Gift

Legal interest

For X to have indefeasible legal interest in [land] in the TT system, the gift transferring such interest must be complete; X must be a registered proprietor RPA s 41(1).

IF REGISTERED, RP WITH INDEFEASIBLE TITLE.

IF NOT REGISTERED, NO LEGAL INTEREST. SEE IF THERE CAN BE AN EQUITABLE INTEREST BELOW

GO TO WHICHEVER TYPE OF GIFT APPLIES

(a) GIFT
(b) GIFT IN CONTEMPLATION OF DEATH AKA DONATIO MORTIS CAUSA
(c) GIFT PER STRONG V BIRD

Equitable interest

For X to have an equitable interest in [land] in the TT system, the donor must have:

(a) Done all that is necessary to have been done by them to transfer legal title, and
(b) Done whatever is necessary to put the transfer beyond their recall
(c) Given the transfer to the donee with the intention of parting with the property in it (Corin v Patton).

In essence, this requires the donor to have given the donee an executed and registrable transfer, and to have done whatever the donor needs to do to make the certificate of title irrevocably available to the donee or to the Reg-Gen to enable the donee to lodge the transfer of registration (Corin v Patton).

Where the donor has taken these steps, the donee is then free to attend the registration unaided by the donor. Since the donee is equipped to achieve a transfer of the legal (registered) interest, the gift is complete in equity (Corin v Patton).

A voluntary promise to do these things is not sufficient, even if made under seal (Dean v Westham).

CF WITH BELOW CASES

<u>Corin v Patton (gift complete)</u>

- Facts: A husband, as a surviving joint tenant (under a joint tenancy with his recently deceased wife) gave the donee a signed but unstamped transfer, plus the certificate of title. The donee could pay the stamp duty, lodge a notice of death, and apply to become registered as proprietor.
- Held: gift complete

<u>Costin v Costin (gift incomplete)</u>

- Facts: one of two joint tenants had executed a transfer in favour of the donee and authorised the person holding the certificate of title to produce it at the Land Titles Office to enable

registration of the transfer, but that person refused to do so without the authority of both joint tenants
- Held: there was no effective gift

NOTE – an alternative, simple solution for the intended joint tenant donor would be to declare themselves trustee of the share in writing in favour of a nominated beneficiary according to the requirements of CA s 23C(1)(b). This would appear effective to sever the joint tenancy in equity, so that on death, the surviving joint tenant would hold the share of the legal estate on trust for the volunteer.

IF SUCCESSFUL, EQUITABLE INTEREST IS ACQUIRED

If complete, it seems that the gift vests in the donee an equitable interest in the land (Corin v Patton).

Gift in contemplation of death / donatio mortis causa

By the doctrine of donatio mortis causa, a gift is effective without any formality if:
(a) It is made in contemplation of imminent death,
(b) There was delivery of the property or of the indicia of title, and
(c) The gift was conditional on the donor's death (Duffica v Mollica)
NOTE – if the intending donor recovers, the gift does not take effect (Staniland v Willcott)

NOTE – in Australia, ***the doctrine has been held not to apply to gifts of land (Watts v Public Trustee)***, although if the basis of the doctrine is a trust, it is difficult to see why it should not apply (Public Trustee v Bussell).

Public Trustee v Bussell
- Facts: Mr Bussell, seriously ill in hospital, gave his de facto partner documents relating to his house and told her she would have it if he did not recover. He later died. His partner claimed the property under the doctrine of *donatio mortis causa* (DMC). The Public Trustee argued the gift was invalid.
- Issue:Could a DMC operate to transfer an interest in Torrens system land, where the donor had delivered indicia of title and intended the gift to take effect only if he died?
- Held: The Court of Appeal held the requirements of DMC were factually satisfied (contemplation of death, delivery of indicia of title, conditional intention). However, following *Watts v Public Trustee*, the doctrine does not apply to Torrens land in Australia. The gift failed, and the Public Trustee took the property as part of the estate.
- Reasoning:
  - Contemplation of death:
    - Mr Bussell's grave illness and statement to his partner ("you will have it if I don't recover") showed a clear intention that the gift was conditional on his death. The court accepted this satisfied the DMC requirement.
  - Delivery of indicia of title:
    - Handing over property documents amounted to delivery of symbolic possession, satisfying the second element. Equity has long treated delivery of title papers as equivalent to delivery of the property itself.
  - Conditionality:
    - The arrangement was expressly conditional on his death, consistent with DMC doctrine. If Bussell recovered, the property would revert to him.
  - Limitation in law:

- Despite all requirements being factually met, the court applied *Watts v Public Trustee*, which had established that DMC cannot operate over land under the Torrens system because property law requires statutory formalities for land transfer. Thus, the claim failed.

IF SUCCESSFUL, EQUITABLE INTEREST IS ACQUIRED

If complete, it seems that the gift vests in the donee an equitable interest in the land.

Gift under rule in Strong v Bird

A gift of land can be made under the rule in Strong v Bird, which assumes the following circumstances:

(a) A person makes a purported immediate gift of specific property which fails for want of compliance with the legal requirements for transferring property from the donor to donee,
(b) The donor's will appoints to the intended donee as executor, and
(c) Up until the donor's death, the donor regards the property as ahving been given to the donee.

As [insert facts], the present circumstances are analogous. Thus, the requirements are satisfied and on grant of probate to the donee as executor, the donee takes the property free of the dispositions of the will and hld it as owner (Strong v Bird).

