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Geoffrey Moore

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Foreword

This book is part of the Cavendish *Essential Series*. The books in the series constitute a unique publishing venture for Australia in that they are intended as a helpful revision aid for the hard-pressed student. They are not intended to be a substitute for the more detailed textbooks which are already listed in the current Cavendish catalogue.

Each book follows a prescribed format consisting of a checklist covering each of the areas in the chapter, and an expanded treatment of 'essential' issues looking at examination topics in depth.

The authors are all Australian law academics who bring to their subjects a wealth of experience in academic and legal practice.

Professor David Barker
General Editor
Faculty of Law,
University of Technology, Sydney

Preface

The purposes of the book

The primary purpose of this book is to be used as a textbook for the subject of 'Real Property' (or 'Land Law' or 'Property Law and Equity' as this subject is known in some law schools).

As a textbook, it endeavours to set out the salient principles together with quotations from cases and materials to enable the student to better appreciate the judicial reason behind the principles enunciated.

My concern over many years as a lecturer in law is the failure of many students to sufficiently study the judicial reasoning behind the cases that have enunciated the basic principles in this subject area. This failure leads to a superficiality of understanding, which results in some law students graduating without having mastered the process of legal reasoning.

A secondary purpose of this book is to provide a useful overview of the subject matter of 'Real Property' for practitioners. This book should provide a useful summary of the law for the busy practitioner who wishes to research a point of law in the area of Real Property.

Acknowledgments

As a student of Real Property at the University of Sydney in 1973, I was privileged to be taught this subject by Professor Roy Woodman. It was during this time that I first developed an interest in this area of law.

Later, as a Research Assistant to Professor Woodman in 1977 and 1978 and then in 1980 and 1981 as a tutor in Real Property at Sydney, my interest in and knowledge of the subject was deepened.

I have drawn heavily from Professor Woodman's *The Law of Real Property in New South Wales*, 1980, Sydney: LBC, and acknowledge a debt of gratitude to both Professor Woodman and his book, which is referred to in this book as 'Professor Woodman'.

A fellow student of Professor Woodman and undoubtedly the premier writer in the area of 'Real Property' is Professor Peter Butt of the University of Sydney. I acknowledge the quality of *Land Law in New South Wales*, 4th edn, 2001, Sydney: LBC. References in this book to the 4th edition of Professor Butt's book are referred to as 'Professor Butt'. I also express appreciation for the time Professor Butt has given to me over the years to draw from his deep knowledge of this area of law.

Since 1982 I have been a Lecturer in Law at the University of Technology, Sydney (UTS). I acknowledge the stimulation involved in teaching these students and I am sure that some of the questions asked by my students over the years have deepened my understanding of 'Real Property'.

Appreciation is also expressed to:

- Susan Moore, Katharine Montoya and Debbie Margaritis for the careful and thorough secretarial assistance provided in preparing this book.
- Andrew Moore for his research assistance, especially in relation to the law of fixtures.
- David Barker, Dean of the Faculty of Law at UTS, for his encouragement and support in completing this book.
- Bill Hodgekiss, a colleague at the Sydney Bar with whom I have discussed many of the intricacies of this and other areas of law over innumerable cappuccinos and breakfasts consumed over the last 25 years.
- Joyce and the late Allan Moore, my parents, who instilled in my sister and me, from a young age, the value and importance of educational endeavour and academic excellence within the context of a loving and supporting family life.
- Finally and most importantly, Cora, Isabella and Alexei, my wife and two youngest children whose support and encouragement has been greatly appreciated, particularly as I have put in the time to finish this project.

Geoffrey Moore
Sydney, Australia
30 June 2004

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1 THE MEANING OF LAND

You should be familiar with the following areas:

- the owner's rights to airspace
- the owner's rights to minerals on or under the surface
- the boundaries with neighbouring land and
- the owner's rights to things grown on the land

RIGHTS TO AIRSPACE

Introduction

The Latin maxim *cuius est solum, eius est usque ad coelum* means a person entitled to possession of land has exclusive rights upwards to the Sun and downward to the centre of the Earth. See generally the history of this maxim discussed by Lord Wilberforce in *Commissioner for Railways v Valuer – General* (1974) at 351. The application of this maxim in England can be traced back to at least 1285, although it is suggested by Professor Butt (at p 206) that its origins may lie in Jewish law at least 1,000 years earlier.

Lord Coke in his *Commentary on Littleton* in 1628 observed:

> The earth hath in law a great extent upwards, not only of water … but of ayre and all other things even up to the heaven.

In practice, the cases do not literally apply this maxim. The courts do not restrain each and every encroachment of airspace, because an action in trespass is based on an interference with the possession of land. Some encroachments of airspace are not seen to interfere with the possession of the land.

Who may bring proceedings?

In *Rodrigues v Ufton* (1894), it was held that an owner of real estate can only bring an action to restrain trespass to airspace where:

- the owner is in possession; or

- the owner's reversionary interest will be affected.

It follows that in the absence of the owner's reversionary interest being adversely affected by any trespass to airspace, only the lessee of tenanted property can complain about a trespass to airspace.

Permanent encroachments

The court has shown a greater willingness to find a trespass where there is a permanent encroachment of the airspace above the land than in other situations. For instance, in *Kelsen v Imperial Tobacco Co Ltd* (1957), a permanent encroachment by a sign protruding from the building on one property into the airspace of the adjoining property was held to be a trespass.

In so holding, McNair J relied on the decision of Romer J in *Gifford v Dent* (1926), where the judge had taken the view that a sign that was erected on the wall above the ground floor premises and which projected some four feet, eight inches (ie, 1.4 metres) from the wall constituted a trespass over the plaintiff's airspace. McNair J at 345 held:

> That decision ... has been recognised by the textbook writers ... as stating the true law. It is not without significance that the legislature in the Air Navigation Act 1920, s 9 (replaced by s 40(1) of the Civil Aviation Act 1949), found it necessary expressly to negative the action of trespass or nuisance arising from the mere fact of an aeroplane passing through the air above the land. It seems to me clearly to indicate that the legislature at least was not taking the same view of the matter as Lord Ellenborough in *Pickering v Rudd* (4 Camp 219), but rather taking the view accepted in the later cases, such as the *Wandsworth District case* (13 QBD 904), subsequently followed by Romer J in *Gifford v Dent* [1926] WN 336. Accordingly, I reach the conclusion that a trespass and not a mere nuisance was created by the invasion of the plaintiff's airspace by this sign.

Other cases of permanent encroachment include:

- *Wandsworth District Board of Works v United Telephone Co Ltd* (1884), where a case of wires swinging across a neighbour's property was held to be a trespass; and
- *Lemmon v Webb* (1895), where the House of Lords held that an owner may cut branches and roots of a tree which encroach on their land from an adjoining property (subject to tree preservation orders and other requirements of local councils and shires).

Temporary encroachments into airspace – the balloon and bullet cases

In *Pickering v Rudd* (1815), Lord Ellenborough expressed the view that a person in an air balloon passing over a property would not be a trespasser. His Lordship at 71 observed that:

> I do not think it is a trespass to interfere with the column of air super incumbent on the close. I once had occasion to rule upon the circuit that a man who, from the outside of a field, discharged a gun into it so as that the shot must have struck the soil, was guilty of breaking and entering it ... but I am by no means prepared to say that firing across a field *in vacuo*, no part of the contents touching it, amounts to a *clausum fregit* ...

The English court has declined to restrain the firing of bullets that passed over the plaintiff's land at a height of 22.5 metres (ie, 75 feet) in *Clifton v Bury* (1887). On the other hand, the Tasmanian Supreme Court has held that a plaintiff has sufficient rights to the airspace above his land to prevent his neighbour from shooting his cat while it was sitting on the roof of his shed: *Davies v Bennison* (1927).

It is suggested that *Davies v Bennison* is reconcilable with *Pickering v Rudd* and *Clifton v Bury* because of the proximity of the cat to the structure on the land. It would appear that where the intrusion into the airspace occurs near the surface of the land, the court is more likely to determine that there has been a trespass than in the situation where the intrusion into the airspace occurs at a significant height above the surface.

Temporary encroachments into airspace – the aircraft cases

There is some uncertainty in relation to aircraft flying over land. Insofar as the courts are prepared to extend Lord Ellenborough's reasoning in *Pickering v Rudd* (1815) to aircraft cases, aircraft flying above the surface of land will not normally be regarded as a trespass unless traversing the land near to the surface.

Because the matter is not free from doubt and because of the increasing importance of aircraft in our modern society, Parliament has enacted legislation to ensure that aircraft flying over private land are not automatically liable for trespass to that land. See generally the Damage by Aircraft Act 1952 (NSW) and the Damage by Aircraft Act 1999 (Cth).

This legislation provides that as long as an aircraft traverses a property at a reasonable height, having regard to all the facts and circumstances, there will be no liability for trespass. On the other hand, as a legislative trade-off, there is strict liability should the aircraft cause damage to personal property such as would occur if the aircraft crashed into the land or into a structure erected on the land.

Bernstein of Leigh (Barron) v Skyviews & General Ltd (1978)

In *Bernstein of Leigh (Barron) v Skyviews & General Ltd*, the plaintiff was the owner and resident of country property in Kent, England. The defendants operated a business that involved the taking of aerial photographs of properties. The defendants took aerial photographs of the plaintiff's property from a height of several hundred feet. The plaintiff objected to this taking

place without his permission and commenced proceedings. In particular, he contended that the defendants were not entitled to rely on the statutory defences available under the UK equivalent of our Civil Aviation legislation on the grounds that it did not permit the use of airspace for the purposes of photography.

Griffiths J rejected the submission that the plaintiff's rights in the airspace continued to an unlimited height. His Honour noted the disapproval of the views of Lord Ellenborough in *Pickering v Rudd* (1815) by McNair J in *Kelsen v Imperial Tobacco Co Ltd* (1957).

While Griffiths J made it clear that he did not wish to cast any doubts in the correctness of the *Kelsen* decision on its own particular facts, Griffiths J held at 486–88:

> It may be a sound and practical rule to regard any incursion into airspace at a height which may interfere with the ordinary user of the land as a trespass rather than a nuisance. Adjoining owners then know where they stand; they have no right to erect structures overhanging or passing over their neighbours' land and there is no room for argument whether they are thereby causing damage or annoyance to their neighbours about which there may be much room for argument and uncertainty. But wholly different considerations arise when considering the passage of aircraft at a height, which in no way affects the user of the land …
>
> I can find no support in authority for the view that a landowner's rights in the airspace above his property extend to an unlimited height … The problem is to balance the rights of an owner to enjoy the use of his land against the rights of the general public to take advantage of all that science has offered in the use of airspace. This balance is in my judgment best struck in our present society by restricting the rights of an owner in the enjoyment of his land and the structures on it, and declaring that above that height he has no greater rights in the airspace than any other member of the public …

His Honour applied this test of 'what is necessary for the ordinary use and enjoyment of the land and the structures on it?' to the facts of the case and determined that the defendant's aircraft did not infringe any rights in the plaintiff's airspace and, thus, no trespass was committed.

Temporary encroachments into airspace – the building cases

Woollerton & Wilson Ltd v Richard Costain Ltd (1970)

In *Woollerton & Wilson Ltd v Richard Costain Ltd*, the English Court of Appeal was asked to restrain a building contractor from allowing a tower crane to encroach upon the airspace of the plaintiff's land. When the crane was in operation and also when it was not in use, but the wind was blowing in a certain direction, the jib of the crane encroached upon the plaintiff's airspace at a height of 15 metres above the roof level.

The building contractor admitted the trespass but pointed out that the building would be substantially delayed as it had been planned around the

use of the tower crane. There was evidence that the building contractors had offered the plaintiffs a substantial sum for the right to encroach on their airspace.

The English Court of Appeal held that there was a trespass to the plaintiff's airspace but, in the exercise of its discretion, the court delayed the operation of the injunction for sufficient time to allow the builder to complete the building.

The court so exercised its discretion because the building contractor had offered the plaintiffs a substantial sum of money as compensation and by reason of the fact that there was no earlier precedent to forewarn the building contractor of the possibility that it would be restrained from completing the building at a time when the work was in progress. The court was satisfied that the building contractor had not acted in flagrant disregard of the plaintiff's rights.

