

LECTURE 1A: INTRODUCTION & OLD SYSTEM TITLE

INTRODUCTION

Conveyancing Act s 47

- Overturns the old common law where you had to specify 'to A and his heirs' to create a fee simple. Now you can just say 'to A' it will make a fee simple.

DEEDS

A document on paper that is (1) **signed**, (2) **sealed** and (3) **delivered** b/w parties whereby interests/rights/property passes or (4) **obligations binding is clear**. (Section 38 Conveyancing Act)

- Deeds of trust
- Deeds of settlement
- Deeds of litigation

GENERAL OVERVIEW OF PRIORITY RULES:

- Legal interests: Recognised by statute and first in time prevails (exceptions)
 - When there are two legal interests they are not necessarily inconsistent → owner v lease – a later purchaser in fee simple can take title subject to the earlier legal lease. i.e. will have a reversion in fee simple.
- Equitable interests: Equity follows the law, the general rule being that where equitable interests are equal, the first in time prevails.
- Between equitable and legal interests:
 - **PRIOR EQUITABLE, LATER LEGAL** → bona fide purchaser for value without notice (BFPFVWN) (Wilkes v Spooner)
 - Think O enters into a contract to sell P who pays a deposit, then executes a deed of conveyance to P2 which is signed sealed and delivered to P2 (s 23B). If P2 is a BFPFVWN then they will take free of the equitable interest.
 - **PRIOR LEGAL, LATER EQUITABLE** → the legal takes priority (assuming BFPFVWN) unless there is postponing conduct.
 - **Postponing conduct include:**
 - The legal owner is fraudulent in the creation of the equitable interest (Whipp's Case)
 - The legal owner fails to get his documents in (Walker v Linom)
 - The legal owner gives authority to an agent to deal with the property as a security and the agent exceeds that authority (Whipp's Case)

NORTHERN COUNTIES OF ENGLAND FIRE INSURANCE V WHIPP (1884)

Principle	1. If the prior legal estate assists in the fraud that led to the creation of the subsequent equitable estate, its interest will be considered serious postponing conduct. 2. Also considered the situation where an agent who overreaches authority may also constitute postponing conduct.
Facts	CR borrowed money from the company (C) he managed and granted it an OS mortgage to secure repayments (so that the C held legal title and CR held an equity of redemption). The C kept the deeds for the mortgaged property in a safe to which CR had the key.

	Without the C's knowledge, CR took the deeds except the deed for his mortgage to the company from the safe and then used them to grant a mortgage to W (which was equitable although granted by deed). W had no notice of the earlier mortgage interest.
Issue	C has prior legal interest. W has subsequent equitable interest. Did C have priority over W or did its negligence regarding the custody of the deeds postpone its interest?
Reasoning	The Court held that yes, C retained its priority because it was not fraudulent. The Court said that they will postpone the prior legal interest in two situations: <ol style="list-style-type: none"> 1. If the prior legal interest holder had assisted in or connived in the fraud which led to the creation of the subsequent equitable estate. Here, C was careless but not fraudulent since C did not get any benefits from this. 2. If C had made CR their agent with authority to raise more money and the agent exceeded his authority. Here CR was not the agent of the company and approached W as the unencumbered owner of the property. There was no representation by C that CR was acting as their agent.

WALKER V LINOM (1907)

