

Real Property Sept 2009 Examiners Comments

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

(20 marks)

Maree was the owner of a large block of land under the Torrens system in Minnie Waters, a remote fishing village in NSW. The land was extremely valuable because it had the potential to be developed into a resort. The land was being leased to Robert, a local, who ran some cattle on the property. The lease with Robert was informal, but Robert and Maree had agreed to a 2 year term, and Robert had quickly taken possession and paid rent.

Maree owed some money on the property secured by way of a deed of mortgage to Elizabeth. The mortgage was not registered and no caveat was lodged.

Maree's solicitor Rodney, had possession of the certificate of title. Rodney was in trouble with his local drug dealer, Joe, and owed enormous amounts to the dealer caused by his addiction to cocaine. Rodney decided to use Maree's property to pay off his debts. He forged Maree's signature and gave the certificate and the transfer to Joe. While Joe was not expressly told about the fact the transfer was forged he knew that the circumstances were highly suspicious and he decided to make no further inquiries.

Before Joe registered the transfer he decided to sell to property his neighbour, Gary. Gary had no idea about Joe's business dealings but he had often spoken to Joe about his love of the Minnie Waters and how he would like to buy a house there one day. Joe approached Gary and Gary very quickly agreed to buy the property and exchanged contracts. Gary arranged to make an inspection of the property but on the week he was to go a cyclone hit and all the dirt roads into Minnie Waters were washed away and he never got a chance to get there. He could have gone later but other things came up.

At settlement of the property Gary received the certificate of title, the forged transfer from Maree to Joe, and a transfer from Joe to Gary. However when Gary finally got the Land and Property Information he discovered that a caveat had just been lodged by Maree, who had discovered that her CT had gone missing from Rodney's office.

1. What is Gary's legal position with regards to Maree's claim of ownership? (5 marks)

Gary has no interest in the land. Section 43A needed to be discussed. Gary does not satisfy the requirement for him to be immediately registrable. His title comes from Joe but Joe has no title either under the rule in *Wilkes v Spooner*. Joe's interest is forged and unenforceable: *Jonray; Mayer v Coe*. An injunction can be sought to prevent registration.

2. Will whoever gets the property be subject to the lease to Robert?

Robert's lease is legal even though it is not registered as it is less than 3 years in duration: s 53 RPA/ s 23D(2) CA. Robert had possession and paid the best rent obtainable without payment of a fine. If Gary took ownership he would be subject to the lease as per s 42(1)(d). If Maree is the owner then she is subject to the lease in personam: *Bahr*.

3. Will the owner be subject to the mortgage?

The mortgage is equitable via the doctrine of part performance: *Bank of NSW v O'Connor*. Maree is subject to it via in personam.

4. How would your answer differ if Gary had become registered?

Gary would be indefeasible if he got registered. He would not be subject to the mortgage as his registration will destroy Elizabeth's equity. Gary is not acting fraudulently. Students should have defined fraud to be personal dishonesty: *Aspett Co*. As stated above Gary would be subject to the lease.

QUESTION 2

(20 marks)

In 1875 a large parcel of land near Orange in NSW was subdivided into two farming properties. The two lots became known as 'Millerton' and 'Kirbydale'. Millerton had a frontage to a constructed public road and Kirbydale had a frontage to a reserved road which had never been constructed. Both properties were settled shortly after the subdivision and the owners of Kirbydale commenced using a track through Millerton to obtain access to the constructed public road. Over the years the track was used by the owners of Kirbydale for the passage of supplies by horse and by people on foot. Later with the popularisation of trucks and cars, such vehicles were also used on the road. There was never any agreement about the use of the track nor any discussion between the owners of Millerton and Kirbydale about access.

In 1970 both properties were converted to titles under the Real Property Act 1900. In the conversion process no entry was made on either title regarding the track nor any right of way. In 2006 the owners of Millerton decided to subdivide the property and its solicitors wrote to the owners of Kirbydale advising that the use of the track would no longer be available to them and they should make their own arrangements for the construction of the reserved road to allow access to Kirbydale. The owners of Kirbydale were very upset and saw the decision as a breach of their rights.

