

LAWS2017 Real Property Comprehensive Notes

1. Common Law and Equitable Approached to Competing Interests

The basic rules of priority:

1. Priority disputes occur when two or more people claim independent property rights that cannot co-exist. When one property right takes priority over another, the latter is extinguished or diminished to the extent of any inconsistency between them.
2. An earlier legal right takes priority over a subsequent legal right (*nemo dat* rule at common law).
3. A legal right takes priority over an equitable right of which a bona fide purchaser does not have notice.
4. An earlier equitable right takes priority over a later equitable right (but some exceptions exist).

A: Old System Title

- Deeds:
 - A deed is the most solemn act that can be done in respect to property: ***Manton v Parabolic Pty Ltd (1985) 2 NSWLR 361***.
 - Where the land is Old System title, the alienation of the fee simple and most interests in land at law must be effected by deed: s 23B(1) *Conveyancing Act* 1919 (NSW). There are four requisites for a valid deed: signing, sealing, delivery and attestation: **s 38 Conveyancing Act**
 - To create a legal interest under old system title, a deed must be signed conveying the land to the mortgagee whereas for an equitable interest under old system title, the title deeds are deposited with the mortgagee.

→ There can only be one legal owner, subsequent mortgages can only create equitable interests in the land.

3 stage process to purchase land:

1. Decision to buy
2. Enter into the contract with the vendor (exchange of contract) – payment of deposit
 - At this point the purchaser acquires an equitable interest in the land equivalent to the deposit. In most cases, courts will order specific performance because land is deemed special and unique.
3. Settlement – the relevant documents are handed over – the purchaser pays the remainder
 - The deed of conveyance (Old System Title)

B: Priorities between competing legal interests

- Consider the situation where O (owner) delivers a deed of mortgage to M (mortgagee), then O delivers a deed of conveyance to P (purchaser). The important rule is that:
 - Where two or more legal interests in the one parcel of land are inconsistent with each other, priority depends on the date of creation of the interests. Where there is inconsistency, an earlier legal right takes priority over a subsequent legal right (*nemo dat* rule at common law).
 - The rule ‘*nemo dat quod non habet*’ means that you cannot give what you do not have.
 - Note the effect of a mortgage of old system title land → the first mortgagee has a legal interest. The right of a second or subsequent mortgagee can only be equitable because it is a mortgage of an equity of redemption.

C: Equity

- Equitable interest in property is one that will be enforced by a court exercising equitable jurisdiction.
- Kinds of equitable interests include:
 1. Beneficiary’s right under a trust
 2. Right of purchaser under a valid agreement for sale of land
 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)
 5. Right of a second or subsequent mortgagee
 6. Right of mortgagee under mortgage by deposit of deeds (principle of part performance)
 7. Grantee of an option
 8. Unpaid vendor (vendor’s lien)
 9. Purchase price resulting trust – where both A and B contribute to the purchase price but the land is only conveyed to A.
 10. A profit à prendre which is in writing but not in the form of a deed (i.e. fails to satisfy s 23B)

- The general maxims of equity:
 1. Equity follows the law (i.e. first in time prevails). Equity adopted the common law rule that priority depends upon the date of creation of the interest.
 2. Where the equities (merits) are equal, first in time prevails ('qui prior est tempore potior est jure').
 3. Equity will not suffer a wrong to be without a remedy.
 - Competing equitable interests
 - Consider the situation where O deposits the title deeds with M as security for a loan and then later O enters into a contract to sell the land to P. There are two competing equitable interests. The general rule that will be applied is that if the merits are equal, the first in time will prevail.
 - Note that the mere fact that the person second in time has given value and has taken without notice will not protect him/her. He/she will have to show that there is some inequitable conduct that would lead the court to exercise its discretion in his/her favour. There are different interpretations as to what will suffice in this situation. What is important will be whether the person first in time is guilty of postponing conduct.
- Two views which are exceptions to the general rule:
1. Look at whether there has been any postponing conduct by the prior equitable owner
 2. The equities are not objectively equal – mere equities
 - Look at all the circumstances of the case

