

# MID SEMESTER SCAFFOLD

## UNREGISTERED INTEREST

Unregistered interests are not provided status under s41, but that does not mean they have no effect. They get their status from the transaction behind the dealing (**Barry v Heider**)

### 1. EQUITABLE INTEREST

#### Equitable interests in land can be created through either:

- (A) **Writing** as per **s 23C(1)(a)**
- (B) **Part performance** exception as per **s 23E**
- (C) Deposit of title deeds with intention if it's by way of security (**Theodore v Mistford**)

**ALSO:** Vendor's lien (right of a seller to repossess the property sold until the buyer makes all payments for the full purchase price) **Heid v Reliance**

Fraud or forgeries would also frustrate equitable interests:

**Forgery:** if the signature of the grantor has been forged, the **instrument is void** and passes no rights in law or equity.

**Fraud:** if the instrument was signed by the grantor, but its execution was induced by fraud, the instrument will pass a legal interest, but equity will allow the grantor to have the instrument set aside (*nemo dat quod non habet*)

#### (A) **WRITING** AS PER **S 23C(1)(A)**

**23C(1)(a)** requires writing to create or dispose of interests in land by parol. That is:

- Writing signed by the person creating the interest OR
- Writing signed the person's agent (agent's authority also need to be in writing); OR
- By will; OR
- By operation of law (statute).

→ *Consideration is not required to create an equitable interest under 23C(1)(a).*

#### (B) **PART PERFORMANCE** EXCEPTION AS PER **S 23E**

##### 1. Identify the acts **by the party relying on part performance**

- ☐ Acts done must be done by the party to the contract seeking to rely on the doctrine, or his or her authorised agent: **Maddison v Alderson**

##### 2. Acts must be within the **permitted** by the agreement

- ☐ Acts must be **permitted, but not necessarily required**, to be done by the terms of the agreement, **Regent v Millett**
  - Purchasers of a house took possession, but they were not required to take possession under the terms of the contract of sale/mortgage.
  - Gibbs J: "... if a vendor permits a purchaser to take possession to which a contract of sale entitles him, the giving and taking of that possession will amount to part performance notwithstanding that under the contract the purchaser was entitled rather than bound to take possession."

##### 3. Acts must be **unequivocally** attributable to point to the existence of an agreement

*In establishing this element it is generally accepted that the court looks at the acts done and then judges to see if there is an implication of an agreement of the type alleged, rather than looking at the terms of the alleged agreement and judging if the acts are inconsistent with such an agreement: **McBride v Sandland***

## ☒ EQUIVOCAL ACTS (NOT SUFFICIENT FOR PART PERFORMANCE)

- **Payment of money** (e.g. mortgage payments, purchase price, deposit, rent) can be relevant, but it is equivocal on its own and not sufficient to establish part performance (**Cooney v Burns**)
  - o In **Cooney v Burns**, money was paid but it wasn't clear what it was for on the evidence: could have been an actual deposit ahead of the purchase price or a holding deposit – it was equivocal.
- **Acts which are preparatory** to completion (rather than the formation) of the agreement are not within the scope (**Cooney v Burns**). Ask **'does the act affect possession'**?
  - o **Inspection of lease documents**: Handing over the lease was not a deposit of the title: preparatory or ancillary to performance. Does not relate to the use or improvement of the land or touch or concern the land in any way whatever. Did not change the relative position of the parties in respect of the land (i.e. title, possession or use)
    - *Court contrasted with mortgage by deposit of the title deeds*
  - o **Taking inventory of the pub (e.g. food and beer)**: not a part of the agreement, nothing to do with the right of ownership. Preparatory to the enforcement of the contract.
  - o **Incurred legal expenses**: this also did not affect possession, it was preparatory and common ahead of decisions to commit to purchase property
- **Love, affection and gratitude**: There is a strict requirement that the acts need to be performed for no other reason – family or love/relationship will complicate the situation.
  - o **Maddison v Alderson**: Woman cared for man and did housework on promise of life estate. Argued she had sacrificed building her own family to do this. Court said acts might have been for love and affection, not solely because of the agreement.
  - o **Regent v Millett**: However, the court doesn't assume 'love and affection' motivation just because it is a family. Here court enforced an equitable mortgage granted to Regent's daughter and son-in-law (part performance acts were mortgage repayments, taking possession and making repairs).

