

Property Law 2004 Exam
Question 1
High Distinction 85%

Bob

Martha (M) and Arthur (A) have a legal fee simple resolute in the estate, as they are the registered proprietors under the Torrens system. Registration conveys indefeasibility: s.69 Real Property Act 1886 (RPA). In Australia, immediate indefeasibility has been adopted (*Breskvar v Wall*).

There are a number of specific exceptions to immediate indefeasibility. On the facts, there appears to be fraud by A: s.69(a) RPA. Fraud is not defined in the RPA but reliance is on case law. In *Estration*, fraud was defined as something beyond mere notice, but designed cheating or underhandedness by the registered proprietor and is brought home to the registered proprietor (*Assets Co v Mere Roihi*).

On these facts A only has a ½ interest in the shop, and he designed a cheat to M to get her into signing.

It is arguable there was fraud as M & A already had signed to sell it to Bob.

The proviso in s69(a) RPA does not operate here as Joe is not the registered proprietor yet. Therefore the ??? of A is brought to ??? back to M & A.

Alternatively, there may be an exception in s71(d) RPA: contracts. Here Bob signed a contract to buy the shop. This *in personam* exception is expressly available in SA as compared to other states.

Bob would only have an equitable right in fee simple under contract, as per *Walsh v Lonsdale*: Equity deems done what ought to be done. The contract is valid and binding, it is in writing and the fee simple is a valid proprietary right.

This is the same with Joe's contract to buy except it is arguable that it is not valid and binding because of the fraud of A.

The equities would be settled per *Rice v Rice*. As nothing has been transferred it is arguable that Bob has the better right as his right was 1st in time. I would advise Bob that he has a good chance to buy the shop. He could caveat under s191 RPA to protect his interest.

Forgery

If A forged M's signature of sale to J who became the registered proprietor (RP) the situation would be different.

Forgery is an exception to indefeasibility: s69(b) RPA. On the facts this rule would operate to render the transaction void.

The RP (Joe) must have been a bona fide purchaser for valuable consideration. On the facts it is likely that the proviso is satisfied as there is nothing about Joe's actions leading up to the transaction to render it not bona fide.

s72 RPA makes knowledge of previous unregistered interests as insufficient to constitute lack of bona fides.

On these facts there is nothing to suggest any knowledge or greater than mere knowledge by Joe of Bob's unregistered interest.

It is arguable that Joe had an indefeasible title in the Shop.

Bob

Bob has an unregistered 1 year fixed term lease of the Block. However, a short term lease not exceeding one year does not need to be registered and is an exception to indefeasibility. The lease needs to be in writing under s26(1) Law of Property Act to be valid but under Walsh v Lonsdale principle, s26(2) LPA part performance is an exception to the writing rule. The acts must be unequivocal and in their own nature relate to such agreements alleged (Regent v Millett).

On these facts, Bob paid rent for 2 fortnights and moved in. This is sufficient to satisfy the part performance doctrine.

Kim's registered legal fee simple is subject to Bob's 1 year short term lease. Termination of a fixed term lease is at the expiry of the term ie 1 year here as there is no express contrary agreement. He can stay for 1 year and need not vacate the Block.

NB: elements of a lease, exclusive possession etc, are not in issue here.

Merlene

Arguably Merlene has an easement here. Nerlene's property is the dominant tenement & A's is the subservient tenement, the tenements are connected and owned by different people.

The question here is whether the right is capable of forming the subject matter of the grant. It cannot be too vague or too wide (Re Ellensorough Park).

It is arguable that it is not too vague here. Merlene could access her property by crossing the back garden of the Block. It is pretty clear.

If this is not satisfied, the right would only be a contractual licence which is revocable at will. The only remedy is to sue for contractual damages.

The easement is an equitable one as it is not registered, per Walsh v Lonsdale. Part performance is inferred by extending the driveway and installing a gate.

Equitable fraud

It is arguable that there has been equitable fraud (s249 RPA) by Kim as per Bahr v Nicolay No2.

Here there is clearly an acknowledgement by Kim of an undertaking that Kim respected the rights of Merlene's equitable right. She committed fraud when Kim denies Merlene's equitable right by padlocking Merlene's property.

Merlene should caveat under s191 RPA to protect her interest.

s249 is an exception to indefeasibility.

The Shop

It appears there is only a bare licence for shop customers. A bare licence is revocable at will and so the Shop owner cannot do much as on the facts there does not appear to be an easement.

Ben

Undue influence is an equity under s249, which is an exception to indefeasibility. However, as A sold to Kim, Kim's registration defeats that of Ben's equitable interest provided Kim satisfies the proviso which she would on the facts.

On a resulting trust argument would not be a different conclusion as s71(e) RPA is also subject to the proviso.

Note: statute of limitations not relevant to Torrens legislation.