

JURD7283 Land Laws - SAMPLE

Exam Notes

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Introductory Concepts

Numerus Clausus → Limited interests in land recognised as proprietary.

- Fee simple = Largest interest in land
- Lease = Interest in land limited by time
- Mortgage = Interest in land given in exchange for money
- Easement = Right to do something on someone's land
- Restrictive/Freehold Covenants = Right to stop someone doing something on their land
- *Profit a prendre* = Right to gather naturally occurring materials from another's land
- Lien/Charge = Interest in land equivalent to an amount of money owed. Does not include a right to sell the land.

s54A CA → Any contract for the sale of land/disposition of land (or any interest in land) must be in writing. If not, the contract is not enforceable in Court. Part-performance is an exception.

s23C CA → Requires all instruments conveying interests in land to be in writing whereas s54A focuses on whether there is a sufficient written note or memorandum embodying an agreement to transfer an interest in land.

- **s23C(1)(b)** merely requires evidence in writing in relation to a declaration of trust of land. However, the disposition or creation of an interest pursuant to s23C(1)(a) must itself be in writing.
- **s23C(1)(a)** and **s23C(1)(b)** apply to the creation or disposition of interests, whereas **s23C(1)(c)** only applies to the disposition of subsisting interests.
- **s23C(1)(a)** applies to the disposition of legal and equitable interests in land.
- **s23C(1)(a)** and **s23C(1)(b)** apply only to land, whereas it has been held that, despite the references to land in the opening sentence of the section, **s23C(1)(c)** applies to interests in both land and personality.
- **s23C(1)(c)** requires assignments of subsisting equitable interests to be in writing. It does not apply if the assignor has both the legal and equitable interest in the property.

Equity in Land Laws

A specifically enforceable contract will give the purchaser an equitable interest (*Bunny Industries v FSW Enterprises*)

- A specifically enforceable contract to sell a legal fee simple = equitable fee simple (*Bunny Industries v FSW*)
- A specifically enforceable agreement to grant someone a lease = equitable lease (*Walsh v Lonsdale*)

An equitable interest is a proprietary right. Also remember to consider the applicability of:

- Fiduciary Obligations: Remedy to breach can be a Constructive Trust
- Resulting Trusts: Apply presumptions of contribution/purchase money/advancement
- Constructive Trusts: Look for unconscionability (*Baumgartner v Baumgartner*)
- Equitable Estoppel: Fulfill the expectation, unless onerous (*Giumelli v Giumelli*)

Commented [AK1]: As long as there are written documents which contain all of the essential terms and they can be linked with each other, as well as the signature of the party you are attempting to enforce the agreement against, a court will generally enforce the agreement.

Commented [AK2]: s66R - It is an offence to advertise residential property for sale without a prepared contract available for inspection.

Commented [AK3]: ❖ The acts relied on must unequivocally, and in their own nature, be referable to (indicative of) some agreement of the general nature of that alleged.
❖ This requires that the acts could only have been done for the purposes of fulfilling the alleged agreement - there can be no other reason why they were performed.
❖ The party performing the acts must have been doing so in reliance on the alleged agreement (ie under the assumption that the agreement exists), and the other party must have permitted the acts to be done also because of the agreement.
❖ The acts must have been done by a party to the alleged agreement.

Commented [AK4]:
23C Instruments required to be in writing

(1) Subject to the provisions of this Act with respect to the creation of interests in land by parol:

(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 the person's agent thereunto lawfully authorised 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 the person's 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 the person's will, or by the person's agent thereunto lawfully authorised in writing.

(2) This section does not affect the creation or operation of resulting, implied, or constructive trusts.

Indefeasibility

PROCESS

Step 1: Who is registered? – prima facie title

Step 2: Are there any exceptions to indefeasibility?

- Unregistered interests in s42(1) e.g. short term tenancies
- Fraud
- Volunteers (with notice of personal right against transferor) *Bogdanovic*
- Overriding inconsistent legislation
- *In personam* rights

Step 3: Caveats: has anyone lodged one or should they have?

Step 4: Are there any priority issues to resolve?

