LAWS2017 – Real Property

A) Fundamentals of Land Ownership and Torrens System

Foundations of Land Ownership

1. Historically, a statement that a person owned 'an estate in fee simple' developed into a settled meaning that the person had:
   A. An estate which may descend only to the lineal heirs of the owner without restriction.
   B. An estate which may descend to the heirs of the owner whether collateral or lineal.
   C. An estate which was dependent on all collateral and lineal heirs surviving the owner.
   D. An estate which may descend only to the collateral heirs of the owner without restriction.
   E. None of the above.

1) B

Butt [3.40]

2. In NSW:
   A. It is still necessary to use the previous words of limitation in conveyances to convey the fee simple eg 'to A and his heirs.'
   B. It is not necessary to use the traditional words of limitation in the light of the statutory changes made in s 47 of the *Conveyancing Act 1919* (NSW).
   C. Words of limitation are not relevant at all in regard to the construction of any documents in NSW.
   D. It is not necessary to use the traditional words of limitation in the light of the statutory changes made in s 23B of the *Conveyancing Act 1919* (NSW).
   E. None of the above.

2) B

3. Today a trustee of land
   A. Acquires the equitable interest in the land.
   B. Acquires the legal fee simple in the land without any power to deal with the land notwithstanding what the deed of trust states.
   C. Acquires nothing whatsoever.
   D. Acquires the legal fee simple in the land and the normal legal powers for dealing with the ownership of the fee simple, subject to the terms of the trust deed and relevant equitable principles.
   E. None of the above.

3) D

4. A beneficiary under an express trust acquires:
   A. An equitable interest.
   B. A legal interest.
   C. A legal remainder.
   D. A legal reversion.
   E. No interest whatsoever.

4) A

Butt **[4.110]**

5. A person who enters into a contract to purchase land from the owner of the fee simple acquires (prior to settlement):
   A. A legal interest in the land.
   B. A legal and equitable interest in the land.
   C. An equitable interest in the land based on the specific enforceability of the contract (or other equitable relief).
   D. No interest whatsoever.
   E. None of the above.

5) C

- OR – an opposing argument is that this easement was really obvious (E had placed a fence over the easement area → which would have given P constructive notice) → notice would postpone P (notice is important in the competition between two equitable interests)
- This could go either way (E could be postponed due to no lodgement of caveat, or P could be defeated due to notice of the easement)

- **V v P**– competing equitable interests – better equity rule (first in time prevails, unless there is postponing conduct)
  - **V** (equitable lien)
  - **P** (equitable fee simple)
  - V should have lodged a caveat over the lien – liens are just forms of charges, and charges are identical to mortgages in Torrens system (and many cases have said that caveats must be registered if you have an unregistered mortgage, and failure to lodge caveat would postpone the lien/charge/mortgage: *Person-to-Person Finances Pty Ltd v Sharari*)
  - SO – V would be postponed for failure to lodge caveat when V was unpaid for the purchase price

Part B

- If P gets registered – P is indefeasible (**ss 42** – indefeasible title after registration, **s 43** – notice doesn't affect the registered proprietor) – unless an exception to indefeasibility applies (**s 42**)
- **L v P**
  - P has indefeasibility (due to registration: **s 42**)
  - But there is an exception to indefeasibility for short-term leases (**s 42(1)(d)** – lease under 3 years (including option), P will take subject to L's lease if P had notice of it before registration)
    - Notice includes actual and constructive notice (**s 164, *CA***) → here, P has constructive notice (since L is in possession, and P should have reasonably inspected the property: ***Hunt v Luck*** → purchaser who brought land should inspect the land to identify whether the vendor or another person is in possession, and that would fix them with constructive notice of other occupiers [Butt 12.830])
  - So, the short-term lease exception in **s 42(1)(d)** applies, and P is subject to the lease
  - Here, registration didn't help P – due to the exception to indefeasibility
- **E v P**
  - P has indefeasibility
  - There is an exception for easements (**s 42(1)(a1)** – see Butt [13.730]-[12.750]) → it applies to easements that was omitted or misdescribed
    - Omitted = left off a conversion process from Old System (not relevant here)
    - Misdescribed = on the register, but registered the wrong way (not relevant here – since not registered)
  - Hence, **s 42(1)(a1)** doesn't apply to E's easement since the easement was not validly created under the ***RPA*** (since it was not registered)
    - This is similar to ***Castle Constructions v Sahab*** – R-G had actually removed an easement under an agreement to remove it, the HCA acted on the presumption that it had been wrongfully removed – but it was not considered to be omitted since it's not there anymore → the easement has to be in existence, and once it's been deregistered, it's no longer in existence (so it can't be omitted or misdescribed)
    - Here, the easement was not registered, it was never registered, it never existed under Old System, so it would be destroyed by registration
- **V v P**
  - P has indefeasibility – and V is an unregistered vendor's lien
  - P's registered interest would wipe out V's unregistered lien
  - P's notice of V doesn't matter after V becomes registered (**s 43**) – notice only matters if it is in combination with other things (e.g., a false statement, a lie, a promise – like in ***Loke Yew*** – buyer promised to the contractual lessee, unregistered, that they can stay on the property, and after becoming registered, buyer used their indefeasibility to try to get the lessee off the property)

