

Real Property Examiner's Statement March 2009

General Comments

There was a disappointing lack of preparation in a large proportion of the papers. The exam was based on older questions which everyone had access to and were encouraged to practice upon. By far the biggest let down was in the area of priorities with many people failing to demonstrate the most basic understanding, even after having done two assignment questions on these topics. Most people who failed did not attempt the whole exam, again, indicating a lack of preparation.

QUESTION 1

Cameron was the registered proprietor of land under the Real Property Act. He borrowed money to invest in an emu farm at Bathurst from Peter. Cameron completed a memorandum of mortgage (which he gave to Peter) but he had mislaid his certificate of title. Cameron told Peter that he would find it as soon as possible and give it to Peter. In the meantime Peter did not lodge a caveat.

Cameron also sought to borrow money from Nerida for the emu farm. Cameron did not mention the mortgage agreement to Peter. Nerida agreed to lend the requested sum. Given that the certificate of title was missing, Nerida was happy to evidence their agreement in a deed. She advanced the money and then lodged a caveat over the property.

Two days later, the certificate of title was found by Cameron's son, Max. Max had a gambling problem and decided that he would use the certificate to raise some much needed funds. He sold the land to his bookie, Penny. Penny made no search of the register. Penny received the certificate of title and a transfer dealing reputedly from Cameron but which had been forged by Max.

Penny was also in need of quick cash and before she registered her ownership she onsold the property to Ken. At settlement, Ken received the certificate of title, the forged transfer from Cameron to Penny, and the transfer from Penny. When the documents were presented to the Land and Property Information Office they could not be lodged because of Nerida's caveat.

Discuss the respective property rights of:

(a) What is the nature of Peter's and Nerida's interests in the property?

Both interests are equitable as they are unregistered: s 41/*Barry v Heider*. Importantly they are equitable because of the doctrine of part performance.

(b) What is the nature of Ken's interest in the land?;

Ken probably doesn't have an interest at this stage as he is not registered and not protected by s 43A. Section 43A should have been discussed in detail. Ken does not have an immediately registrable interest. Nor can he get one from Penny via *Wilkes v Spooner* as her transfer is a forgery: *Jonray/Mayer v Coe*. In that sense if he cannot get registered (and he shouldn't) he will not have an interest.

(c) Can Cameron prevent the registration of the forged transfer dealing?;

Yes – he can do that either through registering a caveat (given he has lost possession of the CT) or through an injunction (*Rush*). Both *Jonray and Mayer* support such a course of action.

(d) If Cameron remains as registered proprietor, will Peter or Nerida's interest have priority?

Many students misread this as asking whether Peter is subject to the mortgages. Of course he is! He agrees to both of them so is bound by the *in personam* exception. In terms of their priorities Nerida has priority as Peter has engaged in postponing conduct by failing to lodge a CT and failing to get possession of the CT: *IAC, Lapin, Sharari, Osmanski*.

QUESTION 2 This Question must be attempted. All parts must be answered (20 marks)

Nugget and Robert bought a shopfront on Torrens title land containing a 24-7 convenience store with monies secured by a mortgage over the land from Shark Investment Ltd. The mortgage was registered. Two years later, Nugget and Robert ran into financial difficulties. Shark Investment Ltd sent the proper notices, which were not complied with and then set about exercising the power of sale. Shark Investments decided that it would sell for any price that it could get that would return its investment and costs. After advertising in a local newspaper it received two offers, one from Terry for \$500,000 and the other from Matt for \$650,000. For reasons which are unclear Shark decided to accept Terry's offer even though it was significantly less than Matt's. The parties aim to exchange contracts in two days time. Terry is anxious as he has found out about Matt's offer and wants to seal the deal before Shark Investments changes its mind.

- 1. Explain the requirements for the exercise of the power of sale under a registered mortgage in Torrens system.**

This is discussed in Butt at [18129]-[18141]. The two relevant sections are 57, 58 and 58A of the RPA. Students should have discussed notice and the requirement to give the defaulting mortgagor 1 month to rectify. The defaults need to be properly identified and what must be done to rectify them.

Some students discussed foreclosure which is completely irrelevant.

2. What duties are owed by a mortgagee when exercising the power of sale?

There is a long list of requirements which were set out in Butt and the lecture notes. Mortgagees cannot sell to themselves, there must be a sale at arms length. The mortgagee is not a trustee for the power. The two lines of authorities for the standard of care should also have been discussed (*Cuckmere/Kennedy/Pendelbury*).

3. What can Nugget and Robert do to prevent the sale?

At this stage the failure to get the higher price appears to be a breach. In *Bangadilly* it was said that the mortgagee should case up prospective buyers, but they may fail to do so if there are reasons for doubting the higher offer: *Chia*. If Nugget and Robert can prove that there is a breach they can seek an injunction. If the court is satisfied of breach they will not generally require the payment of money for the default into court (although there are conflicting authorities on this point – see *Allfox/ Inglis*).

4. What if the contract has been exchanged already but not yet completed?

Once exchange has occurred there are greater difficulties: see Butt [18169]. Improper exercise of the power can give rise to an injunction on the completion of the contract, but courts may be reluctant to interfere unless the purchaser has notice of impropriety: *Forsyth v Blundell*. The interests of Terry are equitable whereas Robert and Nugget still retain their legal interest prior to completion and registration. Many students did not attempt this question at all – even though Butt devotes an entire paragraph heading to it – this demonstrates that some students were not even familiar with the contents of the textbook.