D: The Competition between Legal and Equitable interests

- **Prior Equitable Estate, Subsequent Legal Estate**
 - Consider the following situation: O enters into a contract to sell the land to P. P pays a deposit of \$50,000. O then executes a deed of conveyance i.e. the deed is signed, sealed and delivered to P2 for a purchase price of \$100,000.
 - The rule is that a bona fide purchaser of the legal interest for value and without notice (of P's equitable interest) will take free of the prior equitable interest. This doctrine includes any legal interest in land acquired for valuable consideration – fee simple, mortgage and leasehold.
 - Important criteria to apply:
 - Bona fide purchaser (in good faith) – a mortgagee satisfies this requirement or a transfer of valuable shares. The purchaser providing valuable consideration is the key.
 - Without notice of the earlier equitable interest
 - Types of inquiries: a duty to inspect the land and to inspect the title deeds. Notice or intelligent apprehension of the nature of the encumbrance can be achieved in 3 ways:
 - a. Actual knowledge of the equity interest
 - b. Constructive situations where actual notice would have been achieved if diligent or reasonable inquiries had been made by the purchaser.
 - c. Imputed – actual or constructive notice to an agent acting in your capacity
 - Time when the notice is relevant: at the time consideration is paid.
 - Restriction on constructive notice: **s 164 Conveyancing Act**
- The rule in **Hunt v Luck [1902]**: A purchaser who knows that any person is occupying or using the property – whether or not as a tenant – is on notice (constructive) of the occupant's or user's proprietary rights. Hence knowledge of a person occupying a property is notice of that person's proprietary rights.
- Rule must yield in Torrens system to indefeasibility of title
- **Tabula in naufragio (plank in a shipwreck)**: 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. 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 (from M) even though at the time P knew of S's earlier interest.
 - P needs to acquire the equitable interest without notice but can acquire the legal interest with notice
 - The rule in **Wilkes v Spooner [1911]**: bona fide purchaser of legal estate for value without notice can give a good title to purchaser from him or her (even with notice). Consider the situation where A has a prior

equitable interest, B is a bona fide purchaser for value without notice of the legal estate and C is a purchaser with notice of A's interest but is purchasing through B. C can hide behind B's protection i.e. B's lack of notice.

- There is an exception: when the trustee has sold property in breach of trust or a person who acquires property by fraud cannot rely on the being a bona fide purchaser of the legal estate without notice.
 - An intervention of a bona fide purchaser extinguishes any prior equitable interests permanently.

Prior Legal Estate, Subsequent Equitable Estate

- The general rule is that the holder of the legal interest takes priority.
- An earlier legal interest generally prevails over a later equitable interest in accordance with the maxim, '*where the equities (merits of the case) are equal, the law prevails*'. However the equitable interest holder can show that the conduct of the legal interest holder has been such that the legal interest ought to be postponed to the equitable.
- Note here the 6 situations where the legal estate will be postponed:
 1. Legal owner has expressly created the equitable interest.
 2. Legal owner has been a party to some fraud ('fraudulently connives') that has led to the creation of the equitable interest. It is irrelevant that the fraudulent purpose achieved was different from that intended, or that the person defrauded was not the person intended to be defrauded (**Northern Counties**).
 3. Legal owner's act of gross negligence (usually in relation to the title deeds – in failing to inquire after, obtain, or retain possession of the title deeds) has allowed equitable interest to be created: **Northern Counties of England Fire Insurance Co v Whipp** → mere negligence or carelessness is not sufficient.
 4. Where the legal owner entrusts an agent with the title deeds with limited authority to raise money on them and the agent exceeds the authority by creating a security for a larger sum in favour of a person who had not notice of the limitation. The legal interest is bound by the interest so created to its full extent, not merely to the extent authorized: **Temperance Permanent Building Society (1895)**.
 5. Where the title deeds themselves are not handed over to an agent or someone else, but rather some document which on its face appears to entitle the holder to a beneficial interest in the land or to get the legal estate vested in him or her
 6. Based on "estoppel:" The legal owner is estopped from asserting his or her legal title against the holder of the equitable interest.