Principle	1. The prior legal estate's failure to gain control of the documents is postponing conduct because it would be inequitable for him not to be postponed. He has allowed misrepresentations to be made by the previous legal estate to the world. 2. The negligence leading to the prior legal estate's failure must be gross in order to make it inequitable.
Facts	W created a family trust and conveyed the land to his solicitors as trustees. He had a life interest under the settlement, which was to determine on alienation. His wife's family was not happy with W's assets and so they changed it to be non alienable (cannot be assigned, otherwise the interest would disappear) and that his wife would have a deferred life interest. The same solicitor acted for W, his wife and were also the trustees. The solicitors got in all the deeds except the deed by which the land was previously conveyed to W. W retained the deed and later used it to equitably mortgage the land. The mortgagee subsequently exercised his power of sale to sell the land to L.
Issue	T has prior legal interest. L has subsequent equitable interest. Did L's equitable interest have priority over the Trustee's legal interest?
Reasoning	The court held that yes, L's equitable interest had priority over the Trustee's legal interest because the Trustees had not gained control of the deeds. This allowed the previous owner to represent himself as such to the subsequent owner of the equitable interest that any prior legal interest did not exist. Note: W technically lost his interest when he attempted to alienate his interest and thus under <i>nemo dat</i> , L should have no interest at all. However, this case shows that the legal owner's postponing conduct in failing to get the deeds not <i>only</i> postponed their interest to the subsequent one but also <i>created</i> the later interest itself. L took nothing under the mortgage from W because he had nothing to give, but L acquired an equitable interest against the trustees arising from their negligence.

PRIOR EQUITABLE V SUBSEQUENT EQUITABLE

If they are equal then generally earlier will prevail (*Abigail v Lapin*). However, the subsequent will prevail if it has the more meritorious equity (earlier interest holder engaged in postponing conduct – *Heid v Reliance Finance Corporation*).

- Postponing conduct in this sense is less serious than in prior legal v later equitable.
- It is insufficient that the subsequent interest holder is a BFPFVWN, although it is a necessary element. The BFPFVWN doctrine does not apply.
- Postponing conduct includes:

- The earlier interest's act or neglect contributed to the subsequent interest being created without notice of the earlier interest (*Abigail v Lapin*)
- It is reasonably foreseeable that, as the consequence of the acts or omissions of the earlier interest, a subsequent equitable interest might be created and that the owner of that subsequent interest would assume the non-existence of the earlier (*Heid v Reliance Finance Corporation*)

ABIGAIL V LAPIN [1934]

Principle	<p>1. Affirmed the equitable maxim where equities are equal, the first in time prevails.</p> <p>2. The claimant who is first in time will lose priority by postponing conduct. This is defined as any act or omission, which had or might have had the effect of inducing a subsequent claimant to act to his prejudice.</p>
Facts	<p>L executed a transfer of their Torrens land for H, who became the registered proprietor. Although the transaction was absolute in form, in substance, it was intended to be a mortgage. Thus, L retained an equity of redemption in the land.</p> <p>H granted a mortgage over the land to A, which was unregistered.</p>
Issue	Did L's earlier equitable interest (equity of redemption) or A's later equitable mortgage have priority?
Reasoning	<ul style="list-style-type: none"> • The court (Privy Council) held that A's equitable mortgage had priority because L's conduct in allowing H to be the legal owner of the fee simple rather than as a mortgagee ultimately allowed her to present herself as such to the world and to A. <u>L had allowed the misrepresentation to occur.</u> • Privy Council: "In the case of a contest between two equitable claims, <u>the first in time, all other things being equal, is entitled to priority.</u> But all other things <i>must</i> be equal and the claimant who is first time may lose the priority by <u>any act or omission which had or might have had the effect of inducing a claimant later in time to act to his prejudice.</u>" • The court recognised that these misrepresentations often operated through the <u>intermediary</u> (H). This fact in this case is irrelevant because L's conduct still allowed H to make this misrepresentation to A. L had other options such as lodging a caveat on the register or granting her a mortgage rather than legal title.

HEID V RELIANCE FINANCE CORP (1983)

Principle	<p>1. Note that this is a Torrens title case but still applicable to OS title</p> <p>2. Postponing conduct is whether there have been any acts that make it <i>inequitable</i> for the earlier equitable interest to retain priority.</p>
Facts	<p>H owned land and sold it to C. H handed C the CT and a transfer in favour of C, which contained an acknowledgement that the purchaser price had been fully paid.</p> <p>However, it had not so the statement was incorrect. Therefore, H held a <i>vendor's lien</i> (an equitable interest to secure payment of price).</p> <ul style="list-style-type: none"> • C grants an unregistered equitable mortgage to R.
Issue	Did H's vendor's lien or R's unregistered equitable mortgage have priority?
Reasoning	<p>Court held that R's unregistered equitable mortgage had priority over H's vendor's lien as H's act of giving the CT and the incorrect statement had constituted postponing conduct</p> <ul style="list-style-type: none"> • Whether it is based on estoppel or negligence or a combination, the conclusion is the same. <u>The concept is about whether they contributed to the creation of the subsequent equitable interest in a way they should not have.</u> <p>Gibbs CJ: The concept of postponing conduct that undermines the merit of the equity comes from estoppel. While the representation is made by an intermediary and does not technically satisfy estoppel, the fact that H allows C to have the CT with an incorrect statement allows them</p>

