

# Real property

Relevant legislation: CA 1900 (NSW); *Real Property Act 1900* (NSW)

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## Torrens

### STEPS:

1. Identify the registered proprietors (fee simple/mortgage etc)
  - Purchaser of property, mortgage, lease etc
2. Are there any registered interests which would impact your claim on the interest?
  - Fraud, s 42(1), in personam exceptions (cause of action)

### Immediate indefeasibility

- **Immediate: indefeasibility is conferred immediately upon registration of the instrument.**
- the title of a purchaser who registers a forged instrument is 'defeasible'. However, if the purchaser on-sells the property to an innocent purchaser who registers in good faith, their title is indefeasible (Gibbs v Messer 1891)
- **However**, 'a registration which results from a void instrument is effective according to the terms of the registration' (Breskvar v Wall)

### Frazer v Walker - forgery of signature

- Indefeasibility granted upon registration of title (bona fide purchaser) even in cases of fraud/forgery
- Registered proprietors of a farm. Mrs Frazer gave R a mortgage over the farm, **forging her husband's signature**. Solicitor witnessed her and Mr Frazer's sign without physically seeing his signature. Registered on folio.
- She made no payments under the mortgage, R sold the farm to another (W) who became the new registered proprietor who brought action for land possession.
- W had indefeasibility due to his registration of title.

### Breskvar v Wall - no named transferee

- B executed transfer to P as security for loan. P sold to W who sold to A. Before A registered interest, B lodged a caveat to stop them.
- **Key fact: prior to registration the transfer was void.** Not because of forgery – B signed the transfer – but because there was no transferee named and therefore it was void under the Qld Stamp Act.
- "The Torrens system ... is not a system of registration of title but a system of title by registration"
  - **Even if there is registration gained by a title with a forged/void instrument, the registration still exists as indefeasible.**
  - (the documents (i.e. certificate of title) prior to registration do not give you ownership - only registration gives you ownership)

### Volunteers

- A volunteer is one who does not provide valuable consideration.
- Controversial decision: volunteers gain indefeasibility on registration: Bogdanovic v Koteff 386
  - In that case, the interest of the testator's beneficiary son (a volunteer) prevailed over the interest of an earlier unregistered life estate holder, because the son, on registration, obtained an indefeasible title that defeated the unregistered life-estate holder's interest.
  - Arambasic v Veza (No 4), applying Bogdanovic, that **notice** by the registered volunteer did not preclude the volunteer gaining immediately indefeasible title

### Ambit of indefeasibility

There are two issues here:

1. An interest that is uncertain or does not meet the criteria for validity for that interest is not somehow made valid by registration.
- Example: at common law an easement has 4 criteria for validity: if any of these are missing then it is not a valid easement. Registration will not somehow make the easement valid where it would otherwise not be: Bursill v Berger
  - An application could be brought to the Supreme Court to have the interest declared invalid and it would then be removed from the register.

2. Even if an interest is considered to be indefeasible that does not mean that every provision in the instrument will receive the benefit of indefeasibility
  - Example: if a lease is registered and receives the benefit of indefeasibility, does that mean that every covenant in the lease receives that benefit? What about, say, an option to renew?
  - Barry v Heider, certain unregistered interests are enforceable against the registered proprietor

Fraud:

### **S43(1) RPA**

Purchaser from registered proprietor not to be affected by notice:

'... [e]xcept in the case of fraud no person ... dealing with ... the registered proprietor need inquire into the circumstances surrounding registration' and nor does any person need 'to see to the application of the purchase money' or be affected (direct or constructive) by notice of a trust or unregistered interest.

- The purchaser's interest in land (bought from a RP) is not to be affected by actual or constructive notice of any unregistered interests and they need not inquire further than the Register; knowledge of unregistered interests of itself shall not be imputed as fraud.

