

# TALBOT SAYER NOTEPOOL

## LAWS2706 – Foundations of Property (Final Exam)



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## Personalty to Realty

- Transfers when it is a fixture
  - Once a chattel has become part of the land through having sufficiently annexed to the land or a building on the land
- Absolute rule of law, not dependant on intention (Elwes v Brigs Gas Co)
- Property in the goods, by operation of law, transfers from owner of goods to owner of land => exception to nemo dat rule
- Hobson v Gorringe = gas engine w/ plate under hire-purchase agreement, property contracted to remain w/ lessor (P), lessee attached it to saw mill which was subject to mortgage to Gorringe (D), D took possession over mill and engine affixed, was a fixture, P's contractual right cannot be enforced against D, intention could not be ascertained by some chance agreement □ 3<sup>rd</sup> parties □ always objective & visual approach

## When Does Chattel Become Fixture?

- Each case depends on its own facts (NBA v Blacker)
- Holland v Hodgson, APA v Coroneo (followed HvH) demonstrate 2 factual considerations
  - Degree or mode of annexation □ 2 presumptions
  - Object or purpose of annexation □ role of subjective intention?

## Degree or Mode of Annexation

- Two prima facie classifications of fact (rebuttable assumptions)
  1. Not physically attached, resting by own weight => chattel
  2. Physical attachment, even slight => part of land/fixture

## Object or Purpose of Annexation – can confirm assumption

- Is article affixed to, or resting upon, the property for the purpose of effecting a permanent and substantial improvement of the land/dwelling, or for a mere temporary purpose and mere complete enjoyment and use of the article as a chattel?
- Courts consider
  - Nature of item
  - Conventional function or use
  - Degree of damage done to thing or land if removed
  - Nature/value of land to which item is attached
  - Duration intended to remain attached
  - Status of person who brought item
  - If cost of removal would exceed value of attached property

## Role of Subjective/Common Intention – Ascertain Purpose/Object

- Intention of person only material so far as it can be presumed from the degree and object of annexation
  - Intention must be patent to all to see
- Direct expressions may be relevant in determining rights inter se, but not relevant to third parties without knowledge

- Wholly objective and purely visual approach
- Reid v Smith = the destination which gives a movable object an immovable character, results from facts and circumstances determined by the law itself, and could never be established nor taken away by simple declaration of proprietor, whether oral or written (cited US case) □ subjective intention cannot make chattel a fixture (vv)
- Standard Portland Cement v Good = title did not pass to D as per contract of sale, remained in vendor (P), failure to remove mill did not affect ownership rights, was not explained how vendors remained owners simply through exclusion of mill in contract
- Lockwood Buildings v Trust Bank Canterbury (NZ) = common intention only taken into account inter partes with no 3<sup>rd</sup> parties, home was affixed => onus lay on P to show that it was chattel, prima facie position of fixture applied, degree and object of annexation as objectively apparent did not displace prima facie inference arising from annexation => fixture [subjective intention only for removal rights, not purpose]

### Modern UK Approach

- Melluish v BMI, Elitestone (> Lockwood above) □ balances certainty & fairness
  - o Wholly objective in every case => subjective intention can never override
- 2 mutually irreducible principles
  - o Accession
    - Once a thing has acceded to the land it becomes part of the land
    - No exceptions
  - o Irremovability
    - Whatever becomes part of the land cannot be served by limited owner without the commission of waste
    - Exceptions do exist
      - Tenant's fixture
      - Statute
      - Agreement
      - Estoppel
      - Custom or trade usage
- Intention => purpose object is serving, not purpose of person (Elitestone)
  - o Object and purpose of annexation inferred from circumstances from case
  - o Subjective intention of parties cannot affect whether the chattel has become part of the freehold
  - o Wholly objective test of purpose object is serving
    - Cannot override outward appearance
  - o Subjective intentions may create a right to enter onto the land and serve the item □ equitable interest in land
- Threefold classification (Elitestone)
  - o Object brought onto land may be
    - Chattel (personal property)
    - Fixture (accessories, removable fixed things)
    - Part and parcel of the land itself (building or anything comprising structure)
- Melluish = court will treat clause as removal right at end of tenancy
- Elitestone = intention □ it is the purpose the object is serving, not purpose of the person who put it there, purpose/object of annexation is inferred from circumstance of

the case, subjective intention cannot affect the question whether chattel has become affixed

- Holland v Hodgson = spinning looms attached to factory floor held to be fixtures
- A-G v RT = printing presses bolted to floor => not fixtures
- Pukuweka Sawmills v Winger = moveable tram lines for temporary purpose => chattels
- Leigh v Taylor = valuable tapestries slightly affixed => chattels
- Re Whaley = tapestry to create Elizabethan setting => fixture
- Reid v Smith = house resting on own weight => part of the freehold
- APA v Coroneo = cinema seats lightly attached to wall => chattels
- Maori Trustee v Prentice = house relocated and affixed to landlord's land by tenant => not fixture
- May v Ceedive = houses on mining-lease land => fixtures
- Belgrave Nominees v Barlin-Scott Air-Conditioning = integrated air-conditional system => fixture
- Palumberi v Plaumberi = some fixtures, some chattels
- Auckland City Council v Ports of Auckland = floating pontoons => part of the land
- Chelsea Yacht & Boat v Pop = houseboat not sufficiently annexed to land
- Re Cancer Care Institute of Australia = two linear accelerations installed by tenant => chattels, not fixtures

## Tenant's and Agricultural Fixtures

- CL => tenants may remove fixtures of trade, ornamental or domestic nature affixed by tenant, provided that it is possible to remove without doing substantial damage to leased property □ subject to specific lease provisions (Kyriacou v Manakis)
  - Fixed term => fixtures must be removed before expiration of tenancy
  - Not fixed => may remove within reasonable time after (D'Arcy v Burelli)
  - Provided possible to remove w/out doing substantial damage
    - Tenants must make good any damage caused by removal of tenant's fixtures or be liable for damages (Mancetter Developments v Garmanson)
  - If cannot be removed without causing substantial injury to leasehold premise = landlord fixtures
    - Cannot be removed □ part of landlord's reversionary interest in the land (NZ Gov Property v HM & S)
- Limited interest-holder => less likely intends to gift items to owner
- Removal right subsists as long as tenant has some colour of right, like claim to right to possession (Concept Projects v McKay)
  - Residential Tenancies and Rooming Accommodation Act 2008 (Qld)
    - ss207-209 = residential tenancies
    - ss254-255 = rooming accommodation
- Landlord's fixtures cannot be removed => form part of landlord's reversion (NZ Gov Property Corp v HM & S)
- Residential Tenancies and Rooming Accommodation Act ss207-209, ss254-255
  - Tenants right to remove tenant's fixtures in residential tenancy
- CL => agricultural tenant's fixtures could not be removed
  - Not regarded as trade fixtures (Elwes v Maw)

- o Statute PLA ss153-155 allows removal
- o In QLD you can remove these

## Doctrine of Tenure

- All land is owned absolutely by the Crown => interest derives from Crown grant
- Describes relationship of how an individual holds an estate or interest from the Crown
- PLA s10(1) => all tenures shall be taken to be in free and common socage w/out any incident of tenure for benefit of the crown
- A-G of NSW v Brown
  - Affirms doctrine of tenure => all land held by the Crown
  - Moment of settlement in Aus, colonists brought CL of England
  - Doctrine of Discovery => discover and occupy uninhabited territory get sovereignty
  - Doctrine of Continuity => ceded territories keep pre-existing law
  - Doctrine of Settlement => settled terra nullius peacefully & settled nation's laws
- Crown's absolute ownership based on
  - Fiction that at settlement Aus was terra nullius
  - Fundamental premise that Aus' land laws derived from doctrine of tenure
- Courts in Aus followed Cooper v Stuart (UK) and A-G of NSW v Brown (AUS)
  - Upon acquiring sovereignty, Crown acquired ownership
  - DoT demanded that all rights to land must derive from Crown grant
  - Interests in land deriving from a source other than Crown grant have no theoretical scope
  - Evident in Millirrpum v Nabalco (Gove Land Rights Case)
    - Felt compelled by precedent to hold that their relationship with land was spiritual not proprietary and that native title was precluded by twin pillars of tenure doctrine and terra nullius
- Adapted to accommodate native title after Mabo
  - Doctrine applies only to land granted or alienated by the Crown, and does not preclude the existence of land interests other than a Crown grant

### Mabo (No 1)

- QLDSC – Ps wanted declaration that rights under Meriam customs and laws were legal rights of ownership in Torres Strait

### Mabo (No 2)

- Too late to discard DoT => would fracture skeleton of principle which gives the body of our law its shape and internal consistency
- English were entitled to claim governmental authority, not acquire full and absolute beneficial ownership (which would extinguish native title)
- Sovereignty => Crown gets radical title
  - Allowed Crown to grant interests in land under DoT but this was inconsistent with native title interests => extinguished w/ reqs manifestation of clear and plain intention to extinguish
  - Where granted interest was not inconsistent => native title continues to subsist and coexist
- Interests in land can derive from
  - DoT (Crown grant to individual)
  - Autonomous system of native title rights





