

★ CO-OWNERSHIP ★

WHAT INTEREST DOES PARTY HAVE?

- 🚩 In Law / Equity
- 🚩 Right of Survivorship
- 🚩 Rights + Duties of Co-Owners
- 🚩 Severance of a Joint Tenancy
- 🚩 Termination of Co-Ownership

STEP 1: WHAT FORM OF CO-OWNERSHIP AT LAW?

JOINT TENANCY

(i.e. undivided shares + 4 unities present)

As [insert 2 or more parties] had [jointly registered their interest / did not indicate the form of co-ownership], at law, they are presumed to hold their interest as joint tenants unless the contrary is expressed (**s33(4) TLA**).

***CONSIDER IF: PRESUMPTION CAN BE REBUTTED:**

- **One or More of the 4 Unities NOT Present:** However, as there is no unity of [possession / interest / title / time] as [insert reason why it is not present], the presumption is likely rebutted and the parties are holding their interest as tenants in common with their own distinct shares. **OR**
- **Words of Severance Present:** However, despite the four unities being present, the presumption is likely rebutted as the words “[equally / between / among / in equal shares / between A and B / to A and B respectively / to A and B to share and share alike]” are words of severance and indicates intention that the parties are will hold their interest as tenants in common with their own distinct shares.

***CONSIDER: RIGHT OF SURVIVORSHIP:**

- **What Happens When One Dies:** As/When [insert relevant JT] has died, his/her interest accrues to the other joint tenant(s), being [insert relevant JT(s)] (**s50 TLA**). [Insert JT that died] cannot dispose of his/her interest under his/her will as there is a right of survivorship in a JT. **OR**
- **What Happens When Both Die at the Same Time:** As [insert all JTs] died at the same time from [insert reason for death], their deaths are presumed to have occurred in order of seniority, and the youngest is deemed to have survived the older (**s184 PLA**). Therefore, [insert older party] is deemed to have passed first and [insert younger party] is deemed to have survived [insert older party], thus the interest now vests in [insert whoever the younger put in his/her will].

OR

TENANCY IN COMMON

(i.e. “equally” / “between” / “among” / “in equal shares” **OR**

By [express words to the effect of holding their interest as tenants in common / using words of severance / absence of one of the unities] being [insert express words / words of severance / time/title/interest], [insert 2 or more parties] is holding their interest as tenants in common at law.

*IF APPLICABLE: PROVISION SEEKING TO CONTRACT OUT OF THE NCC	IF seeking to avoid / modify the NCC: Even though there is a clause that states <u>[state clause according to facts]</u>, this clause is seeking to <u>[avoid / modify]</u> the effect of the NCC, and such a provision will be void as s191(1) NCC does not allow for the NCC to be contracted out of. Any attempt to do so results in an offence of strict liability committed by <u>[insert credit provider]</u> (s191(3) and (4) NCC). IF seeking to have the debtor/mortgagor/guarantor indemnify the credit provider: Even though there is a clause that states <u>[state clause according to facts]</u>, this clause is seeking to have <u>[insert debtor / mortgagor / guarantor]</u> indemnify <u>[insert credit provider]</u> for any loss or liability arising under the NCC, and such a provision will be void as per s191(2) NCC. Any attempt to do so results in an offence of strict liability committed by <u>[insert credit provider]</u> (s191(3) and (4) NCC).
*IF NCC APPLIES: STEP 3: ENFORCING POWER OF SALE	
As the NCC applies, there are additional requirements listed in s88 of the NCC that need to be met on top of the ones listed under the TLA before <u>[insert mortgagee]</u> may exercise its power of sale.	
(1) MORTGAGOR IS IN DEFAULT AND	Firstly, the mortgagor must be in default as per s88(2)(a) NCC. This is clearly satisfied as <u>[insert mortgagor]</u> defaulted on <u>[insert date]</u>.
(2) GIVE MORTGAGOR A DEFAULT NOTICE	Although the NCC does not specify, the fact that it does not override the Transfer of Land Act 1958 (TLA) means that <u>[insert mortgagee]</u> must wait for <u>[one calendar month / the period agreed to in the contract]</u> before issuing the default notice (s76(1) TLA). After which, <u>[insert credit provider]</u> needs to serve <u>[insert mortgagor]</u> a default notice, allowing him/her a period of at least 30 days to remedy the default (s88(2)(b) NCC). *IF APPLICABLE – CONSIDER REQUIREMENTS OF WHAT TO INCLUDE IN DEFAULT NOTICE: As per s88(3) NCC, the default notice needs to have a prominent heading on top stating that it is a default notice and specify: - the default (s88(3)(a) NCC). AND - the action necessary to remedy the default (s88(3)(b) NCC). AND - a period for remedying (no less than 30 days) (s88(3)(c) NCC). AND - date after which enforcement proceedings (i.e. power of sale) may begin if default is not remedied (s88(3)(d) NCC). AND - that the repossession and sale of mortgaged property may not extinguish <u>[insert debtor / mortgagor]</u>'s liability (s88(3)(e) NCC). AND - the necessary information prescribed by regulations about <u>[insert debtor / mortgagor]</u>'s right to: - give a hardship notice under s72 (s88(3)(f) NCC). OR - give a postponement request under s94 (s88(3)(f) NCC). OR

★ EXCEPTIONS TO THE INDEFEASIBILITY OF TITLE ★

IS THERE FRAUD AS AN EXCEPTION TO INDEFEASIBILITY?