Definition: Conclusiveness of register - immunity from adverse claims to registered interests (**Frazer v Walker**)

- Torrens system is one of title by registration not registration of title (*Breskvar v Wall*)
- Once registered the title passes immediately (*Frazer*) even if there is some invalidity in registration
- Title is indefeasible except in the case of fraud. For fraud title still passes but it is a defeasible one
- Title is otherwise immune from adverse claims other than those specifically accepted (**see exceptions**)

Nature of indefeasibility

s42(1) Real Property Act - Estate of registered proprietor paramount

The registered proprietor of any estate or interest in land holds it subject to only those interests on the register, except in the case of FRAUD and the following unregistered interests:

- (a1) omitted easements/mis-described existing before entry or through admin error (**See page X for easements**)
- (b) omitted/mis-described profit à prendre
- (c) wrong description of land (provided not derived for value through a purchaser or mortgagee for value)
- (d) short term lease leases (3 years or less, including any extension) < 3 YEARS LEASE

New Priority Rule

s43 (1) Real Property Act - Purchaser from reg. proprietor not affected by notice

Except for FRAUD ("brought home") – which does not include disregarding a known unregistered interest

- No duty to inquire about the validity of registered dealings or how they were acquired
- Notice direct or constructive of any unregistered interest (usually equitable) will not affect the registered proprietor (unless protected by an exception)

Manuel folio considered conclusive evidence of title

S 40 Real Property Act

- (1) Manual folio to be conclusive evidence of title and that the land has been duly brought under the Act
- (2) Folio not impeachable or defeasible for error, omission or informality in the application
- (3) **Leases:** person recorded in any folio as entitled to land – shall have the reversion of any lease recorded and have all the rights/ remedies to which a reversion is entitled by law and is subject to all covenants and conditions expressed to be performed by the lessor.

Bona fide purchasers/ mortgagees PROTECTED re: fraudulent and other transactions

S 45 Real property Act

- (1) Except as otherwise expressly provided nothing in the Act is to be construed to deprive any purchaser or mortgagee bona fide for valuable consideration or any estate or interest in land that is registered
- (2) Proceedings for **RECOVERY OF DAMAGES** does not lie against the above if the vendor or the mortgagor:
 - (a) **Registered as a proprietor** through fraud or error, or by means of a void or voidable instrument OR
 - (b) Procured transfer or mortgage **to the purchaser** through fraud or error or by means of a void or voidable instrument OR
 - (c) **Derived registration from a person who was registered** through fraud or error or void or voidable instrument

What is indefeasible in a forged mortgage?

- Indefeasibility of registered mortgage does not extend to a personal right created by a mortgage covenant, such as the mortgagor's obligations under a deed of guarantee; **Merc Credits v Shell**
- The security interest is conceptually distinct from the covenant to pay; **French v Qld Premier Mines**
 - o Different approaches
 - Full indefeasibility (**Pyramid Building Soc**) – indefeasibility does extend to covenant to pay

Commented [MB5]: Loan secured through fraud – backed by mortgage on a property shared by husband and wife. Bank sold property to bona fide purchaser

Commented [MB6]: W became registered proprietor due to fraud of his agent that was also the agent of B (who owned the property). Property was sold to a BFPVWN but was not registered TF.

Title passed to W and B gained equitable right to rectification. This would have taken priority but for DEFERRING CONDUCT or conduct that contributed to the assumption upon which the holder of the competing equity acted when that equity was created.

Here this conduct was giving the solicitor the CT. Materialisation of inherent risk – *Dollars & Sense*

Commented [MB7]: Operation:

- Eliminate *nemo dat*: can't give what you don't have by creating a system of title by registration
- Fraud vitiates registration and therefore title

Commented [MB8]: Operation: Eliminates *bona fide* purchaser rule as notice has no affect

- No indefeasibility (**Grgic v ANZ**) – covenant to pay merely personal
- Limited (**Duncan v MacDonald**) – only to extent necessary to make security interest effective.

Exceptions to Indefeasibility

FRAUD

S 42(1)/43(1) of the RPA states that fraud is an exception to indefeasibility.

