

Introduction to Land Ownership

Recap of IPCL

- **Doctrine of tenure**

- Land is not owned absolutely; it is held directly or indirectly as a tenant of the Crown
 - Cf native title — does not derive from Crown grant; no tenurial relationship
- Imperial Acts Application Act 1969 (NSW)
 - s 36 — freely alienable inter vivos; no subinfeudation
 - s 37 — free and common socage without incident of tenure for benefit of Crown

- **Doctrine of estates**

- Rather than having an ownership interest, a person with an estate will either have fee simple or life estate
 - Fee simple
 - Life estate — lasts the duration of the measuring life (usually grantee)
 - Fee tail — extinct in NSW; Conveyancing Act 1919, ss 19, 19A

- **Requirements of creation of interests in land:**

- **Essential/substantive**

- What package of rights has the grantor intended to create?
 - **Fee simple** — exclusive possession forever
 - **Life estate** — exclusive possession for duration of measuring life
 - **Lease** — exclusive possession for certain term
 - **Easement** — right, accommodating dominant land to use, or restrain use of, servient land in a manner not inconsistent with servient owner's continuing ownership
 - **Profit a prendre** — right to enter servient land and remove the soil or its natural produce

- **Formal**

- How must that intention be manifested?
 - Must a document be used? If so, what type?
 - Is a particular form of words required?
 - Words of purchase (who is the grantee?) vs words of limitation (under what conditions? Quantum of grant)
- **Section 47 Conveyancing Act**
 - If there is a grant without words of limitation, it is presumed to convey fee simple
 - If there is a manifest contrary intention, it creates a life estate
- **Section 38 Succession Act**
 - A disposition of real property to a person without words of limitation is to be construed as passing the whole estate or interest of the testator in that property to that person
 - Rebuttable

- **Distinctions between law and equity**

- What legal/equitable interests in this land exist?

- **General law priority rules**

- Relevant to Torrens land

Legal and Equitable Interests

- Relevance of distinction?
 - Priority contests — favourable in the event of a priority contest to have a legal interest
- How do we know if an interest is legal or equitable?
 - Primarily historical — which Court would have traditionally recognised the interest?
 - Statute plays a role — requires certain formalities to be adopted if the interest is to be legal
- Requirements for creation?
 - **Legal (Old System)**
 - **Deed** — Conveyancing Act s 23B(1)
 - **Exception** — certain short-term leases — s 23D(2)
 - Implied leases and easements
 - Statutory tenancy — s 127
 - **Equitable:**
 - **Written and signed instrument** — s 23C(1)(a)
 - **Contracts for the sale of land or to grant an interest in land**
 - Which are enforceable — s 54A(1), (2); and
 - In respect of which equity would decree specific performance
 - e.g. *Lysaght v Edwards*; *Walsh v Lonsdale*
 - **Declaration of trust — s 23C(1)(b)**
 - Must be evidenced in writing
 - **Resulting or constructive trust — s 23C(2)**
 - e.g. purchase price resulting trust, **presumed** (rebuttable) where legal title taken in a manner that **does not reflect respective contributions to purchase price** and no operable presumption of advancement
 - If land is transferred to A, but A and B contributed equally to the purchase, then prima facie A holds on trust for A and B in equal shares
 - If land is transferred to A and B in equal shares, but A has paid 75% of the purchase price, A and B are presumed to hold their legal title on trust for A and B in shares of 3:1
 - **Vendor's or purchaser's lien**
 - Applies where there's an uncompleted contract; vendor holds land on constructive trust; vendor has equitable lien to secure unpaid purchase price
 - Or if purchaser has prepaid vendor, purchaser has a lien to secure repayment of purchase price if contract is rescinded
 - **Equity of redemption on grant of a general law mortgage**
 - Right to have the title conveyed back to mortgagor upon repayment of mortgage price

General Law Priority Rules

- **Subject to registration schemes:**
 - *Conveyancing Act* — s 184G — old system land
 - *Real Property Act* — ss 41-43A — Torrens land
- Also need to consider notice — **actual, constructive or imputed** — s 164 *Conveyancing Act*
 - *Constructive* — searches, inquiries and inspections that ought reasonably to have been made by the purchaser
 - **Search of title documents:**
 - Old system — good root of title = at least 30 years of title deeds (s 53)
 - Torrens — inspection of the land to ascertain who is in possession (e.g. a tenant) or who is using it (e.g. holder of an easement)
 - **Inspection of the land** to ascertain who is in possession (e.g. a tenant) or who is using it (e.g. holder of an easement) — ***Hunt v Luck [1902]***

Prior...	Later...	Outcome
EQUITABLE	LEGAL	Earlier interest is defeated by later interest acquired bona fide for value without notice <ul style="list-style-type: none"> • bona fide = without fraud • purchaser for value = consideration; must be sufficient but need not be adequate • without notice = includes constructive notice; search Torrens register or OS title deeds 30 years • extension of protection = <i>Wilkes v Spooner</i>
MERE EQUITY	EQUITABLE	
LEGAL	LEGAL	Earlier interest has priority unless the holder is guilty of postponing conduct (fraud or gross negligence) <ul style="list-style-type: none"> • legal + legal = nemo dat; nb possibility of partial incompatibility & taking subject to prior interest • legal + equitable = may postpone through fraud; gross negligence; agent exceeding authority; arm's length conduct • equitable + equitable = technically first in time; but really best equity Also need to be a bona fide purchaser etc.
LEGAL	EQUITABLE	
EQUITABLE	EQUITABLE	