## Land Management

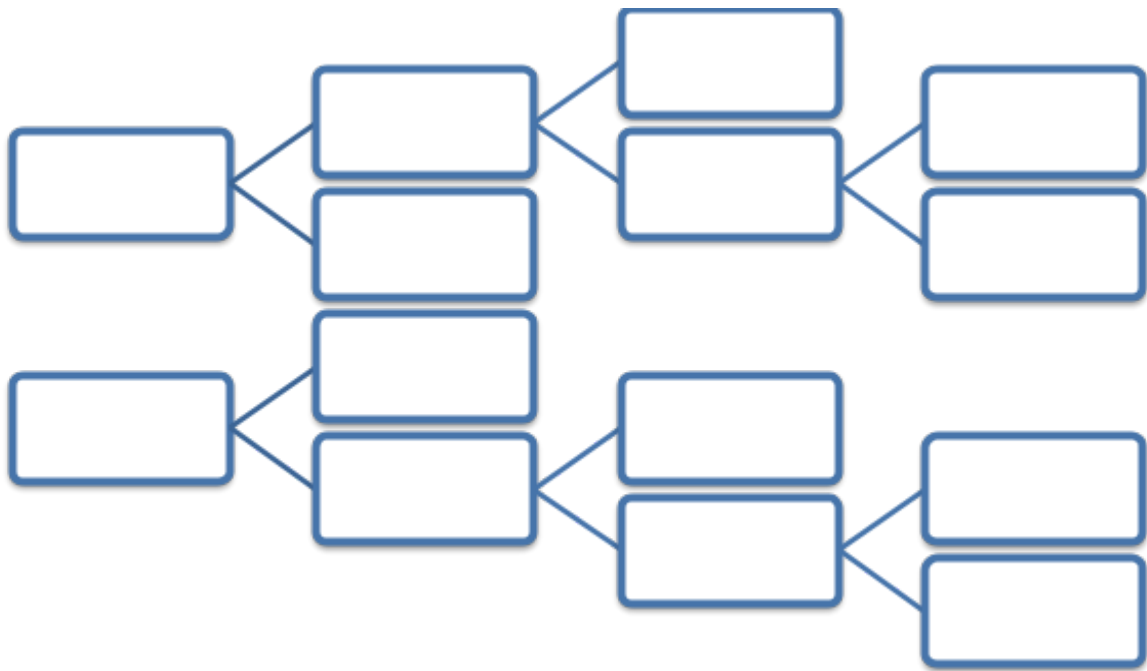
- Constitution Act (Qld)
  - s30 – legislature empowered to make laws regulating sale and other disposal of waste lands
    - Waste lands = land vested in Her Majesty and has not been granted in fee simple or leased, or dedicated/set aside for public use
  - s40 – entire management of Crown lands and all revenues thence arising to be vested in local legislature
- Land Act (Qld)
  - Now relevant statute authorising sale or other disposition of State lands (unallocated State land)
    - s3 => unallocated State land means all land that is (a) freehold land, (b) road or reserve, or national park etc, (c) subject to lease, licence or permit other than permit to occupy
  - s14 – Governor in Council may grant, in fee simple, unallocated State land
  - s15 – Minister may (a) lease unallocated State land for either a term in years or in perpetuity
  - s4 – land must be managed for the benefit of the people of Qld by having regard to the following principles (p259)
- Crown Leases
  - Majority of land mass in Qld is held under some type of lease issued by State over State land

## Basic LTA

- Lot = separate, distinct parcel of land (sch 2)
- Indefeasible title is created on recording of particulars in freehold land register (s 37)
- Indefeasible title is current particulars in freehold land register about the lot (s 38)
- Registrar (s 6) and register (s 7)
- Responsibilities of registrar (ss 27-30)
- Register in land registry may be kept in form registrar considers appropriate (s 8(1))
- Registrable interests
  - Transfer of lot
  - Mortgage
  - Easement
  - Lease
  - Statutory covenant
- Interest is recorded on register though registration of appropriate instrument
- Reg occurs when registrar records particulars necessary to ID instrument (ss 173-174)
- Reg'd instrument forms part of register when lodged (s 175)
- Instruments affecting a lot must be reg'd in order i/w they are lodged (s 177)
- Must be executed by both transferor and transferee (s 11(1))
- Must be executed correctly and sealed (company) or witnessed (indiv) (s 161)
- Obligations of witness (s 162)
- Once reg'd, instrument forms part of freehold land reg (s 31)
- Instrument does not transfer/create interest until reg'd (s 181)
- On reg, instrument vests in person identified as entitled to interest (s 182)
- Reg'd instrument operate as deed (s 176)
- Applies regardless of valuable consideration (s 180)

## Doctrine of Estates

- Collar of doctrine of tenure => what indivs hold is not the land
- Estates in land are artificial constructs => lesser form of interest granted by Crown as ultimate owner
- DoT => relationship of lord and tenant
- DoE => determines relationship of person who holds land to the land that is held
- Seisin = concept of possession, applicable only to freehold estates
  - o Theoretical link between holding of estate and rights to possession of land
  - o Estate-holder has seisin or possession
  - o Owner of estate is entitled to seisin of estate, not ownership of land
  - o Ownership attaches to estate in land



## Freehold Estate

- Estates in fee simple (unrestricted)
- Estates in fee tail (abolished by PLA s22)
- Freehold life estate (arises under a will)
- All freehold estates are uncertain and temporary in duration
- Estates 'in fee' are capable of inheritance
- PLA s19 – freehold estates capable of creation

## Fee Simple Estate

- Most extensive estate
- Holder of estate in fee simple is absolute owner
- Fee simple freehold is of uncertain duration and is incapable of lasting indefinitely
- Key bundle rights
  - o Inheritability
  - o Alienability □ right to create lesser interests in land
  - o Unrestricted estate □ no restriction to whom it can pass

- PLA s29 – words of limitation (no precise words needed to create fee simple estate)
- LTA s61(1)(d) – instrument of transfer must include description sufficient to identify interests to be transferred
- Three types
  - o Fee simple absolute
    - Perpetual and not determinable by any special event
  - o Determinable fee
    - Automatically determines on happening of a specified event, which may or may not occur
    - Grantor has possibility of reverter
    - If determining event becomes impossible, fee simple becomes absolute and possibility of reverter is destroyed
  - o Fee simple upon condition
    - Condition subsequent attached to it
    - Estate may be determined electively upon the happening of the event
    - Upon breach of condition, the estate becomes voidable
      - Grantor may enter and determine estate
    - If limiting event is found void, the limiting clause is struck down and grant of estate becomes absolute
- Fejo v NT = fee simple is equivalent of full ownership, confers the lawful right to exercise over, upon and in respect to the land, simply does not permit enjoyment

### **Life Estate**

- Not an estate of inheritance
- Estate-holder is entitled to seisin of the land when the estate vests in possession
- Shortest form of freehold estate
  - o Determined by reference to the life of a person (measuring life)
- Arise by inter vivos disposition by will or inter vivos transfer
- Determine automatically on death of person in whom they are vested
- Exists in two forms
  - o Ordinary life estate
    - Measuring life is tenant's
  - o Life estate pur autre vie
    - Measuring life is of a 3<sup>rd</sup> party
- Once seised of life tenancy, tenant enjoys certain core rights and owe duties

### ***Rights of Life Tenant***

- Dispose of interest inter vivos
  - o Cannot create greater interest
  - o Transferee to 3<sup>rd</sup> party can only get life estate pur autre vie
- Exclusive possession of land
- Income from land
- Emblements
- Timber
- Removal of trade, ornamental and domestic fixtures

### *Doctrine of Waste*

- Act or omission that permanently alters the land, +ve or -ve
- Can be restrained by injunction and/or generate liability in damages to person entitled to fee simple (in reversion or remainder)
- Balances or reconciles rights or interests of life tenant with those of vested future interest-holders in the land
  - Applies to landlord and tenant situations (and co-owners *Ferguson v Miller*)
- Four types
  - Ameliorating
    - Permanent acts of improvement
    - No substantial remedy will lie => victim is no worse off
  - Permissive
    - Passively letting the property fall into disrepair
    - Not doing what ought to be done to prevent the nature and character of premises
    - No liability unless instrument creating life estate also creates duty to repair (*Re Cartwright, Avis v Newman*)
  - Voluntary
    - Positive act of injury
    - Doing what not to be done
  - Equitable
    - Sub-species of voluntary waste
    - Tenant intentionally inflicts serious harm to property
    - Tenant would be liable equitable waste even if they were, under the instrument, unimpeachable for voluntary waste and not liable at CL (*Vane v Lord Barnard* □ PLA ss 24, 25)
- PLA s24(1) – tenant for life shall not commit voluntary waste, (3) – tenant who infringes subsection (1) is liable in damages to tenant's person in remainder or reversioner, but this section imposes no criminal liability
- PLA s25 – an estate for life without impeachment of waste shall not confer upon the tenant for life any legal right to commit waste of equitable waste, unless an intention to confer such right expressly appears by the instrument creating such estate
  - Instrument that created the life interest exempts the tenant from L for voluntary waste

### **Future Estates / Interests**

- Vest in either of two ways
  - In interest only
    - Until seisin is established □ Estate in expectancy
    - When estate-holder can be ascertained but lacks seisin bc prior interest requires determination
  - In interest and possession
    - Upon seisin □ Estate in possession
    - Owner of it has present right of beneficial enjoyment, whether accompanied by actual physical possession of the land or not (*Glenn v FCLT*)
- Must be continuity in seisin

