

Contents

INTRODUCTORY NOTES	4
TOPIC 1: INTRODUCTION; COMMON LAW, EQUITABLE AND STATUTORY APPROACHES TO COMPETING INTERESTS – PRIORITIES	5
1.1 IPACL RECAP	5
1.1.1 DOCTRINE OF TENURE	5
1.1.2 DOCTRINE OF ESTATES	5
1.1.3 REQUIREMENTS FOR CREATION OF PARTICULAR PROPRIETARY RIGHTS	5
(A) <i>Essential/Substantive Requirements</i>	5
(B) <i>Formal Requirements</i>	6
1.1.4 LAW/EQUITY DISTINCTION.....	6
1.1.5 INTRODUCTION TO GENERAL LAW PRIORITY RULES.....	6
<i>General Law Priority Rules: Hierarchy of Interests</i>	7
1.2 OLD SYSTEM TITLE	8
1.2.1 DEEDS	8
1.2.2 GENERAL LAW PRIORITY RULES	8
1.2.2.1 <i>Prior Legal v Later Legal</i>	8
1.2.2.2 <i>Prior Equitable v Later Equitable</i>	8
1.2.2.3 <i>Prior Legal v Later Equitable</i>	9
1.2.2.4 <i>Prior Equitable v Later Legal</i>	10
1.2.3 OLD SYSTEM REGISTRATION UNDER Pt 23, DIV 1 <i>CONVEYANCING ACT</i>	11
1.2.3.1 <i>Introduction to s 184G</i>	11
1.2.3.2 <i>Elements</i>	11
1.2.3.3 <i>Effect of Registration</i>	12
1.2.3.4 <i>Residual Place for General Law Priority Rules</i>	12
TOPIC 2: TORRENS TITLE	13
2.1 HISTORICAL INTRODUCTION	13
2.2 TORRENS TITLE REGISTRATION VS. OLD SYSTEM REGISTRATION (S 184G)	13
2.3 MAJOR ELEMENTS OF THE SYSTEM	13
2.4 BASIC LEGAL CONCEPTS: TITLE BY REGISTRATION	13
2.5 INDEFEASIBILITY OF TITLE: S 42	14
2.5.1 VARIOUS <i>RPA</i> PROVISIONS ENACTING THE INDEFEASIBILITY PRINCIPLE	14
2.5.2 MEANING OF INDEFEASIBILITY – “IMMEDIATE” INDEFEASIBILITY	14
2.5.3 THE INDEFEASIBILITY UMBRELLA – WHAT ASPECTS OF AN INTEREST/PARTS OF THE INSTRUMENT ARE PROTECTED BY INDEFEASIBILITY?.....	14
2.5.3.0 <i>Starting Point/General Test</i>	14
2.5.3.1 <i>Leases</i>	14
2.5.3.2 <i>(Forged) Mortgages</i>	15
2.6 BEFORE REGISTRATION: DEALING WITH UNREGISTERED INTERESTS	16
2.6.1 PRIOR UNREGISTERED V LATER REGISTERED: PRELIMINARY	16
2.6.2 PROTECTING AN UNREGISTERED INTEREST – CAVEATS AND INJUNCTIONS	16
<i>Caveats</i>	16
<i>Injunctions</i>	17
2.6.3. PRIOR REGISTERED V LATER UNREGISTERED	18
2.6.4 PRIOR UNREGISTERED (EQUITABLE) V LATER UNREGISTERED (EQUITABLE).....	18
2.6.5 UNREGISTERED (LEGAL) V UNREGISTERED (EQUITABLE) OR UNREGISTERED (EQUITABLE) V UNREGISTERED (LEGAL): S 23D(2) LEASE.....	19
2.7 BETWEEN SETTLEMENT AND REGISTRATION: THE S 43A UPGRADE (PRIOR UNREGISTERED EQUITABLE V LATER ‘DEEMED LEGAL’)	20
2.7.1 REQUIREMENTS OF S43A PROTECTION	20
<i>Dealing Registrable under s 43A(1)</i>	21
SUMMARY OF FORGERY, FRAUD AND NOTICE UNDER TORRENS.....	22