### **Fraud checklist:**

- S42 + s43
- Can the fraud be brought home to the registered proprietor?  
If the fraud was by an agent can that fraud be imputed to the registered proprietor?
- Was there fraud?
  - Was there actual fraud? Dishonesty; moral turpitude
  - Was there notice + sufficient conduct to constitute fraud?
  - Was there knowledge of fraud?
  - Was there wilful blindness?
- When was the fraud?
- Section 118(1)(d)(ii)? Are they a volunteer, making the fraud exception valid?

Fraud:

- S43 - you don't have to ask if it is a void instrument or how the title came into being, can simply just rely on the Register. You are not affected by notice unless there is fraud
- Fraud excludes fraud determine purely by actual or constructive notice
  - Constructive notice - logically assume something i.e. based on inquiries

### **Who has to be fraudulent?**

1. For there to be an exception to the indefeasibility of the registered proprietor the fraud must be brought home to that registered proprietor.
2. So fraud must be on the part of the new registered proprietor or an agent
  - So fraud in earlier transactions are not relevant

- Agency - agency means one party (the principal) grants another party (the agent) authority with respect to certain matters to act on their behalf with third parties – think real estate agent: Cassegrain; Schultz v Corwill
  - ‘proof of agency in this context requires more than merely the fact that someone acted for the interests of another’

#### Agent has knowledge of the Fraud

- Mere knowledge of the fraud by the agent is not enough. That knowledge must be brought home (i.e. imputed) to the principal: Schultz v Corwill
  - Express knowledge is imputable, not constructive. There is a duty on agents to communicate express knowledge to the principal, therefore there is an irrebuttable presumption of communication.
- However, if the fraud is that of the agent herself, then the principal is entitled to bring evidence to rebut the presumption and prove ignorance of the matter because it can't really be argued logically that the agent actually told the principal of her own fraud.

#### Cassegrain:

- G owned land. C was a director of G's company holding the land fraudulently transferred to him and his wife F as joint tenants. Then transferred it for \$1 to his wife.
  - Director is an agent for the company but is separate legal entity from it
  - C committed fraud, but wife F had not (current registered proprietor)
- In Cassegrain, the High Court concluded that s 42 fraud could not be ‘brought home’ against Felicity Cassegrain, and so the **first transfer** of a joint interest in the ‘Dairy Farm’ to her was **indefeasible**. However, the **subsequent transfer** of Claude's interest to Felicity **was defeasible** by virtue of fraud s118(1)(d)(ii)
- The HCA confirmed that if fraud by an agent can be brought home to the registered proprietor, the RP's title would be defeasible.
  - Just because C was the one who undertook the transaction and registered on her behalf, this did not make him her agent. She was a ‘passive recipient’ of the interest. The agent does not need to be appointed, but one who provides the passive recipient with the interest to classify as such.
  - Claude Cassegrain had been the driving force behind the transaction; in every way, he had facilitated the registration on her behalf. However, the court found that Claude was not Felicity's agent.

#### Schultz v Corwill

- S deposited money with G (solicitor and secretary of S's company holding the land) to invest in land using a mortgage. G forged the mortgage over the land with company seal and CT, and took the money. Galea tricked Schultz into signing a discharge and told her he would reinvest the money. Schultz wanted a declaration that the mortgage was enforceable.

Fraud committed by agent.

**Memoranda examples:** telegram, letter, written offer, recital of the transaction in a will (268)

- In *Stellard Pty Ltd v North Queensland Fuel* - the exchange of emails = memoranda
- In *ANZ v Widin* - parties executed a mortgage document that did not include any details of the title, not read together
  - In *Perpetual Trustee v Motive Finance*, four documents could be read together

Transfer an Interest in land

Specific Performance (SP):

- principal means by which contractual obligations are enforced in equity if P cannot be adequately compensated by an award of damages at common law
- As land is considered unique, damages will be an inadequate remedy
- *Lysaght v Edwards* [1876]
- When there is a valid contract of sale, ownership has passed, and the vendor has right to the money (else retain possession), the vendor is a 'naked or bare trustee, or a mere trustee' (w/o beneficial interest) and mortgagee is not owner of the estate but entitled to possession of the estate.
- L before death entered into a contract to sell land in writing, settlement had not occurred. Sale of land was an enforceable contract subject to an order of SP. Present owner becomes trustee for the purchaser and the purchaser acquires equitable interest in the property.
- **Unpaid vendor's lien:** When the vendor has received a deposit, an equitable interest arises (security interest allows possession until they receive remainder of the purchase price on settlement)