- Interest in land is created but has not yet vested in possession
- Estate in expectancy => no seisin
- Interest presently exists but possession is postponed until some future time
  - Possession is thing that can be present or future
  - Interest must always vest in present
- There must be continuity in seisin => always someone entitled to seisin of land
- Two types of future estates or interest yet to vest in interest
  - Reversion
  - Remainder

### ***Reversions***

- Revert back to original grantor upon determination of life estate
  - By operation of law
- Residue of grantor's interest after they granted away some lesser estate
- When last person dies, estate in fee simple reverts back to original grantor (estate in fee simple in reversion)
- Only one reversion is possible => always vested interest

### ***Remainders***

- Future interest that passes to a 3<sup>rd</sup> party after the determination of any prior particular estate □ remains away from original grantor
- Created by act of grantor
- Holder of estate grants a particular estate to one person, and then in the same in same instrument, grants to some other person another estate in the same land
- Three characteristics
  - Must vest during continuance of particular estate or at the moment of natural determination
  - Must be created by same instrument that created freehold life estate
  - Cannot be limited after a grant of fee simple
    - Cannot grant a fee simple after a prior grant of fee simple
  - Void if designed to take effect in possession by defeating the particular estate
- Two classes □ always vested bc never leaves grantor of particular estate
  - Vested
    - Ascertained remainderman is deprived of seisin because they are awaiting natural determination of prior particular state
    - No precondition
    - Estate vests automatically in interest, but not in interest and possession
  - Contingent
    - Either remainderman is not ascertained or some precondition exists as to the estate taking effect in possession (besides regular determination of prior particular estate)
    - No presently existing estates □ only takes effect in equity not CL (PLA s30)
      - Estate vests in interest only when contingency/ pre-condition is satisfied

## Legal vs Equitable Interests in Land

- Estates a fragmentable => time (present or future), duration (life or longer)
- Equitable estates
  - o Not recognised at CL
  - o Recognised in equity
  - o May exist simultaneously with legal estate
  - o Imposed upon the legal estate and exists simultaneously with it (DKLR Holding v CSD)
- Equitable estates or interests in the land mirror legal estates or interests in the land
- Legal and equitable interests still different regarding creation, transfer and enforceability
- Re Transphere = legal owner holds property on trust for others, B has right to compel him to hold and use those rights which the law gives him in accordance w/ obligations which equity has imposed on him by virtue of existence of trust

## Creation of Legal and Equitable Interests

- Legal estate/interest must be created in manner prescribed either by CL or statute
  - o CL estate
  - o Created in accordance w/ requisite legal formalities
  - o Statute of frauds => PLA ss 10, 11
    - PLA s10 – assurances of land to be in writing
    - PLA s11 – instruments required to be in writing
  - o Legal interest only created when registration is complete => PLA s181
    - PLA s181 – interest in a lot not transferred or created until registration
    - PLA s182 – effect of registration on interest
- Equitable estate/interest can be created informally
  - o Express trusts
  - o Non-express trusts
  - o Equitable coercive remedy
    - Ramsden v Dyson = proprietary estoppel □ where an owner creates or encourages an expectation in another that the other will obtain an interest in the land, and in reliance of that expectation, other alters position thus exposing them to loss if the expectation is not fulfilled
- Equitable interests: examples
  - o Mortgager's equity at redemption
    - Outright transfer of legal title from owner/mortgagor to mortgagee
      - Subject to covenant that mortgagee will transfer property back to mortgagor once debt is paid
    - Mortgagee holds legal title and owner enjoys specifically enforceable equity of redemption
      - E will compel re-conveyance of security property once primary obligation is discharged
  - o Purchaser's interest under an enforceable agree for sale and purchase before settlement
    - Purchaser of land (for valuable consideration) is regarded as obtaining an immediate equitable interest in the land (bc gets E remedy of SP)
    - Specifically enforceable contract converts the estate (Lysart v Edwards)

- Vendor's interest in payment of purchase price = personality
- Purchaser's interest in land as B owner = realty
- Golden Mile Property Investments □ summary of general principles
  - Moment of entry into valid C => vendor becomes in E a T for purchaser => naked, bare, mere T
  - When title is made out and purchaser has paid price under C => vendor becomes constructive T of property sold
  - Whether or not relo of vendor to purchaser if that of T to cestui que trust, court of E will treat purchaser as having interest that it will protect => equitable interest
- o Restrictive covenants
  - Right in dominant owner to restrict use made by servient owner of property (Post Investments v Wilson)
  - Covenant that restricts use of land may run with land (Tulk v Moxhay)
  - Purchaser is bound if (Tulk v Moxhay)
    - Convenient is restrictive
    - Current owner purchased w/ notice (constructive notice suffices)
    - Covenant benefits land of covenantee
    - Intention that burden of covenant should run with the land
  - Doesn't bind bona fide purchaser of legal estate for value without notice (Tulk v Moxhay)
  - Equitable right => equitable remedies for breach (i.e. injunction PLA s53(2))
  - Cannot be registered (PLA s4) but are caveatable

### Transfer of Legal and Equitable Interests

- Legal estate □ Transferred in manner prescribed either by CL or statute
- Equitable estate □ Transferred less formal way

### Enforceability of Legal and Equitable Interests

- Legal estate □ Enforceable against whole world
- Equitable estate
  - o Enforceable against parties to arrangement
  - o Vulnerable to being defeated by a bona fide purchaser of the legal estate for value and without notice of the equitable interest => indefeasibility of title
  - o Good against all except bona fide purchaser for value and without knowledge
- Doctrine of notice
  - o Protect holders of equitable interests
  - o Three kinds
    - Actual
    - Constructive => PLA s346\*
      - Duties □ investigate title docs and inspect land itself
    - Imputed
  - o RP of an interest in Torrens-title land is protected against operation of doctrine of notice unless they have been guilty of fraud => notice, actual or



constructive, of prior unregistered interest affecting the lost is not fraud (LTA s184(2)(a))

### **Hierarchy of Equitable Rights or Interests**

- Significant when priority disputes between competing E proprietary rights or interests re same parcel of land
- Equitable interests
  - Normal characteristics of property right/interest
  - Power to specifically recover (not just right to receive damages)
  - Power to transfer or assign benefit to stranger
  - Ability to trace property to 3<sup>rd</sup> parties
- Mere equities
  - Not a right to property
  - Merely right to bring an action to obtain an equitable remedy
  - E.g. right to have sale set aside because of fraud or undue influence (Latec Investments v Hotel Terrigal; cf Breskvar v Wall)
  - Westminster Bank v Lee\*

### **Torrens System of Land-Title Registration**

#### **Title to Land**

- Relative, not absolute
- Older title is preferred to recent title
- Title by registration => administrative process
- Torrens title => LTA
- Unregistered land title => PLA pt 18
- Land title under other legislation => Land Act, Mineral Resources Act

#### **Transfer: Conveyancing**

- Only by way of grant via a written statement
- PLA s8(1) – lands lie in grant only

#### **Unregistered Land Title**

- PLA pt 18
  - Land before 1 Jan 1862
  - System of derivative title and retrospective investigation of unbroken chain of title documents for at least 30 years (PLA s 237(1))
  - Title is defeasible
- Many flaws

#### **History of Torrens**

- After 1 Jan 1862 – Land Title Act 1994 (Qld)
- Breskvar v Wall = system of title by registration, title which registration itself has bested in the proprietor

## Key Features & Advantages of Torrens Title

- Gibbs v Messer = main object is to save persons dealing with registered proprietors from trouble and expense of going behind the register in order to investigate the history of author's title and to satisfy themselves of its validity => indefeasible right
- Certainty of title is provided through concept of indefeasibility of title
  - Frazer v Walker = immunity from attack by adverse claims to the land or interest, central to system of registration
- Contrast unregistered land title p304

## Underlying Principles

- Mirror
  - Register reflects all facts that are material to owner's title to land
  - Register accurately and completely mirrors state of title
- Curtain
  - Curtain falls on the past
  - Register is conclusive
  - Title is indefeasible
- Insurance
  - Safety net for victims
  - Loss should be met by a state-administered assurance fund
  - People can lose interest in land to innocent parties who manage to get registered
- Objects of Statute (LTA s3)
- Twin Pillars of Torrens Title
  - Register
    - Simplified registration system
    - Mirror principle
  - Indefeasibility
    - Protection that registration confers
    - Title by registration
    - State-guaranteed title
    - Curtain principle

## The Register

- Interests are either
  - Registered
  - Unregistered
  - Unregisterable
    - Interests not capable of being registered on freehold land register include a beneficial interest under a trust, an interest in remainder, and restrictive covenant
- Mechanics of registration
  - LTA s 6 – registrar of titles
  - LTS s 7 – land registry
  - LTA ss 7(2)(a), 27 – freehold land register
  - LTA s 8 – register kept in electronic/computerized form
  - LTA s 41 – optional paper certificates of title only on written request

- o LTA s 28 – particulars that registrar must record
  - o LTA ss 10, 11, 30, 31, 32, 153, 174 – instruments
  - o LTA s 35 – publicly accessible record
  - o LTA ss 37, 38 – indefeasible title => separate title for each indiv look
- Registration of instruments
  - o LTA s176 – registered instrument operates as a deed
  - o LTA s177 – order of reg of instrument
  - o LTA s178 – priority of reg'd instruments
- Consequences of registration
  - o LTA s181 – interest in lot not transferred or created until reg
  - o LTA s182 – effect of reg on interest
  - o LTA s31 – instrument form part of freehold land reg
  - o Bursill Enterprises v Berger Bros Trading = RP bound by earlier transfer because transfer instrument was sufficient to have this effect

