

Part A

Awarded 90

1.

A registered title is indefeasible but may be subject to exceptions, unless it is obtained by forgery in which case it is void.

As per *Frazer v Walker*, Fin obtains the registered Fee Simple by forgery and hence his title is void (and so Aaron retains the Fee Simple). However, upon the registration of interests deriving from that title, those subsequent registered interest-holders (such as Bert) have good title and rectify the nullity of Finn's title (provided they satisfy the proviso). There is a question about whether Debbie satisfies the proviso (as she does not provide consideration, she is a volunteer) but she is the executor of Finn's estate and therefore acts on his behalf. Although, even if she doesn't, Bert's registration cures this nullity.

There is no evidence on the facts that Bert was involved in any conduct that would suggest that his registered title is subject to Global Bank's equitable mortgage (exception to indefeasibility). Bert's registered title being subject to (possible) interest will be discussed in the next question.

Bert holds the registered Fee Simple subject to Tracy's registered lease (s56 RPA) and Neil's equitable easement. Debbie might argue that Bert was involved in actual fraud as the sale was at an undervalue, (*Efstratiou*), but she was a consenting party to this agreement and there is nothing on the facts to suggest Bert was indeed fraudulent.

There is a question of whether Bert's registered title is subject to Aaron's caveat. However, the effect of the caveat is to give notice of the equitable interest and prevent registration (of subsequent interests) and hence Bert's registered title prevails over Aaron's possible equitable interest.

2.

a.

Veronica may argue that she has an equitable interest to the Fee Simple on the basis of unconscionability, (*Baumgartner*). She may argue that Fin, and therefore also Debbie, holds her equitable interest on trust for her. This is evidenced in Fin's statement that he would hold half of the benefit of the land for her but he would retain the registered title in his name.

However, this beneficial interest is subject to a condition which isn't fulfilled [discussed below]. There may also be an issue that she is deriving an equitable interest from a void title. To escape the potential problem of not having paid the money, Veronica might argue there is an express trust. It would be difficult for Veronica to assert that there is an express trust as this statement might be deemed not to suggest a deliberate intention to create an express trust, even if he signs and the agreement is in writing.

Veronica may argue that she has an equitable interest under contract, (the doctrine of conversion, *Lysaught v Edwards*). However, again, she has not fulfilled this contract. The failure to pay does not suggest in itself that Veronica cannot have an equitable interest – it is the contract which renders it relevant.

If Bert does not satisfy the proviso (his involvement in fraudulent behaviour by obtaining lower price than market value could be argued to be actual fraud), his title will be void and hence Aaron will have the rightful claim to the title. However, as discussed above, this argument mightn't be plausible as Bert is not doing anything to suggest that he intended his registered interest to prevail over Aaron's. However, Veronica might argue that Bert's title is subject to the exception of indefeasibility – actual fraud – in that he intended his registered title to prevail over her equitable interest. However, it is not clear in his statement that this was designed cheating in order to obtain the registration. Veronica would also state that Debbie ought to have recognised that Bert's statements did not promise acknowledgement of her equitable interest, though it is unlikely that this is sufficient to suggest fraudulent behaviour. Furthermore, Bert could even distinguish the

case from the facts, stating that the price was not a gross undervalue (though this is arguable).

b.

Debbie has acknowledged Veronica had an equitable interest and hence Veronica might argue that she does not satisfy the proviso as she lacks bona fides on the basis of equitable fraud, (*Bahr v Nicolay*). However, Veronica explains the arrangement after Debbie's registration and hence Debbie may distinguish this scenario from the facts of the authority, assuming this is the case. Hence, it may be that Veronica can only pursue a contractual claim against Debbie for half of the money. It is unlikely Debbie is involved in any conduct such as fraud to suggest that her registered title is subject to an exception of indefeasibility in relation to Veronica's interest. The court may then consider the relevance of Veronica not paying the \$200 000 under her agreement with Fin (conditional equitable interest, Debbie mentions belief of investment in statement) as this might be important in the absence of registration. If Veronica is unsuccessful, she has no claim to half of Debbie's money.