QUESTION 3 This Question must be attempted. All parts must be answered (20 marks)

1. Describe the doctrine of tenure that exists in New South Wales (6 marks).

Students need to outline the doctrine and its history and its application in Australia via cases like *AG v Brown*, *Cooper v Stuart*.

2. Describe the doctrine of estates and the different kinds of estates that exist in New South Wales (6 marks).

Students should have discussed the kinds of freehold estates in NSW and issues of conditional natures and even leases.

- 3. Describe how the recognition of native title has changed the concept of tenures and estates in New South Wales. In doing so outline the concept of native title and whether it is an estate of real property (8 marks).**

Students needed to canvas the shift to a radical title theory. *Fejo* indicates that native title is not an estate but after *Yanner* it is hard to see how the *sui generis* theory is helpful at protecting native title, unless it is understood as an estate.

QUESTION 4 This Question must be attempted. All parts must be answered (20 marks)

Denise was seized for an estate in Blackacre, a country property under the old system of title. She had live there for forty years and had good relationships with her neighbour Grubby, who had for, at least 22 years, moved his cattle up and down a track across her property.

As she was getting older and finding the farm harder to manage, Denise agreed to lease the property to Iain for a period of 4 years. They entered into an agreement to lease but never formalized the lease in a deed. Iain went into possession of the property and paid his rent monthly.

After two years Denise contracted to sell the property to Malcolm. They entered into a deed of purchase and Malcolm paid the deposit of 5%. Malcolm inspected the property and met Iain but assumed he was just Denise's friend, staying over for a visit.

Two days later Denise was contacted by Lawrence (a friend of Malcolm's). Lawrence had heard of the agreement and wanted to purchase Blackacre for \$100,000 more than the agreed price with Malcolm. Denise accepted the offer and the contract was completed in 7 days. Lawrence received the title deeds to the property at settlement. At no time did Lawrence inspect the property.

Soon after, Malcolm discovered what had happened. He registered his contract with Denise in the General Register of Deeds. The next day Lawrence registered his deed of conveyance in the General Register.

Meanwhile Denise has just been given notice from her next door neighbour Grubby that he intends to claim an easement over the back part of her property.

(a) Who has priority between Malcolm and Lawrence? (8 marks)

Malcolm has an equitable interest as the contract is not complete: *Lysaght v Edwards*. Lawrence is legal but had actual notice of Malcolm. Under the common law rules Lawrence cannot take priority: *Pilcher*. Additionally s 184G also protects Malcolm as he was able to register successfully. Students should have discussed the working of the section: *Bullen/ Moonking Gee / Darbyshire/Marsden*. His notice of Lawrence does not make his registration male fides as notice is relevant only at the date of the instrument: *Moonking Gee*.

(b) How are either of Lawrence and Malcolm affected by Iain's lease? (6 marks)

Iain has an equitable lease: s 23D, s 23E. Both Malcolm and Iain would be subject to it regardless of who takes the land. Both have notice which means that both would be postponed and neither can rely on s 184G because of their notice.

(c) Can Grubby claim an easement if he has used a track for more than 22 years? If the property is later converted into Torrens title will he be able to continue to use the easement? (6 marks)

Yes – the easement is via prescription. The characteristic of easements needed to be defined: *Ellenborough Park*. The track would be converted into Torrens and if it was omitted it would bind the registered proprietor: s 42(1)(a1). See *Dobbie*.

QUESTION 5 This Question must be attempted. All parts must be answered (20 marks)

Fred owns a property, 22 Peter Pde, under old system title. Fred, was a big fan of Jamie Durie, and decided to create an 'entire look' for his backyard. He imported valuable statues which rest on their own weight in the grounds, and which enhance the beauty of their surroundings. He has also furnished the house with antique furniture and a collection of fine old paintings mounted on special frames which are screwed to the walls.

Fred leased the property for two years to Pat, who installed a washing machine in the laundry. The machine is attached by pipes to two taps on the wall, and by a cord plugged into an electrical fitting which Pat has specially installed. Pat put down rugs which were attached to the floor by adhesive strips. These strips are removable, although their removal may cause some damage to the polished floors beneath.

Fred then executes a conveyance of the property by way of mortgage to John. Shortly thereafter Fred defaulted, and John sold 22 Peter Pde to Steve. The contract of sale does not mention the statues, the pictures, the washing machine or the rugs.

Meanwhile the vacant land next door has started to be used by the owner to launch air balloon joyflights. The positioning of the blocks means that the balloons often taken off at a low speed straight over 22 Peter Pde. They make quite a deal of noise as they pass over.

(a) Is Fred is entitled to remove the statues and the pictures before Steve becomes the owner? (6 marks)

The 'entire look' casts the mind to *D'Eyncourt v Gregory* with the notion of a 'grand architectural design'. The statues would be considered fixtures on that basis even though they are on their own weight. Whereas the furniture and paintings would be personalty, as per *Spyer v Phillipson*.

(b) Is Pat entitled to remove the washing machine and the rugs or do they now belong to Steve? (7 marks)

Tenant's fixtures are relevant here. If the fixtures are trade, domestic or ornamental they can be removed. The rugs probably aren't fixtures in any case: *De Falbe*. The washing machine probably is a fixture but can be removed as it domestic: *NZ Government Property case*.

(c) What rights does Pat have to prevent the balloons from disturbing his possession (7 marks)

This question concerns trespass (not quiet enjoyment as some mistakenly believed – the landlord has done nothing to derogate from the grant). The issue concern *cujus est solem* and the issue of interference. Relevant cases include *Pickering v Rudd/LJP Investments*.