.
- **Non-tidal Waters:** Middle line approach- abrogated by statute in Vic to vest river bed in Crown. Riparian entitlements now also vested in the Crown- see: Water Act 1989 (Vic), ss 7 and 8 and s 385 Land Act.
- **Accretion/Avulsion:** Land with 'ambulatory borders' may acquire or lose land where there is erosion or accretion which is gradual and 'imperceptible' rather than sudden and dramatic: *Williams v Booth* CB3.22.

## Encroachment

- Property rights only extend to physical boundaries of land.
- Any encroaching property which is affixed to the land will be owned by the adjoining land owner pursuant to doctrine of fixtures. If encroachment not affixed, adjoining owner may claim damages for intrusion. Encroachment includes land and airspace.

## Priority Rules

### Why do we need Priority Rules

- Land Interests exist under common law, equity and state- so do priority rules.
- General Land rules: common law and equity apply as base rules and TLA superimposed on this.
- Torrens title priority rules are superimposed over general law rules where land interest is registered under Torrens system.
- Jurisdictional Fragmentation increases chance of conflict. It determines which interest is entitled to priority. Priority dispute will arise where two or more interests in conflict, whether partial or direct, over one piece of land. Priority only conferred to extent of conflict.

## Different Sources of Priority Rules

- Land Interests exist under common law, equity and statute- so do priority rules.
- General Law rules: common law and equity apply as base rules and TLA superimposed on this.
- Torrens title priority rules are superimposed over general rules where land interest is registered under Torrens system.

## Priority Rules: Pure Legal Interests

- Legal interest are created in land by deed or per exemption.
- Torrens legal interest- registered s 40(2) TLA.
- Old title legal interest- chain of title representing all transaction over that land since first issued by Crown.
- Note *Nemo Dat* Rule:
  - (1) A person cannot transfer title they do not have and
  - (2) A person can only transfer the title which they actually have

## Priority Rules: Equitable Interests

- Equitable interest in land is a right to compel legal owner to hold legal rights in accordance with equitable obligations.
- Right based character of equitable interest- allows for multiple creation of equitable interests against same land.
- *Nemo Dat* not applicable to equitable interests as title and possession not conferred.

## Priority Rules for Prior Legal and Subsequent Equitable Interest

Rule= Legal Estate Holder will always take priority if bona fide and have not contributed to the subsequent creation of equitable title (Northern Counties Fire Insurance v WHIPP).

### *Northern Counties Fire Insurance v Whipp: CB 10.11*

#### Facts

- Crabtree manager of Northern Counties
- Crabtree borrowed from Northern Counties
- Old title mortgage – Northern Counties put title deed into safe to which Crabtree had keys
- Crabtree removed mortgage deed and obtained further legal mortgage from Whipp
- Competition between legal mortgage: Northern Counties and equitable mortgage: Whipp

#### Held

- Fry LJ: The prior legal interest holder must have fraudulently contributed to the creation of the subsequent equity.
- Mere carelessness or negligence not enough
- Negligence implies duty of safe custody over title documents and this does not exist
- Carelessness or want of prudence insufficient to postpone prior legal mortgage: CB10.12