Veronica might apply the same line of reasoning (*Bahr v Nicolay*) in relation to Bert. However, Bert may argue that he did not make an agreement to acknowledge Veronica's equitable interest (due to the nature of his first statement) and hence may not be subject to the proviso and therefore can take care of Veronica's interest. If Bert is successful, Veronica has no claim to Avarice. If Veronica can establish she has an equitable interest, as she vacates the land (and does nothing over it), her prior equitable interest is likely to be postponed to Ernest's subsequent equitable interest, and hence Ernest's will prevail (*IAC v Courtenay*).

3. (a and b)

Ernest has an equitable interest in the Fee Simple upon signing the contract of sale. (doctrine of conversion, *Lysaught v Edwards*). Tracy has a registered fixed term lease.

Tracy may argue that the option to renew qualifies the registered interest (the lease) and is intimately connected with the registered lease and hence, upon registration of the lease, the option too becomes a registered interest. Prior registered interests prevail over subsequent registered interests. Hence, even if Ernest becomes registered, he must take hold of the Fee Simple subject to Tracy's lease which is renewable for a further three years. The issue of the caveat prevents registration until the dispute involving Neil's equitable interest is resolved.

Neil has an equitable easement (since it is registrable, not registered). Hence, there is a priority dispute between two equitable interests which must be settled according to *Breskvar v Wall*. The principles of *Rice v Rice* are followed, in which priority of time is given if the interests are equal. The lodgement of a caveat is not conclusive that the prior equitable interests should not be postponed. However, on the facts, there is nothing to suggest the postponement of Neil's interest or the promotion of Ernest's interest (though the fact that he might not have inspected the premises might be considered but this is unclear on the facts). Hence, Neil's interest will prevail. However, on registration of Ernest's interest, the registered Fee Simple will prevail over Neil's equitable easement, provided there is no exception to the indefeasibility of Ernest's title. Mere notice of the interest is not enough to suggest the proviso is not satisfied.

4.

I am assuming that the dispute in question 4 occurs prior to Bert's involvement in the problem's scenario.

Global has an equitable mortgage (because it failed to register). Hence, its power of sale is only exercisable if the current registered proprietor does not satisfy the proviso in relation to this equitable interest. Mere notice of the equitable mortgage is not enough to suggest a lack of bona fides. There is nothing on the facts to suggest that it poses an exception to the indefeasibility of Debbie's registered title (such as fraud). However, as discussed above, Debbie might have a problem satisfying the proviso in terms of providing consideration (she has inherited the Fee Simple estate).

Part B

1.

The interests that can exist in property are limited to those recognised at law (the *numerus clausus*). However, these interests operate in a dynamic social setting and hence the law needs to adapt to cater for changing circumstances. Furthermore, property rights do not operate in a stand-alone manner but function in an interconnected system of relationships, with obligations being just as inherent in property as rights. The law sometimes lacks the scope to deal with the impact of the exercise of property rights on the interests of the wider community. This discussion will address how property can be utilised as a tool to facilitate government policy, such as environmental protection and economic development.

The priority hierarchy in relation to property should be reassessed in that, where fair and just, the social interest should no longer be treated as subsidiary to the individual's traditionally defined rights and expectations. This bears particular significance in relation to the issues we face in regards to climate change and environmental protection. Singer and Beerman discuss how property rights are not absolute and that the law needs to look beyond whether actions have contravened the formal boundaries of property rights and the use of formulaic reasoning to achieve uncontroversial decisions to the effects flowing from these exercises (in relation to the *Castle* and *Investment Models*).