Woollerton has since been applied in Australia by the Full Court of the Queensland Supreme Court in *Graham v KD Morris & Sons Ltd* (1974). There it was held that a builder should be restrained immediately from allowing a crane on the building site to encroach the airspace of neighbouring land. This builder acted in flagrant disregard of the plaintiff's rights and was of course on notice of the precedent set by the earlier case of *Woollerton*.

LJP Investments Pty Ltd v Howard Chia Investments Pty Ltd (1989)

In *LJP Investments Pty Ltd v Howard Chia Investments Pty Ltd*, Hodgson J, as he then was, held that the defendant was liable for trespass to airspace because it allowed scaffolding to encroach over the plaintiff's land during the course of construction of a wall along the boundary between the defendant's land and the plaintiff's land.

In this case, the defendant was the owner of a property on which a substantial commercial development was being constructed. The defendant instructed its builder to erect scaffolding, which encroached over the plaintiff's land from a height of about 4.5 metres above ground level. The scaffolding extended about 16 metres along the boundary and protruded about 1.5 metres into the airspace above the plaintiff's property.

Senior Counsel for the defendant relied on *Bernstein of Leigh (Barron) v Skyviews & General Ltd* (1978). He argued that an encroachment into airspace is only a trespass if it occurs at a height and in a manner that interferes with the occupier's use of the land.

Hodgson J at 495 held:

> If the defendant's submission is to the effect that entry into airspace is a trespass only if it occurs at a height and in a manner which actually interferes with the occupier's actual use of land at the time, then I think it is incorrect.
>
> In my view, the rule stated in *Bernstein of Leigh (Baron) v Skyviews & General Ltd* by Griffiths J was rather that a trespass occurred only if the

> incursion was at a height which may interfere with the ordinary user of land, or is into airspace which is necessary for the ordinary use and enjoyment of the land and structures upon it: see (at 486, 488). It was held that in that case there was no trespass by an aeroplane flying many hundreds of feet above the land.
>
> On the other hand, in *Woollerton and Wilson Ltd v Richard Costain Ltd* and *Graham v KD Morris & Sons Pty Ltd*, the incursions of crane jibs at heights of the order of 50 feet above the plaintiff's roof were treated as trespasses.

At 495–96, Hodgson J went on to observe:

> I think the relevant test is not whether the incursion actually interferes with the occupier's actual use of land at the time, but rather whether it is of a nature and at a height which may interfere with any ordinary uses of the land which the occupier may see fit to undertake. Such a rule has the advantages stated by Griffiths J in *Bernstein of Leigh (Baron) v Skyviews & General Ltd*.

In passing, Hodgson J stated that the weight of authority was against the view adopted in *Pickering v Rudd* (1815) that the incursion into the plaintiff's airspace of an overhanging sign was a nuisance rather than a trespass.

Bendal Pty Ltd v Mirvac Pty Ltd (1991)

In *Bendal Pty Ltd v Mirvac Pty Ltd*, Bryson J was faced with a case where a defendant builder used protective mesh screens, which encroached into the plaintiff's airspace from a high-rise building site. His Honour held that the encroachment was a trespass. He followed the decision by Hodgson J in *LJP Investments Pty Ltd v Howard Chia Investments Pty Ltd* (1989).

On behalf of the defendant in this case, it was argued that *Bernstein of Leigh (Barron) v Skyviews & General Ltd* (1978) was applicable. Bryson J distinguished this case at 470 as follows:

> At some point for which no precise definition is available, activities above the surface of land cease to have sufficiently close relationship with it to be protected by the law of trespass, the modern example being furnished by the decision of Griffiths J in *Bernstein of Leigh (Baron) v Skyviews & General Ltd* relating to over flying aircraft.
>
> The activities complained of in the present cases are supported by the ground surface. They have a clear relation to ownership of the right to control the ground surface and they do not involve the kind of problems presented by overflying aircraft for trespass law. Hodgson J expressed the matter this way:
>
> > 'I think the relevant test is not whether the incursion actually interfered with the occupier's actual use of the land at the time, but rather whether it is of a nature and at a height which may interfere with any ordinary uses of the land which the occupier *may* see fit to undertake.'
>
> The defendants' own activities demonstrate that putting building works in position at a great height, including screens and the operation of cranes, are ordinary uses of land, which an occupier may see fit to undertake, because the defendants are undertaking them themselves in relation to the second defendant's land and at the height complained of. It is not relevant to the ambit of protection of trespass law that the plaintiff himself is not at present

> undertaking corresponding activities and does not intend to in the near future. The defendant's own conduct demonstrates the advantage of owning the land and controlling such activities.
>
> In my view, the defendant's conduct complained of relating to the screen is a continuing trespass and the defendant's own evidence makes it in every way plain that the defendants intend that it should continue and that it is highly probable that it will continue unless restrained by injunction.

Bryson J noted that the defendant could have carried out the building working in a manner which did not involve such a serious encroachment, although this would have involved greater cost for the builder. At 472, His Honour observed:

> ... The defendants have adopted techniques which involve encroachment, although other techniques, which would not have involved such serious encroachment but would have involved a greater cost, were available to them and still are available ...
>
> The resource represented by the plaintiff's airspace is not available like natural resources of the countryside for them to take as they find suitable, any more than they could count on using other people's bricks or other resources. At the heart of the litigation is a very simple question of using or not using other people's property, and this disqualifies the defendants from any real claim to consideration of hardships which they have incurred.

Although His Honour ordered that the defendant be restrained from allowing the protective mesh screens to encroach the plaintiff's airspace, he declined to restrain the defendant's encroachment constituted as what is known as 'weathervaning'. In this respect, he held at 467:

> Another encroachment related to the crane is referred to as weathervaning. When the crane is not under load it is allowed to act as a weathervane, and it moves with the wind with the jib at an elevation of 45 degrees at which it has a radius expressed horizontally of about 23 m. The free movement of the crane would carry it from time to time in an uncontrolled way over the plaintiff's building.
>
> I do not take a very grave view of the encroachment constituted by allowing the crane to weathervane. Any encroachment has, I suppose, some discernable risk but the free movement of the crane has relatively small discernable risk, particularly when compared with the use of the crane to pass loads over the plaintiff's building. There is a good practical reason for allowing the crane to weathervane, as this minimises the stresses produced on the tower and the crane structure generally by wind.

Can these cases be reconciled?

There are clearly differences of approach in the cases mentioned above.

In the cases discussed under the heading 'permanent encroachments', such as *Kelsen v Imperial Tobacco Co Ltd* (1957), there is a rejection of certain comments made by Lord Ellenborough in *Pickering v Rudd* (1815). On the other hand, in *Bernstein of Leigh (Barron) v Skyviews & General Ltd* (1978), Griffiths J is critical of the views expressed by the court in *Kelsen*,

although Griffiths J was at pains to point out that he did not disagree with the outcome of the facts of *Kelsen*.

In *LJP Investments Pty Ltd v Howard Chia Investments Pty Ltd* (1989) and *Bendal Pty Ltd v Mirvac Pty Ltd* (1991), the Supreme Court of New South Wales rejected submissions that invited the court to apply the test annunciated by Griffiths J in *Bernstein of Leigh* to the facts of these building cases.

Certainly, the diverse reasoning by the judges in these cases is difficult to reconcile. On the other hand, it is suggested that they are reconcilable if one applies different principles to the balloon, bullet and aircraft cases from those that have been applied in other situations.

On balance, it would appear that this is an area of law where judicial guidance at the appellate level is required to clarify the law in relation to trespass to airspace.

Enforcement

If there is a trespass, an occupier (or an owner not in occupation insofar as the reversionary interest is affected) can:

- exercise a right of self-help by, for example, evicting a trespasser or removing an encroaching wall: *Traian v Ware* (1957);
- claim damages for the loss suffered. Sometimes it will be possible for the plaintiff to recover restitutionary damages based on the benefit to the defendant by reason of the trespass or exemplary damages by way of punishment of the defendant. See generally *LJP Investments v Howard Chia Investments (No 2)* (1990); or
- seek an injunction: *Woollerton & Wilson Ltd v Richard Costain Ltd* (1970); *Bendal Pty Ltd v Mirvac Pty Ltd* (1991).

Legislation regulating rights to airspace and access to land at ground level

The above law relating to trespass to airspace and land at ground level is subject to the following New South Wales legislation:

- s 88K of the Conveyancing Act 1919 (NSW);
- the Access to Neighbouring Land Act 2000 (NSW);
- the Damage by Aircraft Act 1952 (NSW);
- the Damage by Aircraft Act 1999 (Cth); and
- the Encroachment of Buildings Act 1922 (NSW).

Section 88K of the Conveyancing Act

This is dealt with below, in Chapter 9 under the heading 'Creation of easements by statute – s 88K of the Conveyancing Act'.

The Access to Neighbouring Land Act 2000 (NSW)

Section 7 of the Access to Neighbouring Land Act 2000 (NSW) (the 'Access Act') provides:

> (1) A person who, for the purpose of carrying out work on land owned by the person, requires access to adjoining or adjacent land may apply to a Local Court for a neighbouring land access order.
>
> (2) A person who, for the purpose of carrying out work on land owned by another person, requires access to adjoining or adjacent land may apply to a Local Court for a neighbouring land access order with the consent of the person on whose behalf the work is to be carried out.
>
> (3) The Local Court may waive the requirement for consent under sub-section (2) if it thinks it appropriate to do so in the circumstances.
>
> (4) A person may apply for a neighbouring land access order even if access to the land concerned, for the purposes for which access is required, may be obtained by way of an easement imposed by an order under section 88K of the Conveyancing Act 1919. However, a person may not apply for a neighbouring land access order if access to the land concerned, for the purposes for which access is required, may be obtained or granted under any other provision of an Act.

Section 8 of the Access Act provides:

> (1) A person who, either solely or jointly, is entitled to the use of a utility service or a proposed utility service but who is not the owner of the whole or part of the land on which it is located or proposed to be located and who requires access to that land for the purpose of carrying out work on or in connection with the utility service may apply to a Local Court for a utility service access order.
>
> (2) A person may apply for a utility service access order even if:
>
> (i) there is an easement or other right of access to the land concerned to carry out the work, or
>
> (ii) access to the land concerned, for the purposes for which access is required, may be obtained by way of an easement imposed by an order under section 88K of the Conveyancing Act 1919.
>
> (3) However, a person may not apply for a utility access order if access to the land concerned, for the purposes for which access is required, may be obtained or granted under any other provision of an Act.

A person who requires access for purposes referred to in both ss 7 and 8 may apply to a Local Court for both a neighbouring land access order and a utility service access order, under s 9 of the Access Act.

Section 10 of the Access Act requires an applicant for an access order to give at least 21 days' notice of the lodging of the application and the terms of any order sought to:

- the owner of the land to which access is sought under the application; and
- any other person entitled to the use of any utility service on which work is proposed to be carried out; and

- any other person the applicant has reason to believe will be affected by the order.

The Local Court may direct that notice of an application be given to a person or that notice be given in a specified manner or within a specified period. The Local Court may waive the requirement to give notice or vary the period of notice under this section if it thinks it appropriate to do so in the circumstances, under s 10 of the Access Act.

A Local Court may make a neighbouring land access order if it is satisfied that, for the purpose of carrying out work on land, access to adjoining or adjacent land is required and it is satisfied that it is appropriate to make the order in the circumstances of the case.

On the other hand, s 11 of the Access Act provides that a Local Court must not make a neighbouring land access order unless it is satisfied:

- that the applicant has made a reasonable effort to reach agreement with every person whose consent to access is required as to the access and carrying out of the work; and
- if the requirement to give notice has not been waived, that the applicant has given notice of the application in accordance with ss 10 and 34 (if applicable).

Section 12 of the Access Act deals with the types of work for which neighbouring land access orders may be made. This section provides:

> (1) A neighbouring land access order may be made for one or more of the following purposes in connection with the land on which the work is to be carried out:
>
> (a) carrying out work of construction, repair, maintenance, improvement, decoration, alteration, adjustment, renewal or demolition of buildings and other structures,
>
> (b) carrying out inspections for the purpose of ascertaining whether any such work is required,
>
> (c) making plans in connection with such work,
>
> (d) ascertaining the course of drains, sewers, pipes or cables and renewing, repairing or clearing them,
>
> (e) ascertaining whether any hedge, tree or shrub is dangerous, dead, diseased, damaged or insecurely rooted,
>
> (f) replacing any hedge, tree or shrub,
>
> (g) removing, felling, cutting back or treating any hedge, tree or shrub,
>
> (h) clearing or filling in ditches,
>
> (i) carrying out any work that is necessary for, or incidental to, anything referred to in paragraphs (a)–(h).
>
> (2) This section does not limit the kinds of work with respect to land for which a neighbouring land access order may be made.

