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1. Identify Property

- 1.1. **Real property (land)** – leasehold, freehold
- 1.2. **Chattel (chose in possession), or**
- 1.3. **Chose in action** - contractual rights, debt, shares, mortgage

2. Identify which interests currently Exist in Property

- 2.1. **Identify Legal Interests**
- 2.2. **Identify Equitable Interests**
 - i. Interests under existing trusts or wills

3. Assignment of Legal Interests

3.1. Land

- a. Requirements for legal assignment
- b. If failed – equitable assignment?
 - i. Incomplete Sales (agreements to assign)
 - ii. Failed Gifts

3.2. Choses in Possession

- a. Requirements for legal assignment
- b. If failed – equitable assignment?
 - i. Failed Gifts

3.3. Choses in Action

- a. Can the chose in action be assigned?
- b. Requirements for legal assignment
 - i. General requirements to assign both equitable and legal choses in action
 - ii. Requirements for choses in action re land
- c. If failed – equitable assignment?
 - i. Failed absolute assignments
 - ii. Partial assignments
 - iii. Failed Gifts
 - iv. Incomplete Sales (agreements to assign)

3.4. Assignments of Future Property

- a. Is it current or future property being assigned?
- b. If current – can it be assigned at law or equity? (go to normal chose in action – 3.3(b))
- c. If future – can it be assigned in equity?

4. Assignments of Equitable Interests

4.1. Creation of new equitable interests

- a. Any created through failed legal transfers (above)
- b. Declarations of Trust
- c. Wills (interest created upon death)
- d. Agreements to Declare Trusts