Equitable Lease - *Walsh v Lonsdale* (1882)

1. Where parties have entered into a written agreement, which fails to comply with the formal requirements (i.e. not in a deed as required by s 23B); or have engaged in sufficient acts of part performance (s 23E)
2. And a court would grant specific performance on the agreement;
3. That an equitable lease arises based on - 'treat that as done which ought to be done'.

Priority contests:

*Succinct:* Olivia is the RP of an easement: s41. B has a prior registered mortgage, etc.

A part of the advice might be to lodge a caveat (not register) or priority notice

- Short-term lease does not have to register but can

**Scaffold structure**

Step 1: Identify the relevant interests e.g. a tenant under a lease, a mortgagee, the interest of a purchaser under a contract for sale.

Step 2: Identify whether those interests are legal or equitable.

Step 3: Identify which interests are actually in competition with one another (cf subsequent slide).

Step 4: Apply the applicable priority rule.

## Step 2: Are the interests legal or Equitable?

Legal Interests:

- For Torrens land: Interests that are registered or short-term leases (under 3 years) which meet the requirements of s 23D(2).

Equitable Interests:

- Unregistered Torrens Interest (except a lease under 23D(2))
- Interests in writing (per s 23C(1)(a));
- Interests which are enforceable through Part Performance (s 23E(d));
- The interest of a purchaser under a signed contract for sale.
- A lease arising under the doctrine in Walsh v Lonsdale;
- A Vendor's Lien (i.e. the vendor's right to be paid the outstanding purchase price);
- Equitable mortgage by deposit of title deeds.

## Step 3: Which interests are actually in competition?

Ask: Which type of right are the parties seeking to enforce?

- 1) Possession: A tenant living upon the property, and a purchaser seeking to obtain vacant possession of the land are both competing for possession. The tenant wishes to remain, and the purchaser wishes to evict them.
- 2) Repayment: Two mortgagees may be competing against one another to determine who should be repaid first from the proceeds of sale.
- 3) Use of the land: A new Registered Proprietor may discover that another party is using their land pursuant to an easement, covenant or profit a prendre. Should the registered proprietor be subject to the exercise of this right?

## Step 4: Which Priority Rule applies

- A) Registered Interest vs Registered Interest: the interest registered first will prevail.
- B) Registered Interest vs Unregistered Interest: the registered interest will prevail unless an exception to indefeasibility can be established (cf Topic 2).
- C) Two Unregistered interests: if both interests are equitable, the first in time will prevail, subject to an examination of the merits.
- D) Two Unregistered Interests, where the latter is a Purchaser of the land: s 43A. If 43A does not apply, Rule C will be applied.

Equitable interest > equitable interest without notice > mere equity > equitable interest with notice:  
Double Bay v AW Holdings

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**A) Prior vs Later Legal: s36(9) RPA** - registered dealings affecting the same land = first in time rule.

**B) Prior Legal vs subsequent equitable**

- Rule: Legal will prevail unless evidence of conduct which led to creation of the later equitable interest
- Fraud: “where the owner of the legal estate has assisted in or connived at the fraud” (Northern County v Whipp)
  - Gross negligence “omission of ordinary care” could be sufficient to postpone but “any mere carelessness or want of prudence” is not enough
- Negligence: where the failure to procure the title deeds makes them guilty of negligence: Walker v Linom

### **Northern Counties Of England Fire Insurance Co V Whipp (1884)**

C (manager of N Co) gave mortgage to N Co by giving title deed. C had one of the 2 keys and w/o N Co knowing, used the deeds to grant 2nd mortgage to W (no notice of earlier mortgage)

