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- Gaudron, Gummow and Hayne JJ reasoned that the Western Lands Act grants were “leases” in the strict proprietary sense, conferring a right of exclusive pS. Because exclusive pS was inconsistent with the enjoyment of NT rights, NT was extinguished.
 - They stressed that the **statutory context indicated that Parliament intended the rights granted to pastoral lessees to exclude others, including native title holders.**
 - They acknowledged that earlier case law, such as Wik, had left open the possibility that some pastoral leases might not extinguish NT, but distinguished the NSW statutory regime on the basis that its **language and structure clearly gave lessees exclusive possession.**
- Kirby J dissented. He argued that the term “lease” in the Western Lands Act did not necessarily equate to exclusive pS and should be construed consistently with the principle of recognition of NT
 - He emphasised that the statutory grants could be understood as conferring rights of pastoral use without necessarily extinguishing NT. Kirby considered that the majority’s approach placed too much weight on formalism and failed to take account of the underlying purposes of the NTA and the need for reconciliation.
- Callinan J, with whom McHugh J agreed, took the view that the grants under the Western Lands Act plainly conferred rights of exclusive pS
 - He stressed that the text and **purpose of the legislation were clear** and that once such leases were granted, NT rights could not co-exist.
 - He also rejected the argument that pastoral leases could be understood as merely granting non-exclusive rights.
 - For Callinan, the “lease” terminology in its legal sense was decisive, and he gave weight to historical understandings of leases in property law.

WIK PEOPLES V QLD (1996) 187 CLR 1

4. Pastoral leases

- Concerned land in Qld in Cape York Peninsula
- 2 areas, 1000 square miles, 500 square miles
- Relevant statute in Land Act 1910
- Equivalent to a lease in perpetuity
- Argument against NT was to be understood as if the word lease was to be used in its CL sense therefore exhaust any NT
 - Majority said no
- Terms of the lease under the statute did not confer a title like a lessee held at CL

TORRENS TITLE

INDEFEASIBILITY & EXCEPTIONS TO INDEFEASIBILITY

[While instruments cannot take effect until registration as per s 41 RPA, it was made clear in Barry v Heider that equity can give effect to the rights that arise from transactions as evidenced by the instrument. While the RP takes their interest free from unregistered interests as per s 42 RPA, such interests will be binding on the RP if an exception to indefeasibility applies.] [An EI will arise where there is an enforceable transaction (e.g. formal requirements have been complied with – see full list in above section.)]

1. Extent of indefeasibility

a. Is the term or cond of the registered agrmt covered by indefeasibility?

- i. Registration does not validate all the T&Cs of the instrument which is registered. It **validates those which delimit or qualify the estate or interest or are otherwise necessary** to assure that estate or interest to the RP (*PT v Maradona*)

ii. Leases: Option to renew

1. *Mercantile Credits v Shell*:

- a. Facts: Option was valid, no Q of fraud or unlawfulness to void the instrument. Q was abt priorities.
 - i. A grants B a lease containing an option. Lease is registered. A then mGs the land to C. C has registered mG over the land.
 - ii. B purports to exercise an option to renew after the mG has been granted. New lease is created. A defaults under the mG, mGee exercises power of sale. Is the land sold free of the renewed lease or subject to the renewed lease? I.e. does the renewed lease or mG have priority?
- b. Held: even tho the mG preceded the new lease, **the new lease arose out of the option to renew in the og lease which was registered prior to the mG, therefore it is indefeasible and has priority.**

iii. mGs:

1. mGs usually incl a security interest in the land and a personal covenant to repay the entire loaned amt, so the mGor is personally liab if there is a shortfall following the exercise of a power of sale upon default (**s 58 RPA**)
2. If the mG is forged:
 - a. Indefeasibility attaches to the mG if the mGee is:
 - i. Not guilty of fraud; and
 - ii. Took reasonable steps to verify the identity of the mGor (**s 56C RPA** see PG 21 above)
 - b. Indefeasibility:
 - i. Definitely attaches to the security interest in the land (mGee can exercise power of sale);
 - ii. Might attach to the mGor's personal covenant to repay the loan amt, but the better view is that it probably is NOT covered by indefeasibility bc mGor did not actually consent/sign the personal covenant, if fraud (**Printy**)
3. Old Style vs All Moneys mGs:
 - a. ***Problem only arises when the mG and any collateral docs are forged***
 - i. Old style mG → principal amt secured stated in registered instrument (e.g. "this mG secures the repmt of \$1mn plus interest and costs")
 1. Indefeasibility attaches (**Printy**)
 - ii. All moneys mG → purports to secure money owing under unregistered collateral loan docs like personal loan, car loan, credit card debt, etc. and does NOT state specific amt:
 1. Q of **construction**, whether indefeasibility attaches
 2. Collateral loan docs cannot be registered bc they don't affect the land, they're just personal debts
 - iii. NB: these issues only arise where loan docs are forged (void, not voidable)
 1. **s 56C RPA** requires mGees to take reasonable steps to verify identity of mGor executing the mG, which would mean the forgery would need to be very sophisticated to meet this requirement, but still be forged
 - b. Cases (**Printy**; **PTV v English**)
 - i. Single borrower/mGor (**Printy**)
 1. **Single borrower/mGor all moneys mGs are going to be unenforceable bc the charge secures nothing and**