1. Describe the various ways that easements can be created under the Old system (5 marks);

The four characteristics should have been discussed: *Re Ellenborough Park*. Easements can be made by express assignment, express reservation, impliedly and via prescription. Brief descriptions were needed of these different mechanisms.

2. Was an easement created in favour of Kirbydale under the old system? (5 marks);

The easement was created by prescription. The easement was in use for longer than 20 years and could satisfy the fiction of the lost modern grant: *Delohery*. It was not used with force, permission or secrecy.

3. Is there a valid easement benefiting Kirbydale that can currently be enforced? (10 marks)

Yes. Easements *va* prescription do not arise in Torrens system: *Williams/Australian Hi-Fi Publications*. However, if the easement arose under the Old System and then was left off a conversion into Torrens, it will be treated as an omitted easement for the purposes of s 42(1)(a1): *Dobbie v Davidson*.

QUESTION 5

(20 marks)

The Avoca Beach Rugby Football Association Ltd (“the Avoca Football Club”) was an incorporated association that owned 2 acres of old system land in Avoca which was used by the Club for the running of its football competitions. When the land had been originally granted to the club, the land was subject to a restrictive covenant which limited the any building on the land to a height or no more than 20 metres. This covenant was expressed to be for the benefit of the neighbouring block.

According to the club’s constitution the land was held by the company on trust for the existing members. The taking of loans was forbidden without the express agreement of the majority of the Club board. The trust had been created with a registered deed. Robert was the Club President. Unfortunately Robert had a gambling problem.

Robert removed the title deeds to the land from the Club's safe. He borrowed \$500,000 from the local mortgage broker, Shifty McGraw. Robert said that it was for the Club purposes but he used the money to feed his addiction to poker machines. The loan was secured by a mortgage in the form of a deed, signed by Robert on behalf of the Club. Shifty registered the mortgage.

Meanwhile the Club board decided that it wanted to rebuild the clubhouse and its approved a loan for that purpose. It approached the Eastpac Bank about a short term loan which could be repaid at the end of the season. Eastpac were happy to lend on the strength of an informal arrangement whereby the Club would deposit the title deeds with the bank for the period of the loan.

The plans for the Clubhouse have it being built at 25 metres of height. Terry is the new owner of the adjoining block. He only just recently purchased his land. He didn't know about the covenant at the time he purchased his land, but he is concerned how the new clubhouse will affect his views of the beach.

1. What is the legal status of the loan from Shifty? (5 marks)

The mortgage was in a deed form and satisfies s 23B. However, Robert had no authority to create a mortgage: *nemo dat* The mortgage is a nullity. The Club is not responsible for the actions of Robert as they were not actually involved in the fraud: *Northern Counties*. Registration does not cure the fraud: *Re Cooper*.

2. What is the legal status of the loan from Eastpac? (5 marks)

The mortgage is in equitable form, via the deposit of title deeds which is a sufficient act of part performance.

3. In a conflict between the two mortgages which one would have priority? (5 marks)

The second mortgage is valid in equity, whereas the first fails due to fraud. The fact that the first is registered is on no moment as there are no competing instruments and s 184G could not be applied.

4. Can Terry enforce the covenant concerning building height? (5 marks)

This is a question about the passing of the benefit of a restrictive covenant. The benefit of a restrictive covenant can pass at common law and in equity. The main requirements are that there be an intention for the benefit to pass (which is presumed with s 70 CA), and that the covenant touch and concern the benefitted land (Terry's). It doesn't matter that Terry was ignorant of the covenant: *Rogers v Hosegood*.

QUESTION 6

(20 marks)

"In discharging its duty to declare the common law of Australia, this court is not free to adopt rules that accord with contemporary notions of justice and human

rights if their adoption would fracture the skeleton of principle which gives the body of our law its shape and internal consistency.” Per Brennan J, *Mabo v Queensland (No 2)* (1992) 107 ALR 1 at 18.