1. Prior Equitable Interest & Later Legal Interest

- A prior equitable interest is defeated by a later legal interest where acquired by **BFPFVWN - *Pilcher v Rawlins (1872)***
- The relevant time at which the legal interest holder must be free of notice is the time at which the consideration for the legal interest is paid — ***Pilcher v Rawlins***
- **Extension of protection:**
 - The priority enjoyed by a bona fide purchaser of the legal estate for value without notice extends also to persons claiming through that purchaser — **even persons who take with notice of the earlier equitable interest or are mere volunteers**
 - **Protects a purchaser who buys *with* notice from a purchaser who bought *without* notice**
 - This principle also exists in s 43A of the RPA

Wilkes v Spooner [1911]

Outcome

- The Court of Appeal held that the **restrictive covenant ceased to run with the land once it had come into the hands of the landlord who had no notice of it**
 - The landlord took free of the restrictive covenant, as did the Son, who took a legal interest from the landlord (the new lease)
 - The son could shelter behind the protection of the landlord even though the son **did** have notice of the Apprentice's equitable interest
 - **The fact that a lease was then granted to S2, who did have notice, did not bring the restrictive covenant back to life**
- The burden of a restrictive covenant runs with the land and binds successors unless they are bona fide purchasers for value without notice of the restrictive covenant
 - Once the estate has come into the hands of the BFPFVWN, **the burden ceases to run even if the land later comes into the hands of someone with notice of the covenant**

2. Prior Mere Equity & Later Equitable (or Legal) Interest

- Later equitable interest has priority over an earlier mere equity if the later equitable interest was taken bona fide, for value, and without notice of the earlier equity
- **Double Bay Newspapers:**
 - Equities or mere equities do not participate in competitions of priorities on the same basis as equitable interests; they may be defeated by equitable interests acquired for value without notice of them; **yet they may prevail against equitable interest which are acquired with notice of them**

3. Prior legal v subsequent legal

- **This simply involves applying the *nemo dat* principle**
- **Note also — partial incompatibility:** if A grants a legal lease to B then purports to convey the legal fee simple to C, C takes the fee simple **subject to** B's lease
 - ***C takes the interest that A has — namely, the reversion in fee simple***

4. Prior legal v subsequent equitable

- There are four categories in which a prior legal may be postponed to subsequent equitable:
 1. Where the legal interest holder was a **party to fraud** that led to the equitable interest being created — ***Whipp***
 2. Where the legal interest holder was **grossly negligent** in failing to inquire after, obtain or retain possession of the title deeds, thereby allowing another to pose as the legal owner and create later equitable interests — ***Walker v Linom***
 3. Where the legal interest holder entered the title deeds to an agent with limited authority to raise money by giving security, and the **agent exceeds this authority** — ***Perry-Herrick v Atwood***
 4. Where the legal interest holder **hands another person a document appearing to give them a beneficial interest**, and that other person, so armed, then purported to create an equitable interest in favour of a third person, who took on faith of the document — ***Barry v Heider***

Northern Counties of England Fire Insurance Company v Whipp (1884)

Facts	<ul style="list-style-type: none">• Crabtree borrowed money from a Company and granted a mortgage as security• The Company kept the deeds for the mortgaged property in safe - Crabtree had a key• Without the Company's knowledge, Crabtree removed the deeds from the safe and used them to grant to Whipp an (equitable) mortgage• Whipp had no notice of the earlier mortgage to the Company
Outcome	<ul style="list-style-type: none">• NO POSTPONEMENT• Carelessness was not sufficient evidence of fraud — no fraud by inaction — must have connived at the fraud• When a holder of a legal interest gets the title deeds but later loses control over them, they'll only be postponed if they were somehow guilty of fraud or they somehow represented the fraudster as being their agent

- The legal mortgagee will only be postponed if the failure is properly characterisable as **gross negligence**
 - Cf prior equitable vs later equitable, where something **less than gross negligence** will suffice to postpone an earlier to a later equitable interest

Walker v Linom (1907)

Outcome	<ul style="list-style-type: none">• Walker looked like the legal owner to the equitable mortgagee<ul style="list-style-type: none">• Because the trustees were <u>negligent in not getting the deeds</u> in, their interest was postponed to the interests of the equitable mortgagee• There's a different between getting the deeds in the first place and then losing custody of them, and <u>being so careless as to never get them in the first place</u><ul style="list-style-type: none">• In the former scenario, there needs to be fraud for postponement; in the latter, the carelessness can lead to postponement
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5. Prior equitable v subsequent equitable

- Often occurs in the Torrens context, where you have a contest between two unregistered interests
- The rule is technically 'first in time prevails'
 - But courts will tend to seek out the best equity — meaning that if it would be inequitable for the earlier interest to prevail, the holder of the later interest may prevail
- **Relevant factors will include (per *Heid v Reliance Finance*):**
 - Nature of the competing interests
 - Manner of their acquisition
 - Whole conduct of the parties

Abigail v Lapin [1934]

Facts	<ul style="list-style-type: none">• Mr and Mrs Lapin owned land, and executed a transfer of their land in favour of Mrs Heavener, who became the registered proprietor<ul style="list-style-type: none">• Looked like an unconditional transfer of fee simple, but really, it was to secure repayment of debt owed by the Lapins to Heavener• Mrs Heavener granted a mortgage over the land to Abigail, which was unregistered• The priority contest was thus between the Lapins' earlier equitable interest (equity of redemption) and Abigail's later equitable interest (equitable mortgage)
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