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1 Introduction; common law, equitable and statutory approaches to competing interests – priorities

1.1 Old system title

- Areas settled prior to 1860 in NSW could still be governed by old system title
- In old system title, the way to effect transfers is through the practicality of deed

1.1.1 Deeds

- The most solemn act that can be done in respect to property, has a large impact on priorities (Manton v Parabolic Pty Ltd (1985) NSWLR)
- No conveyance of land in NSW under the old system title is valid to pass an interest at law unless made by deed (s 23B(1))
- There are four requisites for a valid deed: signing, sealing, delivering and attestation – s 38
- Where an interest or right passes (conveying), or an obligation is created, or affirmation of some act where an interest or right passes
- While there are other kinds of documents that are not needs, we still have them in our legal system and can play an important role to play in land transactions
- In relation to legal interests note the delivery of the deed of conveyance and the delivery of the deed of first mortgage. A recent decision is Segboer v AJ Richardson Properties Pty Ltd [2012] NSWCA

1.2 Priority rules between competing interests (old system)

- CF to Torrens Title where conflict is resolved chiefly by reference to the Real Property Act 1900

1.2.1 Competing legal interests

- Where two or more legal interests are inconsistent, priority depends on the date of creation of the interests (nemo dat rule)
- Nemo dat = if you don’t have it you cannot give it
- This applies unless the interests are not necessarily inconsistent

1.2.2 Competing equitable interests

- General maxims of equity
1. *Equity follows the law* (i.e. first in time prevails). Equity adopted the common law rule that priority depends upon the date of creation of the interest.
2. Where the equities (merits) are equal, first in time prevails.
3. Equity will not suffer a wrong to be without a remedy.

- Generally the earlier interest has a stronger claim than the later
- Qualification: there is some similarity to nemo dat but not really b/c equity is a *court of conscience*
  - Court of equity is able to determine priority according to the ‘best equity’
  - Thus, the first in time principle is often used as a last resort
  - *Heid v Reliance Finance*: priority between equitable interests is to be determined by a more general and flexible principle with preference to the better equity
- Postponement
  - Occurs only where the earlier holder’s act or neglect contributed in some way to the later holder acquiring its interest without notice of the earlier interest
  - BUT not every equitable interest holder will be postponed to a later interest holder for failure to obtain or retain the title deeds
- No “purchaser for value without notice” doctrine
  - There is no general doctrine like this for competing equitable interests
  - The mere fact that a later-acquired equitable interest was purchased for value without notice of an earlier equitable interest does not give the later priority over the earlier
  - Will have to show inequitable conduct
- Notice defeats claim to priority
  - A later equitable interest generally cannot prevail over an earlier if the holder of the later had notice of the earlier at the time of acquiring the later interest
- Beneficiaries under trusts
  - They are in a special position
  - Generally, their equitable interests are not postponed to a later equitable interest created by the trustees in breach of trust
  - B/c of the duty of trustees not to abuse their position
  - BUT only applies where the trustee has the possession of the title deeds – if the trustees neglect to obtain the title deeds and their neglect allows equitable interests to be created in favour of a third party, the beneficiary’s rights under the trust are no better than those of the trustees
  - Also, the beneficiary’s interest will be postponed where the beneficiary personally engages in conduct allowing a later interest to be acquired in the belief that the beneficiary’s interest did not exist
- ‘Equities’
  - An equity often refers to a person’s right to bring an action to enforce a remedy in respect of land
  - Mere equity
    - Some Aust courts recognise that an equity has proprietary characteristics but is somehow less than full equitable interest in land
    - It’s a right that if established in a court of equity, may lead to an equitable interest arising but until then conferring no proprietary interest
• Tabula in naufragio
  o “Plank in a shipwreck” may enable the later holder to reverse the order of priority
  o If the later was acquired for value and without notice of the earlier, and if the holder of the later subsequently acquires the legal interest in the land – then that holder can squeeze out the earlier equitable interest by tacking the later equitable interest onto the legal estate
  o Exception: doesn’t apply where the later equitable interest holder knows that the transaction by which he/she acquires the legal estate constitutes a breach of trust by the holder of the legal estate
• Kinds of equitable interests (not exhaustive):
  1. Beneficiary’s right under trust
  2. Right of purchaser under a valid agreement for sale of land
  3. Right of mortgagee/lessee under a valid agreement (not a deed) to grant mortgage/lease
  4. Right of a mortgagor in the mortgaged land which is Old System Title (equity of redemption)
  5. Right of a second or subsequent mortgage
  6. Right of mortgagee under mortgage by deposit of deeds (principle of part performance)
  7. Grantee of an option
  8. Unpaid vendor (vendor’s lien)
    • As the vendor has given title docs for less than agreed, vendor has an equitable interest to secure the remaining money
  9. Purchase price resulting trust
  10. A profit a prendre which is in writing but not in the form of a deed
      • S 23B – has to be in form of a deed