Question 2

Astrid is the registered proprietor of two properties, Hem and Dröm. Hem is her home, a 2-bedroom townhouse in Narellan and is valued at $500,000. Dröm is a parcel of land in the Hunter Valley close to wineries and luxury hotels, is ideally located for a hospitality business and has a value of $350,000. In2015, Astrid mortgages Hem and Dröm to Donald for $450,000. In 2018, Astrid was badly injured in a car accident and was unable to continue working and subsequently defaulted on her mortgage repayments. In January 2019, Donald exercised his power of sale and entered into two contracts, onefor the sale of Hem and the other for the sale of Dröm. Donald's daughter Ivanka is the owner of Decadent Day Spas Limited in which Donald holds shares. Donald is aware that Biden's Bar & Grill, a restaurant chain, is keen to buy Dröm and is willing to pay up to $400,000 for it. Donald organised a public auction to sell Dröm in Moree on 7th January. The auction was advertised every day for the fortnight preceding the auction in the *Daily Liberal*, a daily newspaper circulating in and around Dubbo.A representative of Decadent Day Spas Limited was the only person present at the auction. The property sold to Decadent Day Spas for $200,000. Hem was sold by private treaty for $450,000 by a real estate agent from Mosman to the first person to show interest within one week of the listing. The purchaser had no connection to Donald or the agent. The sales are yet to be settled.

a) Advise Astrid.

b) Would your advice differ if the new purchasers were now registered proprietors of those properties?

c) Would your advice differ if Astrid had a limited understanding of English and Donald was her migration agent?

d) Is the fact that one of the properties is Astrid's home legally significant?

Part (a)

Step 1: DROM (property 1) – characterise

- Astrid's interest
  - Astrid had an equity of redemption in the land, she is still registered as the legal owner, but because she is in breach of her mortgage → as a defaulting mortgagor, she has lost all of her rights except for one right (the expectation that the property will be sold in good faith → which is a mere equity: ***Latec***)
  - ***Latec*** → hotel had mortgages on it, and it was sold by the mortgagee to a wholly owned subsidiary company for a very undervalued price and that was obviously a breach of the obligation of good faith → that subsidiary sold the property again to an innocent third party → the conflict was between the mere equity of a defaulting mortgagor and the equitable interest of the bona fide purchaser under an incomplete sale → the mere equity was defeated → mere equities are only effective if the other party had notice of it (actual, constructive, imputed: **s 164**)
- Donald's interest
  - Legal mortgagee → that is a charge under ***RPA*** → he doesn't own the property, but has a right to sell it
- Decadent's interest
  - Decadent exchanged contracts to purchase the property
  - If the contract is specifically enforceable, it will an equitable interest (***Lysaght v Edwards***)

Step 2: DROM (property 1) – priorities

- Donald has an obligation to Astrid to act in good faith
- Breach of good faith
  - Donald has breached his obligation to act in good faith → location, advertising, low reserve, sale to related entity
  - ***ANZ v Bangadilly*** → mortgagee sold to related entity, didn't advertise the property, they put it on an auction at a weird time of the night at a weird place, only 1 person turned up (who ended up buying it – that purchaser was a wholly owned subsidiary company) → complete fraudulent transaction → similar to this one HERE