2.7.2 SUCCESSIVE EFFECT OF S 43A	23
2.8 EXCEPTIONS TO INDEFEASIBILITY: UNREGISTERED V REGISTERED.....	24
2.8.1 FRAUD: S 42(1) – A STATUTORY EXCEPTION TO INDEFEASIBILITY	24
2.8.1.1 <i>Two Common Situations of Fraud</i>	24
2.8.2 OTHER STATUTORY EXCEPTIONS TO INDEFEASIBILITY: S 42(1)(A) – (D)	25
2.8.2.1 “ <i>Subject to estates, interests and entries recorded in the Folio of the Register</i> ”: s 42(1)	25
2.8.2.2 <i>Prior folios of the Register – The estate or interest of a proprietor claiming the sam land under a prior folio of the register: s42(1)(a)</i>	25
2.8.2.3 <i>Omitted or misdescribed easements: s 42(1)(a1); s 42(1)(b)</i>	25
2.10.4 <i>Misdescription/Wrong Description of a Portion/Parcel of Land: s 42(1)(c)</i>	25
<i>Short-term tenancies s 42(1)(d) [CONSIDERED IN ‘TOPIC 6: LEASES’]</i>	25
2.8.3 RIGHTS IN PERSONAM/PERSONAL EQUITIES: EXCEPTION TO INDEFEASIBILITY	26
2.8.4 REGISTRAR GENERAL’S POWER OF CORRECTION	27
2.8.5 OVERRIDING STATUTES AND INDEFEASIBILITY	27
2.9 VOLUNTEERS ARE REGISTERED PROPRIETORS IN NSW	27
TOPIC 3: CO-OWNERSHIP	28
3.1 INTRODUCTION	28
3.2 JOINT TENANCY	28
SUBSTANTIVE REQUIREMENTS: FOUR UNITIES	28
3.3 TENANCY IN COMMON.....	28
FEATURES	28
3.4 CREATION OF CO-OWNERSHIP	29
3.5 RIGHTS BETWEEN CO-OWNERS.....	30
3.5.1 OCCUPATION FEE/RENT	30
3.5.2 CLAIM FOR IMPROVEMENTS AND REPAIRS.....	31
3.5.3 RIGHT TO ACCOUNT FOR RENT AND PROFITS RECEIVED.....	32
3.6 CO-OWNERSHIP AND WASTE	32
3.7 DETERMINATION OF CO-OWNERSHIP:	33
3.7.1 DETERMINING THE TIC.....	33
3.7.2 DETERMINING THE JT (CONVERSION INTO TIC)	33
<i>Severance of the JT</i>	33
3.7.3 TERMINATION OF CO-OWNERSHIP BY S 66G STATUTORY TRUST FOR SALE OR PARTITION	34
TOPIC 4(A): EASEMENTS	35
4.1 DIFFERENCE FROM OTHER LEGAL INTERESTS	35
4.2 POSITIVE VS. NEGATIVE EASEMENTS	35
4.2 FOUR ESSENTIAL (SUBSTANTIVE) CHARACTERISTICS	36
4.3 CREATION OF AN EASEMENT: FORMAL REQUIREMENTS	38
4.4 EXTENT OF PERMISSIBLE USE (CONSTRUING OF EASEMENTS): WHAT RIGHTS DOES THE GRANT OF AN EASEMENT CARRY WITH IT FOR THE OWNER OF THE DOMINANT TENEMENT....	42
4.5 REMEDIES IN RESPECT OF EASEMENTS	44
4.6 EXTINGUISHMENT OF EASEMENTS.....	44
TOPIC 4(B): PROFITS A PRENDRE.....	46
4(B).1 NATURE	46
4(B).2 EASEMENTS AND PROFITS COMPARED AND DEFINED	46
4(B).3 CREATION: FORMAL REQUIREMENTS.....	46
<i>PAP – Prescriptive, exceptions to indefeasibility (s 42(1)(b) and in personam exception)</i>	47
4(B).4 EXTINGUISHMENT.....	47