Section 14 of the Access Act has similar provisions in relation to the various types of work for which utility service access orders may be made.

A Local Court, pursuant to s 13 of the Access Act may make a utility service access order if it is satisfied that access to land is required for the purpose of carrying out work on or in connection with a utility service situated on the land and it is satisfied that it is appropriate to make the order in the circumstances of the case.

On the other hand, s 13 of the Access Act provides that the court must not make a utility service access order unless it is satisfied that:

- the applicant has made a reasonable effort to reach agreement with every person whose consent to access is required as to the access and carrying out of the work, and if the requirement to give notice has not been waived; and
- the applicant has given notice of the application in accordance with ss 10 and 34 (if applicable).

Before determining an application for an access order, the Local Court is required by s 15 of the Access Act to consider the following matters:

- whether the work cannot be carried out or would be substantially more difficult or expensive to carry out without access to the land which is the subject of the application; and
- whether the access would cause unreasonable hardship to a person affected by the order.

Section 16 of the Access Act sets out the conditions which may be imposed by the Local Court when making an access order, while s 17 of the Access Act sets out the form of access orders.

The general effect of neighbouring land access orders is dealt with in s 18 and the general effect of utility service access orders are dealt with in s 19. Section 20 of the Access Act empowers the Local Court to give authority to carry out ancillary activities.

Section 21 of the Access Act sets out the obligations on an applicant under the Act to restore the land and indemnify the owner of the land for any damage arising from access being given by the Local Court. This section provides that:

> The applicant must:
>
> - restore the land concerned to the same condition it was in before the access, so far as is reasonably practicable, on or before the date specified in the order for that purpose, and
> - indemnify the owner of the land to which access is granted against damage to the land or personal property arising from the access.

The owner of the land to which access is granted must permit access to the land in accordance with the order and this Act, under s 22 of the Access Act.

Under s 23(1) of the Access Act, a person who is not a party to the proceedings for an access order, or expressly bound by the order, is not bound by the access order.

A successor in title to an owner of land to which access is granted is bound by that order in the same way as that owner, under s 23(2) of the Access Act.

An access order does not confer on any party to the order any interest in the land to which access is granted sufficient to enable any such person to place a caveat on the title to the land under the Real Property Act 1900: s 23(3) of the Access Act.

A Local Court may vary or revoke an access order on application by the applicant for the order or by any other person affected by the order, under s 24 of the Access Act.

Section 25 of the Access Act deals with the circumstances when access orders cease to be in force.

Section 26 of the Access Act deals with compensation, providing that:

(1) A Local Court may order that a person to whom an access order is granted pay compensation to the owner of the land to which access is granted for loss, damage or injury, including damage to personal property, financial loss and personal injury arising from the access.

(2) Compensation is not payable under this section for loss of privacy or inconvenience suffered by the owner solely as a result of access authorised by the access order or solely because of the making of the order.

(3) An order for compensation may be made at any time and may be made whether or not the access order is in force.

(4) An action for an order for compensation may not be brought more than three years after the last date on which access occurred under the order.

(5) Any such order is enforceable as if it were a judgment for that amount by a Local Court exercising jurisdiction under the Local Courts (Civil Claims) Act 1970.

The costs of an application for an access order are payable at the Local Court's discretion, under s 27 of the Access Act. In determining whether the whole or part of the costs of an application for an access order are payable by a party, the Local Court may consider the following matters:

- any attempts by the parties to reach agreement before the proceedings;
- whether the refusal to consent to access was unreasonable in the circumstances; and
- any other matter it thinks fit.

Section 28 of the Access Act deals with the consequences for a person who fails to comply with an access order.

A Local Court must order the transfer of the whole or any part of proceedings for compensation under this Act to the Land and Environment Court, if the amount of any compensation or damages involved is likely to exceed the amount of the Local Court's jurisdiction in an action for the recovery of a debt under the Local Courts (Civil Claims) Act 1970: s 29(1) of the Access Act.

The Land and Environment Court has, in respect of proceedings transferred under this section and in addition to any other jurisdiction and functions it has, the same jurisdiction and functions as are conferred on a Local Court by or under this Act, except in relation to ss 30 and 31: s 29(4) of the Access Act.

Under s 30(1) of the Access Act, if, in proceedings before it under this Act, a question of law arises, a Local Court may decide the question or refer it to the Land and Environment Court for decision.

On deciding the question, the Land and Environment Court must remit its decision to the Local Court and that court must not proceed in a manner, or make an order or decision, that is inconsistent with the decision of the Land and Environment Court: s 30(3) of the Access Act.

Section 31 of the Access Act states that a party to proceedings before a Local Court for an access order may appeal within 30 days after the decision to grant or not to grant the access order is made by the Land and Environment Court, on a question of law, against a decision to grant or not to grant an access order.

The Minister is to review this Act to determine whether the policy objectives remain valid and whether the terms of the Act remain appropriate for securing those objectives. The review is to be undertaken as soon as possible after the period of five years from the date of assent to this Act. A report of the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of the period of five years: s 40 of the Access Act.

The Encroachment of Building Act 1922 (NSW)

The Encroachment of Building Act 1922 (NSW) gives the Land and Environment Court power to settle encroachment disputes between adjacent landowners. This includes the power to enable encroachments to remain in place: see *Cuthbert v Hardie* (1989).

The Act gives the court jurisdiction to make orders in respect of 'encroachments' by 'substantial buildings' of a 'permanent character'. The definition of 'building' is dealt with by s 2.

The meaning of 'substantial building' of a 'permanent character'

The requirement of 'substantial building' of a 'permanent character' has been held to include:

- a concrete driveway: *Ward v Griffiths* (1987);
- a concrete-block wall: *Cuthbert v Hardie* (1989);
- a retaining wall: *Boed Pty Ltd v Seymour* (1989);
- protruding floor beams: *Droga v Proprietors Strata Plan 51722* (1996); and
- a weld-mesh fence set in concrete: *Ex p van Achterberg* (1984).

The requirement of 'substantial building' of a 'permanent character' does not include small structures such as a swimming pool's pump house and filter (*Cuthbert v Hardie* (1989)), or courtyard paving (*Cantamessa v Sanderson* (1993)).

The encroachment may be either intentional or unintentional: *Droga v Proprietors Strata Plan 51722* (1996); *Boed Pty Ltd v Seymour* (1989).

Either the adjacent owner or the encroaching owner may apply to the court for relief pursuant to s 3(1) of the Encroachment of Buildings Act 1922 (NSW).

Legislation as to relief

The court is empowered by s 3(2) of the Act to make such orders as it may deem just with respect to:

- the payment of compensation to the adjacent owner;
- the conveyance transfer or lease of the subject land to the encroaching owner, or the grant to the encroaching owner of any estate or interest therein or any easement right or privilege in relation thereto; and
- the removal of the encroachment.

Pursuant to s 3(3) of the Act, the court may grant or refuse the relief or any part thereof as it deems proper in the circumstances of the case, and in the exercise of this discretion may consider amongst other matters:

- the fact that the application is made by the adjacent owner or by the encroaching owner, as the case may be;
- the situation and value of the subject land, and the nature and extent of the encroachment;
- the character of the encroaching building, and the purposes for which it may be used;
- the loss and damage, which has been or will be incurred by the adjacent owner;
- the loss and damage which would be incurred by the encroaching owner if the encroaching owner were required to remove the encroachment; and
- the circumstances in which the encroachment was made.

The court may refer to any registered land surveyor (within the meaning of the Surveying Act 2002), or to any registered real estate valuer (within the meaning of the Valuers Registration Act 1975), any question involved in proceedings on the application, under s 3(4) of the Act.

Compensation as a remedy

The minimum compensation to be paid to the adjacent owner in respect of any conveyance, transfer, lease or grant to the encroaching owner shall, if the encroaching owner satisfies the court that the encroachment was not intentional and did not arise from negligence, be the land value of the subject land, and in any other case three times such land value: s 4 of the Act.

The court, in determining whether the compensation shall exceed this minimum, and if so by what amount, shall have regard to:

- the value, whether improved or unimproved, of the subject land to the adjacent owner;
- the loss and damage, which has been or will be incurred by the adjacent owner through the encroachment and through the orders proposed to be made in favour of the encroaching owner; and
- the circumstances in which the encroachment was made.

The order for payment of compensation shall, except so far as the court may therein otherwise direct, upon registration operate as a charge upon the land of the encroaching owner, ie, the parcel of land contiguous to the boundary beyond which the encroachment extends, or such part thereof as the court may specify in the order in priority to any charge created by the encroaching owner or by his or her predecessor in title: s 5 of the Act.

Where the encroaching owner is not an owner

Where the encroaching owner is not an owner beneficially entitled to the fee simple free from encumbrances, the court is empowered by s 6 of the Act to determine:

- by whom and in what proportions the compensation is to be paid in the first instance, and is to be borne ultimately; and
- to whom, for whose benefit and upon what limitations the conveyance transfer or lease of the subject land or grant in respect thereof is to be made.

Where the adjacent owner is not an owner beneficially entitled to the fee simple free from encumbrances, the court is empowered by s 7 of the Act to determine:

- to whom, for whose benefit and in what proportions the compensation is to be paid or applied; and
- by whom the conveyance transfer or lease of the subject land or grant in respect thereof is to be made.

Different forms of relief

Where the court decides to grant relief, it may order the ownership of the land on which the encroachment stands to be transferred. This occurred in *McGeever v Kritsotakis* (1992) and also in a number of South Australian decisions: *Carlin v Mladenovic* (2000); *Gladwell v Steen* (2000); and *Bunney v South Australia* (2000).

The court may, in its discretion, grant a lesser interest, such as:

- an easement: *Re Marsh* (1941); *Kostis v Devitt* (1979); *Ward v Griffiths* (1987); or
- an easement for the life of the encroachment: *Cantamessa v Sanderson* (1993); or
- a lease, the possibility of which was recognised in *Kostis v Devitt* (1979).

Alternatively, the court may order that:

- the encroachment be demolished: *Perdita Pty Ltd v Lark* (1987);
- the encroaching structure be relocated so that it is within the proper boundaries: *Vaughan v Byron Shire Council* (1999) at 333–34; or
- there be no relief ordered at all: *Haddans Pty Ltd v Nesbitt* (1962) (which concerned a carport); *Ex p van Achterberg* (1984) (which concerned a fence); *Cuthbert v Hardie* (1989) at 323 (which concerned an encroaching wall); and *Euchtritz v Watson* (1993) (which concerned a tennis court fence).

The Damage by Aircraft Act 1952 (NSW)

Under this Act, no action lies in respect of trespass or in respect of nuisance, by reason only of the flight of an aircraft over any property at a height above the ground, which, having regard to wind, weather and all the circumstances of the case, was reasonable, or the ordinary incidents of such a flight, so long as the provisions of the Air Navigation Regulations were satisfied: s 2(1) of the Act.

On the other hand, where damage is caused to any person or property on land or water by, or by a person in, or an article or person falling from an aircraft while in flight, taking off or landing, then unless the loss or damage was caused or contributed to by the negligence of the person by whom it was suffered, damages shall be recoverable without proof of negligence or intention or other cause of action, as if the damage had been caused by the wilful act, neglect, or default of the owner of the aircraft.

It should, however, be noted that where material loss or damage is caused as aforesaid in circumstances in which:

- damages are recoverable in respect of the said loss or damage by virtue only of the foregoing provisions of this sub-section; and
- a legal liability is created in some person other than the owner to pay damages in respect of the said loss or damage,

the owner shall be entitled to be indemnified by that other person against any claim in respect of the said loss or damage: s 2(2) of the Act.

Where the aircraft concerned has been *bona fide* demised, let or hired out for a period exceeding 14 days to any other person by the owner thereof, and no pilot, commander, navigator or operative member of the crew of the aircraft is in the employment of the owner, this section shall have effect as if, for references therein to the owner, there were substituted references to the person to whom the aircraft has been so demised, let or hired out: s 2(3) of the Act.