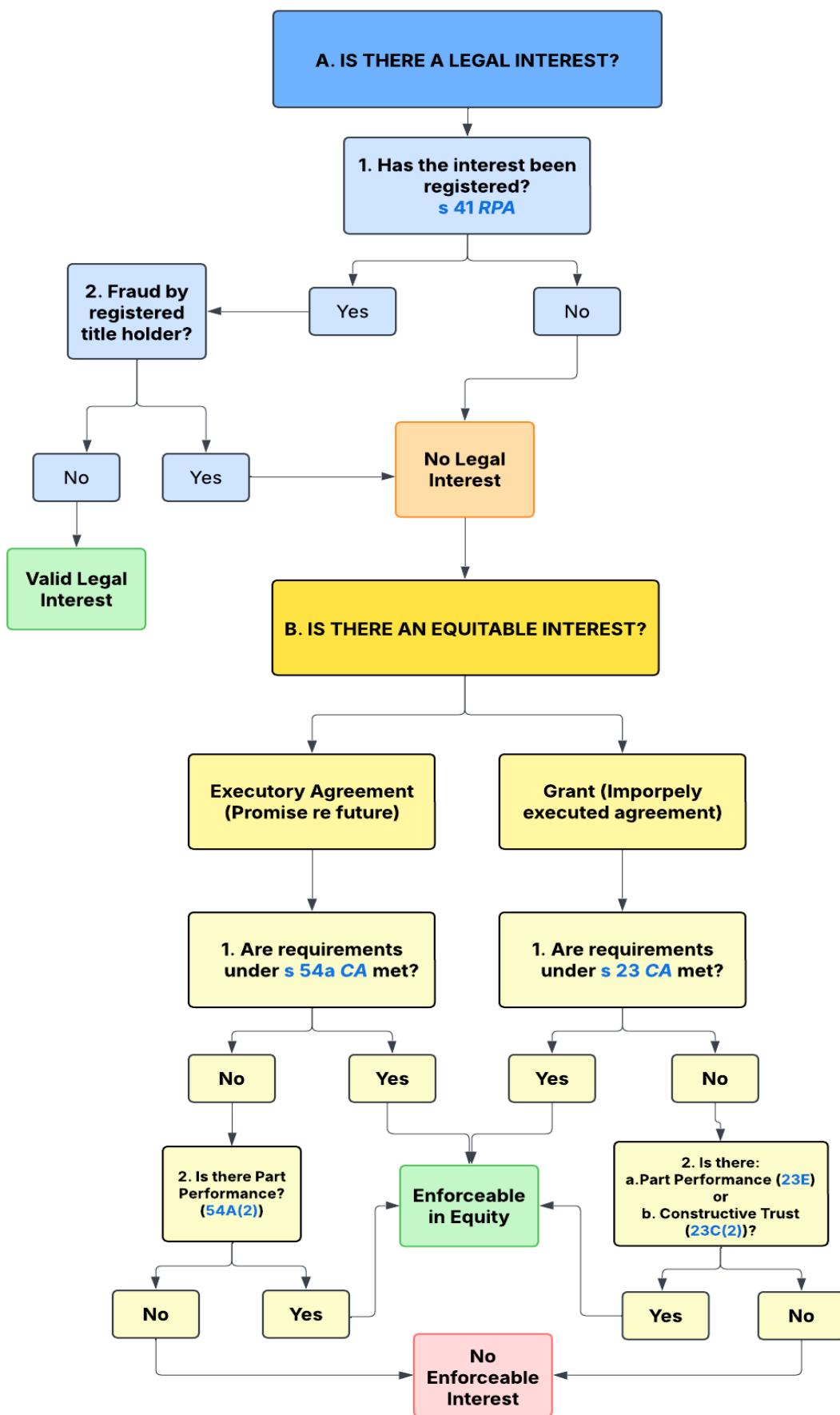
2. Identifying Interests

Note: Once a party holds equitable title to property, party holding legal title holds it on behalf of that other party (ie a trust)

Note: “Full title” = both equitable and legal title (ie no equitable title to property exists)

| Situation | Rights Created |
|-----------------------------------|---|
| Borrowing/Lending of Funds | <ul style="list-style-type: none"> • Creditor → obtains a legal chose in action to sue the debtor for repayment • However, if the creditor is unsecured, they do not obtain any interest in the property of the debtor. Their interest is subject to bankruptcy |
| Security Arrangements | <ul style="list-style-type: none"> a. Legal Mortgages <ul style="list-style-type: none"> ○ Mortgagor → retains full title to the mortgaged property ○ Mortgagee → obtains a legal chose in action (charge) to sell the mortgaged property to recover the debt. b. Equitable Mortgages <ul style="list-style-type: none"> ○ Mortgagor → retains full title to the mortgaged property ○ Mortgagee → obtains an equitable chose in action (charge) to sell the mortgaged property to recover the debt. c. Old System Mortgage <ul style="list-style-type: none"> ○ Mortgagor → obtains an equitable chose in action (right to redemption) to have the property returned upon repayment ○ Mortgagee → obtains legal title to the property |
| Trusts | <ul style="list-style-type: none"> a. Fixed Trusts <ul style="list-style-type: none"> ○ Trustee → holds legal title to the property ○ Beneficiary → holds an equitable chose in action to enforce the trust against the trustee, as well as equitable title to the trust property b. Discretionary Trusts <ul style="list-style-type: none"> ○ Trustee → holds legal title to the property ○ Beneficiary → holds only an equitable chose in action to enforce the trust against the trustee c. Agreements to Declare Trusts (once \$PP paid) <ul style="list-style-type: none"> ○ Trustee → holds legal title to the property ○ Beneficiary → holds relevant equitable interest (depending on whether fixed or discretionary) under a constructive trust d. Agreements to Transfer Trust interest (before \$PP paid) <ul style="list-style-type: none"> ○ Trustee → holds legal title to the property for B1 ○ Beneficiary 1 → holds equitable title to the property on behalf of B2 |

SCAFFOLD 2: Torren's Title Land



| Type of Interest | Creation | Requirement | Enforcement of Interest | Jurisdiction |
|---|---|--|---|--------------|
| Registered Interest (Legal Interest) | Through registration of an interest | Registration under s 41/42 Real Property Act | Person becomes the registered holder of interest. Gains a property right enforceable <i>in rem</i> against the whole world | Law |
| Unregistered Interest (Equitable Interest) | <p>a. Through an agreement to transfer property interests in future which has not yet been performed (executory agreement),</p> <p>Or</p> <p>b. Through an agreement granting unregistered interests (improperly executed agreement)</p> | <p>a. s 54A Conveyancing Act, or</p> <p>Or</p> <p>b. s 23C Conveyancing Act</p> | <p>Equitable right enforced <i>in personam</i> against the registered holder of interest (usually specific performance).</p> <p>However, existence/notice of unregistered interests does not affect the legal property rights of the holder of registered interest (RPA s 42/43)</p> | Equity |

1. Has the interest been registered?

- If yes = there is a registered legal interest.