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

- Facts: Company took the documents of title from Crabtree but Crabtree has access to these documents and he subsequently took the documents and used it to create an equitable interest with Whipp i.e. borrowed some money in exchange for an interest in his property. Priority dispute between company's earlier legal interest and Whipp's later equitable interest.
- **Issue:** Both parties claim to have security over the property. Who has priority?
 - Whipp has an equitable mortgage, satisfied the requirements – there is evidence in writing of the intention of Crabtree to create a mortgage for valuable consideration. Her argument centred on NCF's conduct in failing to secure the deeds was postponing conduct, which allowed her equitable mortgage to prevail over its legal mortgage.
- **Held:** The Court held that NCF had not deliberately defrauded Whipp, they were careless in leaving the deeds in the safe but negligence is not enough – **there needs to be fraudulent behaviour** (higher standard than negligence or mere carelessness). The fraud was caused by Crabtree who was not acting as an agent of NCF (he was acting outside his scope of employment and NCF did not gain from his fraud). This meant that NCF's earlier legal interest takes priority.
 - **Fry J:** The cases which assist in answering the question thus raised will be found to fall into two categories:
 1. Those which relate to the conduct of the legal mortgagee in not obtaining possession of the title deeds → higher standard of performance is expected.
 2. Those which relate to the conduct of the legal mortgagee in giving up or not retaining the possession of the title deeds after he has obtained them.

Walker v Linom [1907]

Facts: concerned W conveying real estate to hold on trust for wife. The trustees (who had legal title) failed to notice that one deed was missing. This deed was used by W to secure a mortgage, which W then defaults.

Issue: priority dispute between the earlier legal interest of W and the conflicting later equitable interest of Linom.

Held:

- Failing to get documents in may subordinate a legal owner to a subsequent equitable interest – as it would be inequitable for the legal owner to argue against a subsequent equitable interest, the creation of which was only rendered possible by the possession of documents but for the conduct of the legal owner would be in his possession.
- Here the trustees did not ensure they received all the title deeds. The missing title deed could have been detected immediately if a proper examination of the title deed chain provided by Mr Walker was carried out at first instance → this was held to amount to *gross* negligence but distinguish to *Whipp* on basis that different standard applies for failure to get documents in
- Also held that wife as the beneficiary cannot be in a better position than her trustees → hence wife was postponed to the interests of the third party (Linom).

Equitable Interests

- The general rule applied is that the earlier equitable interest generally has a stronger claim than the later equitable interest. However, the overriding question is stated by **Mason and Deane JJ** in *Heid*: *‘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 as possibly raising an estoppel and whether it can be said that the conduct of the first or prior owner has enabled such a representation to be made...’*

Exceptions where the earlier equitable interest is postponed to the later interest:

- Where the holder of the earlier equitable interest only has a mere equity (**Latec**)
- Where the holder of the later equitable interest is led by conduct on the part of the holder of the earlier equitable interest to acquire the later interest in the belief or on the supposition that the earlier interest did not then exist (**Abigail v Lapin, Breskvar v Wall**)
- Where the holder of the earlier equitable interest waives its priority specifically, or gives an express or implied licence to the owner of the property to create further interests in the property in the ordinary course of business
- Where the earlier equity is in favour of a volunteer, and the later claimant gave value and took their interest without notice of the earlier claim
- Where there is a competition between the assignees of equitable interests in personalty, in which case priority is accorded to the claimant who first gave notice to the trustees.

Abigail v Lapin [1934]: equity of redemption vs. equitable mortgage

Facts: The Lapins transferred land through a certificate of title to Heavener but this was only ever supposed to be a mortgage, with H holding it as security for a loan. The Lapins did not lodge any caveat. H then mortgaged the land to a third party, Abigail who did not search the register for a caveat. Abigail then tried to register this interest and had Abigail done this she would have gotten a legal interest but before this was done the Lapins put a caveat on the property.

Issue: Was the High Court correct in stating the general principle that the earlier equitable interest prevails?

Held: Privy Council affirmed with dissenting view in HCA

- The court stated that the Lapins' equity should be postponed to Abigail's interest, because the Lapins had armed their transferee (H) with the power to deal with the land as the full owner, they allowed H to take an apparent absolute and unencumbered legal title – this was their postponing conduct. The Lapins were bound by the natural consequences of their actions.
- Abigail's failure to search the register did not affect the case, because his priority did not arise from any representation to him by the Lapins, and because they had lodged no caveat. Further, that it was to be inferred that the Lapins had authorized H to raise money upon the lands, and accordingly the case was one of an agent exceeding his authority but acting within its apparent indicia.

→ A later equitable interest generally cannot prevail over an earlier interest if the holder of the later had notice of the earlier at the time of acquiring the later interest.