### Priority Rules under Torrens

- Registered vs registered
  - o Determined by order of lodgement, and subsequent order of registration
    - LTA ss 177-178
- Registered vs unregistered
  - o Registered interests will prevail over unregistered
    - Unless exception to indefeasibility can be made out (LTA ss 184-185)
    - Unregistered interests are equitable interests (Barry v Heider, Butler v Fairclough, Chan v Cresdon)
      - Except short-lease and adverse possession □ legal
- Unregistered vs unregistered
  - o Requires comparison of equities and consideration of caveats and notice
    - Rice v Rice = competing equal equitable interests prima facie take priority i/w they are created, if unequal => better equity will prevail
    - Bourseguin = between P and D3, P's interest was first in time, would prevail over D2 and D3 according to Rice v Rice

### Concept of Indefeasibility

- Concerned with quality of title that is enjoyed by the person entitled to the particular interest claimed under a registered instrument
- Registration confers title
- Only conferred on those covenants that are integral to registered interest
  - o Cf covenants that are merely personal in nature (Mercantile v Shell)
- LTA s184(1) – quality of registered interests => free from all other interests (unreg'd)
- Effect of notice?
  - o LTA ss 184(2)(a), 178(3)
    - Registered interests are not affected by actual or constructive notice of an unregistered interests
  - o LTA s 180
    - Volunteers get equal protection to indefeasibility (no consid)

### Deferred vs Immediate

- Gibbs v Messer = deferred, not relevant position
- Boyd v Mayor of Wellington = (NZ) immediate
- Clements v Ellis = (HCA) deferred
- Frazer v Walker = (PC) immediate, restricted to bona fide purchaser obtaining title from fictitious person
- Breskvar v Wall = (HCA) immediate, leading case in Aus

### Exceptions to Indefeasibility

- Unregistered interests that defeat a registered interest-holder's otherwise indefeasible title
- QLD exceptions
  - o Fraud => LTA s184(3)(b)
  - o Non-complying mortgages => ss 185(1A), 11A, 11B
  - o Personal equity => s185(1)(a)
  - o Short-term leases => s185(1)(b)
  - o Omitted or misdescribed easements => s185(1)(c )
  - o Adverse possessor => s185(1)(d)
  - o Prior title/ wrong description => s185(1)(e), (f), (g)
  - o Corrections of registrar => ss 15, 186
  - o Overriding statutes

### Fraud Exception

- s184(3)(b) – fraud by RP
- Torrens/ statutory fraud is restricted to high levels of actual fraud or dishonesty, perpetrated either by registered owner/ proprietor personally or by their agent
  - o Designed to cheat a person of a known existing right
- Statutory fraud => actual fraud, personal dishonesty or moral turpitude (Bahr v Nicolay)
- Equitable or constructive fraud is not sufficient to trigger fraud exception (Assets v Mere Roihi)
- In order to impugn title, Torrens fraud must be brought home to or implicate the current registered owner/proprietor, or their agent (Assets v Mere Roihi)
- Must relate to the current state of the title/register
  - o Fraud on part of predecessor in title will not render defeasible the title of the current registered owner or proprietor
- Assets Co v Mere Roihi = a person who presents for registration a document which is forged or has been fraudulently or improperly obtained is not guilty of fraud if he honestly believes it to be a genuine document which can be properly acted upon; predecessor's fraud did not make title defeasible, actual fraud implicates RP and indefeasibility will be lost
- Breskvar v Wall = purchaser fraudulently wrote Wall's name on transfer
- Notice
  - o Mere notice/ knowledge of prior interest is not Torrens fraud (LTA s184(2)(a), Wicks v Bennett)

- o Notice coupled with steps taken to defeat prior interest AND deliberate and dishonest trick/representation will amount to Torrens fraud
- o Loke Yew v Port Swettenham = D made fraudulent representations to P but had no intention of honouring them, dishonest act that induced P to sign transfer => statutory fraud; D also was seeking to make a windfall on value of land
- o Friedman v Barrett = F purchased freehold with notice of lease, also aware of options for renewal, but no statutory fraud, F did not make any representations or undertakings in relation to them (stayed silent)
  - Confirmed that denial of unreg'd interest can constitute fraud???
- o Bourseguin v Stannard Bros = since D2 was RP and did not act fraudulently => title was indefeasible, mere notice/knowledge of unreg'd interest is not sufficient (like in Friedman, Bahr)
- Forged mortgages
  - o Grgic v ANZ = no evidence of actual fraud on behalf of bank, no evidence of seeking to take unfair advantage of Mr Grg; a less than meticulous practice as to the identification of persons purporting to deal with land registered under the provisions of the Act does not constitute a course of conduct so reckless as to be tantamount to fraud not guilty of fraud if honestly believed it to be a genuine document, not fraud
  - o Russo v Bendigo Bank = bank did not know of forgery, alleged imputed fraud, agent for bank had no conscious impropriety or personal dishonesty, no evidence of dishonesty on behalf of the bank, she believed it was just a formality, wanted to save time and effort, not fraud
  - o AGC v De Jager = Mrs DJ's signature forged, employees allowing instrument of mortgage to go forward for registration knowing that it has to been signed by an attesting witness amounted to statutory fraud, AGC was in position of one who abstained from making enquiries for fear of learning the truth, fraud
    - Torrens depends on good faith of those presenting instruments for registration
    - Lodged instrument knowing that attesting witness had not been present at execution => bank cannot have honest belief that it is genuine document
  - o NCB v Hedley = forgery of ex-wife's signature on mortgage, bank's employee knew apparent signatory was not present, bank was guilty of fraud through employee, knew to be false or at least reckless, fraud
  - o Young v Hoger = husband/father did not know of mortgage; evidence did not justify actual dishonesty on part of agent, just honest and careless belief that instrument was executed by Mr Hoger, not fraud
    - Honest and careless mistake vs reckless behaviour (Davis v Williams)
  - o Davis v Williams = indefeasibility of joint tenancy was not affected by stat fraud bc clerk was not dishonest, genuinely thought she was helping, not fraud
    - Was not rep to registrar that would induce them to act in way materially different from what otherwise would have been done
    - Must involve an interest which would otherwise take priority over that interest has been defeated
- Extension to forged mortgages / careless mortgagees

- o Failure to take adequate steps to identify mortgagor => LTA ss 185(1A), 185(5), 11A and 11B (2006 onwards)
  - LTPM □ 100 points of ID, face to face interviews
  - [2-2005] all mortgages, regardless of past relationships
- o Mortgagee does not obtain benefit of indefeasibility if it failed to comply with ss11A(2) or 11B(2) AND (b) person who was mortgagor was not the person who was RP
- o LTA s11A – original mortgagee to confirm identity of mortgagor
- o LTA s11B – mortgage transferee to confirm identity of mortgagor
- o CBA v Perrin = Mr Perrin forged wife's signature, bank never dealt with her directly, bank conceded that it had not complied with s11A(2), s185(1A) applied to remove indefeasibility and removed from register (s187 LTA), did not comply with verification practices
- Supervening fraud
  - o Questionable in Bahr v Nicolay but generally has to become before registration
  - o Bahr v Nicolay = fraud is not confined to fraud in obtaining transfer or securing registration, repudiation is fraudulent bc its object was destruction of unregistered interest, immaterial that transferee may have been innocent of any fraudulent intent in taking conveyance in absolute form
- Imputed fraud / agency
  - o Fraudulent act of agent may be brought back to RP
  - o If fraud occurred when agent was acting within actual/ apparently authority, or within scope of task to be performed
  - o 2 situations (Schultz v Corwill Properties applied in HCA Cassegrain v Gerard Cassegrain)
    - Agent committed fraud and RP acquires registration => RP liable if fraud if within agent's actual/apparent authority
    - Agent knows of fraud and knowledge is being relied on to bring fraud home to RP
      - Where agent has actual knowledge => presumption of full communication => agent's actual knowledge will be imputed to RP
      - Communication presumption can be rebutted where fraud if committed by agent
  - o Dollars & Sense Finance v Nathan = imputed fraud => principal will be liable if act is within scope of task that agent was asked to perform, bank asked accused to do something => agent of bank, he committed fraud within scope of what bank asked him to do, not unreasonable that his act of forgery should be regarded as having been done within scope of agency, mortgagee did not have indefeasible title
    - Test = whether the act has sufficiently close connection with task so that the commission of the wrong can be regarded as the materialization of risk inherent in that task
- Remedies
  - o By/ behalf of RP => cancellation of title (s187 LTA)
  - o RP is innocent => compensation from state (s188(1)(a), (2)) => SC app (s 188B)

