

MLP325

Land Law Notes

Creation Requirement and Priority

Interests in Land

- Legal right or interest is a recognisable common law right created in accordance with the requisite formality requirements. Land interest can take several forms:
 - o **Freehold Title**: encompasses fee simple or life estate.
 - o **Security Interest**: interest retained by a mortgagee bank over property of a lender.
 - o **Non-Freehold Estate**: includes leases, where you have exclusive possession for a defined period of time.
 - o **Intangible Right**: This can include, for example, an easement (a right held by someone to use land belonging to someone else for a specific purpose)
- **When are different types of legal right legal and when are they equitable?** – important to recognise this in order to apply priority rules if there is a conflict.
- **Equitable interest** *can arise even where legal requirements have not been satisfied provided a person complies with one of different ways in which equity recognise those interests, including part performance, estoppel.*
- **The doctrine of estates** includes *future interests*: where there is no right to possession until a future time, including reversions (back to grantor); remainders (to a third party).
- **All legal interests over land must be in the form of a deed otherwise not legal; s 52(1)** Property Law Act 1958 (Vic) - **S 52(2)** provides **exceptions** and **s 54(2)** PLA sets out leases not required to be in writing/deed such as oral leases for 3 years and under – lease will still be legal even though it is not executed by a way of deed if it is in accordance with writing requirements for setting up leases.
- However if fee simple is being provided and not executed by a deed it will not be legal interest
- **How legal interest is acquired:**
 - o Vendor (seller) given the purchaser legal interest by purchaser signing a contract and paying a deposit.
 - o Purchaser then gets an equitable interest/equitable lien NOT a title because signed contract simply states what purchaser will do.
 - o Equitable interest arises to protect preliminary legal relationship that parties have entered into – to prevent vendor from selling property to someone else who offered more.
 - o Purchaser does not get legal interest until settlement and until it has been registered.

Conveyance

- Conveyancing is **transfer of ownership of a property from a seller to a buyer** – parties usually hire a third party, a lawyer or conveyancer to make transfer.

- **S 18 PLA** defines conveyance to include – mortgage, charge, lease, assent, declaration etc.
- Conveyance not restricted to formal deed or transfer

s 52 Conveyance to by deed

(1) 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**.

(2) This section shall not apply to— **Exceptions**

- (a) assents by a personal representative¹⁷;
- (b) disclaimers made in accordance with the provisions of any law relating to bankruptcy or insolvency¹⁸ or not required to be evidenced in writing;
- (c) surrenders by operation of law, including surrenders which may, by law, be effected without writing;
- (d) leases or tenancies or other assurances not required by law to be made in writing;
- (e) receipts not required by law to be under seal;
- (f) vesting orders of the Court or other competent authority
- (g) conveyances taking effect by operation of law

s 54 Creation of interests in land by parol

(1) All interests in land created by parol and not put in writing and signed by the persons so creating the same, or by their agents thereunto lawfully authorized in writing, shall have, notwithstanding any consideration having been given for the same, the force and effect of interests at will only.

(2) Nothing in the foregoing provisions of this Division shall affect the creation by parol of leases taking effect in possession for a term not exceeding three years (whether or not the lessee is given power to extend the term) at the best rent which can be reasonably obtained without taking a fine.

s 18 conveyance

(1) conveyance includes a mortgage, charge, lease, assent, vesting declaration, disclaimer, release, surrender, extinguishment and every other assurance of property or of an interest therein by any instrument, except a will; convey has a corresponding meaning;

Deed

- **Manton v Parabolic (1985) 2 NSWLR 361 CB** [10.4 textbook] – deed is most solemn act a person can perform with respect to a particular property.
- Common law required a deed to be signed by both parties, sealed and delivered – It must be executed by grantor in presence of prescribed number of witnesses, known as instrumental witnesses – seal must be affixed to deed – **s 73 PLA** states it must be signed or marked – sealing alone is insufficient – **s 73A PLA** – if deed expressed to be sealed shall have same effect as if it has been.

TOPIC 3

Statutory Exceptions to Indefeasibility: Statutory Fraud

Registered proprietor could be a holder of fee simple or holder of a mortgage

Statutory Exception to Indefeasibility

- **S42** TLA sets out Estate of Registered Proprietor paramount unless:
 - . Fraud (see s44 TLA)
 - . Prior folio or certificate of title; **s44(1)(a)**
 - . Erroneous description of land; **s44(1)(b)**
 - . Paramount interests; **s44(2)**
- If a statutory exception is established, title of registered proprietor can then become indefeasible.
- Exception to indefeasibility; see **s 42(1)**
- Exception to the doctrine of notice; see **s 43**
- **s 44(1)** defines effect of fraud – ie it will void against person defrauded and no party privy to fraud can benefit from it.
- Fraud will not affect a bona fide purchaser for value; **s 44(2)** – if you are bona fide and have given consideration, purchaser can include someone purchasing a fee simple or someone acquiring security, you are not going to be affected by fraud if you are bona fide and have given value.
- No statutory definition of fraud – look at general law: i.e. common law or equity
- Mere notice does not constitute fraud: **s 43** – just because you have knowledge that someone has interest in a property does not mean knowledge is fraud.
- Fraud must be brought home to registered proprietor/interest holder to operate – RP must have been involved in the fraud, if fraud merely taints transaction, then immediate indefeasibility will protect RP

Fraud

- Fraud in TLA is broader than common law fraud which requires proof of deceit
- Fraud in TLA more akin to equitable fraud – ie wherever an unfair consequence may arise
- Fraud where: intend to deceive; suspicions are aroused; even if RP have wilful ignorance: *Assets Co Ltd v Mere Roihi* [1905] AC 176
- Fraud where you act inequitably; *Nocton v Lord Ashburton* [1914] AC 932.

Loke Yew v Port Swettenham Rubber Co Ltd [1913] AC 491

- Rubber Co bought land from RP and RP who owned this land had allowed Loke Yew to occupy the land for a period of time.
- Rubber Co had agreed with RP not to disturb LY's occupation of the land;
- RP sold on the basis that LY's occupation would not be disturbed – Rubber Co became registered
- Rubber Co then sought to remove LY despite previous assurance with RP
- Issue: does breach of contract constitute statutory of fraud?