

# LAWS2017

## Mid Sem Scaffolds

**Look out for 'All Monies' and Agents**

**NOTE: A forged unregistered instrument is simply void.**

### **Exam Structure**

1. Identify Interest
2. Determine what needs to be done

### **Structure of this document**

1. Types of interests
  - a. Old Systems Land
2. E-conveyancing
3. Torrens system
  - a. Is the interest registered?
  - b. Scope of indefeasibility
  - c. Exceptions to indefeasibility
  - d. Is there a in personam right?
  - e. Is there a remedy, through the Torrens assurance fund?
4. Unregistered Interests
5. Priority Disputes
  - a. Registered v Unregistered
  - b. General Law Priorities

## Topic 1: Types of Property Interests

Only interests recognized by law can be registered *Re Ridgeway*

### 1. Is it a fee simple?

- a. The right of exclusive possession for unlimited duration, it only ends if the owner dies with no next of kin.

### 2. Is it a fee tail?

- a. Fee tail interests were abolished by *s19 Conveyancing Act*
  - i. The interest passes down the family.

### 3. Is it a life estate?

- a. Exclusive possession for the period of the life holder, there is no power to grant an interest beyond the holder's lifetime. – needs to have words of limitation *s47(2) Conveyancing Act*
  - i. You can transfer this title however it will end when the life holder dies.
  - ii. The party who receives the land at the conclusion of the life estate is known as the remainderman/woman - they get the 'remainder' interest.
  - iii. If there is no remainder, the interest automatically reverts to the feoffor (reversion).

### 4. Is it a future interest?

- a. Already apparent that estates allow in to be granted for the future e.g. 'to A for life and then to B in fee simple'
  - i. B's estate is a future estate - it doesn't come into being until the death of A
- b. **Reversions** - a grant of an estate in possession which returns to the grantor
- c. **Remainders** - A grant of a future interest to someone who did not have a previous interest e.g. to W for life and then to Y in fee simple - Y is the 'remainderman' or 'remainder'

### 5. Is it a lease?

- a. A right in possession, provides exclusive possession for a fixed period of time.
  - i. The lessor has a fee simple in reversion.

### 6. Is it an easement?

- a. A right for dominant land owner to use / restrain use of servient land in a manner not inconsistent with servient owners continuing ownership.
  - i. Positively: shared driveway
  - ii. Negatively: to stop servant owner from doing something like building a tower that blocks light.
- b. Must burden servant land for the benefit of the dominate land
  - i. Must benefit the land (in terms of use / enjoyment) not the landowner *Easton*

### 7. Is it a profit a pendre?

- a. Right to enter servient land and remove natural produce (as granted by Crown or owner of estate).
  - i. E.g., soil, minerals, minerals lease, vegetation – note it must be naturally occurring.
- b. This is not a right to the things that may be taken, but a property right to the land from which they may be taken.

### 8. Is it a restrictive covenant?

- a. A restriction on the land

## Topic 1: Old Systems Land

- ☐ Has an legal interest in the land been created?
- ☐ Has an equitable interest in the land been created?

Old system land title transfer is a form of historical / derivative title whereby the recipient of the land receives no better title than that of the transferor *Manton v Parabolic*

Note: if it is a transfer via will then Conveyancing Act does not apply *CA 23E(1)(a)*

### Is it a legal interest?

- 1) A deed is required to pass a legal interest in land *Conveyancing Act s23B(1)*
  - a. The deed must be written document *CA s23C(1)*
  - b. The deed must be signed *CA s 38(1)*
  - c. Attested by a witness who is not a party to the deed (the person needs to see you otherwise invalid )  
*CA s 38(1)*
    - i. Sealed, note a deed is sealed if the above is satisfied *CA s 38(3)*
  - d. The deed can be electronic and electrically attested *CA s 38A*

### If the words deed are not specifically said we look at the common law to see if there is a solemn act

- 1) Has the person undertaken the most solemn act they could in accordance with the particular type of land concerned *Manton v Parabolic*.
  - a. If it appears clearly prima facie that the parties must have been endeavouring to transfer interest in property by the execution of a statutory form it can be interpreted to mean a deed *Manton v Parabolic per Young JA*

### [Exception] If it is a short-term lease it may be exempt from writing requirement

- 1) Leases which are
  - a. At 'best rent which can be reasonably obtained' (market rate)
  - b. Take immediate effect by giving the lessee immediate right to possession
  - c. And not for more than 3 years
    - i. Are not required to be in writing and can be made verbally *CA s23D*
- 2) They are effective even if not recorded on the register *RPA s41(2)(d)*