2. If no: Is there an agreement which can be enforced in equity?

- **Agreement to transfer:**
 - Definition: A promise on the part of one party to transfer an interest in the future.
 - Requirement: The agreement can only be enforced in equity if **S 54A** is met (requires singing by person *to be charged*)
 - Exception: Where there has been sufficient acts of part performance.
- **Grant:**
 - Definition: An agreement which itself purports to immediately transfer an unregistered interest (ie some execution of agreement).
 - Requirement: This can only be sufficient to transfer an interest under equity where **23C** is met (requires singing by person *creating or transferring interest*)
 - Exception: Where there are sufficient acts/facts to construct a trust relationship, or part performance
- Note – something can start as an agreement (54A), and then create a grant (23C) where there has been some performance of the agreement.

A. Transfer of Title (Fee Simple)

- Right conferred under fee simple = rights equivalent to ownership. Right to deal with/dispose of interests in land.

1. Legal Rights: Registered Interests

1.1. Does this create a legal right?

- a. TEST: Has the title been Registered? → *Real Property Act 1900 (NSW)*
 1. Title does not pass until a dealing is recorded with the Register (**s 41**)
 2. Once the title is registered, the registered title holder has paramount title (**s 42**).
This is not affected by the existence of unregistered rights of another party over the land (such as a mortgage). (**s 43**).
- b. Effect of Fraud?
 - a. Fraud by third party
 - Upon registration, title becomes indefeasible. Fraud by a third party (ie making the contract/documents void) does not affect title → *Frazer v Walker 1967*
 - b. Fraud by person acquiring title
 - Exception: The registration of title does not pass indefeasible title where the title holder themselves has committed fraud (including through knowledge of another party's fraud) (**s 42**) → *Breskvar v Wall 1971*

2. Equitable Rights: Unregistered Interests

- Where transfer has not been registered (and thus cannot create legal interest)
- Note: General rule is that equity will not allow courts to rely on **s 23C or 54A** as an instrument of fraud → *Ciaglia*
 - Requires facts of some 'unconscionable conduct' beyond a party simply trying to get out of obligations (ie if they made a promise to induce other party to do something)

A. Executed but Unregistered Agreements (Grants)

- Where parties enter into a contract (grant) which itself purports to transfer title to land but have not registered it.
 - Because the land cannot actually be transferred without registration (and therefore cannot be executed), this is instead treated as an agreement to sell (which may give rise to equitable rights).

- **Requirements:** *Conveyancing Act 1919 (NSW) s 23C*: Equitable interests in land can only be created/transferred (and thus enforced in equity) where:
 - a. In writing (containing all essential terms), **and**
 - b. Signed by the party creating or transferring the interest (or a person authorised by them)
- **If REQUIREMENTS NOT MET:**
 May be an applicable exception which will allow Equity to enforce grant despite it not meeting formality requirements:
 - a. Part Performance**
 - **S 23C** does not affect the operation of doctrine of part performance (**23E**)
 - **Test:** P must establish that they carried out acts unequivocally referable to the performance of the alleged contract → *Pipikos v Trayans 2018*
 - Ie these acts must be such that there is no other possible explanation except the existence and performance of the contract for transfer of title
 - **High Threshold** → SEE CASE EXAMPLE
 - Note: This still requires that the agreement was valid (ie promisor must have had the right to transfer the title)
 - b. Constructed/Resulting Trust**
 - **S 23C** does not affect the operation of resulted or constructed trusts (**23C(2)**)
 - Because of this, where there is a valid agreement to sell the land, equity can still hold that trust relationship exists despite **23C** not being met.
 - Trust Relationship: Once a valid agreement is made for sale of land, equity holds that the seller becomes the trustee for the purchaser up until legal title is transferred. This gives the parties equitable interests until the title is transferred → *Lysaght v Edwards 1876*
 - Seller: Gains a personal interest in the purchase money (which can be enforced in persona against purchaser).
 - Purchaser: Once purchase price is paid, purchaser gains *beneficial title* to land (ie they become equitable owners of the land before title is legally transferred). Gain an equitable lien against the estate to have purchase price repaid upon non conveyance.
 - Note – suggestions that this trust relationship (and accompanying rights) may only arise at time that purchase price is paid → *Golden Mile 2015*.
 - **Note:** A ‘trust’ is not automatically created. Equity only holds this to exist at point in which a party is attempting to get out of obligations → *DKLR*