- ii. mG was in the form of an absolute transfer doc. MrsH was registered as owner of the land, not mGee of the land
- iii. Transaction was in substance a mG, so the Ls retain an EI in the land - equitable redemption of title. Also happened in *Ciaglia* (disguised mG - in substance it is a mG, but it is disguised as an absolute transfer)
- iv. Mrs H is RP of the land, she grants mG to A. mG is unregistered. A thinks they are getting the mG from the holder of the fee simple, but they are in fact getting mG from another holder of a mG.
- v. Priority contest b/w prior interest of Ls (unregistered equity of redemption) and later interest of A (unregistered equitable mG)
- vi. Held → Ls interest postponed to the As due to postponing conduct
- vii. **Postponing conduct → Ls armed MrsH w the ability to go out into the world under 'false colours'** - she was able to represent herself as RP of the land - whereas in equity, she is only the mGee of the land

c. *Breskar v Wall* → Void instrument (distinct from voidable instrument)

- i. Bs execute a transfer in blank. Name of W is fraudulently inserted into the transfer. W is registered - he's guilty of fraud (party to the fraud). W contracts to sell to Albans. Contract of sale is settled, but transfer of title is not registered. Executing transfers in blank were void under Qld Stamp Act
- ii. Priority contest b/w unregistered interest of Bs (right to have the register corrected - bc W's title defeasible as he was party to the fraud) against later EI of As (unregistered transfer pursuant to a completed contract to purchase)
- iii. Held → earlier interest postponed to later interest
- iv. **Postponing conduct → signing the transfer in blank and handing over the CT ultimately misled As into believing W was the unencumbered proprietor and no other interests existed**
- v. Note:
 - 1. Bs have a right to be restored the register bc the person shown as RP has defeasible title (fraud). That gives them a prior equitable interest in the land. Some discussions by the court here abt whether right to be restored to the register is a mere equity rather than an equity (bc it requires a suit by the Bs to enforce this right), but the Court decides they will assume it is a full EI bc it will lose anyway

d. *Heid v Reliance Finance* → 'disclaimed' vendor's lien

- i. Heid was RP of land, sold to C Investments. H handed over (to an em/ee of CI) a CT of the land and a transfer that included an acknowledgement that H had received all purchase moneys due under the contract. Most money was outstanding
- ii. H had vendor's lien over the property (unregistered EI) that was binding upon CI whose conduct led to creation of the v/or's lien. B4 CI's interest was

LEASES & LICENCES

(1) What are the substantive requirements?

- (a) **Certainty of duration** (*Prudential Assurance*)
- (b) **Exclusive pS** (*KJRR*)

(2) What are the formal requirements for the creation of a lease?

- (a) In law? In equity?
- (b) OS? Torrens?

(3) Types of tenancies?

- (a) Note - possibility of equitable lease for a term and a periodic tenancy at law based on payment of rent - effect of **s 127 CA?**

(4) Is it a licence or a lease?

(5) Rights and duties of landlord/tenant?

- (a) Expressed in lease
- (b) Implied by statute
- (c) At CL

(6) Assignment or subletting?

- (a) Landlord's consent

(7) Enforceability of covenants

- (a) Privity of estate
- (b) Requirement that covenants touch and concern the land
- (c) Effect of **s 51 RPA**
- (d) Effect of **ss 117, 118 CA**

(8) Remedies for a breach

(9) Termination by re-entry

- (a) Procedural requirements - **s 129 CA?**
- (b) Effect of repudiation
- (c) Relief against forfeiture

STEP 1 → WHAT ARE THE SUBSTANTIVE REQUIREMENTS?

[1] [A valid lease requires both certainty of duration (*Prudential Assurance*) and the grant of exclusive pS (*KJRR*).]