## ☒ UNEQUIVOCAL ACTS (SUFFICIENT FOR PART PERFORMANCE)

- **Possession** is par excellence as an indicator of part performance.
  - o **Cooney v Burns** did not have possession, but the court endorsed it as the **greatest act of part performance a party could demonstrate regarding property**.
  - o **Regent v Millett** The daughter and son-in-law took exclusive possession.
  - o **Maddison v Alderson** the woman did have possession, but it was not exclusive possession. Rather she cohabited with the titleholder and this act was accompanied by love and affection, which the court said made it equivocal.
- **Repairs/improvements/work on the property**
  - o **Cooney v Burns** Court said that *'laying out of money in improvements on the land changes the position of the parties in relation to the use of the land'* and could be considered an unequivocal act of part performance.
  - o **Regent v Millett** The daughter and son-in-law made repairs and improvements to the property after taking exclusive possession
  - o **Maddison v Alderson** the woman cleaned and maintained the house over a number of years, but this act was accompanied by love and affection, which the court said made it equivocal..
- **Payment of money** can be relevant
  - o **Ciaglia v Ciaglia** payment of money (especially in mortgage transactions) can be relevant, even though not itself sufficient. In **Ciaglia**, mortgage payments made by third parties on behalf of the plaintiff were considered to be acts of part performance because of **the defendant's admission that loan had been repaid**.

## (C) DEPOSIT OF TITLE DEEDS WITH INTENTION

**Theodore v Mistford**: An **enforceable equitable mortgage can be made by a deposit of title deeds**, if they were deposited **with the intent the land was to be security for payment of a debt**.

- Title document: Torrens System = certificate of title
- **Facts**: Mr Theodore was trying to secure a mortgage for the purchase of a business and the vendor wanted additional security than just the business. His mother, Mrs Theodore, gave her son the title documents for land she owned and the son gave it to his solicitor. Court held she created an equitable mortgage over the house.
  - o The court said that where formalities are not complied with sufficiently to create a legal mortgage, **the act of handing over the title documents creates an equitable mortgage, unless it is established the certificate was deposited for other reasons**
- Was there **any other reason** the title documents were deposited:
  - Safekeeping (e.g. to a bank or lawyer)?
  - Was the party mistaken as to what the document was?
- **Focus on the intention** in handing over the document: was it to secure an interest?
  - o Court **focused on Mrs Theodore's intentions**: Mrs Theodore handed over possession of the title documents to provide additional security for her son's obligations so he would be successful in getting the loan.

## 2. MERE EQUITY INTEREST

### Mere equities

- Definition of a mere equity:
  - **Latec Investments**: A mere equity is claim to have an equitable interest that can only be **enforced by succeeding in court**.
- Examples:
  - 1) Claim for **rectification**: (see **Double Bay Newspapers** in mere equities below)
    - *Party needs to prove error in document in court before it can be rectified. If equitable interest relies on correct explanation, that interest doesn't arise until the document has been amended.*
  - 2) Claim to **set aside a transfer on the basis of fraud**:
    - *Alleging that fraud has arisen is a mere equity. Party needs to prove the fraud before they have a right to set a sale aside on the grounds of fraud. Until court grants that order it is a mere equity.*
  - 3) Claim to **set aside transfer on the basis of impropriety**: see **Latec Investments** below
  - 4) *Possibly* a claim to **enforce contract based on part performance**
    - *If a party can establish sufficient acts of part performance, they can show an enforceable agreement which gives rise to an equitable interest if it is specifically performable.*
    - Whether acts of part performance should be treated as a mere equity is debateable **Double Bay Newspapers**

## 3. LEGAL (UNREGISTERED) INTEREST

### **Legal lease: s 42(1)(d) RPA**

Exception under **s 23B(2)(d)** C.A. – lease or tenancy not required by law to be made in writing

- **s 23D(2)** does not require leases to be in writing if they are:
    - At the best rent that can reasonably be obtained (market rent); and
    - Term not exceeding three years (including any option to extend); and
    - A right to immediate possession (i.e. not with a future commencement date).
- *Query whether there is any consideration and whether this might be required to support a the creation of a parol of a lease that is excepted from writing requirements under s 23D(2).*

- them for registration: *James v RG*. I.e., basically inapplicable as RG would have to somehow lose it off the folio.
- If created expressly, then can enforce in personam against the granting RP; should caveat as subsequent registration will erase.
- If created via prescription, cannot enforce via presumption by analogy with *Williams v STA*.

## Extinguishment of profits

- **Express agreement:**
  - For Old Systems, as profit is an interest in land (s 7 CA), its release is the beneficiary conveying back to the servient owner an interest in land, it must be in deed: s 23B CA
  - For Torrens, by registration of s 47(6A) release form.
- **By abandonment**, in the same manner as easements.
- **If their subject matter becomes extinguished** (e.g., pond runs out of fish): *Clarkson v Woodhouse*
- **By Court order under s 89 CA**

## COVENANTS

**Covenant** = contractual obligation affecting a landowner that has proprietary consequences (such as to avoid the limitations of the doctrine of privity). *Only restrictive ones are proprietary*

**Positive covenant** requires an act *to* be done; **negative (restrictive)** covenant requires an act *not* to be done.