## Personal Equity Exception

- Absence of statutory fraud
- 'in personam' claim against RP for a recognised cause of action in law or equity that involves unconscionable conduct
- RP is not relieved of enforceable personal obligation owed to unregistered interest
- Claim 'in personam' will survive registration
- LTA s185(1)(a) – exception to s184 (indefeasibility)
  - (a) will not obtain benefit of s184 because of an equity arising from act of RP
- Frazer v Walker = reg will not extinguish personal obligations created inter partes
  - Indefeasibility in no way denies the right of P to bring against RP a claim in personam, founded in law or in equity, for such relief as a court acting in personam may grant
- An equity arises from act of RP which court will enforce notwithstanding that the interest is not reflected on RP's title
- Level of moral wrongdoing in lower than statutory fraud
- Elements
  - Conduct before or after registration
  - Conduct from RP or agent
    - Doesn't apply where current RP is not 'primary wrongdoer'
  - Conduct incurs a personal or conscientious obligation that constitutes a recognised and enforceable legal or equitable cause of action
- Notice of unregistered interest coupled w/ 'other circumstances'
  - E.g. honestly given but subsequently repudiated undertaking to take subject to an obligation
  - Bahr v Nicolay = Bahr's had option to repurchase w/ Nicolay and new owners agreed in cl4 to honour that agreement, indicated intention to honour it => constructive trust imposed otherwise it would be unconscionable, not equitable estate just personal equity against Thompsons, amounts to equitable fraud
  - Valbirm v Powprop = unreg'd lease + option to renew for 3+ years, sale was conditional upon purchaser accepting terms of lease (which they did), P was tenant, V became new owner, V made no rep apart from agreeing to provisions in contract, V agreed to be bound by terms nonetheless, acceptance of terms of Powprop's lease, would be unconscionable for V to renege on it
    - Contractually recognising those interests is equivalent to an agreement to recognise the unreg'd interests and be bound to them
  - Bourseguin v Stannard Bros Holdings = last agent acted fraudulently but her principle wasn't RP, RP not dishonest and had not undertaken to be bound, RP was holding land on trust for fraud agent's principle
- Forgery, duress, UI or unconscionable dealing on part of mortgagee
  - Grigg v ANZ = no evidence of cause of action in law or E against bank, employees did not fall short of exercising relevant degree of care
  - Mercantile Mutual Life Insurance v Gosper = mortgagee held title for purpose of original mortgage and subject to obligation not to permit it to be used for any other purposes, they breached their duty => strict L => equitable cause of action sufficient to engage in personam exception, misuse of title = PE
- Knowing receipt of property



- o Rule from *Barnes v Addy*
  - Person (or agent) who received trust property will be liable as constructive trustee if
    - Knew that property was trust property that had been misapplied by T (knowing receipt)
    - Knowingly assisted T in misapplying trust property (knowing assistance)
- o Knowing receipt of misapplied trust property cannot enliven personal equity exception because no notice in Torrens
- o *Macquarie Bank v Sixty-Fourth Throne* = registration of mortgage was honestly obtained by mortgagee bank => indefeasible, did not give rise to in personam claim for knowing receipt; not possible to treat holder of registered mortgage over property subject to a trust as having received trust property (registration was honestly obtained) – no
- o *Tara Shire Council v Garner* = Garner had knowledge of trust over portion of land, although RP is not affected by notice under s184(2)(a) it is subject to s185 ‘dishonesty’ – yes
- o *Farah Constructions v Say-Dee* = distinction between in personam claims where D is primary wrongdoer attempting to ignore obligation to P (like *Bahr v Nicolay*), and where D a party who merely had notice of earlier interest or notice of 3<sup>rd</sup> party fraud – no => applied in *Bli Bli v Kimlin Investments*
- Restitution of property after reversal of court judgement
  - o *White v Tomasel* = RP’s rights can be affected by subsequent court orders; title was subject to personal equity in favour of White (restitution not unconscionability), unconscionability not necessary
- Remedies
  - o LTA s187 (orders for SC about fraud) does not apply to s185(1)(a) exception
    - Because of s187(1)
  - o Off register interest holder must rely on relevant in personam rights and remedies
  - o Courts will need to make orders requiring D to transfer property and submit a vesting order under Trusts Act
  - o *Williams v Turner* = mortgagee committed stat fraud => order under s187 to cancel registration, Court would have found that execution of mortgage was ultra vires and void => mortgagee would have lost benefit of indefeasibility => relief granted by making vesting order under s82 of Trusts Act (registrar could cancel registration of mortgage)

### Personal Equity vs Fraud

- Issue of timing
  - o Fraud occurs before and only before act of registration
    - Cf *Bahr v Nicolay (No 2)*
  - o PE could arise before or after
- Quality of moral wrongdoing
  - o PE is lower than statutory fraud



## Short-Lease Exception

- Leasehold interests have legal validity => registered in approved form (ss64,65 and ss181,182 of LTA)
  - Leases for 3+ years must be reg'd for legal validity (LTA s64, PLA ss10-11)
  - Not invalid if not reg'd (LTA s 71) but only effective in E (Ashton v Hunt)
- Binding on successors in title
  - Leases only take effect in possession
  - PLA ss10(2)(c), (12)(2)
  - Unreg'd lease for more than 3 years is not legal interest & not affected by notice (s 184(2)(a), only bind successor if in personam)
- RP's indefeasible title will be subject to and bound by unregistered short lease
- LTA s185(1)(b) – exception to s184
- LTA sch 2
  - Short lease = >3 years, from year to year
- LTA s71 – validity of unreg lease
  - Not invalid merely because it is unregistered
- Statute of unreg short lease is legal and equitable (Deventer v BP Aus)
  - Relevant in comp with other unreg interests
  - Irrelevant in comp with reg interest
    - Enforceability and priority turns exclusively on LTA s185(1)(b)
    - Unreg short lease enjoys security of tenure against later RPs
- Favoured
  - Historically they are legal
  - Policy reasons -> encourages productive use of land
- LTA s185 – exceptions to s184
  - (2) interest of lessee under subsection (1)(b) does not include
    - (a) right to acquire fee simple or other reversionary interest after ending short lease
    - (b) right to renew or extend term beyond 3 years from beginning of original term
  - May be bound in personam (Valbirm v Powprop)
- If option to renew (which creates a new lease) is exercised before reg of new owner, then new term will be protected if it falls within 3-year max period (Re de Jersey)
- An earlier registered mortgagee is not bound by later short lease unless mortgagee consented to lease (LTA s66)
- Mercantile v Shell = right of renewal should be regarded as part of estate or interest, but not option to purchase (sep and indep covenant)
- Friedman v Barrett = options beyond 3-year lease term were not protected
- Valbirm v Powprop = OG term of 3 years would enjoy protections of s185(1)(b) because of s185(2)(b) but right to renew wouldn't
  - Was still protected by personal equity exception

### Omitted / Misdescribed Easement Exception

- Easement = non-possessory, intangible use right that attaches to one parcel of land (dominant tenement) and burdens another parcel of land (servient tenement)
- S185(1)(c)
- S185(3)
  - For subsection (1)(c) particulars of an easement are taken to have been omitted from freehold land register only if
    - (a) easement existed when lot burdened by it was first registered
    - (b) easement was previously recorded but current particulars are not included (other than because easement has been extinguished)
    - (c) instrument was lodged for reg but, because of error of registrar, has never been reg'd
- James v Registrar-General = easement was reg'd but later accidentally left off servient tenement's title but was still on dominant tenement's, title was not indef => still subject to easement
- Rock v Todeschino = QLD authority of James v R-G
- Mount Cathay v Lend Lease Funds Management = registered easement was granted, recorded in both dominant and servient land, but dominant land was subdivided into four lots + common property, easement was still reg'd interest, did not affect operation of s184(1), owner of servient land was still subject to easement

### Adverse Possessor Exception

- LTA s185(1)(d) – no indefeasibility because of an interest of a person, who would be entitled to be registered as owner of the lot because the person is an adverse possessor
- LTA sch 2 dictionary
  - Adverse possessor = a person against whom the time for bringing an action to recover the lot has expired under the Limitations of Actions Act 1974, and who is entitled to remain in possession of the lot
- LTA s98 – adverse possession claims cannot be made in certain circumstances (particular matters)
  - (1)(a)-(d) and (2)(a)-(b)
- Possession of property grounds substantive property rights that are tantamount to prima-facie ownership
  - But right of dispossessed occupant does not endure forever => subject to statute of limitations and right to recovery is extinguished after a certain time has elapsed
- Rationale for limiting right to recover (Cholmondeley v Clinton, p384)
  - General principle of public utility
  - Public have great interest in having a known limit fixed by law to litigation, for the quiet of the community
  - Better that negligent owner, who has omitted to assert his right within the prescribed period, should lose his right, than that an opening should be given to interminable litigation
- Acquiring title to land by possession + statute of limitations = adverse possession
  - Adverse possession is extinctive rather than acquisitive process
- Doctrine of adverse possession
  - Possessory title extinguishes documentary title through passage of time

- Only rights extinguished are those of persons entitled to sue for recovery of the land
- Non-possessory interests to which the land is subject run with the land and will continue to bind AP (Re Nisbet v Potts' Contract)
- o Without express exception of s185(1)(d) -> AP would conflict with concept of indefeasibility (Miscamble v Phillips)
- o Sig practical utility in circumstances of (1) off-the-register dealings or innocent mistakes by possessors
- o Three step process
  - Proving CL elements
  - Limitations of Actions Act
  - Land Title Act part 6, div 5