NOTE – The rule in Strong v Bird applies to gifts of land, including Torrens title land

IF SUCCESSFUL, EQUITABLE INTEREST IS ACQUIRED

If complete, it seems that the gift vests in the donee an equitable interest in the land

Notes on the back of a document / not in the registered document

A restrictive covenant is only enforceable against the purchaser if, 'those rights are notified on the certificate of title or by express reference to other registered instruments which contain that information'. Thereby, notes on the back of a document are not covered by indefeasibility if not registered (Deguisa).

AKA it needs to be referenced on the certificate of title/dealing.

NOTE – you should not have to go 'behind the register'.

Deguisa v Lynn

- Facts: Mr and Mrs Deguisa purchased a residential lot in a housing estate. The **certificate of title** contained a notification that the land was subject to a **memorandum of encumbrance** which set out **building scheme restrictions** (e.g. house size, design standards).The Deguisa family built a house that breached these restrictions. Neighbours sought to enforce the restrictions, arguing they were protected by the Torrens system since they were notified on the register.

- Held: The **High Court** held that the restrictions **were binding**. The encumbrance was notified on the register by reference, which was sufficient to incorporate it into the registered title and give it **indefeasibility**.
- Reasoning:
    - Register is everything:
        - Purchasers are bound by interests that are either **expressly notified on the certificate of title** or **incorporated by reference to other registered instruments**. No need to conduct further inquiries beyond what the register discloses.
    - Effect of registration:
        - The memorandum of encumbrance was specifically referred to on the title, so it became part of the registered interest. Indefeasibility attached to those restrictions, making them enforceable against successors in title.
    - Policy:
        - This ensures clarity and certainty in land dealings: whatever is on the register (or incorporated by reference) binds future proprietors.

IF SUCCESSFUL, EXCEPTION TO INDEFEASIBLE INTEREST IS FOUND

IF UNSUCCESSFUL, INDEFEASIBLE INTEREST IS INTACT

Misdescribed instrument title on folio, but the details are correct

In this instance, [interest] is described/identified as [description] in the folio.

As it is expected that a prudent purchaser, encountering the reference on the folium to a transfer described as [e.g. granting a right of way] would inspect the transfer (held at the Land Titles Office) to ascertain the nature of the rights conferred, it is not intended that the folium alone should 'provide a purchaser… with all the information necessary to be known to comprehend the extent or state of [the] proprietor's title to the land" (White v Betalli).

NOTE – don't go beyond these immediate indicators

Under the present wording of RPA s 42(1), this misdescription will not constitute an exception to the indefeasible interest of X over [land] if:

(a) The folio states the registration number of the dealing creating it and identifies the itnerest (even if only in generic terms) (R v Recorder of Titles)
(b) The recording refers to another folio of the register where the registration number of te dealing is stated and the nature of the interest identified (White v Betalli),
(c) A chain of certificates can be linked to disclose an interest (Registrar-General v Cihan),
    (i) E.g. where an interest (such as an easement), noted on one folio, that referred to another folio which described it in more detail but without all relevant particulars. As long as there is a further notation on that folio to another certificate where full details can be ascertained, the recording is complete (Registrar-General v Cihan)
(d) NOTE – NOT SUFFICIENT for the folio merely identify the interest without also stating the dealing number from which its terms can be ascertained (Siemenski v Brooks Nominees)

Has the conveyancer conducted reasonable searches?
If the conveyancer has not conducted reasonable searches that is no bar to the finding of an exception on these grounds.

Bursill's case

- Facts: A registered transfer described the land as granting a right of way but actually also included a fee simple interest in the airspace above that land. On the folio, only "right of way" was noted; the airspace transfer was not spelt out.
- Held: interest was sufficiently notified, so it did not defeat indefeasibility → did not cut down the right of the RP to be subject to the rights of other proprietors over the right of way and airspace – it is binding on subsequent purchasers
- Reasoning:
  - HCA said the airspace transfer was still "sufficiently notified" because:
    - A prudent purchaser would see the folio reference to the transfer, and
    - They would inspect the transfer itself at the Land Titles Office
  - So the register did not need to contain EVERY DETAIL as long as the dealing number and enough description was there to let you trace the rights.
  - It was "sufficiently "notified" or "recorded" in the folio of the register if the folio:
    - States the dealing number of the instrument, and
    - Identifies the interest (even in only generic terms)

R v Recorder of Titles

- Restrictive covenant was sufficiently described as a "condition"

White v Betalli

- By-laws were sufficiently recorded in the folio of the register for a lot in a strata plan, where that folio referred to interests recorded on the folio of the register for the common property, and the folio of the register for the common property directed attention to the by-laws filed with the strata plan

Registrar-General v Cihan

- Easement noted on burdened land referred to earlier folio, which contained details of rights, but no dominant tenement; however there was reference to a "Last Certificate Vol 1022 Folio 161" which did identify the dominant tenement
- Held: easement was recorded

Siemenski v Brooks Nominees

- Folio referred to "conditions" in Transfer No 128440. That transfer in turn said that the land was subject to covenants mentioned in a given certificate of title, but that certificate of title, while stating the effect of covenants which it said bound the land, gave no indication of how or by what instruments the covenant had been created

IF SUCCESSFUL, EXCEPTION TO INDEFEASIBLE INTEREST IS FOUND

IF UNSUCCESSFUL, INDEFEASIBLE INTEREST IS INTACT