The Damage by Aircraft Act 1999 (Cth)

The Damage by Aircraft Act 1999 (Cth) (the Commonwealth Act) must be read in tandem with the state Damage by Aircraft legislation.

Section 9(4) of the Commonwealth Act provides that this Act applies in relation to Commonwealth aircraft, aircraft owned by a foreign corporation or a trading or financial corporation (within the meaning of para 51(XX) of the Constitution), or aircraft (including foreign aircraft) engaged in:

- international air navigation;
- air navigation in relation to trade and commerce with other countries and among the States;
- air navigation conducted by a foreign corporation or a trading or financial corporation (within the meaning of para 51(XX) of the Constitution);
- air navigation to or from, or within, the Territories; or
- landing at, or taking off from, a place acquired by the Commonwealth for public purposes.

Section 10(1) of the Commonwealth Act applies where a person or property on, in or under land or water suffers personal injury, loss of life, material loss, damage or destruction caused by:

- an impact with an aircraft that is in flight, or that was in flight immediately before the impact happened;
- an impact with part of an aircraft that was damaged or destroyed while in flight; or
- an impact with a person, animal or thing that dropped or fell from an aircraft in flight.

Section 10(2) makes the following people jointly and severally liable in respect of the injury, loss, damage or destruction:

- the operator of the aircraft immediately before the impact happened;
- the owner of the aircraft immediately before the impact happened;
- if the operator of the aircraft immediately before the impact happened was authorised to use the aircraft but did not have the exclusive right to use it for a period of more than 14 consecutive days, the person who so authorised the use of the aircraft;

- if the operator of the aircraft immediately before the impact happened was using the aircraft without the authority of the person entitled to control its navigation, the person entitled to control the navigation of the aircraft.

Section 10(2A) exempts from liability any person who immediately before the impact happened was the owner of the aircraft, and did not have an active role in the operation of the aircraft, and either:

- there was a lease or other arrangement in force (whether or not with the owner) under which another person had the exclusive right to use the aircraft; or
- another person had the exclusive right to use the aircraft and there was an agreement in force under which the owner provided financial accommodation in connection with the aircraft.

The recovery of damages is dealt with by s 11 of the Commonwealth Act, which provides that:

> Damages in respect of an injury, loss, damage or destruction of the kind to which section 10 applies are recoverable in an action in a court of competent jurisdiction in Australian territory against all or any of the persons who are jointly and severally liable under that section in respect of the injury, loss, damage or destruction without proof of intention, negligence or other cause of action, as if the injury, loss, damage or destruction had been caused by the wilful act, negligence or default of the defendant or defendants.

RIGHTS BELOW THE SURFACE

Minerals

A mineral is anything capable of being mined. At common law, the surface owner's rights extend downwards sufficiently to permit the extraction of minerals. In the absence of any express or implied limitation of rights, an owner of land at common law is entitled to the subsoil, *cuius est solum, eius est usque ad coelum et ad inferos*, and to the minerals therein: *Wade v NSW Rutile Mining Co Pty Ltd* (1969).

It is, however, possible for a person other than the owner of the land to own minerals on or under the land. A severance of minerals from the rest of the land may be affected by:

- a Crown grant itself by way of a reservation of the minerals to the Crown; or
- an assurance or reservation contained in an instrument operating between the owner of the land and another person.

The reservation of minerals implies the existence of a right to mine them where such a right is not specifically reserved: *Borys v Canadian Pacific Railways* (1953).

The royal minerals

Even in the absence of an express reservation, the royal minerals (ie, gold and silver) are vested in the Crown at common law. The royal minerals do not pass from the Crown unless specifically stated: *Woolley v Attorney General of Victoria* (1877); *Attorney General v Great Cobar Copper Mining Co* (1900).

The rights of the Crown to gold were expressly reserved by the Statutes 16 Vict, No 43, 20 Vict, No 29, s 31, and 30 Vict, No 8, s 26: see *R v Wilson* (1874).

The Mining Act 1906 (NSW)

The Mining Act 1906 defines minerals to be:

> silver, copper, tin, iron, antimony, cinnabar, galena, nickel, cobalt, platinum, bismuth, manganese, marble, kaolin, mineral pigments, mercury, lead, wolfram, coal, shale, scheelite, chromite, opal, turquoise, diamond, ruby, sapphire, emerald, zircon, apatite and other phosphates, serpentine, molybdenite, alunite and alum, barytes, asbestos, gypsum, monazite, and any other substance which may from time to time be declared a 'mineral' within the meaning of this Act by proclamation of the Governor published in the Gazette.

Section 8 of the Mining Act 1906 provides that:

> Nothing in this Act, except so far as is herein expressly enacted, shall abridge or control the prerogative rights and powers of Her Majesty in respect to gold mines and silver mines.

The mining of coal

All reservations of coal mines contained in Crown grants made in New South Wales before 29 January 1850 were abandoned by the Crown by proclamation in the Government Gazette of that date, except those affecting such lands as were comprised in any city, township or village.

Under s 2 of the State Coal Mines Act 1912 (NSW), the Governor, by proclamation, is empowered to set apart Crown lands which contains coal or may be required for coal mining operations under the Act.

Section 3 of the State Coal Mines Act 1912 (NSW) provides that private land alienated without any reservation of minerals to the Crown or, alternatively, private or Crown lands held under mineral lease from the Crown may be purchased on offer from the owner or lessee, as the case may be. Section 4 provides that the Minister may resume such land for coalmines.

Petroleum products

All petroleum and helium existing in a natural state on or below the surface of any land belongs to the Crown, under s 6(1) of the Petroleum Act 1955 (NSW). This is so regardless of whether these minerals were or were not originally reserved to the Crown, because s 6(2) provides that all Crown grants and leases shall, whether granted before or after the commencement of the section, be deemed to contain a reservation to the Crown of all petroleum and helium existing in a natural state on or below the surface of the land.

Petroleum is defined by s 3 of the Petroleum Act 1955 (NSW) to mean:

> Any naturally occurring hydrocarbon, whether in a gaseous, liquid or solid state, any naturally occurring mixture of hydrocarbon whether in a gaseous, liquid or solid state, or any naturally occurring mixture of one or more hydrocarbons whether in a gaseous, liquid or solid state, and one or more of hydrogen, sulphide, nitrogen, helium and carbon dioxide and includes any substances referred to above that has been returned to a natural reservoir.

Commonwealth powers

The Commonwealth Constitution has not divested the States of their control of minerals. Where, however, property is vested in the Commonwealth by virtue of the Constitution or where it is compulsorily acquired under the Lands Acquisition Act 1955 (Cth), all minerals pass to the Commonwealth: *Commonwealth v New South Wales* (1923).

The Atomic Energy Act 1953 (Cth) has conferred wide powers on the Commonwealth. Pursuant to s 41, a person may be authorised by the Commonwealth to carry on mining and treatment operations on private land in relation to 'prescribed substances', which are defined in s 5 as being 'uranium, thorium, plutonium, neptunium, or any of their respective compounds and any other substance specified in regulations as one which is, or may be, used for or in connection with production of, or research into atomic energy'.

Summary of the law on minerals

The position in relation to minerals in New South Wales has been helpfully summarised by Professor Woodman at p 30 as follows:

- The Commonwealth has certain powers, for defence purposes, in relation to 'prescribed substances'. It also has the power of 'acquisition' of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws: Commonwealth of Australia Constitution Act 1900, s 51(xxxi). In conjunction with the defence power, this power authorises the Federal Government to acquire and control such mineral rights and resources as are essential for the defence of the Commonwealth.

- The Commonwealth has title to minerals vested in it under s 85 of the Constitution, or compulsorily acquired by it.
- All petroleum and helium are, by statute, vested in the Crown right of the State: Petroleum Act 1955, s 6. It would seem, however, that if the Commonwealth resumes the land, the title of the Commonwealth would prevail over that conferred by the State Statute.
- Gold and silver are reserved to the Crown, by virtue of the prerogative, and remain vested in the Crown unless and until granted in express terms.
- Other minerals and metals may, or may not, be reserved to the Crown, the matter being dependent upon the terms of the Crown grant. If not reserved to the Crown, they will vest in the surface owner, unless he or one of his predecessors in title has severed the minerals from the rest of the land by a severance in favour of third parties.

BOUNDARIES

Meaning of 'boundaries'

Lines on the surface of the Earth define the horizontal boundaries of land. As to the vertical boundaries, the theoretical starting point is that land usually extends down to the centre of the Earth and up to the Sun.

Land can be limited in height or depth. For instance:

- a transfer may reserve to the transferor all land more than a certain height above the Australian Standard Height Datum; or
- a Crown grant may reserve to the Crown all land more than a certain depth below the surface.

A boundary may be a natural one, such as the seashore, or the shore or bank of a lake or stream: see Moore, 'Land by the water' (1968) 41 ALJ 532. Alternatively, land may be bounded by a non-natural boundary.

Tidal water boundaries

Land adjoining tidal water is bounded by the mean high water mark, unless the contrary is shown. The contrary can be shown by demonstrating that the title has a different boundary.

If a Crown grant or a transfer describes land as adjoining tidal water, the natural inference is that the title boundary was the actual high water mark at the time of the Crown grant: see Moore, 'Land by the water' (1968) 41 ALJ 532.

The mean high water mark is taken to be at a point of the line of the medium high tide between the spring and neap, ascertained by taking the average medium tides during the year: *Attorney General of Southern Nigeria*

v John Holt & Co (Liverpool) Ltd (1915); *Humphrey v Burrell* (1951); *Verrall v Nott* (1939); *Government of the State of Penang v Beng Hong Oon* (1972).

Such a boundary is ambulatory. If the high water mark retreats as a result of natural accretion, the additional land accrues to the landward title. As Moore has stated at p 534, 'Land described as being bounded by the sea is not excluded from the benefit of accretion because measurements are also given'.

A boundary may be defined by measurement or by reference to the mean high water mark. Where tidal water constitutes a boundary, the mean high water mark is taken, in the absence of any contrary indication in the Crown grant, to be the correct line of demarcation. Any land below that line is vested in the Crown: *Hill v Lyne* (1893).

Crown grants in New South Wales frequently contain a reservation to the Crown of a strip of land above high water mark, typically 30.48 metres (ie, 100 feet). In this situation, the line is determined by reference to the mean high water mark at the date of the grant: *McGrath v Williams* (1912), but contrast *Attorney General v Merewether* (1905), where it was held that the lagoon in question was not an 'inlet of the sea' within the meaning of the Crown grant and so the reservation of 100 feet did not apply.

Accretion and erosion in relation to tidal waters

It follows that where the boundary turns out to be defined by the mean high water mark or by reference to the mean high water mark, and the mean high water mark shifts by accretion or erosion, the boundary shifts.

The above rules apply in relation to land under the Real Property Act 1900, notwithstanding the issue of a certificate of title showing the boundary in a plan: *Verrall v Nott* (1939).

The existence of a certificate of title to land with a water frontage, even if there is also a certificate of title to the foreshore and sea bed, does not exclude the doctrine of accretion, provided the true boundary is ambulatory: *Verrall v Nott* (1939); *Butcher v Lachlan Elder Realty Pty Ltd* (2002).

Where there is an accretion as a result of artificial works, the boundary does not change: *Attorney General, Ex Relatione Hutt River Board, and Hutt River Board v Leighton* (1955). The boundary does, however, change where the accretion is intentionally assisted by artificial means: *Verrall v Nott* (1939).

If accretion occurred on the water frontage, title to the additional land would have accrued in favour of the owner of the waterfront lot. Once reclamation work is undertaken, however, the boundary to the mean high water mark is fixed, as the title to reclaimed land is in the owner of the sea bed, and not the frontager: *Attorney General of Southern Nigeria v John Holt & Co (Liverpool) Ltd* (1915); *Butcher v Lachlan Elder Realty Pty Ltd* (2002); and Moore at p 536.

Non-tidal water boundaries

The adjoining owners own the bed of non-tidal water, such as occurs in relation to part of a river or a creek or a lake, which is above tidal reach. The boundary is taken to be in the middle unless a contrary intention is expressed. This is known as the *ad medium filum* rule.