🚩 Forgery / Impersonation / Fraud by Agent/Employee

STEP 1: DEFINE FRAUD

Prima facie, [insert registered proprietor] has the benefit of indefeasibility which confers ‘immunity from attack’ granted by the state (*Frazer v Walker*) per **s42 TLA**. It is also noted that per **s43 TLA**, mere notice of an unregistered interest does not amount to statutory fraud by the registered proprietor and thus, the focus is on dishonest conduct prior to registration (*Bahr*). However, [insert plaintiff] can challenge [insert party]’s indefeasible interest of the [title / mortgage] by establishing the exception of fraud (**s42 TLA**). Fraud under **TLA** requires actual dishonesty, moral turpitude or willful blindness (*Assets Co; Pyramid*), which must be brought home to the registered [proprietor / mortgagee] (*Schultz; Pyramid*).

Here, [insert plaintiff] is the person who was defrauded and is seeking legal advice, [insert registered proprietor] is the one that [committed the fraud / hired the agent] (and [insert agent] is the agent of [insert registered proprietor]).

STEP 2: WAS THERE FRAUDULENT CONDUCT?

***NOTE: LIST ALL FRAUDULENT CONDUCT & DISCUSS EACH SEPARATELY:**

IF FORGERY / IMPERSONATION

AND/OR

There is [clearly / arguably] actual dishonesty as [insert dishonest person] [insert fraudulent conduct] e.g. sought to gain a mortgage in sister’s name / forged party’s signature / impersonated himself as insert P. There is a level of moral turpitude (*Assets*).

IF FRAUD BY AGENT / EMPLOYEES

The fraudulent conduct here was committed by [insert agent / employee] an [agent / employee], who has authority to act on behalf of a principal, [insert principal].

STEP 3: CAN THE FRAUD BE “BROUGHT HOME” TO REGISTERED PROPRIETOR?

IF NO AGENT INVOLVED (i.e. committed by RP)

OR

The fraud must also be capable of being brought home to [insert registered proprietor], the registered proprietor (RP) of [property / mortgage] (*Schultz*). In this case, the fraud was committed by [insert registered proprietor] himself/herself so it is clearly brought home to him/her (*Assets*).

IF FRAUD DONE BY AGENT / EMPLOYEES

The fraud must also be capable of being brought home to [insert registered proprietor], the registered proprietor (RP) of [property / mortgage] (*Schultz*).

- ***IF THERE IS AGENT (NON-CONTENTIOUS):** Here, [insert agent / employee of bank] is the [agent / employee] of the [insert registered proprietor], the agency relationship is not controversial here and thus, [insert agent] is presumed to have communicated the fraud to [insert principal]. **OR**
- ***IF THERE IS AGENT (CONTENTIOUS):** Here, [insert plaintiff] will argue that [insert dishonest person] is acting as the [agent / employee] of

★ UNREGISTERED INTERESTS UNDER THE TORRENS SYSTEM ★

WHOSE INTEREST TAKES PRIORITY BETWEEN TWO (2) UNREGISTERED INTERESTS?

STEP 1: CHARACTERISE EACH PARTY'S INTEREST

LIST OF EQUITABLE INTERESTS:

- equitable mortgage
- equitable right to redeem land after payment
- equitable interest under a specifically enforceable contract of sale
- equitable fee simple (i.e. fully paid but not yet registered)
- option to purchase
- vendor's lien
- mortgage by deposit of title deed
- equitable charge
- agreement of lease
- beneficial interest under express CT / RT
- restrictive covenant

***NOTE: IF PARTY HAS > ONE EQUITABLE INTEREST: CONSIDER EACH SEPARATELY!**

(1) IF BOTH EQUITABLE INTERESTS OR	[Insert relevant party] has a(n) [insert type of equitable interest] while [insert other party] has a(n) [insert type of equitable interest]. Therefore, this is a priority dispute between two unregistered interests. *CONTINUE TO STEP 2!
(2) IF MORTGAGOR (STILL RP) TRYING TO SET ASIDE IMPROPER PoS OR	*IF RE CAVEAT (i.e. whether mortgagor's interest is caveatable to stop registration): [Insert mortgagor] has a registered interest in [insert property] and thus cannot be the basis of lodging a caveat per s89 TLA. Per Swanston, [insert mortgagor] in trying to get the improper power of sale (PoS) set aside, only has a "mere equity" which is held to not be a full proprietary interest and thus, cannot be the basis of a caveat under s89. Therefore, [insert mortgagor] <u>cannot lodge for a caveat / caveat is invalid and will be removed</u> (Swanston). It is noted that the case of Swanston has been heavily criticised, but it still remains authoritative in Victoria and was followed by Vasiliou later on. AND/OR *IF RE INJUNCTION (i.e. whether mortgagor can seek an injunction to prevent a purchaser from registering): However, per Forsyth v Blundell, [insert mortgagor] may apply for an injunction to prevent the completion of the sale. As defaulting on the mortgage does not equate to postponing conduct and there has been no further postponing conduct, the court will likely also grant an injunction to prevent the sale here. *ENDS HERE
(3) IF MORTGAGOR vs. BFPFVWN	priority dispute between mortgagor's interest + subsequent equitable interest The facts of this case are similar to that of Latec Finances where there [insert original purchaser from PoS] is a related party to [insert mortgagee]