1. Certainty of duration (*Prudential Assurance*)

- a. Commencement date must be certain or capable of being rendered certain prior to lease commencement.
 - i. 'Capable of being rendered certain' provides some flexibility
 - 1. It is acceptable to have a lease that commences on complete of construction of a building. This is usually defined as 'the date on which the architect issues cert of practical completion' to avoid ambiguity
- b. Maximum duration must be certain at the start of the lease

	necessarily enforceable against third parties due to the grantor's lack of title. This is a non-lease estate. ● Criticism: While it may be 'putting the cart before the horse' to determine a lease based on the proprietary nature of the interest, it is inherent in a lease that it is proprietary so the concept of non-estate leases is antithetical.
	KJRR: Lease Exclusive pS case ● Sportsco was the lessee of a shop in a shopping complex. Sportsco entered into two agreements with KJRR: franchise agreement to conduct a Sportsco shop and licence agreement that entitled KJRR to use that leased shop. ○ Licence agreement terms: KJRR was allowed to use the shop for the term of the remaining Sportsco lease less one day. Licence fee was equal to the amount Sportsco was obliged to pay under its lease to the owner of the shopping centre. Structured as a licence, rather than a sub-lease. ○ Victorian stamp duty authority assessed the licence agreement and determined it was actually a lease for tax purposes because the licence fees were actually rent. ● Held: Agreement was a licence not a lease Reasoning: ● Court held that cl 2.3 (which stated KJRR received contractual rights rather than proprietary rights) was of little to no effect – instead the court would look at the substantive rights to determine the nature of the transaction. The rights the parties intended to have is substantive, not based on formal declarations ● Court looked at cl 2.2, which stated KJRR was not granted a right to exclusive possession. Court was bound to follow this express statement of an intention to grant exclusive possession, unless there was a cogent reason for the clause to be disregarded. Two possible reasons: ○ “Sham” doctrine is established on the facts ○ Court looked at the relationship between the parties as a whole. ○ Not a sham here because there was no evidence of surrounding circumstances that would indicate the clause denying right to exclusive possession was intended by the parties to have no effect. ○ In fact, there was circumstantial evidence that the contrary was true: there were sound commercial reasons for why a franchisor might want to deny the franchisee a right to exclusive possession of the premises ■ Court read the licence agreement in the context of the franchise agreement, which was granted at the same time. Franchise agreement gave the franchisor rights to inspect or

1. It is likely the general law applies here to render this a non-delegable duty of reasonable care – the mortgagee cannot escape obligation by appointing an agent
 - iii. s 111A(4) CA: **Purchaser protection** if mortgagee breaches duty under this section:
 1. **statutory right to damages** if mGee breaches DOC and land is sold for less than market value.
 - iv. s 111A(5) CA: Section applies even if mG doc says it doesn't – **can't contract out of this provision.**
 - v. s 111A(6) CA: Nothing in this section affects the operation of any rule of law relating to the duty of the mGee or chargee to account to the mGor or chargor.
 - vi. s 111A(7) CA: applies to mortgages whenever they were made, provided that the relevant default occurred after 1 November 2011.
 - vii. s 111A(8) CA: Applies to OS and TT mortgages.
- c. **Relevant factors → has mGee breached obligation under s 111A(1)?**
- i. **Advertising:**
 1. Advertising a sale in advance to "bring subject of the sale to the notice of... probably p/ers, and so induce such competition as will be likely to secure a fair price." (*Pendlebury*)
 2. Material misstatement and material omissions leading to reduced price
 - a. *Pendlebury* → advertising was inadequate bc:
 - i. It was a rural property & not advertised in suitable locations – only advertised in metropolitan newspapers, not the local media
 - ii. There was insufficient detail abt where it was located, the quality of the soil, whether it was cleared or cropped, whether it was fenced
 - b. *Cuckmere* → advertising was inadequate bc:
 - i. Insufficient detail abt the type of development approval that had been granted (advertisement for sale only referred to approval to construct a number of houses on the land, not the number of flats)
 - c. *ANZ v Bangadilly* → advertising factors that contributed to breach (not determinative)
 - i. Timing of auction was close to Xmas – unlikely to be maximum interest from prospective p/ers
 - ii. Limited advertising of auction

ii. Valuation:

1. mGee must get a valuation to indicate the price they should be seeking (i.e. informs reserve price if sold by auction and/or advertised price range)
2. Should retain an experience & qualified valuer

iii. Genuine negotiation:

1. Auction vs private treaty
 - a. Selling by auction is more likely to be considered a proper exercise of the POS: process more transparent, it is obvious whether there is competitive bidding
 - b. Selling by priv treaty could be more acceptable depending on nature of property
2. Must follow-up prospective p/ers
 - a. **Forsyth v Blundell** → a genuine negotiation w prospective p/ers individually to drive up the price, not just choosing 1 p/er and negotiating individually

iv. Engage competent agents → mGee remains personally liable – non-delegable duty to exercise POS properly

v. Expenditure by mGee:

