

LEGAL PROFESSION ADMISSION BOARD

SEPTEMBER 2008

REAL PROPERTY

EXAMINER'S COMMENTS

Question 1 (20 marks)

Graeme was the owner of a 3 bedroom house in North Ryde, NSW, with a separate granny flat, near Lachlan University. The property was in the Torrens system. He was nearing retirement but was concerned that he did not have enough money to live on.

As a way of getting some extra weekly income he decided to rent out the granny flat to Zada, who was a visiting lecturer at the university. She was visiting for 6 months, so he entered into a "gentlemen's" agreement to let the flat for \$200 a week for six months. Nothing was written down. Zada moved in the day they made the agreement.

Graeme then decided that he needed more money so he borrowed \$50,000 from his friend Bruce. As security for the loan he gave Bruce a blank transfer dealing, signed by Graeme, as well as the certificate of title. Graeme used the funds to go on a long holiday before he officially finished at work.

Meanwhile Bruce used the blank transfer and CT to remove Graeme's name from the register and registered the property into his own name. Using the property as security he then attempted to borrow money off the North Ryde Bank, a local community bank. Bruce executed a mortgage in their favour and the Bank took possession of the CT and the mortgage dealing. The settlement was late on a Friday and the documents weren't lodged for registration.

Meanwhile Graeme returned from holidays. He had won a lottery overseas and wanted to pay out Bruce's interest but when he contacted Bruce, Bruce hung up on him. Graeme did an internet title search and discovered that he had been deregistered. He lodged a caveat on Monday morning.

(a) What is the nature of Graeme's interest, Bruce's interest, Zada's interest and the bank's interest? (10 marks)

Graeme has an equitable interest – *Breskvar*

Bruce is registered but defeasible due to fraud, as defined by *Assets* test.

Zada is legal short term lease (23B) protected by s 42(1)(d)

The Bank is legal under s 43A – dealing registrable needed to be defined – similar to *IAC Finance* – some may say that don't get a legal interest due to *Jonray* if so they are equitable but in a strong position due to *Heid*.

(b) Can Graeme have the property returned to his ownership? How will Zada's interest be effected by these transactions? How will Bruce's interest be effected by his behaviour? Will the bank be able to register an interest in the property? (10 marks)

Graeme can get the property back – *Breskvar* – fraud defeats Bruce title
The bank will be able to get registered as either: their s 43A legal interest defeats Graeme's equity; or the Bank's equity is better than Graeme's due to postponing conduct: *Heid* and *Breskvar*

Question 2 (20 marks)

Bronwyn and Susan owned adjoining pieces of old system land on one side of a gorge. Bronwyn owned the property on the top part of one side of the gorge and Susan owned the property on the bottom side. To avoid problems with pumping stormwater uphill Bronwyn asked Susan if she could run a pipe underground downhill, through Susan's property and into the drain in the street below. Bronwyn also had wonderful views of the gorge and was concerned that Susan not build structures on the land that would impede Bronwyn's views. Bronwyn offered to pay Susan \$10000 for the right to drain stormwater and the right to limit Susan's building height to 20 metres high. Susan agreed and she had her brother Lex (a solicitor) draft up a deed to record their agreement. The agreement said that 'Bronwyn and her heirs and successors' would be able to enjoy the benefits of the agreement.

Some months later Susan spoke to Bronwyn about the sunlight that she was receiving from the upside of the hill. Because of the nature of the valley in which they lived the sunlight only reached Susan's property via a space through a tall hedge on Bronwyn's place. Susan was concerned that Bronwyn might let her hedge grow so high that they would block out the sun leaving her permanently in shade. Bronwyn agreed that she would allow Susan to continue to receive the light. Bronwyn promised to keep the hedge in good order and lop it when the need arose. She also said that Susan could come onto the property to lop the hedge if she wanted. As a sign of goodwill Susan gave Bronwyn \$100 but they never wrote anything down to record the agreement. Susan also told Bronwyn that she could come and sit in her garden and listen to her birds in her aviary whenever she wished. She even put in a small gate in the back fence to allow Bronwyn to come in and enjoy the garden

