

## PROPERTY EXAM SEMESTER 2012

### Question 2

Tommy, as an unregistered party, must have an equitable interest in the property to claim ownership.

Eddie, as the beneficiary of Anna's will, had an unregistered interest in trust in the property. He is now the registered proprietor.

Tommy may argue that Anna's declaration that she would transfer the property to him amounted to an express trust. However, it does not seem that it was evidenced in writing - thus such an interest will not exist (*Wratten v Hunter*).

Tommy may argue that his financial and in kind contribution to the property - his improvements to the farm and foregoing his full time job - mean that it would be unconscionable for the court to not intervene by creating a constructive trust (*Baumgartner v Baumgartner*). Such an interest would likely not entitle him to the property as a whole, but he may, as a co-owner under a constructive trust, request a share of the property if the land is sold (s 71 LPA) or request a partition of land in his favour given the special circumstances of the facts in this case (s 69 LPA). If the constructive trust gives him a share greater than 50% he may ask for the sale of the property himself (s 70 LPA).

If this fails Tom may claim that his verbal agreement with Anna was partly performed and could thus be enforced - s 26(2) suggests that the formalities of writing can be rendered unnecessary if an agreement is part performed. However, it is not clear on the facts that Tommy has acted sufficiently in reliance on the promise despite past contributions/detriment - not made in reliance (*ANZ v Widin*), in which case he can not make out part performance.

A claim in estoppel would also likely fail due to this lack of detrimental reliance (*Waltons v Maher*).

- *marker's comment: "But didn't he quit his job and start managing farm full time and w/out pay? And you're saying he hasn't acted to his detriment?"*

Although Eddy is now the registered proprietor (and thus ought to enjoy indefeasibility under the RPA s 69), he will remain subject to any trust created in the land, including a constructive trust (s 71 e). If Tommy can establish that his interest in Anna's property exists by trust then Eddy shall be subject to it.

The right to run water across Andy's land, though unregistered, may amount to an easement. It provides a clear benefit to the dominant tenement (Anna's farm), it is within proximity of Andy's land, and not

expressed in wide terms. Rights to surplus water onto adjoining land have been held to be easements (Municipality of Waterloo v Hinchcliffe), thus the interest is capable of forming the subject matter of an easement.

The easement existed during the time of joint ownership, and thus may amount to a quasi-easement (Wheeldon v Burrows) - however, it is not clear if it was used in this way when the land was owned entirely by Andy's father. If this was the case, given that the easement is continuous and necessary for Anna/Tom/Eddie to enjoy the property as it was granted (for farming) then the easement shall be implied. If the court awards an equitable easement from the rule in Wheeldon v Burrows then it shall amount to an exception to Andy's indefeasible title (s 69 d RPA, Dobbie v Davidson).

Andy v Sally

Andy was the registered proprietor of the land. He gave his title deeds to Slick Willy for safekeeping.

- Snake Eyes Louie - registered proprietor

Sally is not yet the registered proprietor but holds an interest on contract and has paid the value in cash for the property.

SEL had acted fraudulently in becoming the registered proprietor - he intended to deprive the true owner of their land (Loke Yew). His title to the land would thus be defeasible - s 69 a RPA.

However, upon sale to the bona fide purchaser for value without notice of past interests, that new purchaser takes indefeasibility immediately even in the presence of a fraudulent intermediary transfer (Breskvar v Wall).

On the facts Sally may satisfy the BFP proviso - she paid value for the house and prior to signing the contract she had no actual notice of the prior interest.

By the end of the scenario Sally's interest is only in a contract for sale - an equitable right for the vendor to follow through with the contract and for her to take possession of the property (Lysaght v Edwards). If the contract is specifically performable then she will hold the property on constructive trust (Tanward Enterprises) - this is likely given she has paid the full price in cash.

Andy gains an equitable right to the property from the fraud of Slick Willy and Snake Eyes Louie. Of the two equitable interests, the first in time shall take priority, but the conduct of each part may postpone their interest (Rice v Rice). The first interest in time here is Andy's.

Andy took action to protect his interest immediately by lodging a caveat (Person to Person v Sharari).

Although Sally did pay value for the property and did not have actual notice, a caveat on the register amounts to good notice of an equitable interest (Moffett v Dillon) - she has constructive notice.

Additionally, it is unclear whether she is bona fide - she paid cash for the property, indicating she was aware of a prior fraud.

- *Marker's comment: Paying cash not an indication*

If either or both of these issues (notice of Andy's interest or not being bona fide) arise then her contractual right will be overridden by Andy's right. She might seek compensation from Snake Eyes Louie or the Assurance Fund for deprivation of her interest.

Jill's leasehold interest, including the covenant to create an option, is registered on the title of the property.