TOPIC 5: COVENANTS OVER FREEHOLD LAND	48
5.1 INTRODUCTION TO COVENANTS.....	48
5.2 ENFORCEABILITY OF BENEFIT/BURDEN OF COVENANTS: IN LAW AND EQUITY.....	49
5.3 DOCUMENTATION OF COVENANTS: STATUTORY REQUIREMENTS FOR CREATING COVENANTS	52
5.4 EXTINGUISHMENT OF COVENANTS	53
TOPIC 6: LEASES AND LICENCES	55
6. 1 NATURE OF A LEASE	55
LEASE V FREEHOLD INTEREST.....	55
LEASE V LICENCE	55
6. 2 TYPES OF LEASES: CLASSIFICATION OF LEASES BY DURATION.....	56
6.3 ESSENTIAL REQUIREMENTS FOR A LEASE: TWO SUBSTANTIVE REQUIREMENTS.....	58
1) RIGHT TO EXCLUSIVE POSSESSION	58
2) CERTAINTY OF TERM	59
3?) CERTAINTY OF SUBJECT MATTER (LAND)	59
6.3 ESSENTIAL REQUIREMENTS FOR A LEASE: FORMAL REQUIREMENTS.....	60
6.4 LEASES & INDEFEASIBILITY: PROTECTION OF UNREGISTERED LEASES UNDER S 42(1)(D) AND THE <i>IN PERSONAM</i> EXCEPTION.....	61
s42(1)(D)	61
<i>IN PERSONAM</i> EXCEPTION (I.E. AN UNDERTAKING TO BE BOUND).....	61
TOPIC 7: MORTGAGES	62
7.1 NATURE OF A MORTGAGE: INTRODUCTION AND DEFINITION.....	62
7.2 CREATION OF MORTGAGES: FORMALITIES FOR MORTGAGES UNDER O.S. & TORRENS	63
7.3 MORTGAGOR’S INTEREST IN THE LAND	63
7.3 MORTGAGEE’S POWER OF SALE.....	64
RESTRAINING POWER OF SALE: AVAILABILITY OF INJUNCTION.....	67
7.4 MORTGAGES & TACKING.....	68
<i>TABULA IN NAUFRAGIO</i>	68
FURTHER ADVANCES.....	70

General Law Priority Rules: Hierarchy of Interests

1. Legal Interest: For example:

- **Old system land:**
 - Complying with s 23B
 - Complying with s 23D(2)
- **Unregistered Torrens:**
 - s 43A
 - Others?

2. Equitable Interest

- **Equitable interest in property:** One that will be enforced by a court exercising equitable jurisdiction.
- **Examples:**
 - i. **Beneficiaries interest under a trust:** Must be a fixed trust, under a discretionary trust only have *in personam* rights.
 - ii. **Right of a purchaser under a valid agreement for sale:**
 - Must be in writing: s 54A(1)
 - Based on contractual rights: No legal interest has passed (as not yet effect by deed), but have an enforceable right under the contract.
 - **Principle:** A person who enters into a contract to purchase land from the owner of the fee simple acquires (prior to settlement) an equitable interest in the land based on specific enforceability of the contract.
 - Must be specifically enforceable: Chan v Cresdon.
 - **Cases:**
 - Old system land: Lysaght v Edwards
 - Torrens title: Chang v Registrar of Titles
 - iii. **Right of a mortgagee/lessee under a valid agreement (not a deed) to grant a mortgage/lease**
 - Conditions as in [ii.].
 - iv. **Equity of redemption:** Right of a mortgagor (grantor of the mortgage; person seeking funds) in the mortgaged land which is Old System.
 - v. **Right of subsequent mortgagor:** If already have a legal (Old System) mortgage, then all mortgagor has is an equitable interest (the Equity of Redemption) thus any subsequent mortgage must be equitable in nature (mortgaging the EOR).
 - vi. **Mortgage by deposit of title deeds:** Right of mortgagee (based on part performance)
 - Doesn't require writing: s 54A(2).
 - Based on
 - a. Doctrine of part performance, and
 - b. Specific enforceability of the mortgage.
 - vii. **Grantee of an option:** A person who obtains an option to purchase land from the owner of a fee simple acquires, prior to settlement, an interest in the land.
 - Again, based on specific enforceability of the contract.
 - viii. **Vendor's lien:** Right of an unpaid vendor to institute an equitable vendor's lien over property.
 - ix. **Purchase price resulting trust:** Arises where person provides funds for the purchase of property but does not become the legal owner, then land gets transferred and they do not become r.p.
 - x. **Profit a prendre which is in writing but not in the form of a deed:** Where an owner of land actually gives a person a right to come onto his/her land to take something from it (but doesn't buy/lease land) and not in deed form.
 - Must be in writing: s 54A(1), s 23C(1)(a)