**Covenantor** = gives the covenant (burdened); **covenantee** = person with benefit of covenant (benefitted)

### Methods of creation

- Restrictive may be created by execution and registration of a transfer in which a covenant is contained OR by written agreement between parties, usually by deed; R-G then notes covenant on the folio of burdened land: 47 RPA
  - May still be recorded if both benefitted/burdened land in common ownership, IF both are TT: 46A(1) RPA
- ss 88D, 88E and 88F CA allow creation of restrictive covenants in gross (no benefitted land) that run with land in favour of certain public and statutory authorities.
- Restrictive or positive can be created by rego of plan under s 88B(3)(d)

### WHICH SCENARIO?

1. OG covenantor vs OG Covenantee (contract law claim)
2. OG covenantor vs NEW Covenantee → Does the benefit of the covenant run at law?
3. NEW covenantor vs OG Covenantee → BURDEN never runs at law (*Austerberry v Oldham*), so does it run at equity?
4. NEW covenantor vs NEW Covenantee → Does burden run in equity? Hence, does benefit run in equity?

### FOR SCENARIO 3 AND 4 Does the burden run? (for scen 4, then run through same criteria for eq. benefit)

I.e., where the original covenantee (beneficiary) wants to enforce against successor covenantor

**IN EQUITY:** [*Tulk v Moxhay* – RESTRICTIVE ONLY] burden enforceable against successors in title of original covenantor if:

### Covenant is negative in substance (cannot enforce positive ones!)

- **Test:** If covenant can be fulfilled by doing nothing, it is negative; if it requires some positive act (e.g., expenditure of money, labour), it is positive: *Westpoint Corporation*
- *Does not matter if framed creatively* – look to substance. E.g., covenant to keep a park uncovered with buildings = negative (although phrased positively) vs. Covenant not to let premises fall into disrepair = positive (although phrased negatively).
- **Severance:** where both positive and negative, may be severed (so that negative are enforceable) unless inextricably linked: *Pirie v Registrar-General*

### Benefitted covenantee's land, not just covenantee personally, at time entered into

- **Test:** question of fact; generally sufficient if land is reasonably regarded as capable of being affected by the performance or breach of the covenant: *Kelly v Barnett*

- Similar, but broader than 'touches and concerns': *Lane Cove Council v Hardie*
- Size? required benefit will be absent if covenantee's land is too large to be in fact benefited by the covenant: *Lane Cove v Hurdis; Re Ballard's*
- Distance? unlikely to be benefited, unless land burdened is reasonably near the land intended to be benefited, although need not be contiguous: *Kelly v Barrett; Clem v Farrelly* (35kms too far)
- Enforceable even if expressly limited to benefiting freehold and not also leasehold interest: *Forestview Nominees*

#### Burden intended to run with covenantor's land.

- S 70A: presumption that burden intended to run unless contrary intention expressed or implied.

Successor in title to the burdened land is not a bona fide purchaser of the legal estate without notice → IN TORRENS, successor is bound because it is **noted** on the title s88(3) C.A., bound by s 42

#### At the time of entering into the covenant, the covenantee owned the benefited land

S 88(1) C.A. details clearly indicated (if not, not binding) instrument must "clearly indicate": The land benefitted; the land burdened; persons (if any) whose consent is required to release, vary or modify the instrument; persons (if any) whose consent to a release, variation, or modification of the restriction is required.

- Sufficient if matters can be discerned by construing the instrument using normal aids excluding extrinsic evidence – *Papadopoulos v Godwin*)

#### **FOR SCENARIO 2 – Does the benefit run at law?**

*I.e., where successor covenantee (beneficiary) wants to enforce against original covenantor.*

#### **AT LAW: POSTIVE OR RESTRICTIVE**

Express assignment: where the benefit, not being annexed, is expressly assigned to successors in title of the land benefited; i.e., as a legal chose in action: 12 CA. Covenant must have complied with s 88

#### Annexation:

Covenant touches and concerns land owned by covenantee, benefiting it rather than the covenantee personally: Ballard's Conveyance; Kerridge v Foley

*Test*: A question of fact. Benefits the land = either enable the holder of the covenantee's land to better enjoy the land OR enhance the value of the land: *Rogers v Hosegood*

Benefit intended to run with covenantee's land → S 70A: presumption that burden intended to run unless contrary intention expressed or implied. Thus likely unnecessary for there to be any intention per HOL in *Rhone v Stephens* & state level, although controversial and HCA left q open in *Forestview Nominees*

Successor in title to the covenantee must have a legal interest in the land; however, that interest may be leasehold, lifeestate etc even though original covenantee had fee simple: s 70(1).

Original covenantee must, at the time of making the covenant, have been the LEGAL owner of the land to be benefited: *Kerridge v Foley*

***Use equity instead where (1) the successor covenantee only has equitable title to the land or (2) where both trying to get BOTH burden and benefit to run, as burden can only run in equity (see above)***