Things that DO NOT constitute fraud

- Disregarding rights (unregistered interest) which the person had notice of (*Wicks v Bennett*) even if knowing that transfer will defeat said interest (*Nills v Stokman*)
 - Exception: it is fraud to collude in transfer designed to cheat a person out of a known existing right or to engage in a deliberate and dishonest trick to cause them not to register (*Waimiha*)
- Mere carelessness (*Pyramid Building Society v Scorpion Hotels Pty Ltd*)

e.g. clerk made an unauthorised alteration (joint tenants to tenants in common) to an executed transfer before lodging that cost the wife an interest upon husband's death. In order to be fraud would need to know alteration was a lie and intended it to induce the RG to act in a way materially different from what he would otherwise have done (*David v Williams*)

But what is fraud? (Not defined in the Act)

Fraud means "actual fraud" and actual personal dishonesty or **moral turpitude** by the registered proprietor (*Wicks v Bennet*, *NAB v Hedley*)

- Must be a **consciously dishonest act that can be "brought home"** (*Stuart v Kingston*)
- Wilful disregard and violation of the rights of other persons (*Waimiha Sawmilling*)

"**Brought home**" means that the fraud must affect the current state of the title...

This means that the registered proprietor must have been involved in the fraud either personally or by its agents (*Frazer v Walker*; *Breskvar v Wall*) OR had knowledge of the fraud - *Assets Co Ltd v Mere Roihi*

Personally involved:

- Committed the immediate act – *Shultz*
- Wilful blindness to the presence of fraud (failing to inquire for fear of learning the truth is tantamount to fraud) - *Young v Hoger + Assets Co Ltd v Mere Roihi*. Also applies to agents
 - o Note: Australian courts are reluctant to take this view of fraud – *Assets Co v Mere*

Fraud by another (transferor)

- Not defeasible unless RP is involved or has knowledge of the fraud – *Assets Co Ltd v Mere Roihi*

False attestations of signatures (typically mortgagees): is it fraud and is it within the scope? NOT CLEAR!

- YES** → for when bank clerk attested that signature was signed in his presence and turned out to be a forgery by the wife – mortgage found to be void *Westpac v Sansom*
- NO** → when it was signed by an impersonator who was introduced by an established customer (held no conscious knowledge of falsity nor reckless indifference to the truth)
- NO** (but not good law in NSW) → In *Russo v Bendigo* a mother and son company where son forged signature – law clerk falsely attested (despite express instructions not to) her boss registered mortgage:
 - Held she didn't appreciate her actions (knew it was falsely attested but was not dishonest in the meaning of fraud- didn't know it was forged)
 - Held solicitor had no knowledge of the false attestation or fraud and was not a party to it at all.

Commented [MB9]:

Moral turpitude = contrary to community standards of honesty or good morals

Commented [MB10]:

Loke Yew v Port Swettenham:

- In this case the new registered proprietor was held to have induced the transfer by fraud when his agent gave verbal assurances that he would take the title subject to Loke Yew's ownership of part of the property (which included a mortgage payable to the proprietor).

NOTE: In order to gain rectification directly the fraud must make the dealing 'void ab initio'. In this case Lok Yew simply gained a personal remedy requiring the Co to rectify the register (equity of rectification)

Commented [MB11]: THIS WAS CORRECTLY DECIDED

Agent

If agent has knowledge of fraud:

- Knowledge imputed to principal – law irrebuttably presumes agent communicates all info during the course of the transaction – *Schultz*
- Exception is when it is committed by the agent or info acquired while agent is a party to fraud – here the assumption can be rebutted by proving actual ignorance – *Schultz*

If committed by the AGENT to be the fraud of the principal the act must:

- A. Have been within scope of actual or apparent authority – *Ex Parte Batham*. Giving them the opportunity to act fraudulently not enough – *Schultz*. There must be a sufficiently close connection btwn the task set and the fraudulent act. The test being “materialisation of risk inherent in the task” - *Dollars & Sense v Nathan*.