SCAFFOLD 3: Transfer by Sale

Legislation: *Sale of Goods Act 1923 (NSW)*

1. Was there a Contract for Sale of Goods?

- A contract for sale of good = a contract where the seller transfers or agrees to transfer property in goods to the buyer for a money consideration called price. → **s 6(1)**
- Does not have to be written. Can be orally or implied → **s 8**.
- Definition creates 2 elements:
*Only need to look at these if relevant/ potential issue

1. Was the contract concerning a good?

- **Test:** Was the substance of the contract an agreement to purchase a good, or to pay for the exercise of skill and labour (to which passing of some material is only incidental)? → *Robinson v Graves*

2. Was the contract for sale of the good?

- Hire-purchase agreements (where purchaser has option but not duty to purchase) not included → *Helby v Matthews 1895*
- **Test:** What was the objective meaning of the contract? On proper construction, was it an agreement to sell, or a hire/purchase agreement with option of sale? → *McEntire v Crossley Bros 1895*

- Note:
 - Where the transfer is to take place at a future time or is subject to a condition, the contract is an agreement to sell → **s 6(3)**
 - An agreement to sell becomes a sale when the time elapses or condition is met → **s 6(4)**
 - Where a contract sells a future good (that does not yet exist), it is treated as an agreement to sell → **10(3)**

2. Is the good Specific or Unascertained at time of Contract?

- Goods can be either:
 - Specific: Goods which are already identified and agreed upon at the time of the contract. E.g. a sale for a specific, identified object.
 - Unascertained Goods: Goods not yet identified as the subject of the contract at the time that the contract is made. Includes *future goods* (which do not yet exist).
- **If good is specific:** → Go to SCAFFOLD A
 1. Already ascertained
 2. Look to intent to determine the point at which title passes
- **If good is unascertained:** → GO TO SCAFFOLD B
 1. Must be ascertained and appropriated before title can pass
 2. Once ascertained, look to intent to determine whether this appropriation itself passed title