1. Describe the doctrine of tenure and estates that exists in New South Wales (10 marks)

A basic discussion of tenure and the three freehold estates was needed: fee simple, life estate and fee tail.

2. How have *Mabo* and subsequent decisions affected the internal consistency of Australian land law, particularly in relation to tenure? Did they shatter the skeleton of land law? (10 marks)

I was happy for students to answer this either way but ultimately they needed to answer the question rather than just regurgitate cases on native title. The best answers tried to look at the wider implication of native title rights into personal property and cultural property issues (art/song/dance/cultural/religious rights – see *Yanner v Eaton*). Students needed to define real property and the estates of real property and looks at how the estates worked within the tenure system. Students should also have discussed the notion of absolute beneficial title in the Crown and the doctrine of reception – *Murrell/ Att G v Brown/ Cooper v Stuart/Milirpum v Nabalco*

Students needed to cover the change in these doctrines wrought by *Mabo* – the invention of radical title, and its effect on estates, the notion of the skeleton of principle. Importantly Wik and new doctrine of Australian estates should have been discussed and the case’s effect on reversion to the Crown and the changes in fundamental doctrine. Gummow J’s statement about the new Australian doctrine when viewed with unique Australian tenure/estates would have helped– Crown grants/pastoral leases etc.

QUESTION 5

Garry is the registered proprietor of 22 Avoca Dr, a property under the *Real Property Act*. There is a house on the land. Garry has also installed a carport beside the house by laying a concrete slab and setting into the slab two steel poles which support an awning attached to the steel poles on one side and the house on the other by clamps secured by nuts and bolts. The structure may be dismantled and removed without causing injury to the house, but some of the concrete around the steel poles must be broken up in order to remove them.

There is also a water feature on the property which Garry constructed from a kit. The entire feature is sunk into the ground to a depth of 30 cm with a cement collar.

The house also has reverse cycle air conditioning, with the motor outside the house next to a wall. The motor is connected to the electricity supply but

otherwise rests on its own weight. Pipes lead from the motor through the wall to a mounted wall unit which is fixed by screws.

Garry enters into a contract to sell the property to Louise and Graham. The contract does not specifically refer to any of the items mentioned. Before completion, Louise and Graham inspect the property and find that Garry has taken the water feature. They meet a workman who tells them that he is giving a quote for the removal of the carport and the air conditioning. One the day of settlement they find that the carport and the air conditioning have been removed.

Meanwhile, a week after moving in, they find themselves constantly bothered by Charlie, the kid from next door. Charlie has a passion for toy aircraft and air rifles. Even day after school and all weekend, he constantly flies a model B52 bomber over Louise and Graham's house, which causes a terrible racket. Disaster struck when Charlie accidentally shot Graham's cat, Tabby, with his air rifle. Tabby was sitting on Graham and Louise's roof when he was hit. Tabby was shaken but managed to survive with the pellet stuck in his hindquarters.

1. Was Garry entitled to remove the water feature, the carport or the air conditioning? (10 marks)

This question invited student to employ the principles of fixtures in determining what remained personalty and what became realty. Cases that should have been discussed include: *LJP Investments Pty Ltd v Howard Chia Investments (No 2)*, *N H Dunn Pty Ltd v L M Ericsson Pty Ltd*, *Standard Portland Cement Co Pty Ltd v Good*, *Webb v Frank Bevis Ltd*, *Palumberi v Palumberi*, *Leigh v Taylor*, *Spyer v Phillipson*

2. What real property rights do Graham and Louise have in relation to Charlie's bad behaviour? (10 marks)

Here the issue concerned trespass into airspace. Cases that should have been discussed include: *Kelsen v Imperial Tobacco Co*, *Baron Bernstein of Leigh v Skyviews & General Ltd*, *Woollerton and Wilson v Richard Costain*, *Graham v K D Morris and Sons* and *LJP Investments Pty Ltd v Howard Chia Investments (No 2)*. The shooting of the cat can be viewed as a trespass (to goods – Graeme and Louise own the cat) but also to land as the boundary was crossed. See *Davies v Bennison* (the dead cat on the roof case).