A contrary intention may result in the boundary being defined by measurement or as being the bank of the non-tidal water.

A Crown grant or a transfer describing land as adjoining non-tidal water is presumed to include the bed of the water as far as the middle line, subject to any contrary intention.

This presumption applies to Torrens Title land: *Lanyon Pty Ltd v Canberra Washed Sand Pty Ltd* (1966); s 45A(1) of the Real Property Act 1900 (NSW).

Accretion and erosion in relation to non-tidal waters

If the boundary turns out to be the middle line and either bank shifts by accretion or erosion, the boundary shifts proportionately. If the boundary turns out to be the bank, and the bank shifts by accretion or erosion, the boundary shifts to the new position of the bank. In relation to rivers, the boundary line may vary by accretion or encroachment: *Hindson v Ashby* (1896). According to s 25A(6) of the Crown Lands Consolidation Act 1913 (NSW), the doctrine of accretion does not apply and is deemed to have never applied to a non-tidal lake.

Avulsion, which is where there is a sudden movement in the normal water mark after, say, an earthquake, does not alter the boundary: *Humphrey v Burrell* (1951). This applies in the case of both tidal and non-tidal waters: *Thakurain Ritraj Koer v Thakurain Sarfaraz Koer* (1905).

The *ad medium filum* rule

There is a presumption at law that the bed of a non-tidal stream and the soil of a highway belong to adjoining owners on each side up to the centre line of the stream or road. The rule does not apply to tidal waters: *Gann v The Free Fishers of Whitsable* (1865).

In their book, *Baalman, The Torrens System in New South Wales*, 2nd edn, 1973, Sydney: LBC, the learned authors Professor Woodman and PJ Grimes at p 222 summarised the position as follows:

> In regard to streams, the rule was held by the Privy Council to apply to Crown grants in *New South Wales: Lord v Commissioners of Sydney* (1859) 12 Moo PC 473; 14 ER 991; followed by *Attorney General v White* (1925) 26 SR (NSW) 216.
>
> In regard to roads, the Full Court of the Supreme Court of New South Wales held that the presumption did not apply to Crown grants of land described as bounded by a road: *Tierney v Loxton* (1891). In the later case of *Harris v*

Municipal Council of Sydney (1910), however, the Full Court held that the *Ad Medium Filum* rule applied to a road created by a private individual; see also *Re Priddle* (1916). The rule did not apply to land bounded by a salt-water lagoon: *Williams v Booth* (1910).

The application of the rule in New South Wales has been restricted by legislative exceptions. The position is as follows:

- it does not apply and is deemed never to have applied to Crown grants described as bounded by a non-tidal lake: Crown Lands Consolidation Act 1913, s 235A(6);
- where under the Crown Lands Consolidation Act 1913 the bed of a river has been reserved from sale or lease, the owner of land adjoining the river is not entitled to any rights 'of access over or to the user of any part of the bed of the river' other than rights under the Water Act 1912: Crown Lands Consolidation Act 1913, s 235A(8);
- it does not apply to land granted by the Crown, which is bounded by a road created by the Crown: Crown Lands Consolidation Act 1913, s 235A(9); and
- it does not apply to public roads in a municipality or shire. Every such road, and the soil and all materials thereof, is vested (in the municipality or shire).

In the absence of rebutting circumstances, the owner of land described in a folio of the Register created under Torrens Title as being bounded by a non-tidal river is the owner of the bed of the river *Ad Medium Filum*: *Lanyon Pty Ltd v Canberra Washed Sand Pty Ltd* (1966).

Under s 45A of the Real Property Act, inserted in 1930, the rule is referred to as a rebuttable rule of construction, which 'shall apply, and be deemed always to have applied' to dealings registered under the provisions of the Act, and the fact that an applicant to bring land under the Act has not expressly declared his entitlement to the middle line of the stream or road shall not prevent the application of the rule. The existence of a folio of the Register which does not indicate ownership of half of a road adjoining the land and the subject of the folio of the Register, or the execution of a transfer referring without more to the land comprised in the folio of the Register, is not sufficient to rebut the *Ad Medium Filum* rule of construction: *Wood v Mittagong Shire Council* (1977).

Jennings v Sylvania Waters Pty Ltd (1972)

In *Jennings v Sylvania Waters Pty Ltd* (1972), H was the owner of land ('the riparian land') adjoining Gwawley Bay, a part of Georges River. In 1866, the bay by Crown grant was issued pursuant to s 9 of the Crown Lands Alienation Act of 1861 granted in fee simple to H ('the riverine land'). At a time when J and X were registered proprietors under the Real Property Act of part of the riparian land and S was the registered proprietor of the whole of the riverine land, S reclaimed the bed of the bay and carried out works on it.

J and X sought damages from S for interference with their common law rights of access to the river and rights to navigate upon the river.

The Court of Appeal held that:

- the plaintiffs' riparian rights and rights to navigate upon the river were natural rights, not easements, and passed to J and X when they acquired their land;
- the fact that in 1866 the riparian land and the riverine land were in common ownership did not end the natural rights formerly attaching to the riparian land;
- the plaintiff's right of access to the waters of the bay was not an interest which, by virtue of s 42, must be recorded in the defendant's folio of the Register if it is to be enforceable by the plaintiffs, nor was it a right requiring to be expressly recorded in the plaintiff's folio of the Register for the purpose of that section;
- the natural rights of a riparian owner do not represent an interest within the meaning of s 42 of the Real Property Act; and
- the natural rights of a riparian owner are rights comprehended within the fee simple of the riparian land.

Non-natural boundaries

These are imaginary lines described by reference to physical objects or survey marks. Such lines may be described in loose terms, or with mathematical accuracy as in a surveyor's description. Their position may then be plotted on the surface of the land by survey, and marked with surveyor's pegs.

Boundaries – description of lands

An accurate description of a property that is the subject of a contract of sale is desirable. The standard form of contract of sale provides, *inter alia*, that no error or misdescription of the property shall void the sale.

It is important to determine what is the subject matter of the sale. The vendor cannot insist on the purchaser taking, with compensation, a property substantially different from that which was purchased. On the other hand, the purchaser cannot take advantage of a slight error or misdescription in the contract and purport to rescind: *Gardiner v Orchard* (1910); *Stephens v Selsey Renovations Pty Ltd* (1974).

Fencing of boundaries

At common law, the owners of adjoining properties are not bound to fence, either against or for the benefit of another: see *Halsbury's Laws of England*, 4th edn, Vol 4, 385.

In New South Wales, under the Dividing Fences Act 1991 (NSW), an owner of land may be required to share the cost of constructing and maintaining an adequate fence between his land and any adjoining land. Owners of adjoining lands not divided by a sufficient dividing fence are liable to join in or contribute equally to the construction of dividing fences.

GROWING THINGS

A tree or other growing thing is part of the land while it is growing. Once it is severed, it becomes a chattel. The exception is a crop, which is replanted from time to time. A crop is a chattel that belongs to the person who plants it.

In relation to things that grow on land, a distinction should be drawn between the annual produce of agricultural labour, which is known as *fructus industriales* (*Duppa v Mayo* (1669); *Dunne v Ferguson* (1832)), and natural things that grow on land, such as trees, grass and the fruit of fruit trees, which are known as *fructus naturales*.

In the case of a contract of sale or will, natural things are considered part of the land and pass under any transfer or will without being expressly mentioned. They may be excluded expressly or they may be granted separately from the land: *Eastern Construction Co Ltd v National Trust Co Ltd & Schmidt* (1914).

2 FIXTURES AND WASTE

You should be familiar with the following areas:

- the distinction between a chattel and a fixture
- cases on fixtures and
- the doctrine of waste

THE DISTINCTION BETWEEN A CHATTEL AND A FIXTURE

The relevance of the distinction between a chattel and a fixture

When a person acquires an interest in real property, the question is often raised as to what precisely is included in the acquisition.

For instance, when a purchaser acquires land on which there is erected a house, is the purchaser:

- entitled to the land only?; or
- entitled to the house built on the land?; and/or
- entitled to any inclusions within the house on the land?

Circumstances giving rise to disputes

There are three circumstances in which it is necessary to determine whether a chattel remains a chattel or alternatively has become a fixture. They are:

- a dispute between a vendor and a purchaser;
- a dispute between a mortgagor and a mortgagee, where the mortgagee will wish to argue that certain chattels have become part of the land and, as a result, are part of the mortgage security; and

- a dispute between a beneficiary under a will of personal property on the one hand, and a beneficiary of real property on the other hand.

What is a chattel?

A chattel is an item of personal property. Where a vendor sells land, in the absence of specific words to the contrary, the contract for the sale of land does not include items of personal property on the land. On the other hand, insofar as an item of personal property has become a fixture, it is regarded as being part of the land being sold.

As Professor Butt at p 301 has observed:

> Fixtures are items that have been attached to land in such a way as to become, in law, part of the land: '*quicquid plantatus solo, solo credit*' – 'whatever is affixed to the soil becomes part of the soil'.

Tenant's fixtures

In addition to an item of personal property being a chattel or being a fixture, there is a third possible outcome where the item of personal property was brought onto the land by a tenant who is one-half of a relationship between either:

- a landlord and a tenant; or
- a life tenant and a remainderman.

The life tenant/remainderman relationship is where a person leaves a property to, say, 'my spouse for life, remainder to my eldest child'. Here the spouse is a life tenant, who alone holds an interest in the property until death. From the date of the death of the spouse thereafter, the property belongs to the person who is called the 'remainderman'.

There are three possible outcomes where a tenant brought the item of personal property onto the land:

- An item of personal property brought onto the land by a tenant may become part of the land forever: see, eg, *D'Eyncourt v Gregory* (1866); *Reid v Smith* (1905); *Webb v Frank Bevis* (1940) as regards the concrete floor.
- An item of personal property may have become a fixture, but is a tenant's fixture. In this case, the tenant can remove it at the end of the tenancy: *Spyer v Phillipson* (1931); *Webb v Frank Bevis* (1940) as regards the shed.
- An item of personal property may have at all times remained a chattel: *Leigh v Taylor* (1902); *NH Dunn Pty Ltd v LM Ericsson Pty Ltd* (1979).

Where a tenant brought the item of personal property onto the land, there are two questions to be asked. First: has the chattel become a fixture? If so, secondly, is it a tenant's fixture, which can be removed from the land? See *Bain v Brand* (1876); *NH Dunn Pty Ltd v LM Ericsson Pty Ltd* (1979).

Removal of tenant's fixtures

A tenant in a landlord/tenant relationship must remove any tenant's fixtures before the relationship comes to an end. Otherwise, the tenant's fixture will no longer be able to be removed from the property: *ex p Brook: re Roberts* (1878).

The requirement to remove a tenant's fixture where there is a landlord/tenant relationship must be fulfilled before the landlord/tenant relationship comes to an end, as opposed to when the period of the original lease between the parties expires. Where the tenant holds over after the expiration of the initial tenancy, the tenant continues to be in a landlord/tenant relationship and, accordingly, is not obliged to remove the tenant's fixture until the landlord/tenant relationship comes to an end.

If, on the other hand, the former tenant remains in possession as a trespasser, the landlord/tenant relationship is at an end. In these circumstances, the former tenant, now a trespasser, has lost the right to remove a tenant's fixture. Such a person would continue to have a right to remove chattels as distinct from fixtures, because a chattel is an item of personal property, which belongs to the person whether they remain a tenant or are a trespasser: *NZ Government Property Ltd v HM&S* (1982).

In the case of tenant's fixtures in the life tenant/remainderman relationship, it will necessarily be uncertain as to precisely when the life tenancy is going to come to an end. Accordingly, the estate of the life tenant will be given a reasonable time after the expiration of the life tenancy to remove any tenant's fixture: *ex p Brook: re Roberts* (1878).

The desirability of specific provisions in a contract in relation to chattels and fixtures

It is highly desirable for the parties to a contract for the sale of land to state with precision what is and what is not part of the sale. This area of law has been developed to resolve issues that arise between parties to land transactions where they have failed to spell out precisely what is and what is not being sold.

The approach based on 'each case relies on its own facts and circumstances'

Whether a chattel remains a chattel, or has become a fixture, or is a tenant's fixture and is thus severable, is determined by having regard 'to all the facts and circumstances': *NH Dunn Pty Ltd v LM Ericsson Pty Ltd* (1979); *McIntosh v Goulburn City Council* (1985); *National Australia Bank Ltd v Blacker* (2000).