The covenant shall only be enforceable and attract indefeasibility regardless of who later becomes registered proprietor if it is effectively part of the interest or intimately connected with the interest (Mercantile Credits Ltd v Shell Co of Australia). That case held that a right of renewal was such an interest. Thus, having had the benefit of the lease being registered, Jill will be able to enforce the option against any later owner.

### Question 3

1. Asha and Arlo are the beneficiaries of Peter's will. As such they hold an equitable interest by express trust in Blackacre.

Mary holds the property as the legal owner on a life estate *pur autre vie* - for the life of Queen Elizabeth II.

As such, the doctrine of waste guarantees that the reversion of Blackacre (which has been granted in remainder to Asha and Arlo) will be as it was when it was granted. Asha and Arlo may argue that the damage caused by the mining operations amounts to voluntary, permissive or equitable waste of the property by Mary.

They may protect this by injunction but they can not do anything but enforce their trust itself against Mary.

As the Queen remains alive, they are not entitled to the property - Mary's power of disposition under the will appears to be fixed.

2. Terry may hold a leasehold estate over the property. There is no evidence of Mary and Terry's agreement being evidenced in writing. Legal leases on general law land that are not evidenced by deed may only take effect for 3 years or less - s 30(2) Law of Property Act. As such, Terry would require an equitable interest to enforce his lease and right of renewal.

Terry may argue that by part performance of the contract (his possession of the property and payment of rent), he has a right to have his expectation of remaining on the property for at least the initial ten year term enforced (*ANZ v Widin*, *Maddison v Alderson*). *Regent v Millett* held that possession and payment of money amounts to unequivocal performance of an agreement for disposition of land. Thus Terry may enforce his agreement in equity. This equitable interest will be good against all except a later bona fide purchaser for value without notice.

However, Terry's later interest is conditional - he may only gain the ten year extension to his lease on the condition that he "uses the land productively". However, the condition is vague, setting no objectively ascertainable standard of productivity. Such a condition will be void (*Sifton v Sifton*) and thus the grant shall be absolute. The lawyer accurately describe the interest to Terry - the right of renewal will not depend on a condition of productivity and Terry will be able to enforce it against Mary.

3. Mary, as Terry's landlord, is under an implied duty to not derogate from the grant - that is she must not use any other portion of her land such that it will be impossible for Terry to continue to use his portion of

the land (*Aldin v Latimer*). As Mary was aware of the use by Terry of his land for raising exotic animals she will be bound by this duty.

The tiger cub is attached to a rabbit trap on the land of the neighbour.

As a finder, the neighbour can not take possession if they are aware of the original owner (*Hannah v Peel*).

As the animal was not 'wild' but merely escaped, it is likely that Terry still had intention to possess the tiger, while the neighbour did not. However, the neighbour has clear possession in fact - he has actual control of the tiger within the trap.

The neighbour may argue that as the tiger had left the property, it was not sufficiently controlled and that he thus had a right of possession as it entered his land (*Bremner v Bleakley*). The trap has also gone beyond the process of possessing - it has controlled the tiger (*Pierson v Post*).

If courts consider the tiger as a found item of personal property - likely given the neighbour's awareness of Terry's ownership - then the effective theft of the tiger shall mean that Terry retains the best title (*Hannah v Peel*).

The neighbour may also argue that as the tiger is fixed within the trap, and the rabbit trap is likely fixed to the ground in some manner, that the tiger is part of the land. However, there was never intention by the neighbour to annex the tiger to the property, and thus this is unlikely to succeed (*Metal Manufacturers Ltd v Federal Commissioner of Taxation*).

4. On the death of the Queen, Asha and Arlo shall become co-owners of the property. As the conveyance is to the tow of them and their interests are identical in possession, interest (absolute owners), source of title (will) and in time (fee simple), they shall take title as joint tenants as long as there is no indication of one of them taking a distinct share in the land.

Mary may be removed from Blackacre by the children in an action for ejection.

As the children are volunteers, they are not bona fide purchasers for value. They also have likely notice of Terry's interest. Thus, Terry's lease may continue til its expiration.

The right of Hardhat Mining is unclear.

It may be a mere contractual license to enter the property and explore for opals. This would be revocable, though Hardhat may seek a remedy in contract.

- Note Heidke: Damages not an adequate remedy? Court may award injunction against Asha and Arlo.

- Right may be a profit
  - license and grant
  - though Hardhat going beyond removing natural produce (Permanent Trustee v Shand) - mere right to collect produce of land.
- May be a lease
  - exclusive possession not clear on facts (Street v Mountford)
  - no term
- Statutory mining right created by Parliament - takes precedence over indefeasibility.