- Issue: should N have its priority postponed to W due to its negligence conduct. Held: No. The “great carelessness” is not evidence of fraud since P never combined with C to induce W to lend their money (didn’t even know about it).
  - The carelessness was likely to injure and not benefit N Co - thus not fraud
- \*\*Two categories of case for title deeds (slide 32)

### **Negligence?**

“No case has been cited in which the legal mortgagee has been postponed by reason of negligence in the custody of the deeds....:

1) Prior legal estate will lose to a subsequent equitable estate:

- where the owner has assisted in or connived at the fraud which has led to the creation of the equitable estate” OR “the omission to use ordinary care in inquiry after or keeping title deeds”..; [or]
- (b) where the owner has constituted the mortgagor his agent with authority to raise money, and the estate thus created has by the fraud or misconduct of the agent been represented as being the first estate or the agent otherwise exceeds his/her authority.”

### **Walker v Linom [1907]**

Facts: W was the holder of a fee simple which he put in a trust. The solicitors took the title deeds but W retained the deed which conveyed the land and mortgaged the land to B, who subsequently sold it to L. Held: Trustees were postponed to Linom.

- Gross negligence is sufficient to postpone an earlier legal interest. It was gross negligence of the trustees not to have taken safer custody of the documents.

### **c) Prior Equitable vs subsequent Legal**

- Rule: A bona fide purchaser for value without notice, will prevail against an earlier equitable interest. *Pilcher V Rawlins (1872) fraudulent mortgage*
- “bona fide” - without fraud, “for value” – monetary consideration
- “without notice” - Actual, Constructive or Imputed (solicitor → client)



- Under 43 RPA - must be actual notice, constructive notice not enough to impeach good title
- Notice – Conveyancing Act s 164 **for old title** (slide 39)

For Torrens Title – search the register (s 53)

- Inspection of the land
- To ascertain who is in possession (e.g., a tenant) or
- Who is using it (e.g., holder of an easement): cf rule in Hunt v Luck [1902] 1 Ch 428

### **Pilcher V Rawlins (1872)**

P held money (in someone's trust) and gave to R in exchange for mortgaging R's land. They fraudulently mortgaged it again to Stockwell (made title w/o first mortgage shown). Held: S succeeded (against the beneficiaries) - by acting bona fide in granting the mortgage without knowledge that a prior estate existed.

- Sir G Mellish LJ: 'where a trustee in breach of trust conveys [to]... a purchaser for valuable consideration without notice, the purchaser can hold the property against the cestuis que trust who were defrauded by the conveyance ...'
- Sir WM James LJ: where "a purchaser for valuable consideration, without notice, obtaining, ...some legal estate...such a purchaser's plea of a purchase for valuable consideration without notice is an absolute, unqualified, unanswerable defence"

### **Smith v Jones (1954)**

Tenant (S) argues structural damage in property to new landlord (J). Prior equitable interest (right to rectify the agreement) vs new purchaser's interest. Held: No constructive notice - J is only bound to look at the contract terms, not visibly apparent of structural damage.

- At first instance, it was determined the plaintiff was liable, but suggested that he may have a claim to rectify the tenancy agreement to impose liability for structural repairs on the defendant. The Defendant argued that he was not liable to any rectification claim (an equitable interest), because he was a bona fide purchaser without notice.
- Held: Court disagreed with the tenant. "the only relevant inquiry (done by D) would have been to look at the agreement... The defendant was not bound to go through the document step by step. The defendant is entitled and bound to rely upon the terms of the document, and the document speaks for itself."

### **D) Equitable vs Equitable: Breskvar?**

- Rule: First in time if the merits are equal

### **Breskvar v Wall (1971) - see above**

The conflict was between the interest of Breskvars and the interests of Alban Pty Ltd.

Held: Despite the fraud flowing from the void transfer, the Breskvars were unable to have the register amended. Their equitable interest was postponed to Alban Pty Ltd.

## Co-ownership at law and in equity

- Interests in joint tenancies and tenancies in common can exist separately at law and in equity

## Creation of co-ownership

Indefeasibility upon registration: A registered estate in fee simple for tenants in common / co-owners gain indefeasibility: *Cassegrain*

At common law – presumption of joint tenancy - do we still need to mention this?