In *National Australia Bank Ltd v Blacker* Conti J stated the law as follows at [16]:

> ... There is no single test which is sufficient to determine whether an item of property is a chattel or a fixture. It is clear that the Court ought to have regard to all the circumstances of the case in making its determination: see *NH Dunn Pty Limited v LM Ericsson Pty Limited*, *supra* at 9246 *per* Glass JA. No particular factor has primacy and each case depends on its own facts: see *Eon Metals NL v Commissioner of State Taxation (WA)* (1991) 22 ATR 601 at 606 *per* Ipp J. Thus, the approach of the New South Wales Court of Appeal in *NH Dunn Pty Limited v LM Ericsson Pty Limited* has marked a realistic response, which may continue to restate the general law in this otherwise inherently undefinable area.

In so stating the law, Conti J relied on the following observation of Mahoney JA, with whom Priestley and McHugh JJA agreed, in *McIntosh v Goulburn City Council* (1985):

> ... The law of fixtures is not now so simple: at least, it is not open to this court to see it as so. Thus, a chattel may be a fixture even though it is not affixed to the land, and whether it may be removed depends upon rules more complicated than those to which I there referred.
>
> In my judgment, I there referred to certain tests, which have been proposed or adopted for determining whether a chattel accrues to the owner of the land and/or whether it may be removed. I suggested that each of these tests is less than fully satisfactory in that it has in its difficulties in form, which affect its application in the determination of particular cases. I referred in this regard to tests of whether property is a fixture or is removable from land which have been stated variously as: 'the purpose and object of affixing the chattel to the land'; 'the intention of the parties when it was affixed'; and 'whether the chattel was affixed for the better enjoyment of the land or the chattel'.
>
> None of these, I suggested, is a test which, by application of it to the facts, will produce a decision as to whether the chattel is owned by the landowner. It may be that the law in this regard, and the factual circumstances with which it must cope, are such that no single principle will alone be adequate. But, however this be, this is a branch of the law which, I think, is open to judicial reconsideration.

The approach based on the degree and the purpose of annexation 'tests'

This approach is to be contrasted with earlier statements of principle, which focused on the degree and purpose of annexation.

For instance, in *Holland v Hodgson* (1872) at 334–35, Lord Blackburn stated the law in the following terms:

> There is no doubt that the general maxim of the law is that what is annexed to the land becomes part of the land; but it is very difficult, if not impossible, to say with precision what constitutes an annexation sufficient for this purpose. It is a question which must depend on the circumstances of each case, and mainly on two circumstances, as indicating the intention, viz, the degree of annexation and the object of the annexation. When the article in question is no further attached to the land than by its own weight it is generally to be considered a mere chattel. But even in such a case, if the intention is

> apparent to make the articles part of the land, they do become part of the land.
>
> ... On the other hand, an article may be very firmly fixed to the land, and yet the circumstances may be such as to shew that it is never intended to be part of the land, and then it does not become part of the land. ... Perhaps the true rule is that articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such as to shew that they were intended to be part of the land, the onus of shewing that they were so intended lying on those who assert that they have ceased to be chattels, and that, on the contrary, an article which is affixed to the land even slightly is to be considered as part of the land, unless the circumstances are such as to shew that it was intended all along to continue a chattel, the onus lying on those who contend that it is a chattel.

Subsequent judicial and academic commentary in referring to this statement of principle focused on 'the circumstances, as indicating the intention, viz, the degree of annexation and the object of the annexation'.

For instance, in *Australian Provincial Assurance Co Ltd v Coroneo* (1938), Jordan CJ observed:

> The test of whether a chattel which has been to some extent fixed to land is a fixture is whether it has been fixed with the intention that it shall remain in position permanently or for an indefinite or substantial period, or whether it has been fixed with the intent that it shall remain in position only for some temporary purpose. In the former case, it is a fixture, whether it has been fixed for the better enjoyment of any land or building, or fixed merely to steady the thing itself, for the better use or enjoyment of the thing fixed. If it is proved to have been fixed merely for a temporary purpose it is not a fixture. The intention of the person fixing it must be gathered from the purpose for which and the time during which the user in the fixed positions contemplated. If a thing has been securely fixed, and in particular if it has been so fixed that it cannot be detached without substantial injury to the thing itself or to that to which it is attached, this supplies strong but not necessarily conclusive evidence that a permanent fixing was intended. On the other hand, the fact that the fixing is very slight helps to support an inference that it was not intended to be permanent. But each case depends on its own facts.

This in turn led judicial and academic commentary to distinguish between the purpose of annexation being 'temporary' as distinct from 'permanent'.

Facts and circumstances considered in the cases

In relation to the purpose or object of annexation, Conti J in *National Australia Bank Ltd v Blacker* (2000) at [13] noted the following variety of considerations, which have been taken into account:

- Whether the attachment was for the better enjoyment of the property generally or for the better enjoyment of the land and/or buildings to which it was attached: see *Hobson v Gorringe*, *supra* at 190; *Leigh v Taylor* [1902] AC 157 at 158; *Reid v Smith*, *supra* at 680–81; *Litz v National Australia Bank Limited* (1986) Qld Conv R 54-229 at 57,550.

- The nature of the property the subject of affixation: *Metal Manufacturers Limited v FCT*, *supra* at 411.
- Whether the item was to be in position either permanently or temporarily: *Australian Provincial Assurance Co Limited v Coroneo*, *supra* at 712–13.
- The function to be served by the annexation of the item: see for example *A-G (Cth) v RT Co Pty Limited (No 2)* (1957) 97 CLR 146 at 156–57 where printing presses were secured to a concrete foundation by nuts and bolts in order to keep the printing presses steady when in operation.

As to the degree of annexation, Conti J in *National Australia Bank Ltd v Blacker* (2000) at [14] referred to the following considerations, which have been taken into account:

- Whether removal would cause damage to the land or buildings to which the item is attached: see *Hellawell v Eastwood* (1851) 6 Ex 295 at 312; 155 ER 554 at 561; *Adams v Medhurst & Sons Pty Limited* (1929) 24 Tas LR 48 at 49; *Spyer v Phillipson* [1931] 2 Ch 183 at 209–210.
- The mode and structure of annexation: *Leigh v Taylor*, *supra* at 162; *Teaff v Hewitt* 1 Ohio St 511 referred to by Griffiths CJ in *Reid v Smith*, *supra* at 667; *Boyd v Shorrock* (1867) LR 5 Eq 72 at 78.
- Whether removal would destroy or damage the attached item of property: *Litz v National Australia Bank Limited*, *supra* at 57,549.
- Whether the cost of renewal would exceed the value of the attached property: *Metal Manufactures Limited v FCT*, *supra* at 411.

The approach based on 'each case relies on its own facts and circumstances' prevails

In *National Australia Bank Ltd v Blacker* (2000), Conti J, having reviewed the authorities, including two New South Wales Court of Appeal decisions which had never been reported in authorised reports, came down in favour of an approach based on 'each case relies on its own facts and circumstances'. His Honour at [15] held that:

> The New South Wales Court of Appeal has emphasised in more recent years that there is no single principle or test which is adequate to determine whether an item of personal property is a fixture or a chattel. Certainly the purpose of annexation and the degree of annexation will remain important considerations. However, the Court should have regard to all the facts and circumstances: see *NH Dunn Pty Limited v LM Ericsson Pty Limited*, *supra* at 9244–45 *per* Mahoney JA and at 9246–47 *per* Glass JA; *McIntosh v Goulburn City Council* (1985) 3 BPR 97197 at 9374.4 *per* Mahoney JA with whom Priestley and McHugh JJA agreed.
>
> The principal reason behind this relatively slight shift in focus is that in certain circumstances a chattel which is securely annexed to realty may remain a chattel: *A-G (Cth) v RT Co Pty Limited*, *supra* at 156–57; *Anthony v The Commonwealth*, *supra* at 89; *Australian Provincial Assurance Co Limited v Coroneo*, *supra* at 712.

> On the other hand, it has been accepted that occasions may arise where a chattel merely resting on its own weight has become a fixture: *Reid v Smith*, *supra* at 668–69, 679; *Australian Joint Stock Bank v Colonial Finance Mortgage Investment and Guarantee Corporation* (1894) 15 LR (NSW) 464 at 474; *Monti v Barnes* [1901] 1 QB 205 at 207, 209–10.

Having quoted from the passage from Mahoney JA, in *McIntosh v Goulburn City Council* (1985) quoted above, His Honour at [16] continued:

> I would respectfully adopt His Honour's proposition that there is no single test which is sufficient to determine whether an item of property is a chattel or a fixture. It is clear that the Court ought to have regard to all the circumstances of the case in making its determination: see *NH Dunn Pty Limited v LM Ericsson Pty Limited*, *supra* at 9246 *per* Glass JA. No particular factor has primacy and each case depends on its own facts: see *Eon Metals NL v Commissioner of State Taxation (WA)* (1991) 22 ATR 601 at 606 *per* Ipp J. Thus, the approach of the New South Wales Court of Appeal in *NH Dunn Pty Limited v LM Ericsson Pty Limited* has marked a realistic response, which may continue to restate the general law in this otherwise inherently undefinable area.

Whether intention is to be determined objectively or subjectively from the facts and circumstances

Conti J in *National Australia Bank Ltd v Blacker* (2000) at [11] observed that:

> There is an abundance of authorities generally to the effect that the relevant intention is to be determined objectively from such facts and circumstances that are 'patent for all to see', and not by reference to subjective intention: see for instance *Hobson v Gorringe* [1897] 1 Ch 182 at 193; *Melluish v BMI (No 3)* [1996] AC 454; *Elitestone Limited v Morris* [1997] 1 WLR 687 at 693, 698; Love v Bloomfield [1906] VLR 723 at 729; *Re May Bros Limited* [1929] SASR 508 at 513 and *Metal Manufacturers Limited v FCT* (1999) 43 ATR 375 at 411.

His Honour proceeded to note that there are some authorities that leave room 'for recourse to actual and hence subjective intention'. Conti J suggested that:

> this may be more accurately limited to the extent that it would assist the Court to determine the level of permanence or temporariness for which the item is intended to remain in position and the purpose to be served by its affixation or annexation: *NH Dunn Pty Ltd v LM Ericsson Pty Ltd* (1979) at 9244–45, where Mahoney JA referred to the observations of O'Connor J in *Reid v Smith* (1905) and Walsh J in *Anthony v The Commonwealth* (1973); see also *Ball-Guymer v Livantes* (1990).

In relation to Professor Butt's article, 'Near enough is not good enough or we know what you mean' (1997) 71 ALJ 816 at 821 where the learned author commented that 'While private agreements concerning the intended status of an item as chattel or fixture are not permitted to prejudice the interests of third parties, it is difficult to see why the courts should discount the parties' actual intentions where no third parties are involved', Conti J observed at

[12] that 'whilst I need not express a view in this case on what Professor Butt has said so comparatively recently, it may well be that there will be some scope in future litigious disputes which will require a closer examination of the learned author's argument'.

CASES ON FIXTURES

The best way to understand how the courts have gone about determining whether a chattel remains a chattel or has become a fixture or is a tenant's fixture requires an examination of both the facts and the decision of the court in a number of important cases.

National Australia Bank Ltd v Blacker (2000)

In *National Australia Bank Ltd v Blacker*, the Federal Court was concerned with whether or not irrigation equipment, including pumps, remained chattels, or whether they had become fixtures.

The bank's mortgage defined 'mortgaged property' as including:

> ... (b) all plant machinery and other improvements affixed to the land ... or subsequently affixed thereto or made; and (c) all rights and privileges of the Mortgagor in respect of those lands plant machinery and improvements or any part thereof.