3. A 'Mere Equity'

- Mere equity: *In personam* right in equity which requires intervention of the court to flower into a full blown equitable interest: *Double Bay Newspapers.*
- **Examples:**
 - i. Claim to rectify a deed: *Smith v Jones.*
 - ii. Claim to set aside transfer on basis of fraud: *Latec.*
 - iii. The claim to enforce a contract based on part performance... maybe: *Double Bay Newspapers.*
- Can be devised by will.

1.2.2.4 Prior Equitable v Later Legal

RULE: Later legal interest holder will take free of an earlier equitable interest if the holder of the later legal interest takes as a BFPFVWN: *Pilcher v Rawlins* (1872), *Wilkes v Spooner* [1911]

BFPFVWN (Bona Fide Purchaser, For Value, Without Notice) – The Elements

- **Bona Fide:** In good faith, without fraud (usually satisfied if no prior notice).
- **Purchaser:** Purchaser of the legal estate (providing value) in return for an interest in the property (including leases, mortgages, etc.): *Goodright v Moses* (1774).
 - Prior holder must get full equitable interest, not a mere equity.
 - Subsequent holder must take full legal estate.
- **For Value:** Need not be the full value of the property, but must be more than nominal.
 - A promise to marry will suffice.
- **Without Notice:**
 - **Includes actual, constructive and imputed notice: *Conveyancing Act*, s 164.**
 - **Actual:** Actual knowledge of the facts that created the interest: s 164(1)(a)
 - **Constructive:** If purchaser would have had actual knowledge if they had made reasonable searches, inquiries and inspections: s 164(1)(a).
 - Constructive notice consists of two things:
 1. **Inspect documents: A search of the title documents**
 - **Old System Land:** Search of title deeds back to a good root of title at least 30 years old: *Conveyancing Act*, s 53.
 - **Torrens:** A search of the Register.
 2. **Inspect land: Inspection of land to ascertain who is in possession (eg.. tenant) or who is using it (eg. Holder of an easement): *Hunt v Luck***
 - **Rule in *Hunt v Luck*:** A purchaser who knows that any person is occupying or using the property (whether or not as a tenant) is on (constructive) notice of the occupation user's property rights.
 - Failure to search ASIC registers is not constructive notice: s 164(1A)
 - **Imputed:** If agent had actual or constructive notice.
 - **Time when notice is relevant:** At the time consideration is paid: *Pilcher v Rawlins*.