### ***Proving CL Elements***

- Quality of possession => sufficiently adverse or hostile to interests of true owner
- Assumes dispossession/discontinuance of true owner's possession
- CL indicia (Buckinghamshire County Council v Moran)
  - o (1) factual possession (exclusive physical control)
  - o (2) intention to possession
    - Usually inferred from acts of factual possession
- Possession must be open not secret
  - o Ensures true owner has chance to challenge adverse possession before right to recover becomes statute-barred
- Peaceful not by force (Shaw v Garbutt)
- Adverse not by consent of true owner (Mulcahy v Curramore)
  - o Owner's knowledge of dispossession is immaterial (Re Johnson)
- Q = whether D squatter has disposed the paper owner by going into ordinary possession of land for requisite period without consent of owner (J A Pye v Graham)
- Time does not commence until CL test is met
- Factual possession
  - o Unequivocal, continuous and exclusive to claimant
    - Cannot be exercised at different times by several members of single family on behalf of one member alone (Morris v Pinches)
    - Single possession can be exercised by, or on behalf on, several persons jointly (Powell v McFarlane)
  - o Degree of possession must be considered in circumstances of each case
    - Character and value of property, suitable and natural mode of using it, course of conduct proprietor might reasonably be expected to follow with due regard to his own interests (Riley v Penttila)
  - o Question of fact
    - Type of conduct that indicates possession depends and varies on character and value of land
    - Has alleged possessor been dealing w/land in ways an occupying owner might have been expected to deal with it, and no one else has done so?
- Intention to possess

- o Constituted by unequivocal intention to possess the land to exclusion of all others, not necessarily intention to own (J A Pye v Graham)
- o Intention to exclude the world at large, including owner with paper title (Powell v McFarlane)
- o Possession usually indicates mental element (Whittlesea City Council)
- o Objective indicators (Powell v McFarlane)
  - Fencing
  - Effective improvements
  - Erecting 'no trespassing' signs on land
  - Taking up residence
  - Cultivating land/running livestock
  - Payment of rates and other outgoings

### ***Limitations of Actions Act***

- Duration of CL possession (12 years min, 30 years max)
- Extinguishing true owner's title after that time
- s13 – actions to recover land / true owner bring action to recover land s19(1)
  - o right expires after 12 years s13(1)
- s14(1) – accrual of right of action in cases of present interests in land
- s19(1) – right of action not to accrue or continue unless there is adverse possession
- s24(1) – extinction of title after expiration of period of limitation
- s29(1), (2) – extension in cases of disability
- s5(2) – interpretation
- s38 – postponement in cases of fraud or mistake
- Ultimate time bar = 30 years (s29(2)(b))
  - o If true owner is unknown (Re Johnson)
- Period of adverse possession must be continuous and unbroken for entire statutory period (s19(2))
  - o Question of fact
- Written and signed acknowledgement of true owner's title (s35(1), s36)
- Abandonment of possession by adverse possessor
  - o Question of fact
  - o If possession is abandoned before full limitation period has run => possessory title is simply lost, and clock goes back to zero
  - o Status quo ante is restored (Mulcahy v Curramore)
  - o Mere non-use or short intervals are ok (Nicholas v Andrew)
- Successive possessors
  - o AP acquires possessory title □ alienable □ can be transferred to 3<sup>rd</sup> party (Asher v Whitlock)
  - o Derivative possessory title-holders can base their claim on that of original AP
  - o Possible that series of possessors whose occupation of land is treated as continuous and cumulative for purpose of running limitation period & can add preceding indep possessors to own period (Mulcahy v Curramore)
  - o Possible that successive independent possessors (continuous but do not claim title through one another) may establish AP (Shaw v Garbutt) PROVIDED there is no break in possession (Mulcahy v Curramore)

### *Land Title Act part 6, div 5*

- Statutory compliance procedure for vesting title to land in adverse possessor
- Must be application for whole of a lot (s98(1)(a))
- Lodge application with Registrar
  - s99(1) – application for registration
  - supply relevant info □ s199(2), LTPM [14.2290]
- Registrar serves notice on true owner
  - s103 – notice of application
- Caveat lodged by true owner
  - s104 – objecting by caveat
  - s105 – lapsing of caveat □ if lodged, registrar decides whether -or has interest and whether it has been extinguished (s 105(1))
  - s106 – further caveat
- SC proceedings
  - s107 – refusing or compromising application □ if -or has interest and within time
- Registration of AP
  - s102 – refusal of application OR
  - s108 – registering AP as owner
  - s108B – consequences of registration
- Re Johnson = Mr Johnson and father acquired title to Torrens-title land, had informal way of passing land through the line, Mr Johnson built minor residence on property and started to live there consistently, Johnson line of family had been in occupation for decades, true owner could not be located nor daughter (who had unreg's conveyance of the land to her), there was factual possession and intention to possess, BUT only 6 years elapsed since commencement of AP => failed on second step, family had not exhibited sufficient lengthy duration the patent AP required (min 12 years), ALSO true owner could not be located => limitation that applied was max 30-year period
- J A Pye v Graham = G was farmer who entered 1-year grazing licence with Pye, it expired but Pye ignored G and so G continued grazing, initially there with consent of owner but consent was no longer present, never had intention to own but he nonetheless had full possession of it and, was unequivocally an intention to possess to exclusion of all others, Pye's title was statute-barred and extinguished
- Whittlesea City Council v Abbatangelo = land gifted to council to build hall that was never built, land was surrounded by A's land, A added gate to fence around C's land, A used block as backyard, A started to treat land as theirs, demonstrated intention to possess, block became part of A's land, no issue with limitation period (hurdle was with possession since they always said they didn't own it)

### Remaining s185 Exceptions – errors on register

- s185(e) – earlier existing indefeasible title
  - Where 2 subsisting titles are issued for same lot of land to 2 RPs at same time, earlier title will prevail
  - Registrar of Titles v Esperance Land = owner of Blackacre sold Blackacre on but accidentally included Whiteacre (which someone else owned), E became RP for Blackacre (and kinda Whiteacre), courts held register to be corrected to reverse error, first owner of Whiteacre prevailed
  - Does not apply if earlier title is cancelled and new title has been issued (Medical Benefits Fund v Fisher)
    - Compensation under ss188, 188B LTA for person suffered loss from reg'd interest not, by error, being carried forward onto new indef title
- s185(f) – failure to cancel following a transfer
  - New owner's title prevails
  - Intention was that first title was to extinguish and defeated by second
- s185(g) – wrong inclusion of land
  - Owner of Lot 1 will take title to wrongfully described lot subject to interest of the other owner
  - Power to correct (s186(1))
- Remedies
  - Registrar has power to correct if won't prejudice other rights (s 15(1))

### Overriding Statutes Exception

- Possibly the greatest single threat to operation of the Torrens System (Quach v Marrickville Council)
- Matter is statutory interpretation
  - Determination of the question of the priority between two inconsistent statutes must depend upon the purpose and interpretation of the statute under which the interest arises (Miller v Minister of Mines)
- LTA ss29(2) and 34 enables orders, notices or agreements pursuant to other statutes to be recorded on indefeasible titles as administrative advices
  - Neither comprehensive nor mandatory
  - Register may not be a complete mirror in a particular lot
  - Do not affect indefeasibility
    - If recorded => just about notice
    - In QLD, they do go some way toward mitigating the threat posed to Torrens system by modern proliferation of overriding statutes
- Revenue
  - Rating and taxing statutes that create charges on the land □ Land Tax Act s60
  - First charge will take priority even though it is not on the title □ innocent purchasers will inherit the debt
  - South-East Drainage Board = first charges on Torrens-system land created by S-E in respect of construction costs and maintenance rates took priority over a mortgage granted by RP
    - Standard canons of stat interpretation □ p414 \*

- Resumption / compulsory acquisition of land for public purposes
  - Pratten v Warringah Shire Council = provisions of Torrens statute in relation to the conclusiveness of the register had to give way to the clear terms of the later statute, title to the land affected by the reservation was vested at all times in the Warringah Shire Council
- Defects in title
  - E.g. dividing fences, illegal buildings, encroachments
- Compulsory / involuntary vesting of title by express court order
- Statutes that void an interest in land unless prescribed procedures are followed
- Hillpram v Heaven's Door
  - If a written law is valid, clear and applicable => must be given effect according to its terms
  - Where conflict between commands of written laws => courts endeavour to reconcile the texts
- Checklist
  - Is there a provision in the other Act that expressly overrides LTA
  - If not, is it a proper implication from the other Act that LTA is to be overridden?
    - Can they be reconciled
    - Can they continue to operate simultaneously or sequentially?
    - Canons of construction
      - Specific > general (Miller v Ministers of Mines)
      - Provision of later statute > earlier statute
      - Public interest > purely private rights
  - s109 of Cth Const – inconsistency of laws
    - Cth > State
- South-Eastern Drainage Board v Savings Bank of South Australia = statutory charge prevailed
- Hillpram v Heaven's Door = sequential approach, later enactment and partakes more public law enactment, wording of act provisions displayed intention that they are to be of universal force
- Pratten v Warringah Shire Council = public vs private rights approach
- Kogarah Municipal Council v Golden Paradise Corp = like Hillpram, court interpreting planning legislation narrowly as to avoid conflict with Torrens statute => sequential approach, transfer was invalid but once reg'd □ immediate indefeasibility
- City of Canada Bay City Council v Bonaccorso = sequential approach □ narrow textual interpretation of later statute and emphasising of primacy of indefeasibility provisions of relevant Torrens statute, used Kogarah's argument
- Koompahtoo = used Kogarah's argument