The irrigation equipment was attached to the land as follows:

- Each pump is mounted on a steel skid and bolted to the skid's rails with the assistance of cross bars; there are hooks and towing points at each end of the skids so that each pump can be towed and/or pulled; each of the pumps are electrically driven using a large cord with a three-phase plug; the steel skids rest on the ground and are towed and/or pulled by a tractor.
- The said pumps are used to pump water from the Bega river and thereafter to irrigate pastures on the dairy farm, and to supply some stock with water; pumping of water from the river occurred by means of a steel pipe secured by bolts to each pump, each of which pipes ran down to the river from the pumps; one pipe was 10 inches in diameter and weighed about 500kg, and the other pipe five inches in diameter and was lighter; each pump had approximately eight bolts on its suction end and four bolts on its delivery line end; each of the pumps could be moved and disconnection of the bolts from each pump would take about twenty-four minutes.
- The delivery line from each of the pumps ran up to two houses on the property where there were two further pumps described as booster pumps; one of such latter pumps was bolted to the concrete floor and the other was placed on a similar style of flat skid structure as the pumps located near the river; each of these latter two pumps are directly wired into the electrical system and remain on the property; from these booster pumps, delivery lines travel out to various paddocks and ancillary to such

delivery lines are so-called lateral lines; all such delivery lines and lateral lines have remained on the property.

- On or from the lateral lines there is placed a special valve which allows soft polythene pipe to lock in, and from the soft polythene pipe such valve travelled out to sprinkler heads mounted on little skids; a distance of between 30–33 metres of soft polythene pipe separated each sprinkler head; the special valve attached to the lateral line allowed the soft polythene pipe to rotate without kinking, and so that it could be moved easily; there were approximately 6.5 kilometres of soft polythene pipe that remained on the property when the Blackers vacated the same.
- The special valves above referred to comprised 200 in number, and took the shape of an L. There were also 200 of such sprinkler heads. The two booster pumps also referred to above were not of course the same as the two pumps installed on the skids which are the subject of dispute.

On behalf of the bank, it was submitted that the irrigation system needed to be addressed as a whole, and that the entire irrigation system depended upon the placement and function of the two electric pumps. The bank further submitted that there was no evidence that such pumps were moved around different paddocks adjacent to the adjoining river, and that indeed there was no evidence of other sources of electrical supply in other paddocks. Thus, the bank contended, without the two electric pumps, the underground pipes and the remaining infrastructure of the entire irrigation system would have been without utility, and accordingly it should be inferred that the pumps were intended to remain in the same position permanently.

Conti J at [25] to [29] held that:

> In all the facts and circumstances I have reached the conclusion that the two electric pumps the subject of controversy bear the characterisation of chattels according to law, and that the Bank has not discharged their burden of proof ... I would not infer the existence of any objective intention to make any of the pumps part of the land. The pumps have rested on the land on their own weight for all operational purposes ... and were not so relatively heavy in weight as to have yielded any inference of intended permanency of physical location. It is true that the pumps were held in the same ownership as the land, but it is equally true that upon the sale of farming property, it is a well-known practice for the farmlands to be sold separately from plant equipment and stock.
>
> Whilst the two pumps, alike the irrigation equipment in *Litz v NAB Limited*, *supra* at 57,548, tended to be operated in a specific area, there are a number of distinguishing features about that case here relevant. First, the irrigation equipment in that case was affixed to the land. Secondly, the irrigators in *Litz* could only move at right angles, whereas the two pumps here involved can be towed in any direction that a tractor may pull the same. Thirdly, unlike the present case, structural adjustments were necessary to change the method of attachment of the wheels. Furthermore, in the present case no damage would be done to the pumps or the realty (see *Hellawell v Eastwood*, *supra* at 312 and *Eon Metals NL v Commissioner of State Taxation (WA)*, *supra* at 609) and it would cost far less to remove the pumps than what they are worth (*Metal Manufacturers Limited v FCT*, *supra* at 411). By way of contrast in *Litz*,

> Connolly J found that the irrigators would cost tens of thousands of dollars and that some damage would be done to the equipment.
>
> ... Having regard to the degree of annexation and the place where the two pumps are positioned (ie, by the river), the pumps were designed by virtue of its towing gear to be able to be towed around without any real difficulty. What if the river was flooded for a significant period of time? Surely the pumps could be moved to a more suitable location by the swollen river. The nature of a river and a riverbank can change by reason of flood, drought or erosion. I find that the design of the pumps and their placement were intended to be able to adapt to any such variations.
>
> ... The operational features of (the L shaped) valves were such as to deny to them the character of fixtures, notwithstanding that, when installed, they functioned as part of an underground irrigation system. They could be readily and conveniently removed and replaced by the same or similar items without causing damages or inconvenience; they were comparatively inexpensive as items of plant, and would have been readily replaceable if lost or damaged ... The sprinkler heads can similarly be removed without difficulty. They rested on their own weight and the Bank failed to meet the onus required to prove that they are not chattels.
>
> I therefore find that all of the above described plant and equipment in issue bore the character in law of chattels, and I would therefore dismiss the Bank's cause of action for return and delivery up of the same.

NH Dunn Pty Ltd v LM Ericsson Pty Ltd (1979)

In *NH Dunn Pty Ltd v LM Ericsson Pty Ltd*, the lessor leased the top floor of a commercial building to the lessee for five years with an option to renew for a further five year term. At about the same time, the lessee leased a PABX telephone exchange pursuant to a lease of this equipment from the owner of this equipment.

After four years, the lessee vacated the premises leaving the PABX on the premises. The owner of the PABX equipment asserted an entitlement to remove it from the premises. The lessor denied this right.

The New South Wales Court of Appeal held in favour of the owner of the PABX. The court held that the PABX was never a fixture or a tenant's fixture and that, accordingly, the owner of the equipment was entitled to remove it. The court's process of reasoning was as follows (*per* Glass JA):

> The circumstances relevant to the present decision are that the chattels comprised in the PABX were attached to the premises to steady them, that the enjoyment of them was thereby enhanced, that they could be detached with little difficulty and expense, that they were to remain there for an indefinite period, that the tenant had the right as against the owner of the realty to remove them at the termination of the Lease and that the owner of the chattels had the right as against the tenant to repossess them at the end of the hiring period.

Palumberi v Palumberi (1986)

In *Palumberi v Palumberi*, two brothers were previously tenants in common of a property. After falling out with each other, it was agreed that one would sell his half-share to the other. A fresh dispute broke out between them as to whether or not the sale of the half-share in the property included venetian blinds, curtains, a large built-in linen cabinet, a television antenna, carpets, an outside spotlight and timer, light fittings, a stove and a portable heater.

Immediately before the hearing, the purchaser conceded that the curtains, outside spotlight and timer, light fittings and portable heater were chattels. The court held, having regard to all the facts and circumstances, that the carpets and the stove were fixtures, but that everything in dispute was and remained a chattel.

Kearney J, in coming to this conclusion, reasoned as follows:

> The provision of cooking facilities by means of a stove would seem to me to form an essential and integral element to constitute a kitchen. Such provision is something necessary to the ordinary use of such premises, so that such provision should be properly characterised as being for the benefit of the premises …
>
> Notwithstanding the slight degree of annexation in the case both of the stove and of the carpet, these items are in the special circumstances of this case to be regarded as having been installed for the purpose of improvement and enjoyment of the premises themselves so as to constitute fixtures …
>
> As to the venetian blinds … I do not consider that it is proper to treat them as fixtures, having regard to the indirect and very slight form of annexation, and the basic purpose for which they were installed in the premises …
>
> As to the television antenna, I consider that the installation of this item was merely for the better enjoyment of the television set.

Holland v Hodgson (1872)

In *Holland v Hodgson*, the owner of a property on which was erected a worsted mill mortgaged the property including together with various engines and 'all other fixtures whatever which now or at any time hereafter … shall be set up and affixed …' to a mortgagee.

The owner of the property subsequently went bankrupt. A dispute arose between the owner's trustee in bankruptcy and the mortgagee in relation to 436 woollen looms installed in the mill.

The looms were driven by a steam engine. In order to keep them steady and in a proper position for working, the looms were fastened to the floor by nails driven through holes in the feet of the looms into wooden plugs in the stone floor. The looms could easily be removed by drawing the nails from the wooden plugs without serious injury to the floor.

The court held that the 436 looms had become fixtures and the mortgagee, as distinct from the trustee and bankruptcy, was entitled to them. The court held:

> Where an article is affixed by the owner ... though only fixed by bolts and screws, it is to be considered as part of the land, at all events where the object of setting up the articles is to enhance the value of the premises to which it is annexed for the purposes to which those premises are applied ...
>
> It is of great importance that the law as to what is the security of a mortgage should be settled ...

Hobson v Gorringe (1897)

In *Hobson v Gorringe*, Hobson hired a gas engine to King, the owner of a mill. The engine was brought onto the premises and bolted onto iron plates which were set into a concrete bed, the purpose being to prevent the engine from rocking and shifting when in use. King subsequently mortgaged the property to Gorringe. Thereafter, King defaulted on both the mortgage and on the hiring agreement. In this dispute between the mortgagee and the owner of the gas engine, the court found in favour of the mortgagee on the basis that the gas engine had become part of the property. The English Court of Appeal at 192 held:

> It seems to us that the true view of the hiring and purchase agreement, coupled with the annexation of the engine to the soil which took place in this case, is that the engine became a fixture – ie, part of the soil ... The right [of the owner of the equipment] to remove the chattel if not paid for cannot be enforced against the [mortgagee] who is not bound either at law or in equity by King's contact.

The court rejected an argument that the existence of a hiring agreement demonstrated an intention that the gas engine had not become a fixture. In relation to this submission, the English Court of Appeal observed:

> How a *de facto* fixture ... is not a fixture as regards a purchaser of land for value without notice by reason of some bargain between the affixers, we do not understand.

National Dairies WA Ltd v Commissioner of State Revenue (2001)

National Dairies WA Ltd v Commissioner of State Revenue involved the payment of stamp duty on a transfer of dairy processing equipment in a factory. Under the stamp duty legislation in force, where equipment was found to be a fixture, stamp duty was payable on the value of the equipment.

The equipment in question included tanks and vats, boilers, butter printers, hot water softeners, refrigeration plant, water-cooling towers and other kinds of machines which made bottles and containers.

Most items were not fixed other than by their own weight, although the water-cooling towers were bolted to water pipes and the pumps sat on frames outside the factory building. All the machinery was connected to the

power source of the factory and most of the equipment was connected to a piping system for refrigeration or water.

The Full Court of the Western Australian Supreme Court held that the pieces of equipment were fixtures. Emphasis was placed on the following:

- the individual pieces of equipment were interconnected, making them an integrated whole;
- although easily able to be removed without material damage, each piece of equipment was installed for an indefinite period;
- there was no evidence that there had been any intention to remove and relocate any item of equipment when that equipment was originally installed.

Standard Portland Cement v Good (1982)

In *Standard Portland Cement v Good*, a vendor sold rural property to a purchaser on which was housed a substantial cement mill, weighing 100 tons when empty. The mill rested on its own weight.

The contract for sale of land entitled the vendor to enter upon the property for the purpose of removing the cement mill within 12 months. The mill was not removed during the 12 month period. Thereafter, the vendor asserted an entitlement to remove the cement mill, but the purchaser contended that title to the mill had passed to them.

The Privy Council held that:

- the special condition in the contract enabling the vendor to remove the cement mill demonstrated an intention on the part of the parties that the mill was a chattel owned by the vendor;
- the delay on the part of the vendor in removing the cement mill may have exposed the vendor to damages;
- any delay did not take away the vendor's right to take possession of the cement mill.

Reid v Smith (1905)

In *Reid v Smith*, a vendor sold a property to a purchaser on which was erected a house, which rested on its own weight on piers that were fixed into the ground. After the parties entered into the contract to sell the land, the vendor asserted an entitlement to remove the house from the land. The High Court held in favour of the purchaser, even though the house rested on its own weight and was not annexed to the land. Griffiths CJ stated the position at 668 as follows:

> It appears to me that the proper inference to be drawn from the facts is that these houses became part of the freehold ... I think it ought to be inferred ... that any dwelling-house put on the land should be considered annexed to the freehold.

D'Eyncourt v Gregory (1866)

In *D'Eyncourt v Gregory*, the dispute concerned whether or not 'ornamental stones' in landscaped gardens together with statues, figures, vases and stone garden seats in the grounds of a property were fixtures, even though they rested on their own weight.

The court held, on the facts of the case, that the articles were fixtures. Lord Romilly recognised that because these articles were part of an architectural design, they were regarded as fixtures even though they rested on their own weight.