Twenty three years passed without incident. They were good neighbours and Bronwyn loved coming over to Susan's house to talk to Feathers, the singing cockatoo. In the 24th year Bronwyn died. Her son, Angus, became the owner but he did not have a good relationship with Susan. One day Angus relieved himself against the back fence, near the gate. Susan told him never to come back to her property. She boarded up the gate. Angus, in turn, refused to trim the hedge (which is now very tall) and will not let Susan onto the property to trim it. Consequently her land is now permanently in shade. Susan, in retaliation, has blocked the drainage pipe with guano from Feathers' bird cage. She also has lodged plans with Council to build an extension that will block Angus' views of the valley.

To make matters worse the Registrar General has now indicated that he wishes to convert the properties into Torrens title.

(a) What rights does Angus have to drain water from his property? Will those rights survive the conversion process? Why, why not? (5 marks)

The drain is protected by a legal easement created in accordance with s 23B. The deed will be registered during the conversion process and if it is not it will be protected as an omitted easement under s 42.

(b) What rights does Angus have to come onto Susan's property and enjoy the garden and aviary? Will those rights survive the conversion process? Why, why not? (5 marks)

The right to come into the garden brings up the issue of whether this is capable of forming the subject matter of the grant. In *Ellenborough Park* they stated that such a right could form an easement. There also appears to be consideration as it appears to be apart of the wider agreement about the sunlight.

However there is no deed so it could only be either part performance or an easement by prescription. Both these types of easements can survive the conversion process under s 42(1)(d).

(c) What rights does Susan have to continue to enjoy the light coming through Angus' land? Will those rights survive the conversion process? Why, why not? (5 marks)

This an agreement supported by part performance. The right to light does form the subject matter of the grant. Again it can survive the conversion process

It's not a easement by prescription as their was permission.

(d) Can Angus enforce the agreement regarding building height on Susan's land and how will could Angus protect his right to restrict the building height once the properties are in the Torrens system? (5 marks)

You cannot have an easement for a view. The restriction on height is a restrictive covenant contained in a deed. Students should have discussed the passing of burdens and benefits. The burden can only pass in equity under the rule in *Tulk v Moxhay*. This rule is satisfied, and the covenant can be enforced against Erin. The covenant should be noted on the title during conversion.

Question 3 (20 marks)

Mattie and Becky were married for 10 years. Mattie was 32 and Becky was 36. They were joint tenants of a mansion in Erina Valley which was registered under the Torrens system. They had two children, Max and Jazmyn. Unfortunately Mattie and Becky's relationship had fallen apart and Becky suspected the Mattie had begun an illicit affair with a workmate. Becky had also received further bad news regarding her health. She had contracted a rare disease which was likely to prove fatal to her over the long term.

Becky was worried that when she died Mattie would marry his lover and the children would miss out on their inheritance. Becky decided that she would like to

set up a trust of her interest in the house for her children. She decided to do this secretly as she was worried that Mattie would 'go bonkers' should he find out. She secretly created a trust of her interest in the house in favour of the children, with her brother Peter as trustee. She signed a transfer in which she assigned her interest in the house to Peter.

All the documents were forwarded to her solicitor, Cameron, who also had possession of the Certificate of Title. Cameron was badly organised and hadn't sent the documents to Land and Property Information for processing.

Meanwhile, Mattie discovered Becky's secret plot and was enraged. It was unclear what happened next but Mattie and Becky's bodies were later found in a car wreck. One theory was that Mattie had killed himself and Becky by driving into a tree. Another was that they had just had a car accident due to Mattie's excessive speeding. In their wills Mattie had left everything to his mistress, Vanessa, and Becky had left everything to the two children in equal shares.