Breskvar v Wall (1971)**Facts:**

- In exchange for a loan from Petrie the Breskvars deposited the title deeds to land and a blank signed transfer form with Petrie, with the idea that when Breskvars repaid the loan these would be returned. But P had the means to transfer legal title.
- P entered the name of his grandson Wall into the transfer box and Wall became the full legal owner despite the Breskvars not defaulting at all. Wall then sold the land to another party O but before the transfer of title went through the Breskvars caveated in time – despite the having no reason here to caveat their own legal title as they did not think that legal title was doing to move.

Issue: who has the interest to the land?

Held (Barwick CJ):

- The Court applied **Abigail v Lapin**, the right of A to be registered had priority over any right of the plaintiffs, the Breskvar's interest, though earlier in time was postponed. The Breskvars had facilitated in the fraudulent transfer because they handed over a blank certificate which allowed the fraudulent transfer to be possible, enabling Wall to hold himself out as having an absolute interest in the property. The Breskvars were negligent.
- Although the Court did not determine the case through looking at the relative strengths of the equity, this was a case where the equitable interests were not subjectively equal. O had a strong equitable interest after paying consideration the land, meaning it was held on constructive trust for O. Breskvars only had an equitable right to set aside the registration in Wall's name (due to fraud). This would be a weaker equity than a constructive trust although it was first in time.

Heid v Reliance Finance Corp (1983)

Facts: Heid as RP released the signed transfer and certificate of title to a solicitor that was an employee of C. Memorandum of transfer acknowledged receipt of the \$165,000, even though this had not happened. Heid did not caveat his vendor's lien or his mortgage. C then used the land as security for a loan from Reliance Finance who became equitable mortgagees and caveated but did not register their mortgage.

Held: The Court held that the priority for the Heid's equitable interest had been lost and his vendor's lien was postponed to the subsequent equitable mortgages. The vendor's conduct in handing over a completed memorandum of transfer containing an acknowledgement of payment (even though it had not happened) accompanied by the certificate of title had put the purchaser in a position to represent itself as absolutely entitled to the land in law and in equity or had armed it with the capacity to represent itself as the true owner of the property and to engage in fraudulent and deceptive conduct, the risk of which was a natural consequence of Heid's actions.

- Gibbs CJ: postponing conduct analogous to an estoppel argument – although there is no direct representation, Heid has given the intermediate person all the title documents meaning Heid has effectively represented to the innocent third party that the intermediate person has a right to deal with these documents hence Heid is estopped from relying on his equitable interest.
- Mason and Deane JJ do not think there is estoppel (as representation is difficult to be established) but important to look at which person has the stronger equity.
- Prefer a more general and flexible rule: it will always be necessary to characterise the conduct of the holder of the earlier interest to determine what is the better equity in all the relevant circumstances? Do fairness and justice require prior equitable interest to be postponed for the later equity?
 - With the relevant factors being the conduct of the parties, questions of negligence by the prior claimant, effect of any representations as to amount to estoppel and whether it was the conduct of the first claimant that enabled the presentation to be made.

Mere equities

A 'mere equity' has proprietary characteristics, but is somehow less than a 'full' equitable interest in land – they are rights that are ancillary to an equitable estate or interest.

- In **Double Bay Newspapers**, **Bryson J** said a mere equity is a claim to have an equitable interest which can only be enforced by succeeding in some claim to a court for equitable relief (such as a claim for rectification or a claim to set aside a conveyance obtained by fraud) does not participate in competitions of priorities with equitable interests which have been acquired in good faith, for valuable consideration and in a manner which can be clearly shown without obtaining any decision of the court upholding them.
- A later equitable interest prevails over an earlier mere equity if acquired for value without notice (*Latec*).

Latec Investments Ltd v Hotel Terrigal Pty Ltd (1965)

Issue: The battle was between HT, which had the right to have the fraudulent sale to Southern Hotels set aside and MLC, which had a crystallised floating charge (fixed charge). Southern Hotels were the legal owners but HT's right to set aside the sale arose first.

Held: The High Court held that MLC won, even though HT had done nothing wrong they still lost.