1. mGee not generally required to expend money on the mortgaged land but may choose to do so in order to increase likely sale price (added to debt)
 - a. mGee can make reasonable expenditure to protect their own interests (ensure proper price by making repairs) and it can be added to debt to recover on sale, but mGee cannot go beyond that by fundamentally changing the nature of the mGed land and preventing the mGor from getting back what they had given by way of mG
 - b. **Southwell v Roberts** → mGee demolished dilapidated buildings and built new buildings, expending signif amounts of money. Court agreed the mGor would be unable to effectively redeem the mG – nature of the land had changed and it made the mGor's right to redeem illusory, bc the debt would have been so large it could not be repaid.
 - i. Expenditure must not be out of proportion w mG debt
 - ii. Expenditure must not hamper the mGor's right to redeem
 - iii. Expenditure must not radically alter the nature of the land

d. Remedies for breach under s 111A(1) CA:

- i. **s 111A(4) CA** – statutory right to damages GO TO PG 108

e. Procedural issues:

- i. mGee is not under a duty to sell
 1. mGee can allow interest to accrue rather than exercise POS
- ii. Ability of mGor to apply for order of judicial sale
 1. OS: s 103 CA → mGor power to apply for court order to sell the property
 2. TT: s 103 CA does **not** apply to TT land.
 - a. Speculation that the court has an inherent jurisdiction to order sale of property at the request of the mGor if mGee declines to proceed to sell under its POS

CAN THE MORTGAGOR RESTRAIN POWER OF SALE?

1. mGor seeks an injunction to restrain mGee from exercising POS → entering into a contract of sale or conducting an auction.
2. Preliminary → does the mGor have an obligation to pay the debt into court?
 - a. **mGee's power of sale has properly arisen:**
 - i. mGor must pay debt into court if injunction is sought to restrain contract of sale being entered into
 - b. **mGor alleges that mGee's POS has not properly arisen:**
 - i. Circumstances – defective notice or improper (not an independent bargain or not reasonable care)
 - ii. Generally no requirement of paying debt into court in proceedings for an injunction to prevent contract of sale being entered into
3. **Restraining proper exercise of sale:**
 - a. Court will not restrain completion where mGee has already entered into a contract of sale pursuant to a proper exercise of the POS
 - i. Even if mGor has refinanced and can pay the debt - too late if mGee has entered into contract
4. **Restraining improper exercise of sale:**
 - a. Court must be satisfied the exercise of power was improper (see above PG 105, 106)
 - i. mGor defaulted on terms of the mG agrmt
 - ii. Notice issued under s 57(2)(b) RPA → was the **notice defective?**
 - b. Exercise of power was proper:
 - i. Transaction is a **genuine bargain**
 - ii. mGee has taken **reasonable care** to ensure market or best price
 - c. **Can mGor successfully restrain exercise of sale with an injunction?**
 - i. **Depends on stage of transaction (Forsyth):**
 1. **Priority contest b/w p/er and mGor.**

STEP 1 → IS THE INTEREST VALID? – EXPRESS EASEMENTS

[1] Both the substantive and formal requirements must be satisfied for the interest to be valid (Clos Farming).

- An interest can be formally valid (correct dealing used and registered), but not substantively valid (*Clos Farming*)
 - Facts → the correct dealing for an easement was completed and registered, but it was not valid bc it didn't accommodate the dominant land and they weren't capable of forming the subject matter of a grant.

1. Substantive Requirements:

- a. 4 substantive requirements (*Re Ellenborough*)
- b. If substantive requirements are not contentious, deal with them quickly: *[Access Way A in providing more convenient access from Lot 1 to and from the street satisfies the 4 substantive requirements for an easement per Re Ellenborough.]* Otherwise:

c. (1) There must be a dominant and servient tenement:

- i. Contrast – PAP can exist in gross (i.e. w/o dominant land)
- ii. Exception:
 1. *s 88A CA* allows easements in gross to be created in favour of the Crown or a statutory public or local authority or particular types of corporation where the easement is for the purpose of supply to the public of utilities for infrastructure facilities. Applies to TT land.
 2. *s 88(1) CA* requires dominant and servient land to be clearly identified. Formal requirement below, but it alters the position at CL where it was possible to identify the dominant land thru evidence extrinsic

d. (2) Easement must accommodate the dominant land

- i. *The easement must be reasonably necessary for the better use and enjoyment of the dominant land.*
- ii. **Satisfies the accommodation requirement:**
 1. **Increases land value** → usually if the purported easement increases the value of the dominant land, it is an indication that it benefits or accommodates the land (but this is not decisive) (*Re Ellenborough*)
 2. **Communal amenities** (communal garden) → park was a communal garden for the benefit and enjoyment of those houses that adjoined or were in close proximity... flower beds, lawns and walks afforded amenities, which is the purpose of the garden of a house to provide. It was the substitution for a priv backyard (*Re Ellenborough*)
 3. **Benefits the running of a buss** → the buss must legitimately be conducted on the dominant land. Use of the dominant land cannot be incidental to a separate buss enterprise
 - a. *Moody v Steggles* → buss was legit being conducted on the dominant land