4.2. Assignments of existing Equitable Interests

| 1. Assignments of Existing Equitable Interest | |
|---|---|
| 1.1. General Rule | |
| Rule | <ul style="list-style-type: none">• Conveyancing Act 1919 NSW s 23C(1)(c): A <u>disposition</u> of an equitable interest or trust subsisting at the time of disposition must be in writing signed by the person disposing of the same (or their lawfully authorised agent)• Rule: Disposition of <i>any</i> equitable interest in property (any interest under trust, as well as any equitable interest through failed legal transfers) must be <u>signed and in writing</u> → <i>PT v Maradona 1992</i>• If this is not met, then the equitable interest will not have been transferred<ul style="list-style-type: none">○ For trusts – transferring trust property to non-beneficiary (because interest has not been successfully assigned to that person) will be a breach of trust• Note: <i>Equitable choses in action</i> (which do not create an equitable interest <i>in</i> property) are not covered by this – covered by s 12. Go to 3.3. |
| 1.2. Dealings with Trusts – Does 23C apply? | |
| Rule | <ul style="list-style-type: none">• There are various ways in which beneficiaries can deal with their equitable interest under a trust• Question: Need to determine whether each falls into a ‘disposition’, making it subject to s 23C writing requirements• Remember: Equity will only deal with an equitable interest according to the principles of validity for the intended mode of the dealing → <i>Milroy v Lord 1862</i> |
| i. Assignments | <ul style="list-style-type: none">• Def: Where a beneficiary assigns their equitable interest under the trust to another party.• Rule: 23C requirements do apply• Effect: Trustee then holds the property in trust for the assignee |
| ii. Directions to Trustee | <ul style="list-style-type: none">• Def: Where beneficiary directs trustee to do something with the trust interest.• Question: Need to look at the language of the direction and surrounding circumstances to determine whether the <u>intended to dispose</u> of their equitable interest (making it fall within 23C) → <i>PT v Maradona 1992</i>• 3 Options:<ol style="list-style-type: none">i. <u>Direction was intended to transfer the interest to new beneficiary</u><ul style="list-style-type: none">○ Def: Beneficiary directs the trustee to hold trust assets on behalf of a different party going forward○ Effect: Equitable interest is transferred to the new beneficiary, and assignor ceases to be beneficiary○ Rule: Equitable interest is disposed of, so 23C requirements do apply → <i>Grey v IRC 1960</i>ii. <u>Direction was intended as authorisation to transfer trust assets</u><ul style="list-style-type: none">○ Def: Beneficiary authorises the trustee to transfer <i>some</i> of the trust assets to a third party |

4. Priorities

5.1-5.3 Priorities

Note: Priorities do not destroy the lower priority interest. Just means that if cannot satisfy both, the higher priority interest takes priority.

| 4.1. Legal vs Legal Interests | |
|--|--|
| 4.1.1. General Rule | |
| Nemo Dat Rule | <ul style="list-style-type: none">• General Rule: A person cannot title which they do not have<ul style="list-style-type: none">○ Where two parties are claiming the same legal title, the earlier interest will prevail (because the second party could not have obtained a legal interest without assignment from first party)• For Land:<ul style="list-style-type: none">○ Registered interests are indefeasible under s 42 RPA |
| 4.1.2. Exceptions for goods sold to innocent third party - SOGA | |
| Assumption | <ul style="list-style-type: none">• SOGA s 26(1): Where goods are sold by a person who is not the owner without the consent/authority of the owner, the buyer acquires no better title than the seller had, unless.... |
| a. Sale by a Mercantile Agent | <ul style="list-style-type: none">• SOGA s 26(2): Nothing in this Act affects the operation of the <i>Factors (Mercantile Agents) Act 1923</i> or the <i>Property Securities Act 2009</i>• Mercantile Agents Act s 5: Where a mercantile agent has been entrusted as such to possess goods, any dealing with goods by the agent in the ordinary course of their dealing will be <u>valid</u> as if they were <u>authorised</u> by the owner to do the same <p>a. Was the seller acting as a mercantile Agent?</p> <ul style="list-style-type: none">○ Mercantile Agent: A person whose ordinary business is to deal with goods in a certain way – to sell them, consign them, buy them or to raise money through security on them <ol style="list-style-type: none">1. Must have been entrusted as an agent to deal with the goods in that way<ul style="list-style-type: none">▪ Must have been entrusted as an agent in the capacity of the relevant type of dealing – ie must have been an agent in the capacity to sell (even if no authority)2. Must have sold the good as part of their ordinary course of business<ul style="list-style-type: none">▪ Only applies to sales made <u>as part of ordinary course of business</u> of the agent▪ Does not apply if goods are sold outside of business hours, outside of normal practice etc → <i>Pacific Motor Auctions 1965</i> <p>b. Rule</p> <ul style="list-style-type: none">○ Rule: S 5 creates a presumption that the sale was authorised○ However: Subject to requirement that the purchaser acted in <u>good faith</u> - ie if purchaser had notice that seller was not authorised, s 5 does not apply |
| b. Conduct of Owner/ Estoppel | <ul style="list-style-type: none">• SOGA s 26(1): Where goods are sold by a person who is not the owner without the consent/authority of the owner, the buyer acquires no better title than the seller had, unless the owner of the goods is by their own conduct precluded from denying the seller's authority to sell |