- Kitto J: decided on the basis that the equities were objectively unequal referring to *Phillips v Phillips* which held a mere equity to set aside a contract does not beat a proper equitable interest such as a floating charge. Here priority is given to the stronger equitable interest, displacing the general rule that when the equities are equal the first in time prevails.
- Taylor J held the case is not a case of different equitable interests, referring to *Stump v Gaby* which found a mere equity can be inherited and is divisible meaning it is proprietary in nature and is substantive i.e. not a mere equity. Taylor J decided on basis that MLC Nominees has an interest in a crystallised floating charge and only needs the Court's to realise the charge and make repossession with no impediments to their claim. Whereas HT is asking the Court's help in setting aside a sale thereby removing an impediment which is preliminary to HT asserting its interest. This means HT will be denied assistance if prior to his claim, an equitable interest is created in favour of a bona fide purchaser without notice.

Double Bay Newspapers Pty Ltd v AW Holdings Pty Ltd (1997)

Facts: A house in Crows Nest had been mortgaged several times; the owner of the legal mortgage had the first claim to the house. The battle was between 3 equitable mortgages.

- **First in time:** Easyfind took an equitable mortgage but did not lodge a caveat.
- **Second in time:** Double Bay Newspapers also took out an equitable mortgage; they searched the register to see if there were any caveats, found none and thought they were first behind the legal mortgage.
- **Third in time:** Lastly, APC took an equitable mortgage but did not search the register; they did try to lodge a caveat.

On the facts it appears that there are three similar equitable interests. Easyfind was in a way responsible for the situation because it did not lodge a caveat, if it had then Double Bay would have been aware of the existence of Easyfind's prior claim. However, Double Bay's mortgage was defective as several documents were not annexed. Therefore, the mortgage did not satisfy the written requirements – they had the right to rectify the defect but this is only a mere equity.

Held: the contest is between an equitable interest (Easyfind) and a mere equity (Double Bay), thus Easyfind trumps Double Bay. Easyfind also defeats the claim made by APC because it was first in time and since APC didn't search the register.

- Bryson J's judgment suggests despite what they said in *Latec* there is still room for objective differences in the strength of equities. There are some objectively different equitable interests.
- Here Double Bay only had a mere equity which does not have standing to compete with the equitable interests of Easyfind. Double Bay notwithstanding their failure to get a properly constituted mortgage would have succeeded – especially as Easyfind did not lodge a caveat or check the registers. APC did not check the registers and was not influenced by Easyfind's inaction hence Easyfind won.

E: Effect of Registration under Division 1 of Part XXIII of the Conveyancing Act

Land law eventually began to incorporate the process of registration of title deeds at a Government Register. **Section 184 of the Conveyancing Act 1919 (NSW)** brought into land law the notion of registration. However, unlike the Torrens system where land rights arise upon registration and do not exist prior to registration, this section was an intermediate registration act which allowed the rights arising out of ordinary conveyances to be registered.

Section 184G Instruments affecting land to take effect according to priority of registration

(1) All instruments (wills excepted) affecting, or intended to affect, any lands in New South Wales which are executed or made bona fide, and for valuable consideration, and are duly registered under the provisions of this Division, the Registration of Deeds Act 1897 ... shall have and take priority not according to their respective dates but according to the priority of the registration thereof only.

(2) No instrument registered under the provisions of this Division or the Registration of Deeds Act 1897 shall lose any priority to which it would be entitled by virtue of registration thereunder by reason only of bad faith in the conveying party, if the party beneficially taking under the instrument acted bona fide, and there was valuable consideration given therefore.

→ Has one or more of the documents subject to the priority dispute been registered? You can see this as a 5th tier in addition to the L v L, E v E, E v L and L v E priority disputes.

1. The party who registers the title first takes priority

2. If there is a priority dispute between registered and unregistered instruments the registered instrument will take priority → s 184 used registration to deal with priority disputes between interests that had been created by ordinary conveyance through the operation of s 184G.