### **Correction of Errors on Register**

- Core policy rationale exists for correcting patent administrative errors on register
- The powers of the register are significant and extensive => register has power of cancellation and correction (Frazer v Walker)
- Ambit of the registrar's power is not unqualified => must be intra vires
- s15 – registrar may correct registers



- o Equitloan Securities v Registrar of Titles & Yelangi Preschool and Kindergarten = there must in fact be an error in the register (re s15(1)(a))
- o S15(1)(b) => real constraint on registrar's power
  - Correction must not prejudice the rights of an interest-holder recorded in the register
  - Subject to s(3) and s(8) => where the interest-holder sufficiently knows of the error, their interests are not prejudicially affected
  - Notice will taint the RP's title to the extent that a correction is authorised
- s186(1) – action to correct wrong inclusion of a lot
- s17 – power of registrar to lodge a caveat to protect the integrity of the register
- s19(a) – registrar may decide to hold inquiry to decide whether a register should be corrected
  - o Re Crompton = applicant can refer matter to registrar for enquiry, court cannot direct registrar as to how to exercise discretion
- S26 – registrar's power to refer a matter to SC for direction, or to state a case for decision, or to seek an order
- Equitloan Securities v Registrar of Titles & Yelangi Preschool and Kindergarten = registrar's decision to correct the register by deleting registration of the mortgage was void because it exceeded the power conferred on him \*

## Unregistered Interests

- LTA s181 = an instrument does not transfer or create an interest in a lot at law until it is registered
- Unregistered = equitable interests in the land
  - o Lower in hierarchy
  - o Prone to defeat in priority contest
- Chan v Credson = unreg'd instrument is ineffective to create legal or equitable estate in land before reg, but antecedent agreement will be effective to bring into existence an equitable estate or interest in the land
  - o Unreg'd but not void
- Barry v Heider = Torrens legislation □ in denying effect to an instrument until registration, does not touch rights behind it
- Unregistered and unregistrable interests are defeasible unless protected by caveat or exception to indefeasibility arises
- Key issues
  - o Protection of inreg'd interests
    - Caveats
    - Priority notices
  - o Property between 2+ unregistered interests

## Caveats

- Normally registration => protection
  - o But not possible for unregistrable interests
- LTA Part 7, Div 2 => caveat system
  - o Section 131 – requirements



- Acts as statutory injunction
  - Preserves status quo by freezing register (s124)
- Purpose
  - Protective
    - Prevents registration of instrument adverse to the unregistered interest-holder
    - Preserves it from extinguishment
    - Allows for settlement of disputes => assert right and preserve through subsequent registration
    - Does not enlarge right
  - Notice to the world of existence of unreg'd interest
    - Actual or constructive

### Who Can Lodge?

- Section 122(1)
  - (a) person claiming interest in a lot
    - Interest must be proprietary
    - Not personal or contractual interest
    - AIA s36 => interest in land definition
      - Sch 1 □ legal or E estate, or right, power of privilege over prop
    - Re Henderson's Caveat = interest under a conditional contract, equitable interest in the land can exist provided that the claimant can claim equitable relief by way of injunction or specific performance or some other remedy to maintain or protect their interests (doesn't have to be specific performance), caveat over whole portion of land
    - Kuper v Keywest Constructions = interest in a future indefeasible title, caveat cannot be claimed in a proposed lot but interest may be claimed in the lot over which the strata plan will be registered (whole development site)
  - (b) registrar under s17
    - Section 17(2)
    - Person under a disability, persons absent from the state, a minor, and circumstances of emergency
  - (c) registered owner
    - Confirmation/application of s122(1)(a)
  - (d) person to whom Aus court has ordered an interest in a lot be transferred
    - Re Worrell's Caveat = court order □ record of agreement
  - (e) person who has benefit of subsisting order of Aus court in restraining a RP from dealing with a lot
- Section 104 – person claiming an interest subject of a claim for adverse possession
- PLA section 74 – purchaser under instalment contract for sale of land
  - Because title does not pass until final payment □ specific right to caveat

### After lodgement of caveat

- s 123 – registrar give notice to each person whose interest is affected
- s 124(1) – prevent reg of instrument affecting lot from date & time endorsed by registrar

- s 124(2) – will not prevent reg of
  - o instruments caveat does not apply to / caveator consents to
  - o some mortgage instruments
  - o interest that will not affect caveator's interest
- s 124(1A) – has effect until lapses, cancelled, rejected, removed or withdrawn

### Removal of Caveat

- Withdrawal – s125
- Lapsing – s126
  - o Under s122(1)(a) => 3 months
    - Section 126(4)(a)(ii)
    - Or sooner if procedure in s126(2)-(5) is followed
      - Caveatee serves notice on caveator requiring -or to start a proceeding in court to establish interest claimed under caveat
      - Within 14 days of service, -ee informs registrar that notice has been served on -or
      - -or does not, within 14 days of receiving service, bring an action to assert interest
  - o Non-lapsing
    - By registrar
    - Persons having benefit of court orders
    - Registered owner
    - Lodged with reg'd owner's consent – s126(1)
- Court ordering removal – s127
  - o (1) -ee may apply for order of removal
  - o (2) SC may make order whether or not -or has been served with application and may make order on terms it considers appropriate
  - o Similar to deciding whether to grant an injunction
  - o Ross Cook and Brett Cook v Bli Bli = principles to be applied pp435-436\*
    - Onus on caveator to keep caveat
    - Mutuality
    - Caveator proves caveatable interest
    - Onus on -or to prove convenient to maintain caveat
    - Court retains discretion
- Cancellation by registrar – s128
  - o (1) may cancel if request to cancel is lodged and registrar is satisfied that (a)-(c)
    - o Interest claimed by -or has ceased, abandoned or withdrawn
    - o -or's claim has been settled by agreement, or otherwise satisfied
    - o Nature of interest claimed does not entitle caveator to prevent reg of instrument
  - o (2) must give 7 days notice of intention to cancel
- Further Caveat – s129
  - o (1) applies if original caveat is lodged in relation to interest

## Compensation for Wrongful Lodgement

- Section 130
  - (1) -or lodged or continued w/out reasonable cause must compensate anyone who suffers loss or damage
  - (3) onus on =or ☐ presumed w/out reasonable cause unless -or proves reasonable cause
- Onus of proving loss of damage rests on claimant for compensation
  - Onus on caveator to show cause to lodge (s 130(3), Farvet v Frost)
- Von Risifer v Permanent Trustee = compensation awarded for vexatious activity in lodging multiple caveats against one property
- Brooks v Brooks = claim for compensation failed, D was able to discharge onus of proving that caveat was lodged and continued with reasonable cause, D had reasonable grounds for belief that her interest derived from the will constituted a caveatable interest ☐ proof of honest belief based on reasonable grounds discharges
  - S 130(3) is not whether caveator had caveatable interest ☐ is it -or had reasonable cause of lodging or continuing caveat

## Priority Notices

- LTA, Part 7A
  - s139(1) – Created procedures for deposit in registry of priority notice by or for a person who is, or will be, a party to an instrument that is to be lodged and which will affect the lot or an interest in the lot
  - s139(2) – formal requirements
    - Appropriate form
    - State person's name
    - Be signed by or for the person
    - Describe both the lot and each instrument to which the notice relates
    - State order i/w related instruments are intended to be lodged
- Seeks to reserve priority of instruments that are to be lodged
  - E.g. reserve priority for transfer and/or mortgage intended to be lodged
- Alerts all interested parties who perform a title search to fact that lodgement of instruments listed in notice is intended
- s140(1) – Prevents an instrument affecting the lot/interest from being reg'd until notice lapses or is withdrawn, removed or cancelled ☐ s140(2) – Exceptions (p441)
- s148 – Instruments lodged, by prevented from being reg'd by notice, are taken to have been lodged in order immediately after lodgement of related instruments for notice
- Duration / cessation
  - s142- lapses either when related instruments are lodged or after 60 days
    - s141 – can be extended to 90 days
  - s143 – withdrawal by request
  - s144 – removal by SC
  - s145 – cancellation by registrar
- s146 – compensation for improper priority notice \*

## Priority Rules

- General law => 2 questions
  - Nature of particular interest

- Legal or equitable
  - o Time of its creation
    - Earlier or later
- Competing legal interests
  - o General law
    - Nemo dat applies
    - 2+ legal estates that are inconsistent => priority determined on date on which instruments creating the interest came into effect/operation
    - First in time prevails
  - o Torrens
    - RP's title is subject to all other registered interests s184(1)
    - Multiple legal of same type => priority by time of lodgement ss177, 178
    - Unless exception to indefeasibility applies
- Earlier L, later E
  - o General law
    - Equal equities => legal interest prevails
    - Subject to proviso that the rule will not apply where holder of E interest can demonstrate that the conduct of the legal holder has been such that the legal interest ought to be postponed to the equitable one
    - Fraud, gross negligence, estoppel
  - o Torrens
    - Legal will prevail unless exception to indefeasibility can be established
- Earlier E, later L
  - o General law
    - Purchaser, for value, of legal estate prevails where they act bona fide and without notice of earlier E interest
  - o Torrens
    - Legal interest will prevail unless exception to indefeasibility can be established
    - Holder of legal interest is not affected by actual or constructive notice of unreg'd E interest (ss 178(3), 184(2)(a))
- Competing E
  - o Notice? ☐ no ☐ who has better equity ☐ equal (see below)
  - o If they are equal => first in time will prevail => Rice v Rice rule
    - Priority in time is last resort after notice and postponing conduct
    - Butler v Fairclough = time is only when all things are equal
  - o Focuses on first interest-holder ☐ interest and conduct
    - Has there been such conduct on part of 1 interest-holder that their priority ought to be postponed to second one?
    - Postponing conduct req's global factual assessment
      - Nature of competing interest
      - Nature of their acquisition
      - Conduct of parties
    - 1 by conduct, directly or indirectly, misled another 3<sup>rd</sup> party w/ indicia of title or created an appearance or an assumption that title is unencumbered
  - o Postponing conduct