  - But unlike Wonderviews, Equity is immediately interested in Paramatta land because the presumption of resulting trust would arise since the legal title does not reflect the contributions to the purchase price → legal title was held as joint tenancy, but the contributions to the purchase price were unequal (Nelie paid 2/3, Peter paid 1/3)
- BUT – Peter and Nelie are tenants in common in equity because they provided the purchase price in unequal shares.
  - This has been a common situation where courts of equity have inferred that the parties were tenants in common of the beneficial interest in a manner that reflects their respective contributions to the purchase price (here, taking into account joint liability under the mortgage for $100,000, Nelie has a 2/3's share and Peter has a 1/3 share)
  - Equity gets involved in this situation because it is not fair and unconscionable for Peter to claim 50% when he did not pay for 50% (he only paid 1/3) → so the property should be put in a trust to adjust the shares (Equity will take property off Peter and give it to Nelie – done automatically, since it is presumed that that was what the parties intended)
  - But the presumption of resulting trust can be rebutted by saying that Nelie's intention was not for this to happen, and that she was happy for Peter to have 50% share (but there isn't any facts to suggest such intention here) → e.g., was it a gift?
  - Since they were in a de facto relationship, there is no presumption of advancement → advancement is a reverse presumption that is made in two kinds of relationships (husband to wife, parent to child) – not wife to husband → advancement presumption only applies to marital relationships and not de facto relationships (per ***Calverly v Green*** – Deane J's reasons were that de facto relationships were where people did not want to be treated like they were married (since de facto means not being married), so the courts will not treat them like they are married – courts won't impose a presumption of advancement, since the courts don't know what they wanted)
- However, if the parties clearly intended a joint tenancy, equal ownership and the operation of the principle of survivorship, then the courts will not apply the equitable approach.
  - Moreover, courts have held that in domestic relationships where the parties hold the legal estate as joint tenants, the beneficial interest is also presumed to be held as a joint tenancy: see generally, Butt [6.140]
- Nature of the presumption in ***Cummins*** (equity case – about a man (barrister) who did not pay income tax for over 40 years – ATO wants to sell his house, which was registered as joint tenants for him and his wife → he argued that he only paid 25% so resulting trust, and ATO can only take 25% → court rejected this because they decided to register as joint tenants over the marital home, so in those circumstances, the court presumed a joint tenancy → matrimonial home = presumption of joint tenancy)
  - ***Commissioner of Taxation v Bosanac*** **[2021] FCAC 158** → court in this case overturned ***Cummins*** and held that this is not a presumption anymore (no presumption of joint tenancy merely because it is a matrimonial home) → FCAC found that the HCA in ***Cummins*** were influenced by the severe facts and basically wanted to punish Cummins, and so did not create precedent
  - ***Bosanac*** → appeal to the HCA:
    - Email from LAWS2015 (Equity): *"The High Court delivered judgment earlier this week in* ***Bosanac v FCT [2022] HCA 34****, which concerns the application of the doctrines of resulting trusts (particularly presumed resulting trusts, where legal title does not accord with the contributions that were made to the purchase price) and the presumption of advancement. The High Court was asked by the FCT to abolish the presumption of advancement (but not the presumption of resulting trust), but the court decided the case without doing so - the case provides an example of a situation where the court focused on identifying the objective intention of the parties, such that no (resulting) trust arose. It is not necessary reading for Equity, but it is a useful reminder of various points made in other cases and so it could be considered as an entry under 'Recent examples and further reading' in the Reading Guide for the unit."*
- NOTE: Exam will not test you on Equity materials (but it is relevant to real life)

- We are advising Castor at this point, and Castor is a contracting party to this agreement – so there is no issue about passing the benefit here → Castor can just sue on the covenant because he is a party to the covenant (so no need to assess burden and benefit)
  - Hustler (as covenantor) has agreed with Athena and Castor (as covenantees) that it will not build any building exceeding one storey in height
- The only issue will be whether the covenant will be removed/destroyed by the development application (if so, that part of the contract is dead, since it was overridden by statute)
  - Here, Hustler has received Council planning permission to build a three-storey museum
  - ***Cumerlong Holdings Pty Ltd v Dalcross Properties Pty Ltd*** → held that the local Council could overturn covenants through local development plans, but since the governor's approval was not obtained, an injunction was granted to stop the development
  -

Other issues:

Issue 1: Nature of the co-ownership – Consider Butt [6.140]

- Athena and Castor are registered as joint tenants of Romanceacre.
- However, there is a question whether they hold the property as joint tenants in law and equity
  - While at **law** they are joint tenants, **equity** may find that there is only a tenancy in common – in equity when the purchase price is provided in unequal shares, which is the case here.
    - There is a presumption of resulting trust – due to unequal contribution (Athena paid more than Castor – Athena paid 80% of $100K deposit, and Castor paid 20% of deposit → they took a $900K mortgage and equally liable for it, so an additional $450K contribution each)
    - This can be overturned by the presumption of advancement → but it doesn't apply to girlfriend and boyfriend (only to married couples)
    - So, it is a tenancy in common (53-47 split) → if it is a tenancy in common, there is no right of survivorship, so Athena can make a will leaving her share to her cousin Doris
    - Note: subsequent mortgage instalments can be considered under a judicial sale where equitable accounting principles are used or under 'joint endeavour' constructive trust (***Muschinski v Dodds; Baumgartner***) or under estoppel or 'common intention' constructive trust (an actual or implied agreement between parties about their intention → but we don't impute an agreement like the UK)
  - However, contemporary courts have found that if the parties clearly intended equal ownership, then equity will consider them as joint tenants of the beneficial interest
  - We do not know the intention of Athena and Castor, but regarding matrimonial and de facto relationships, courts have been willing to infer that there is such an intention
  - Therefore, there would be a strong inference of a joint tenancy → THIS IS ARGUABLE (in tutorial, Cameron said it was a tenancy in common)
- There does not appear to be any conduct on the part of both or either of Athena and Castor which suggests severance of the joint tenancy
  - The making of a will does not sever the joint tenancy
  - Therefore, it either Athena and Castor die, whether the gift under the will favours Doris will depend upon the characterisation of the co-ownership as a joint tenancy or a tenancy in common

Issue 2: How could Castor have the property sold, and how would the proceeds of sale be distributed – consider Butt [6.720]-[6.780]

- If the parties (Athena and Castor) cannot agree as to a sale → then Castor can rely on **s 66G, *Conveyancing Act 1919* (NSW)** → appoint a trustee for sale under the judicial sale option → if so, then an equitable accounting must be undertaken
- **(1)** Improvements – can be claimed by Athena
  - At the end of the co-ownership, a party may seek accounting for improvements made
  - A distinction is drawn between improvements and recurrent expenditure, although it is arguable that at least in some cases, such a distinction is unhelpful.