- Section 184G gives precedent to registered documents rather than the date of documents.
- If there are sufficient acts of part performance then this is an exception to the rule that conveyance in land requires writing.
- Registration does not cure invalidity (inherent defects) contrast to Torrens title.
- Purpose of registration: publicity, secondary evidence and priority

Registration: important principles which operate in the application of s 184G:

- The conflicting interests must each have been created by instruments. It does not impact upon the priority of interests where no instrument is required. Examples of interests created without an instrument are:
 - Mortgage by deposit deeds, oral contracts to sell or mortgage land (if there are sufficient acts of part performance), vendor's lien for unpaid purchase price, leases less than 3 years under s 23D(2) *Conveyancing Act* and purchase price resulting trust.
 - Here apply the general priority rules
- The section treats both deeds (instruments conveying legal interests) and written instruments (conveying only equitable interests) equally.
- The instrument claiming priority must have been made bona fide. Bona fide includes questions of fraud and deceit, but most of the cases dealing with whether an instrument is bona fides concerned questions of notice. The cases clearly establish that bona fide means without notice, actual, imputed or constructive notice.
 - Notice received before the instrument is entered into will nullify the benefit of registration.
 - Notice received after execution of the instrument but before registration will not nullify such benefit: *Marsden v Campbell* (1897) 18 NSWLR 33
 - However, note that special considerations apply to contracts for sale of land. A purchaser's notice (of the existence of an earlier interest) between the making of the contract and the conveyance will deprive the conveyance of protection: ***Scholes v Blunt* (1916)**
 - **Facts:** A conferred an easement on B by means of an unregistered instrument. A then sold the land to C 'subject to all easements if any affecting to easements, any, affecting the same.' C registered his instrument first.
 - **Held:** Because the instruments could stand together s 184G did not apply and C took the land subject to B's easement.
- There must be valuable consideration – statutory codification of a maxim in equity (does not protect a 'free-rider'). The statute applies bona fide and valuable consideration to all instruments, including deeds – so now deeds need valuable consideration otherwise you can lose priority to a later registration that satisfies the statute.
- Where instrument is void or voidable, registration does not give any greater efficacy than it would otherwise have.
- Registration operates to fill the title of the conveyor who otherwise would have had no title to give. Registration in effect abrogates the 'nemo dat' rule: *Fuller v Goodwin* (1865) 4 SCR 66.
- The instruments must refer to the same interest i.e. there must be conflicting interests. Note that there will be occasions where no inconsistency will be found: where second grantee has really bargained only for such property as the grantor can properly dispose of, where the second instrument is expressly made subject to prior interests and where the existence of prior interests (to which the second instrument is subject) is implied from the circumstances.
- The Division deals with priorities between registered and unregistered instruments as well as between registered instruments. Note that this does not affect the priority of an earlier interest which was created without writing: ***Moonking Gee v Tahos***
- Registration is constructive notice to the world. This is explicable on the basis that prior registered interests take priority and that a purchaser has constructive notice of them. Note the contrast between purchasing a new interest in property and where a party has secured his/her interest via registration.

- The rules apply to equitable as well as legal interests. Therefore, the rules apply between:
 - Competing legal interests
 - Competing equitable interests
 - Competing legal and equitable interests: see *Moonking Gee v Tahos*

Contract for sale may be registered to give an equitable interest priority over legal interest, notwithstanding the bona fide purchaser doctrine

***Moonking Gee v Tahos* [1963]**

Facts: Tahos (vendor) signs a written contract for the sale of land to Moonking Gee (purchaser) on 13 November 1958. By paying the deposit Moonking Gee has an equitable interest in fee simple over the land, which will be specifically enforceable when 'ready, willing and able.' Tahos sold to Moonking Gee by contract on 13 Nov 1958. On 11 February 1959 Tahos entered into another exchange of contract with Wun, the sale was completed on 6 March 1959 meaning Wun acquired the legal estate. On 12 March 1959, Moonking Gee found out there was an exchange of contract (not settlement) and registered his contract, while Wun registered 11 days later. Moonking Gee sought specific performance of contract. His registration conferred priority.

Issue: Does Wun's later legal interest take priority over Moonking Gee's earlier equitable interest as Yuk Wun is a bona fide purchaser?

Held: Under s 184G, Moonking Gee has priority due to the earlier registration of the interest, despite the it only being an equitable interest in fee simple compared to a later legal interest in fee simple held by a bona fide purchaser. Priority follows under s 184G the date of registration meaning Moonking was entitled to an order of specific performance against Tahos to give Moonking the legal estate.

Note: registration cannot overcome inherent defects in the capacity of the conveying party which render an instrument legally void (e.g. forgery)

Re Cooper

Facts: Thomas Frederick Cooper (deceased) through a will appointed his son by the same name, Thomas Frederick Cooper (Junior) and several other children to be executors of his entire estate. Junior was the co-owner of legal title in trust for beneficiaries as stated in the testator's will. Junior created a forged deed which showed that Thomas Frederick Cooper executes a mortgage over the entire legal title with M, pretending to be his father.