Everyone has a responsibility to maintain and preserve the environment at an acceptable standard. It is the role of the law to codify and enforce these obligations and expectations by placing restrictions on individual property rights. For example, the law could appeal to the significance industry attributes to individual property rights by establishing property rights over carbon emissions. These can then be taxed as a means of quantifying the externalities produced in exercising these rights and as an incentive to reduce emissions. This idea corresponds with the Coase Theorem which suggests that these property rights can then also be traded between parties (between industries, the state) until eventually the most efficient outcome is produced.

Property acts as a mechanism to achieve a balancing act between the competing interests that it establishes and protects. However, it places most of its concern on resolving disputes between conflicting individual property rights and focuses on the preservation of private property while neglecting to facilitate a functioning equilibrium between individual rights and those of the community. It is this unbalance that can, on the one hand, aggravate destruction of our environment but, if regulation can be established effectively, can ensure the environment is preserved for future generations. A current illustration is the problem faced in Perth and Western Australia. The law must mediate between the two conflicting social functions which property enables the state to pursue: economic development and the creation of jobs as a result of the mining boom, and the sustainability of the natural environment. While the government has the power to compulsorily acquire land to further these policies and goals, property must regulate this exercise. Again, this is a balancing act between negotiation and consultation with the community, and the business efficacy and purpose of the transaction.

Property also faces challenges on a wider global scale. The *Crude* documentary highlights how the physical concentration of crude oil in certain geographical locations gives rise to the potential for the concentration of power, choice and control over this scarce resources in small, powerful bodies. Property is the very enabler of corruption and the unfair distribution of wealth and rights in areas such as the Middle East and Northern Africa. Crude oil infiltrates almost every aspect of our economic lives. Hence, property needs to not only place restrictions on these property rights but also differentiate between the variety of interests (the producers, the users) as these have different effects on the depletion of the natural resource.

Priority is used to justify instances in which the rights of the individual may be encroached upon by the state. This is an important and beneficial activity as it enables the government to pursue social goals and further the interests of the greater community. However, the film, *The Castle*, highlights two major challenges the law faces in this respect. Firstly, the compensation provided for such acquisitions might not adequately take into consideration the value the owner attributes to the land, which might include a number of additional costs. Hence, the inquiry should move to a more contextual approach. Secondly, it touches on the question of deciding which party should bear the obligation to promote the desired social outcome. While the law provides basic regulatory rules in agreements between parties, it is limited in its recognition of the inequality

in the bargaining power of the state (or more powerful bodies) and the home-owners. Singer suggests that this should be a matter of justice and that property must conduct a relational inquiry to achieve a fairer distribution in deciding whether the obligation should be borne by the public as a whole or by a small group of people.

Property serves both social and individual functions. Its aim is to provide legitimate regulation in order to protect public welfare. However, property rights are shaped by the contexts in which they operate and produce effects that are felt outside of the right-holder's private sphere. Hence, the law must restrict the power, use and control with regard to the impact these have, especially on our environment and on the equality and fairness of the economic distribution of our members of society. In imposing such regulation and restriction, the main inquiry should be a normative one, in determining and justifying whether the law deprives the owner of rights they should rightfully expect to enjoy.

2.

Awarded 90

Anne and Beatrice are registered as joint proprietors. Under the rule of survivorship, Anne's interest cannot be devolved via will to her son George, and hence Beatrice becomes sole registered proprietor and George has no interest to the land. George may argue that a tenancy in common was created as unequal contributions were made to the purchase price, (*Lake v Craddock*). However, Beatrice may then argue that (provided there is no exception to indefeasibility) the registration of the joint tenancy takes clear of the equitable interest. However, as this would render the creation of equity almost useless, George's argument may indeed prevail.

A.