“with the power of going into the world under false colours” that would amount to the same as making the misrepresentation themselves.

Mason and Deane JJ: The theoretical basis is more similar to negligence. Has H acted in a way that they could've foreseen the creation of an equitable interest without notice of any earlier equitable interest? Concluded that H was negligent in the docs given to C that allowed the misrepresentation to be made to R.

PRIORITIES BETWEEN COMPETING LEGAL/EQUITABLE OR LEGAL AND EQUITABLE INTERESTS

An equitable interest in property is one that will be enforced by a court exercising equitable jurisdiction.

- **The practical effect is that all major courts in our legal system recognize, characterize and enforce equitable interests.**
- Dispute between legal and equitable and dispute between registrations.

TYPES OF EQUITABLE INTEREST INCLUDE:

1. Beneficiary's right under a trust
2. Right of purchaser under a valid agreement for sale of land
 - a. Exchanged contracts to purchase property, deposit paid, given time to get finances together – once contracts exchanged you have acquired an interest, only when settled have you acquired the legal estate
3. Right of mortgagee/lessee under a valid agreement (not a deed) to grant mortgage/lease
4. Right of a mortgagor in the mortgaged land which is Old System title (equity of redemption)
 - a. Sign a deed of mortgage, and then get the loan in return (the land is the security), but under Old System the land was conveyed to mortgagee, effectively the new owner
5. Right of a second or subsequent mortgagee
 - a. If you have given a mortgage (legal) and then need more money thus create another – any subsequent mortgages will necessarily be equitable (no more legal title to give!)
6. Right of mortgagee under mortgage by deposit of deeds (principle of part performance) → an equitable mortgage is created even though the documents are not completed
7. Grantee of an option (general approach)
8. Unpaid vendor (vendor lien)
9. **Purchase price resulting trust (s 23C (2))**
 - a. Two or more people (M and B) have contributed to the purchase price (Arises **at the time** when the property is acquired. It will not arise if M contributed after B purchases.) but only one person (B) is the owner of the land. So on the face of it, one person (B) is the sole owner. In this case equity does not intervene. B will be holding a resulting trust on himself and M. A percentage of the purchase price that was contributed by M is also the percentage of the land given to M.
10. A profit a prendre that is in writing but not in the form of a deed.
 - b. Profit a prendre is a right in the land to enter and take away the natural soil, timber and animals (specific purpose).
 - c. Legal profit a prendre is done by complying with s 23B, but if it is not in the form of a deed then it will be equitable in nature.

NOTICE

- Existence of notice is decisive: Abigail v Lapin

NOTICE BEFORE CONSIDERATION?

- Defeated “at the threshold”, as the person is the author of his or her own predicament: *Courtenay v Austin* (1961)
- A distinct and fundamental ground for disqualification, nor merely a factor in the search for the better equity: *Platzger v Cth Bank* [1997]

NOTICE AFTER CONSIDERATION?