The rule in *Wilkes v Spooner*: A secondary purchaser, purchasing through BFPFVWN

- **Rule in *Wilkes v Spooner*:** Someone who obtains property (1) with notice and/or (2) without value from a purchaser who bought as a BFPFVWN (notice of a prior equitable interest that is) “may shelter under the first purchaser”.
 - **Rationale:** Why should a BFPFVWN be hindered in their sale (or gifting)

Tacking and *Tabula in Naufragio*

- ***Tabula in Naufragio*:** If later equitable interest was acquired for value and *without* notice AND the later holder then acquires the legal interest *with* notice, it can *squeeze out* the earlier interest.
- **Most common application:** In relation to mortgages.
- **Rationale:** Policy – to benefit mortgagees who actually obtain the legal interest over those who don't.
- **Examples:**
 - **Example Situation #1:** O grants legal mortgage to A (\$100K), second equitable mortgage to B (\$50K) and third equitable mortgage to C (\$50K). Land is only worth \$200K.
 - **Operation of *Tabula in Naufragio*:** C can acquire legal estate (buy out legal mortgage by paying A what A is left under his legal mortgage) from A, therefore spring boarding C in front of B in terms of priority. C then has a legal interest to which he or she can tack the amount owing under their equitable mortgage. Sale of land will pay out C and B will be left with nothing.
 - **Example Situation #2:** Consider the case where O holds the legal fee simple. O grants a legal mortgage to M. O grants an equitable mortgage to S. O contracts to sell the land to P.
 - **Operation of *Tabula in Naufragio*:** The rule is that the holder of a later equitable interest (P) without notice of an earlier equitable interest (S) can “squeeze out” the earlier interest by acquiring the legal interest (from M), even though at the time of acquiring the legal interest P knew of S's earlier equitable interest.

Summary of Forgery, Fraud and Notice under Torrens

	<p>Notice that an instrument is void: Forged or otherwise deprived of effectiveness through statute (eg. <i>Breskvar v Wall</i> where <i>Old Stamp Act</i> rendered transfer ineffective as executed in Blank)</p>	<p>Notice that instrument is voidable or notice of outstanding equitable interest: Vendor has signed the transfer, but the vendor's signature has been procured by 3rd party fraud or the vendor has previously granted an unregistered interest in the land</p>
<p>Notice acquired before settlement</p>	<p>May amount to fraud by participation: if voidness arises out of a criminal act such as forgery.</p> <ul style="list-style-type: none"> ▪ If you are a purchaser and prior to settlement you know that the transferor who purports to be the vendor is actually void because a rogue has forged the signature of the vendor, and you go ahead and pay money/take transfer and CT and register, you yourself will have participated in the fraud and hence can't rely on s 43A. 	<p>Will defer priority (unless registration is ultimately achieved): because transferee is not a bona fide purchaser of the legal estate without notice.</p> <ul style="list-style-type: none"> • Can't claim to be BFPWN under s 43A because you did have notice. • So while you were off the register, you were bound by the equitable interest as the vendor's signature was procured by fraud of a third party, and vendor had already granted an equitable interest in land.
<p>Notice received after settlement, but before registration</p>	<p>Does not amount to fraud and does not make the instrument more or less registrable: Instrument itself is not registrable because true owner can restrain registration of the forged instrument irrespective of transferee's notice. BUT once you are registered, because you took at the instrument in good faith you are protected.</p> <p>The Court suggested tentatively that a purchaser could proceed as if they had no prior notice but a true proprietor could prevent registration upon learning of the fraud. An injunction could be used by the true proprietor to prevent registration: <i>Mayer v Cole (1968)</i> NSWSC per Street CJ.</p>	<p>Does not deprive transferee of status as a bona fide purchaser of the legal estate without notice: Purchaser can rely on s 43A.</p>
<p>Notice acquired after registration</p>	<p>Irrelevant: Because of immediate indefeasibility. Upon registration a void dealing confers indefeasible title: <i>Frazer v Walker</i> [1967].</p> <ul style="list-style-type: none"> • Fully protected by s 42 as got on register without notice and defectiveness cured by registration (immediate indefeasibility doctrine). 	<ul style="list-style-type: none"> • Irrelevant: because of immediate indefeasibility.
<p>Summary</p>	<p>With a void instrument, <u>s 43A is irrelevant</u> because it neither helps nor hinders.</p>	