- Abigail v Lapin = 2<sup>nd</sup> E holder (A) had priority, 1<sup>st</sup> holder (L) armed 3<sup>rd</sup> party by not putting a caveat on the property, if holder of subsequent equity acquired with notice of prior ☐ priority fails
  - Earlier equity is not to be postponed unless the act of omission proved against him has conduct or contributed to a belief of later equity holder that the prior equity was not in existence
- Heid v Reliance Finance Corp = 2<sup>nd</sup> E holder (finance company) got priority because 1<sup>st</sup> (H) did not register the interest, armed w/ title, reckless to accept that 'solicitor' was a solicitor in circumstances
- Breskvar v Wall = priority of the creation of that right will only be lost by P's conduct that must have contributed to the assumption, upon which the holder of the competition equity acted when that equity was created. B armed the P with the means of placing himself on the register necessary to commit fraud
- Clark v Raymor = 1<sup>st</sup> interest holder had postponing conduct, Clark was not of doing anything more to discover Reymor's interest, failed to publicise interest
- o Priority will be confirmed in 1<sup>st</sup> interest holder if 2<sup>nd</sup> interest holder had notice of 1<sup>st</sup>'s interest
  - PLA s346 ☐ not affected by notice unless
    - (a) within purchaser's own knowledge or would have come to purchaser's knowledge ☐ actual or constructive
    - (b) come or would have come to purchaser's agent ☐ imputed
  - Moffett v Dillon = 2<sup>nd</sup> interest holder had full actual knowledge of the earlier charge thus 1<sup>st</sup> had priority ☐ notice gave 1<sup>st</sup> holder priority
- o Failure by 1<sup>st</sup> to lodge a caveat to protect interest does not automatically amount to postponing conduct
  - May do if fails to publicise interest (Clark v Raymor)
  - Depends on circumstances
    - Including prevailing commercial practice
  - One circumstance to be considered in determining whether it is inequitable that prior equitable interest-holder should retain their priority (Heid v Reliance Finance Corp)
  - J & H Just v Bank of NSW = 1st entitled to priority as holder of the earlier interest, supported by the fact they held the certificate of title, failure to caveat is not postponing conduct (only one factor)
  - Black v Garnock = said must caveat to tell world about interest
  - Capital Finance Australia v Struthers = kinda said nah to ^^ p456
- Mere E, later equitable interest
  - o Holders of mere E reqs assistance of court if they are to ultimately acquire equitable interest in relevant property
    - Rectification, set aside conveyance obtained by fraud, enforcement via part performance
  - o Mere Es will be defeated by subsequent equitable estates or interests acquired for value and without notice of them
    - With notice ☐ ME prevails
    - Without notice ☐ EI prevails

- Earlier EI, later mere E
  - Double Bay Newspapers v A W Holdings = P's claim was a mere equity and not an equitable estate => did not have any standing in competition of priorities compared to A W, but P should have prevailed as A W had engaged in postponing conduct, regardless => A W's priority of time remained undisturbed and they were entitled to have sale proceeds applied first to discharge outstanding liabilities
    - the defence of a bona fide purchaser for value without notice may be available by the owner of an equitable estate against the owner of a prior equity

Nature of Competing Interest	General Law	Torrens
Legal / reg'd interests	Nemo dat	Priority determined by order of lodgement
Equitable / unreg'd interests	Comparison of equities	Comparison of Es + caveats
Prior E vs later L	Bona fide purchaser for value without notice	Reg'd interest will prevail unless exception to indefeasibility exists
Prior L vs later E	Legal prevails except if fraud, gross negligence	Reg'd interest will prevail unless exception to indefeasibility exists

## Remedies and Compensation

- Remedies available
  - Recovery of possession – s184(2)(b) or s184(3)
  - Statutory remedies – ss186, 187
  - State compensation for loss or damage or deprivation of an interest in land – ss188-190

### Recovery of Possession

- Action to recover possession against RP may be brought
  - By another RP – s184(2)(b)
  - Applicable exceptions to indefeasibility under s185 – s184(3)(b)
  - Where fraud exists – s184(3)(b)

### Specific Statutory Remedies

- s15(1) – power to correct register if incorrect & correction will not prejudice right of interest holder (Equitiloan)
  - may correct even with prejudice if
    - subject to SC order (s 15(3)(b))
    - easement omitted or misdescribed (s 15(3)(a))
    - right holder had actual/ constructive notice that reg was incorrect (s 15(8))
  - Without limiting (1), the registrar may correct the register:
    - If it is incorrect due to an incorrect recording of an interest: s 15(2)(a)
    - If an inquiry has been held and it has been determined that the register is incorrect (Eg. due to fraud): s 15(2)(b)
  - If the register is corrected, the registrar must record the state of the register prior to the correction, and the date time and circumstances of the correction: s 15(6)
  - A register that has been corrected has the same effect as if the relevant error had not been made: s 15(7)
- s186 – action to correct wrong inclusion of a lot
  - (1) – s185(1)(g) applies to indefeasible title
- s187 – orders by SC about fraud and competing interests □ remove interests

- o does not apply to PE
  - o court may make another type of order (vesting order under Trusts Act) □ Williams v Turner
- CBA v Perrin = s185(1A) applied, making an order of getting Perrin to pay amount owing under mortgage due to her partial responsibility for husband's fraud would exceed courts powers, entitled to s187 (removal of interest) but removing interests due to errors in process is beyond registrar's power

### **Insurance Principle**

- State compensation scheme
- s188 – claimant must be deprived of land or an interest in land, OR
  - o fraud and tampering w/ register are only this category
- s188A – claimant must suffer loss or damage
- ss188A(3), 188AA, 189(1) – exclusions for matters for which there is no entitlement to compensation
- Pre-reqs for claiming compensation
  - o Must be deprivation of land or loss of damage (ss188, 188A above)
  - o Deprived must be caused by one of the circumstances listed in s188(1) or if loss/damage w/out deprivation by a circumstance listed in 188A
  - o Must not fall within any of the exclusions contained in provisions above

### **Compensable Deprivation**

- s188(1) – list of circumstances of compensable deprivation
- s188(2) – entitles claimant to compensation from the state for the deprivation
- Deprivation may be total or partial
  - o Total = loss of fee simple estate
  - o Partial = fee simple becomes subject to mortgage, easement or Crown road
- Temporary or permanent (Parker v R-G)
- May be reg'd or unreg'd (BReskvar v White)

### **Compensable Loss or Damage**

- s188A(1) – list of circumstances of compensable loss or damage
- s188A(2) – entitles claimant to compensation from the state for the loss or damage
- No express ground of fraud or tampering w/ register
- Additional ground for loss caused by reliance on incorrect state of freehold land register
- Covers consequential losses arising from deprivation under s188
  - o E.g. legal fees

### **Grounds for Compensation (s188(1), s188A)**

- List on p 464 of supp notes

### **Exclusionary Provisions**

- s188A(3) – no compensation for claim for loss or damage where registrar may correct register under s15
- s188AA – no compensation under ss188 or 188A for personal injury
  - o Loss of income
  - o Psychological and psychiatric injury



- s189(1) – matters for which there is no entitlement to compensation \*
  - o list on p 465

### **Procedure**

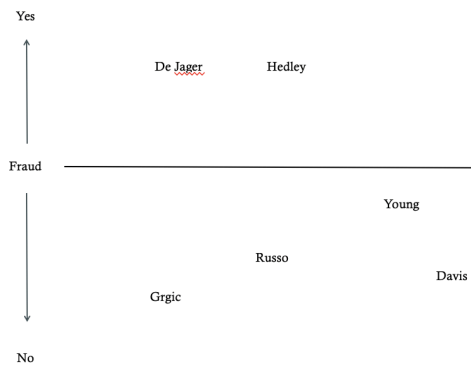
- s188B – order by SC about deprivation, loss or damage □ if claim to register is not resolved
- s188C – time limit for claim = 12 years

### **Assessment of Compensation**

- Victim is restored to same position they would have been in had the wrong that gave rise to compensable claim not been committed / suffered (Registrar of Titles v Spencer)
- Total deprivation => assessed by reference to market value of interest that was lost at date of judgement
  - o Loss of land = market value of land
- Forged-mortgage => amount necessary to discharge mortgage

## Fraud

1. Sections 184(1), (3)(a)
2. Identify parties –
  - o The defendant will be the RP (of the interest allegedly obtained by fraud)?
 Identify the plaintiff - is the alleged fraud against the previous RP/Registrar of Titles/holder of unreg interest?
3. What is fraud? General definition
4. Does the act amount to fraud? Argue by analogy to similar cases
5. Can the fraud be brought home to the RP (or their agent)?
6. Do the LTA mortgage fraud/careless mortgagee provisions apply?
7. Remedies



## Adverse Possessor