(a) Will Max and Jazmyn receive Becky's interest in the property via the proposed trust? (10 marks)

This concerns whether the joint tenancy was severed by Jayne's conduct. The facts are analogous to *Corrin v Patton* and the student must discuss the two limbs of the rule in *Milroy v Lord*. *Costin* suggests that she has not put the property beyond her recall as she could still have told Cameron not to register.

(b) Who would get the house if the proposed trust was unsuccessful and the car accident was found to be an accident caused by speeding? (5 marks)

If the death was accidental and the timing of death uncertain the joint tenancy is determined by the oldest dying first; s 35 CA.

(c) Would your answer to (b) be different if it could be proven that Mattie had purposefully killed himself and Becky? (5 marks).

If Becky had been murdered then Mattie potentially forfeits his interest under the Forfeiture Act. Students should have discussed cases like *Troja* to illustrate.

Question 4 (20 marks)

Lawrence and Andrew were brothers. Lawrence owned a property at Avoca in which he lived which was held under Torrens title. Lawrence had two mortgages on the property neither of which were registered. The first created mortgage was to Lorraine, Lawrence's mother. The second mortgage was to the Central Coast Bank, for a business purpose. Lorraine had protected her interest by lodging a caveat. The Central Coast Bank had possession of Lawrence's Certificate of Title.

Meanwhile, Andrew had fallen on hard times and had asked whether he could live in the house with Lawrence for a year while he got his act together. Lawrence was distrustful of Andrew (he had been let down before by his brother), but he agreed to allow Andrew to live in the property on the following conditions:

- (a) that Andrew only stay for 12 months starting on a certain date;
- (b) that Andrew could be asked to leave after seven days' notice;
- (c) that Andrew could not have guests unless they were approved by Lawrence; and
- (d) that Andrew pay \$200 per week.

Lawrence commenced renovations on the property and wanted to completely redo the landscaping in the backyard. He borrowed further funds from his mother for that purpose. When the landscaping was being done Andrew replanted some of his own pot plants by taking them out of the pots and planting them into the garden.

Unfortunately, 6 months after Andrew moved in Lawrence died in a car accident. Lawrence had left all of his property to Gina, his girlfriend, via the will.

(a) If Gina sells the property can Lorraine claim the entire debt that she was owed by Lawrence under the mortgage, including the later advance? Must Lorraine wait until after the mortgage to the Central Coast Bank has been paid out before she can claim the later advance? (10 marks)

Issue is one of tacking (not tabula). The first mortgage is attempting to tack later debts onto it to skip. Students needed to discuss the possibility of tacking in Torrens. *Matzner* says that it is possible but only when the money was expended on capital improvements. That seems to be the case here

(b) If Gina becomes the registered proprietor, can she require Andrew to remove himself from the house, or can Andrew insist on staying in the property? (5 marks)

Andrew doesn't have exclusive possession as per *Radiach*. However he still falls within the def of a residential tenancy under s of the Act. He can't be removed until the expiry of the term and then after notice

(c) If Andrew must leave, can he take the pot plants with him? (5 marks)

Yes he can as per the doctrine of tenant's fixtures: *Spyer v Phillipson*

Question 5

(a) Using cases, explain whether you think the rule of *cujus est solem* is a rule that should be used by judges in modern times? (5 marks)

This part required a discussion of the development of definition of land and aerospace rights – *Baron Bernstein/ Howard Chia* and the crane cases. The more

examples discussed meant more marks for the student. The normative issues should have been answered

(b) What is the doctrine of tenures and estates? How has native title changed our understanding of tenures and estates in Australia? (15 marks).

Students needed to discuss the origins of tenure and estates and the changes to them over time as feudalism slipped away. Tenure in Australia has radically changed since the introduction of native title. *Mabo* changed the concept of absolute beneficial title to radical title and this change needed to be discussed in detail. *Wik* continued this change by recognising the individual nature of Australian land tenures. Students did best when they addressed this change in *Wik*, particularly in discussing the judgments of Brennan CJ and Gummow J in particular.