The first inquiry in respect to Frederick's (Fred's) interest is the nature of the interest, that is whether it is a proprietary right. It cannot be lease as the agreement is not for a term nor exclusive possession. There is difficulty in asserting it is an easement as it is an easement in gross, which is not recognised at law (it does not satisfy the requirement that the easement must be clearly and precisely defined). Hence, it may be that the agreement is a license which can be revoked at will by the licensor. If it is a contractual license (there is no evidence that Fred has provided consideration), his action may sound in damages. Fred may argue that he has an equitable interest on the basis of estoppel, as he suffered detrimental reliance on the assumption that a legal relationship (involving an easement) exists which Beatrice has induced. However, it is difficult to satisfy the requirements set out in *Walton Stores* as he does not have an interest which is recognised at law (*numerus clausus*) which is all that equity can enforce. Hence, the costs he incurred may be relevant in a contractual claim. Similarly, the doctrine of part-performance may only be used in a contractual claim. A license can operate in gross.

B.

Despite having what may resemble exclusive possession of the corner of the land, Diana cannot argue that she has a lease over the portion of land as there is no term for the agreement. However, she may argue that she has an easement (the road). This claim again faces challenges. Firstly, the road is to access a portion of Beatrice's land and therefore it may be arguable that there is a dominant and servient tenement (specifically the existence of a dominant tenement), and the existence of diversity of ownership (if Beatrice can establish that the right of way is over her land and is not attributable to Diana's, though this is not likely to be successful).

However, as these arguments are questionable, even if there was an easement, its effect would be rendered almost useless as it involves access to a portion of land held under license which can be revoked at will by Beatrice. Diana might argue that she has an equitable Fee Simple over the south-west corner of Utopia. In this case, there may also be an equitable easement. Assuming that this is an oral agreement, Diana may invoke the doctrine of part-performance in relation to these respective rights (takes possession, sets up stands, starts using easement) for these interests to be recognised in equity. The enforceability of these interests against Beatrice and the proviso are discussed below.

There are two tests which are conducted in ascertaining whether an object is a fixture or a mere chattel: degree and intention of annexation, (*Palumberi*). With the latter having more weight, Diana may argue that, as the stands are not fixed permanently to the ground, they are not fixtures. Beatrice may rebut this by arguing that the poles were intended to be attached to the ground in such a way with the holes supporting this claim. Diana might also argue that the intention associated with the stands was not to improve and be of benefit to the land but was merely for the enjoyment and comfort of her occupation. If the stands are deemed to be fixtures, Diana is the rightful owner of them.

C.

I will assume that Charles' lease does not fall within the short lease exception.

Charles may argue that he has a lease. He would state that he has exclusive possession of the south-east corner of Utopia. The presence of rent is not essential for a lease to be created; the provision of services is sufficient for these purposes. The absence of a term may detract from this argument. However, I will assume that all the elements of a lease can be made out (on the facts, the agreement might be a periodic tenancy), as Anne and Beatrice assert that there was a legal right. Provided that the interest was capable of being registered in relation to the discussion above, but isn't registered, Charles may argue that he has an equitable interest.

If the above argument fails, Charles has a contractual license (he provides consideration). This can be revoked at will by the licensor. Any proprietary action cannot be brought (a contractual claim for damages may then be sought).

If Charles (or indeed any of the parties) are found to have equitable interests, Beatrice would need to satisfy the proviso in order to take the registered title clear of these equitable interests (assuming that, as she has contributed to the price of the block, she has provided consideration for these purposes). Mere notice is not enough to suggest want of bona fide. Hence, in the absence of the possibility of an exception to indefeasibility being raised on the facts, Beatrice may prevail over Charles' equitable interest. Again, Charles may argue he has an equitable Fee Simple over that particular area of land though it is unlikely that he can provide an effective argument.

If Beatrice is deemed to have an equitable interest (as a tenant in common), according to *Breskvar v Wall*, the principles of *Rice v Rice* are applied. In the absence of postponing conduct on her part or promoting conduct on George's part (such as a caveat), it is likely that the interests can be deemed equal and hence interests will prevail on the basis of priority in time). However, an action in equity may be possible if one of the elements in *IAC v Courtenay*, is not satisfied.