Default rule

1. Instrument/will presumption
  - An instrument transferring beneficial interest in property to two or more persons together is presumed as transferring a TIC: s26(1) CA
    - Where there is no instrument, this section does not apply
    - Presumption that interests are to be taken as TIC in situations involving mortgagees (*Minter v Minter*)
2. s26(1) applies to law and equity (*Delehunt v Carmody*) UNLESS an exception applies
  - Where there is no instrument, equity might enforce the s26(1) presumption (i.e. if there is an oral trust: *Carmody*)

Express provision for JT:

- S 26(2): s 26(1) does not apply where the instrument expressly provides they are to take as joint tenants (as long as they are joint tenants – ie four unities are present): *Hircock*

Under a will, the two people have to take under the same instrument and at the same time (i.e. turn 18 at the same point) for it to be JT. There must be ALL four unities.

- They don't actually have to be in possession but just get the right to possession at the same time.

## **Delehunt v Carmody**

C was separated from his wife. Lived with Ms D. Mr C entered into a contract for an estate in fee simple and became the **sole** RP. C and D contributed equally to the deposit and instalments. Agreement: the property was to be held on trust for them in equal shares, as **joint tenants**. C died and his wife obtained letters of administration transmitting the property to her. **HC held** the property was on trust for Mr C and Ms D as TIC **in equity**.

- There was **no instrument** to transfer the interest to D, just an **oral** trust for D as beneficiary, so only equity gave her an interest
- Mrs C became sole owner at law, but in equity she only had ½ in equity as TIC since D retained the other half in equity as TIC.

## **Reg. proprietors = JT s100(1) RPA**

Two or more persons who are registered as joint proprietors of an estate / interest in land, shall be deemed to be entitled to the same as joint tenants.

- AKA: a registered joint proprietor has all the rights of a joint tenant: *Hircock Homes*

- Including the right of survivorship!

### JP/JT Presumptions in equity

“equity follows the law” unless...

1) unequal contribution to purchase price

2) Advance money on a mortgage

- Usually equity will follow the law, but equity may find a TIC (of the beneficial interest in the property) where money is advanced on a mortgage (*Re Jackson*)

3) Partnership assets

Same JT in law, but are TIC in proportion to their contributions in equity

- In equity, a constructive trust will arise, with either mortgagee accepting repayment on behalf of both of them for the benefit of each then held on trust in proportion to their initial contribution.

### Unequal contribution to purchase price

- A and B are registered as joint tenants. However, A pays 70% and B pays 30% of the purchase price. At law they are joint tenants (they are **registered** as joint proprietors), but in equity they are tenants in common in 70/30 shares.

### Advancement of money on a mortgage

- A borrows money from B and C, secured by mortgage. B and C are **registered** as joint proprietors of a mortgage. At law B and C are joint tenants. In equity B and C are tenants in common in proportion to their contributions to the money lent.
- By ss96A, 99 CA 1919 (NSW), a joint account clause is implied in mortgages, making mortgagees joint tenants for the purposes of repayment of the loan by the mortgagor

### Partnership assets

- A and B go into business. They purchase premises from which to run their business. They are **registered** as joint proprietors. At law they are joint tenants (proprietors). In equity they are TIC in proportion to their contributions to the purchase price.
- Note: this assumes they have entered into a partnership as legally defined.

### Severance (JT -> TIC)

- Ends joint tenancy by converting it to a tenancy in common
- It does so by destroying one or more of the 4 unities (except possession)
- Ends the right of survivorship (because there is no longer a joint tenancy)

### Unilateral act: alienation (transfer) - *Wright v Gibbons*; *Corin v Patton*

- Alienation severs the joint tenancy (where there are 2 or more co-owners - otherwise if one person severs, other co-owner becomes sole proprietors)
- To be effective at law the transfer must be registered
  - If the transfer is not registered the alienation may still be effective in equity: *Patton*