Issue: Now, the question is whether M can register this forged deed and thereby claim priority?

Held: Because M received a forged deed, M does not have any right, legal or equitable over the land. M only has a personal action against Junior for fraud. Accordingly, M has no right to register. M can register the forged deed but this does not give M any right, legal or equitable, over the land for which a priority dispute may arise.

- **Note:** this is the distinction between old system title registration under s 184G and Torrens title registration. Under Torrens title, the registration itself creates the rights. Accordingly, a forged transfer form or forged mortgage form, when registered, will still provide a legal right to the purchaser.
1. In old system title, the right is created from the delivery of the deed (that is not a forgery). This right is then registered for purposes of priority disputes.
 2. In Torrens title, settlement of the property does not transfer any legal right. The legal right is created only when the appropriate registrable form (mortgage form, transfer, lease form) is registered. This is the case even if the form is a forgery.
 3. So the old system title is a system of 'registration of title' and the Torrens title system is a system of 'title by registration'.

2. Torrens Title

A: Torrens Title – Introduction

Under Torrens's title, each purchaser's title would be 'indefeasible' with a single document the 'certificate of title' evidencing title to each parcel of land and recording all transactions affecting the land. It was held by the Registrar-General and would be available for public inspection. The Torrens system was introduced in NSW in the *Real Property Act 1862* (NSW) which was later consolidated with amendments into the ***Real Property Act 1900* (NSW)**.

- Under old system: act of signing, sealing and delivering deed is what effects a transfer (registration is still optional)
- Under Torrens title: in most cases, purchaser does not acquire a legal interest in land until the point of registration

'The Torrens system of registered title...is not a system of registration of title but a system of title by registration. That which the certificate of title describes is not the title which the registered proprietor formerly had, or which but for registration would have had ... It is the title which registration itself has vested in the proprietor. Consequently, a registration which results from a void instrument is effective according to the terms of the registration. It matters not what the cause or reason for which the instrument is void': Barwick CJ in ***Breskvar v Wall* (1972)**

B: The Torrens System

- Major elements
 - *Real Property Act 1900* (NSW) is the major instrument governing Torrens title land although some aspects of the CA still apply.
 - The Register: **s 31B(1)** requires the RG to maintain the Register for the purposes of the Act.
 - Folios:
 - A 'folio' of the Register may be either a 'manual folio' or a 'computer folio' (**s 3(1)(a)**).
 - Under **s 32(1)**, the RG creates a folio of the Register by making a record of: a description of the land and of the estate or interest in the land for which the folio is created, a description of the 'proprietor' of the estate or interest, and particulars of any other estates or interest affecting the land amongst other things.
 - Certificate of title:
 - Under **s 33**, the RG may issue a certificate of title for the land, which is in effect a copy of the folio of the Register, and is given to the proprietor.
 - Dealings:
 - A 'dealing' is any 'instrument', other than a Crown grant or a caveat, that is 'registrable or capable of being made registrable under the provision of this Act' (**s 3(1)(a)**).
 - Each dealings accepted by the RG is allotted a 'distinctive reference' (**s 36(1A)**).
 - Upon registration, dealing has 'the effect of a deed duly executed by the parties who signed it' (**s 36(11)**). This may become useful for some purposes to overcome an absence of consideration.
- Assurance fund: it is conceivable that a person whose interest in land is not registered or is subject to fraud may have no recourse. The assurance fund although significantly restricted may provide a recourse in these circumstances.
- Basic legal concepts
 - Section 41 of the *Real Property Act*: dealings not effectual until recorded in Register
 - Evidence of title: **s 40(1) RPA**
 - Lodgement and registration of documents: **s 36 RPA**
 - Priority is governed by order of registration, not by date of execution: **s 36(9) RPA**
 - No notice of trusts to be recorded in Register: **s 82 RPA**
 - A registered mortgage of Torrens title land takes effect as a statutory charge or security only, and not as a conveyance (transfer) of the land: **s 57 RPA**

C: Indefeasibility of Title (and the general effect of registration)

- There are a number of provisions of the *Real Property Act* which suggest indefeasibility of title: ss 40, 42, 43, 124 and 135.