1.2.3 Earlier legal interest v later equitable interest
• The legal interest here generally prevails
• However, it is open to the later equitable interest holder to show that the conduct of the earlier legal interest holder has been such that the legal interest ought to be postponed
• Categories of postponement (not exclusive)
  o The legal owner has expressly created the equitable interest
  o Where the legal holder was party to fraud
  o Where the legal interest holder was grossly negligent in failing to inquire after, obtain or retain possession of the title deeds to the land → thereby allowing the later equitable interest to be created
    ▪ HAS to be gross negligence
    ▪ Usually in relation to title deeds – Northern Counties of England Fire Insurance Co v Whipp (1884)
  o Where the legal interest holder entrusted the title deeds to an agent with limited authority to raise money by giving a security intended to bind the legal interest and agent exceeded authority by creating a security for a larger sum in favour of a
person who had no notice of the limitation. The legal interest is bound by the interest so created to its full extent, not merely to the extent authorised (estoppel)
  o Where the legal interest holder handed another person a doc appearing to give that other a beneficial interest in the land (estoppel)
  o Where the evaluation of the conduct of the legal owner is based on estoppel – the legal owner is estopped from asserting his or her legal title against the holder of the equitable interest
• Generally, postponement due to actions or omissions by the legal interest owner

1.2.4 Earlier equitable interest v later legal interest

• The rule is that a bona fide purchaser of the legal interest for value and without notice (of P’s equitable interest) will take free of the prior equitable interest
• The legal interest prevails if it has been acquired by a purchaser:
  1. Bona fide purchaser
     • Need to act in good faith i.e. no fraud
  2. For value
     • He/she must provide value
     • Has to be more than nominal value
  3. Without notice (of the earlier equitable interest) ANY KIND
     i. Types of inquiries: a duty to inspect the land and to inspect the title deeds
     ii. Time when the notice is relevant: at the time consideration is paid
     iii. Note s 164 of the CA: sets out that there are 3 kinds of notice that the purchaser could have – actual, constructive or implied
     iv. The rule in Hunt v Luck
• All three must be proved and the onus is on the person claiming priority for the legal estate

The rule from Wilkes v Spooner [1911]
• The priority enjoyed by a bona fide purchaser of the legal estate for value without notice extends also to persons claiming through that purchaser
• Even if persons who take with notice of the earlier equitable interest
• Thus, purchaser who buys WITH notice from a purchaser who bought WITHOUT notice “may shelter himself under the first purchaser”
• Exception to the rule: when the trustee has sold property in breach of trust or a person who acquires property by fraud cannot rely on the being a bona fide purchaser of the legal estate without notice

1.2.5 Notice

• Actual notice – actual knowledge of facts
• Constructive notice – knowledge of facts that would have come to a person’s attention had that person made the inquiries that a reasonably prudent person would have made in the circumstances
  o Hunt v Luck – a purchaser who knows that a tenant is in possession of the property, is on constructive notice of the tenant’s proprietary rights and takes subject to them
Also extends beyond tenants to anyone who is occupying or using the property
- But also subject to qualifications
  - Encapsulated in s 164 of the Conveyancing Act 1919
  - S 53(3) of the CA gives purchasers some protection against constructive notice
    - A purchaser is not affected with notice of matters that would be discoverable by an investigation into the title earlier than the good root of the title at least 30 years old unless the purchaser makes such an investigation
    - BUT only confers protection against notice of those earlier interests, does not necessarily guarantee protection against the interests themselves
  - Imputed notice – if the principal’s agent has received it
    - s 164(1)(b) of the CA

1.3 The effect of registration under Division 1 of Part XXIII of the Conveyancing Act 1919 (NSW) on the general rules of priority

- NB: this is old system modified by registration (i.e. Conveyancing Act legislation)
  - In reality, priority principles are changed
- Under the relevant leg, priority between competing interests in an old system title is determined by the order in which the instruments embodying those interests are registered
- Any instrument registered under the Registration of Deeds Act 1897 is deemed to have been registered under the CA
- The General Register of Deeds is a different register from the Torrens Register kept under the RP Act
- Registration is important for three reasons:
  1. Publicity (to a degree)
  2. Secondary evidence
  3. Priority
     - S 184G(1)
     - Registration may give an interest priority over a competing interest
     - But s 184G confers priority only where the instruments in question compete
     - Can register contracts for sale of land to get priority