### OUTCOME | Has title transferred?

- 1) An executed deed allows for title to be transferred *CA s 23B(1)* and the purchaser becomes the owner of the fee simple and the legal interest is created.
- 2) [MORTGAGE] An executed deed allows the mortgage interest to be created under *CA s 23B(1)*.
  - a. The fee simple transfers from the mortgagor to the mortgagee (bank)

### Has an equitable interest arisen?

- ☐ Is there a declaration of trust?
- ☐ Is there an executory contract?
- ☐ Is there an executed contract?

If you are unable to satisfy s23C and/or 54A you may be able to overcome these challenges through

- ☐ Doctrine of Part-Performance – ‘unequivocal acts’
- ☐ Fraud on the Statute – ‘Equity will not allow statute to become an instrument of fraud’

***As the formalities in s23B CA have not been made out there has been no legal interest created. Despite this, there may be a equitable interest established***

### Is there a declaration of trust?

- 1) Under **s23C(1)(b) CA**, an equitable interest can be created through a declaration of trust.
  - a. There must be evidence of the existence of the declaration of trust in the form of **signed writing by the grantor** of the trust.
    - i. This satisfies **s23B(1)(b) CA**
    - ii. This applies to both old system and Torrens title land
- 2) A transfer of an equitable interest or trust subsisting at the time of the transfer, **must be in writing signed by the person disposing** of the interest/trust or by the person's will, or by the person's agent thereunto lawfully authorised in writing. **s23C(1)(c) CA**
  - a. Allows for the transfer any equitable interest via a written and signed document by the grantor
  - b. Applies to both Old System Title Land and Torrens Title Land
- 3) Electronic documents and electronic signatures are valid. **CA s23C(3)**

Since on these facts there is evidence of the declaration of trust in the form of signed writing by Owner, **X** is the beneficiary of an enforceable (in rem) trust of land which is an equitable estate whiles the trustee holds the legal estate **DPLK Holdings**.

## Topic 2: Unregistered Interests

- ☐ Beneficial Interest under a trust
- ☐ Equitable interest via enforceable contract (sale of land / agreement for lease)
- ☐ Vendors Lien
- ☐ Equitable Mortgage
- ☐ Grantee's interest under an option
- ☐ Unregistered legal interest

### Unregistered equitable interest?

#### Beneficial interest under a trust

- 1) In order for an equitable interest to be created through a declaration of trust, it must be manifested and proved in **writing, signed** by the **settlor** per **s 23C(1)(b) CA**
  - a. A **transfer** of an equitable interest or trust subsisting at the time of the transfer, must be **in writing signed** by the person disposing of the interest/trust or by the person's will, or by the person's agent **CA s23C(1)(c)**
- 2) **EXCEPTION: Resulting, implied or constructive trusts** do not require the formality requirements in **23C(1) CA (s 23C(2) CA)**
- 3) **CA s23C(3)**: Electronic documents and electronic signatures are valid.

#### Equitable interest via enforceable contract (sale of land/agreement for lease)

- 4) **Executory contract (A will grant X to B)**
  - a. Here, the lease constitutes an executory agreement, and so **CA s 54A** is engaged to determine whether the agreement is enforceable. This requires the agreement to be in **writing** and **signed by the party to be charged CA s 54A(1)**.
  - b. **YES**: There is an enforceable contract and a court would decree **specific performance** as damages are inadequate due to the unique nature of property / land (**Lysaght v Edwards**)
    - i. Under the rule in **Lysaght v Edwards**, a purchaser gains an equitable interest in the land upon conclusion of a written agreement of sale, provided that the agreement is specifically performable
  - c. **NO**: Given the agreement was only made **orally / not in writing**, the agreement is **not enforceable** per **CA s54A(1)**.
    - i. However, this can be overcome through **constructive trust, part performance (CA s23E)** and **fraud** on the statute
- 5) **Executed Contract (Agreement to transfer from A to B, and B now holds the land)**
  - a. Here, the lease constitutes an executed agreement, and so **CA s54A** and **CA s23C** are engaged to determine whether the agreement is enforceable.
    - i. **CA s 54**: Requires the agreement, or memorandum/note, to be **in writing and signed** by the party to be charged for the agreement to be enforceable