AND

- B. Must have ‘operated’ on the mind of the defrauded person – inducing detrimental action by that person - *Bank of South Australia v Ferguson*

Mortgagee

- a. Who in relation to a mortgage, transfer or amendment fail to take reasonable steps to check the identity of the mortgagor. Only need actual or constructive notice for the Registrar General to cancel the mortgage – s 56C.
- b. Fraud committed by intermediaries (brokers or introducers) who pre- assess applicants for loans will not be considered agents (*Octapon v Esanda*). However, where mortgagees retain persons or corporations to perform functions for them they will be fixed with the knowledge of the contractor (*Khoshaba*)

VOLUNTEERS

Volunteer = one who does not give consideration (gift or under a will)

RULE: The benefits of indefeasibility endure as much for volunteers as for purchasers for value under the RPA 1900 - *Bogdanovic* per Priestley. Under the general law volunteer would be subject to equities which affected the donor *Re Nisbit*

Exception: if the volunteer takes title with notice of a personal right enforceable against the transferor this will allow for a personal right enforceable against the volunteer – *Bogdanovic*

Commented [MB12]: Note: the HC also assumed without deciding in *Farah v Say-Dee* that this is the case

RIGHTS IN PERSONAM

Indefeasibility does not affect the personal obligations of the registered proprietor. He/she is subject to contracts he or has entered into AND to trusts: express or implied over the property.

- Note: registered proprietor is only susceptible to a claim *in personam* if he/she has acted **unconscionably** – *Vassos v State Bank of SA*. However, in **NSW** (*Harris v Smith*) a broader view is taken that the plaintiff should not in every case be required to prove unconscionability.

Personal Equities

Fiduciaries

A registered proprietor who obtains registration of a transfer in breach of fiduciary duty to the transferor cannot set up his or her registered title to escape liability (*Tataurangi Tairuakena*) [Same for circumstances giving rise to a constructive trust (*Bahr*)].

Non- fiduciaries (strangers) Rules in *Barnes v Addy* apply (**DOES NOT affect indefeasibility - Farah**)

- **Knowing receipt** of property in breach of trust holds property subject to that trust (First limb)
- **Knowing assistance**: no receipt but assists with knowledge of the fraudulent or dishonest manner on the part of a trustee or fiduciary takes the property on constructive trust (Second limb)
 - o **"Knowing"** – includes:
 - actual knowledge,
 - wilful blindness,
 - wilfully and recklessly failing to make such enquiries as a reasonable/ honest person would,
 - knowledge of circumstances which would indicate the facts to an honest and reasonable person,
 - " " that would put an honest and reasonable person on inquiry

Mistake

In the absence of fraud common mistake does not make a title defeasible – *Merrell Associates*

- If more land was transferred than bargained for relief only available if transferee either knew OR had reason to know the transferor might be mistaken (*Minister for Education and Training v Canham*)

Commented [MB13]:

Bahr v Nicolay (No.2)

- Purchase clause acknowledged a repurchase agreement between the plaintiff and the transferor. (specifically enforceable interest) land (created by the original contract) s 54A Conveyance of Land– this can be enforceable against anyone. Earlier equitable v later legal s 42 and 43 together means later legal wins even if there is notice.
- The Bahr's clearly added in Cl.4 for a reason. To protect their interest as if Thompson did not sell to B then they would be bound.
- This clause gave the Bahrs an in personam right against the transferee/ purchaser (express trust)

SHORT TERM TENANCIES OVERRIDING

NSW *Real Property Act* s 42(1)(d) states that unregistered leases (equitable) **not exceeding three years** are an exception to indefeasibility.

- The lease itself has to be less than three years (doesn't matter if there is less than three years left – the original lease must be less.)
- **Note**: this was found to operate negatively denying the registered proprietor the ability to rely on the registered title to defeat the interest of a tenant in possession – *Perpetual Trustee Co Ltd v Smith*

Priority

Is determined by the general law priority rules... The relevant time for assessing priority is the time of the creation of the mortgage in equity (or other interest) not its registration - *PTC v Smith OR Balanced Securities v Bianco*

OVERRIDING STATUTES (LATER PREVAILS IF INCONSISTENT)

Importantly: s 42(3) states that this section prevails over any inconsistent provision of another other Act or law unless the inconsistent provision expressly provides that it is to have effect despite anything contained in this section."