- Important principles of registration
  1. The conflicting interests must each have been created by “instruments” (examples of interests created without an instrument are: mortgage by deposit deeds, oral contracts to sell or mortgage land – if there are sufficient acts of part performance, vendor’s lien for unpaid purchase price, leases less than three years recognised under s 23D(2) of the Conveyancing Act, purchase price resulting trust. HERE apply the general priority rules.)
     - Needs to be a transaction that is in writing
  2. The instrument under which priority is claimed must have been executed or made bona fide e.g. not by deceit or fraud/with notice. The cases clearly demonstrate that bona fide means without notice: actual, implied or constructive notice. BUT notice received after the instrument is executed by before it is registered does not preclude
priority by registration: Marsden v Campbell (1897); Blackwood v London Chartered Bank (1871).

- However, note that special considerations apply to contracts for the sale of land. A purchaser’s notice (of the existence of the earlier interest) between the making of the contract and the conveyance will deprive the conveyance of protection: Scholes v Blunt (1916)

3. S 184G(1) confers priority only on instruments executed or made for valuable consideration

4. Also registration doesn’t cure defects in the documents
   - If you have a fraudulent document, registration will NEVER fix that

5. Deals with priorities between registered and non-registered instruments as well as between registered instruments. Note that this does not affect the priority of an earlier interest which was created without writing – Fuller v Goodwin and Moonking

6. Registration operates to fill the title of the conveyor who otherwise would have had no title to give. Registration in effect abrogates the nemo dat rule – Fuller v Goodwin

7. The instruments need to refer to the same interest i.e. there must be conflicting interests

8. Registration can constitute constructive notice. This is explicable on the basis that prior registered interests take priority and that a purchaser has constructive notice of them. However, if a person has registered their interest, that person is not required to search the Register for later registered instruments that may affect the exercise of rights under the registered instrument. Compare and contrast two different situations: purchasing a new interest in property; and where a party has already secured his/her interest via registration.

9. Rules apply to equitable and legal interests

1.3.1 Conveyancing Act – s 184G instruments affecting land to take effect according to priority of registration

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

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

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

(3) In the case of an instrument that affects, or intends to affect, both land and an access licence under the Water Management Act 2000:
   - (a) this section has effect in relation to the instrument to the extent to which the instrument affects, or intends to affect, the land, and
2 Torrens title

2.1 Statutory registration system

- Registrations under statutes come in all types of sizes
- Some statutory registration systems that create new property rights where there were none
  - E.g. patent
- Other systems fix upon existing property rights of general law

2.2 Historical introduction

- New system of title by registration that would better serve the property system
  - Registration is the source of the title
- Dobbie v Davidson (1991)
  - Beginning in England in 1829-57, there was a series of reports to changes in the Conveyancing system
  - Old system had the significant characteristic of legal and equitable interests in land and then had to provide system of priorities where there was a clash
    - Clash between two equitable titles: first in time prevails in the absence of some disqualifying conduct
    - Clash between equitable title and a later legal title: doctrine of bona fide purchaser for value without notice
- New system: the title it confers is not historical or derivative
- It is the title which registration itself has vested in the proprietor
- Thus, a registration which results from a void instrument is effective according to the terms of the registration does not matter what the cause/reason for which the instrument is void (Breskvar v Wall (1972))
- Came about due to difficulties with the English land law in Australia
  - ‘Dependent nature of titles’ problem meaning that there needed to be a retrospective investigation of title each time land was conveyed or otherwise dealt with time and cost
- Initiated by Sir Robert Torrens
- On each conveyance, the land would be surrendered to the Crown, which would then re-grant it to the purchaser this would abolish the need for retrospective investigation
- Consequently each purchaser’s title would be ‘indefeasible’ i.e. like a castle, it cannot be attacked by other proprietary interests
- Certificate of title single doc evidencing title to each parcel of land; would record all transactions affecting the land
- First introduced with the Real Property Act 1862 (NSW): all lands alienated by the Crown in fee simple in NSW since 1 Jan 1863 are under Torrens Title
- Many parcels of land granted before that date have since been transferred to Torrens
- 1979 amendments = computerisation of the Register