- Can carry on as long as the equitable interest isn't a trust. You will still get a legal title then but the beneficiary will still have the prior equitable interest: *Bishopsgate Investment Trust*

Limited Exceptions

- Earlier holder has by agreement or conduct waived the right to prevail: *Cth Bank v Platzger*
- Earlier holder engaged in some act or omission which caused the later holder to believe, at the time of acquiring their interest, that the earlier interest ceased to exist: *Lapin v Abigail*
- **Single transaction:** see *Composite Buyers v State Bank of NSW* (1990) [CB 712]
 - Contract as to future property (mortgage), but later purchased property is subject to a mortgage – later considered ‘single transaction’ so first mortgage = over equity of redemption of second mortgage → QUESTION OF FACT

Constructive Notice

- S 164: There are two requirements for purchasers (or anyone taking an interest in the land) to meet, the failure of which would result in constructive notice of any prior interests:
 - S 53 Search of title documents: Purchasers are on constructive notice of interests that are discoverable for a period of 30 years. A purchaser is not fixed with notice of interests earlier than this good root of title, unless the purchaser actually extends the inquiry beyond this period.
 - Note, such a search will protect you from earlier equitable interests and to ensure that you have no such notice of it. However, it will not protect you from earlier legal interests because you are bound by nemo dat whether or not you have notice.
 - Inspection of the land: the inspection should check whether there are any persons in possession and in what capacity they are using the land. A purchaser is on constructive notice of any interests that would be discovered by this inspection and is bound by such interests (*Hunt v Luck*).

MERE EQUITY

A right which ranks at the bottom of the hierarchy of proprietary interests, behind equitable interests, which in turn rank behind legal interests.

Examples

- Right to have rectified a document conferring an interest in land: *Smith v Jones* [1954] (equity to rectify a lease); *Shanyer v Amberday* (2001) (equity to rectify and complete blanks in mortgage)
- Right of a person deprived through a fraudulent transaction to have the transaction set aside and their own interest re-established: *Latec*

POSTPONING CONDUCT

If earlier holder's acts contributed to the creation of the subsequent equitable interest, earlier holder is bound by their acts and the subsequent equitable interest prevails (*Abigail v Lapin*)

- Arming the person (holder of equitable mortgage not taking title deeds = arming); or
- Apparent authority.

Note also

- *Heid v Reliance Finance*
 - Estoppel: Gibbs CJ
 - Negligence: Mason and Deane JJ
- *AG (CQ) v A&T*
 - Which is the better equity? Look for deficiencies in prior interest holder's conduct.

Or Conduct (subjectively unequal):

- • “more general and flexible principle” per Mason and Deane JJ in *Heid v Reliance Finance*:
 - “It will always be necessary to characterize the conduct of the holder of the earlier interest in order to determine whether, in all the circumstances that conduct is such that, in fairness and in justice, the earlier interest should be postponed to the later interest.”
 - “The overriding question is whose is the better equity, bearing in mind:
 - the conduct of both parties,
 - the question of any negligence on the part of the prior claimant,
 - the effect of any representation [by the prior] as possibly raising an estoppel [in favour of the latter] and
 - whether it can be said that the conduct of the prior has enabled such a representation to be made” (at 341)

As a general rule, an earlier equitable interest will be postponed to a later one where the conduct of the earlier interest holder has led or allowed the later interest holder to acquire that interest in the mistaken belief that the earlier interest did not exist: *Barry v Heider*.

REGISTRATION

S 184G – Old System
S 41-43 – Torrens Title

COMPETING BETWEEN LEGAL AND EQUITABLE INTERESTS

- Prior legal v later legal
- Prior equitable and subsequent legal
- Prior legal and subsequent equitable (very serious postponing conduct)
- Prior equitable v later equitable (Postponing conduct (not as serious)) – not enough that BFPFVWN)
- Prior mere equity v later equitable (or legal) (Later will defeat mere equity if BFPFVWN)

Notice: actual (s164(a)), constructive (s164(b)), imputed (s164(b))

PRIOR EQUITABLE ESTATE, SUBSEQUENT LEGAL ESTATE EXAMPLE:

1. Bona fide
2. Value
3. Without notice →
 - Types of inquiries: a duty to **inspect the land (Hunt v Luck)** and to **inspect the title deeds**.
 - **For OS, it is required that the search needs to be back to a good root of title at least 30 years (s 53) → anything within 30 years is considered to be constructive notice.**
 - Time when the notice is relevant: at the time consideration is paid.
 - Note s 164 Conveyancing Act → **constructive notice encapsulate – searches/inquiries**
 - OBJECTIVE TEST– “a purchaser thought ought reasonable to have made”