His Lordship stated the position as follows at 396:

> In all these cases the question is not whether the thing itself is easily removable but whether it is essentially a part of the building itself from which it is proposed to remove it ... there may be mansions in England on which statues may be placed in order to complete the architectural design as distinguished from mere ornament; and when they are so placed ... I should consider that they could not properly be removed although they were fixed without cement or without brackets and stand by their own weight alone ...
>
> Evidence must in every case determine whether the article falls within or without the line. In the present case I have thought the articles which I have mentioned are not removable relying upon the evidence given and drawing laid before me.

Leigh v Taylor (1902)

In *Leigh v Taylor*, Madame de Falbe was a life tenant. She hung in the drawing room of her mansion-house valuable tapestries, which belonged to her. Strips of wood were placed over the wallpaper on the walls and were fastened by nails to the walls. Canvas was stretched over the strips of wood and nailed to them. The tapestries were stretched over the canvas and fastened by tacks to the canvas and the pieces of wood.

The House of Lords held that these tapestries were chattels, which were affixed to the walls for their own better enjoyment as tapestries.

Lord Halsbury, with whom the other members of the House of Lords agreed, observed:

> Where it is something which, although it may be attached ... to the walls of the house, yet, having regard to the nature of the thing itself, and the purpose of its being placed there, is not intended to form part of the realty, but is only a mode of enjoyment of the thing, while the person is temporarily there, and is there for the purpose of his or her enjoyment then it is removable and goes to the executor (of the life tenant) ... [at 158]
>
> The broad principle is that, unless it has become part of the house in any intelligible sense, it is not a thing, which passes to the air. I am of opinion that this tapestry has not become part of the house, and was never intended in any way to become part of the house. [at 161]

Spyer v Phillipson (1931)

In *Spyer v Phillipson*, the lessee of an apartment for 21 years, without the consent of the lessor, installed certain valuable antique wood panelling. It was affixed to the walls by inserting wooden plugs into the walls and then attaching the panelling to the wooden plugs by screws.

Expert evidence was to the effect that this was the ordinary way of affixing panelling to walls which were already built. Luxmoore J and, on appeal, the English Court of Appeal were required to determine whether the panelling was a chattel or a fixture or a tenant's fixture. Having regard to all the facts and circumstances, the court determined that the panelling was a tenant's fixture.

Lord Luxmoore at 195 held:

> I find from the evidence that the panelling and mantel pieces are valuable chattels. They were bought by Mr Phillipson for the purpose of decorating the flat in which he lived, and which he had taken for a term of 21 years. At the time he put in the oak panelling, there were only some 13 years of the term to run ... It would be a little surprising if this gentleman was to spend £5,000 in purchasing panelling and have it put in on the footing that he would only enjoy it for ... 13 years, and at the end of that time he would lose all interest in it, and it would belong to a complete stranger, ie, the landlord of the premises.

Next, His Lordship considered the method of attachment and had regard to the fact that the cost of making good the property was minimal when compared with the value of the panelling, which the tenant wished to remove. Luxmoore J at 198 concluded:

> I am satisfied that, asking myself the question, what was the object and purpose of the annexation of this panelling ... the answer must be the enjoyment of the chattel by the [tenant] ... they are tenant's fixtures and being tenant's fixtures they are removable by the tenant during the currency of his tenancy.

The English Court of Appeal affirmed the decision of Luxmoore J.

Webb v Frank Bevis (1940)

In *Webb v Frank Bevis*, certain property was leased. The tenant was a tenant at will, who carried on a business of manufacturing breeze and cement products. The tenant erected a large shed of approximately 40 x 15 metres to house their machinery and to warehouse their plant and materials.

The shed was uniquely constructed. It was built of corrugated iron and was laid upon a concrete floor. The roof rested on solid timber posts, which rested on the concrete floor. The timber posts, however, were not embedded in the concrete. Each post was tied to the concrete floor by wrought iron straps on the opposite sides. The posts were held in position by a bolt, which ran horizontally through each post. A nut screwed on one end of the bolt fastened the straps, which were fixed in and protruded from the concrete floor, tightly.

The English Court of Appeal held that the shed was a chattel because it could be removed without losing its identity in circumstances where it had been erected by a tenant at will.

In relation to the concrete slab, it was held that it had become a fixture. Lord Scott at 250 observed:

> It was completely and permanently attached to the ground, and, secondly, it could not be detached except by being broken up and ceasing to exist either as a concrete floor or as the cement and rubble of which it had been made.

His Lordship proceeded to consider and reject the argument that because the shed was attached to a concrete floor, which was a fixture, it followed that the shed had become a fixture.

In relation to this argument, Lord Scott at 251 held:

> The attachment [was] obvious – namely, to erect a mere tenant's fixture … The photographs proved below, and shown to us, demonstrate the simplicity of this method of detachment, once the upper parts and the walls have been taken down … The superstructure was 'to a very large extent' a 'temporary' building … The very uncertainty of the company's tenure of the site ultimately of necessity determined 'the purpose and object' of the erection of the shed.

THE DOCTRINE OF WASTE

Waste is any alteration or damage to land by an occupier of the land. Issues of waste frequently arise in the landlord/tenant and the life tenant/remainderman relationships. Whether an occupier is liable for waste or can be restrained from committing the waste depends on the kind of waste involved and also on the instrument creating the relationship between the occupier of the land and the person whose interest in the land is being infringed.

Permissive waste

Permissive waste is where the occupier allows the land to fall into disrepair. A person is not usually liable for permissive waste: *Powys v Blagrave* (1854). Liability to repair can be imposed by the instrument creating the relationship between the occupier of the land and the person whose interest in the land is being infringed: see ss 80(1) and 84(1)(b) of the Conveyancing Act 1919 (NSW).

Voluntary waste

Voluntary waste is a positive act, where the occupier does something intentionally to damage the land. For instance, a tenant is liable for voluntary waste unless excused by the lease, under s 32 of the Imperial Acts Application Act 1969 (NSW).

Where the occupier is a life tenant, even if the instrument creating the life tenancy provides that there is no liability for waste, the life tenant is still liable for waste that amounts to equitable waste under s 9 of the Conveyancing Act 1919 (NSW).

Equitable waste

Equitable waste is waste by an occupier, which is so serious that it will be restrained in equity, because it is an act of 'wanton destruction' and a Court of Equity will not allow a party to a contract to act against conscience by engaging in acts of 'wanton destruction': *Vane v Lord Barnard* (1716).

It should, however, be noted that a life tenant can be excused from liability for even equitable waste by the instrument creating the relationship, under s 9 of the Conveyancing Act 1919 (NSW).

Ameliorating waste

Ameliorating waste is waste that improves the land. Although the person whose interest in the land is to be infringed has not suffered loss, a Court of Equity will nevertheless restrain the act of waste. The Court, however, will only intervene where the ameliorating waste is of a 'substantially injurious character'.

3 TORRENS TITLE: INDEFEASIBILITY OF TITLE AND EXCEPTIONS

You should be familiar with the following areas:

- the essential features of Torrens Title
- indefeasibility of Title
- exceptions to indefeasibility and
- the Torrens Assurance Fund

In New South Wales there are two systems of land ownership. Torrens Title now governs about 99% of the land in the State. The balance is governed by the principles of what is known as Old System Title, which is dealt with in Chapter 5.

THE ESSENTIAL FEATURES OF TORRENS TITLE

The nature of Torrens Title

The fundamental concept of Torrens Title is that a person interested in dealing with a specific property may consult the Torrens Title Register and be satisfied without further inquiry as to who is the owner of the property and as to who has interests in the property. The Privy Council in *Gibbs v Messer* (1891), at 254, has stated the main object of the Torrens System in the following terms:

> The object is to save persons dealing with registered proprietors from the trouble and expense of going behind the register, in order to investigate the history of their author's title, and to satisfy themselves of its validity. That end is accomplished by providing that everyone who purchases, in *bona fide* and for value, from a registered proprietor, and enters his deed of transfer or mortgage on the register, shall thereby acquire an indefeasible right, notwithstanding the infirmity of his author's title.

The Real Property Act 1862 (NSW) introduced Torrens Title into New South Wales, taking effect from 1 January 1863. In 1900, that Act was replaced by the Real Property Act 1900 (NSW) which was assented to and took effect from 22 September 1900.

Part 6 of the Real Property Act provides that the Registrar-General shall cause a Register to be maintained for the purposes of the Act, under s 31B. The Registrar-General is obliged to create a separate folio or a certificate of title for each parcel of land that is governed by the Real Property Act.

Each separate folio has provision for a First Schedule and for a Second Schedule. In the First Schedule is entered the name of the current registered proprietor; in other words, the First Schedule is the place where the vendor's name was previously recorded and where the purchaser's name, upon registration, is recorded. All other registered interests with respect to a particular property will be recorded in the Second Schedule. Interests, which are capable of registration in the Second Schedule, include mortgages, leases, restrictive covenants and easements.

In order to register a dealing, it is necessary for the dealing to be in registrable form (which is defined by s 39 of the Real Property Act) and accompanied by the certificate of title or a direction to the Registrar-General to use the relevant Certificate Title, under s 36(6).

Sir Robert Torrens

In this context, Robert (later known as Sir Robert) Richard Torrens devised the 'Torrens Title' system of conveyancing, which bears his name. Robert Torrens emigrated to South Australia in 1840 to take up the post of Collector of Customs.

Professor Butt at [2002] to [2003] has observed:

> Torrens' writings disclose a strong distaste for the complexity of the inherited land law and for the self-interest of lawyers, who (in his view) devoted their energies to maintaining its mystique in order to preserve their own incomes and influence. See Torrens, *Registration of Title*, pp 5–6, 7, 30, 38, 42; Fox, 'The story behind the Torrens System' (1950) 23 ALJ 489. He had become familiar with the system for registering ownership of and dealings with ships under merchant shipping legislation ...
>
> In his speeches introducing the Bill for his registration system into the South Australian Parliament and in his later writings, Torrens identified what he saw as the main evils of the existing system and the ways in which his new system would overcome them. His starting point was that the law of real property 'could not be patched or mended: the very foundation was rotten therefore the entire fabric must be razed to the ground and a new super-structure substituted. Like a blundered calculation on a slate, it was in too much confusion for correction, so he would take a sponge and rub the whole out' (*Torrens' Printed Speeches*, p 8, cited in Robinson, *Transfer of Land*, p 2).

At the root of the problem lay what Torrens called 'the dependant nature of titles': Torrens' *Registration of Title*, p 8. This necessitated a retrospective investigation of title each time land was conveyed or otherwise dealt with. It was the chief source of the cost and delay inherent in the conveyancing process. Torrens proposed a system of 'independent' titles: in essence, upon each conveyance the land would be surrendered to the Crown, which would then re-grant it to the purchaser: *ibid*, pp 9, 34; First Reading speech, 4 June 1857 (*South Australian Parliamentary Debates*, p 204); Second Reading speech, 11 November 1857 (*Torrens' Printed Speeches*, pp 13–14, cited in Robinson, *Transfer of Land*, p 5). This would abolish the need for retrospective investigation of title and would overturn the concept that a person's title could be no better than his or her predecessor's title: Torrens' *Registration of Title*, p 8. To adopt a term that Torrens used constantly in his writings, each purchaser's title would be 'indefeasible': for example, *ibid*, pp 32, 34, 36, 39, 43; First Reading speech, 4 June 1857 (*South Australian Parliamentary Debates*); Second Reading speech, 11 November 1857.

Torrens proposed a single document evidencing title to each parcel of land. On this document – the 'certificate of title' – would be recorded all transactions affecting the land: Torrens, *Registration of Title*, pp 19, 34. It would replace the numerous documents which, under the existing system, a purchaser had to investigate to ascertain whether the title was sound. This document would be held by the Registrar-General and would be available for public inspection, with a copy given to the owner of the land. In addition, the existing conveyancing forms, lawyer-drawn and prolix, would be replaced by standard forms issued by the Registrar-General, in simple and straightforward language: Torrens, *Registration of Title*, p 9. This Torrens saw as the 'best guarantee that the monopoly of business secured to the legal profession, whenever agency is employed in conducting transfers and other dealings, may not be availed of for the exaction of excessive charges, or the revival of circuitous and perplexing methods'. The new system, with its single 'certificate of title' and short, uncomplicated forms, would contrast sharply with the bulky documents, arcane learning and time-honoured technicalities enshrined in the existing system.

Introduction of Torrens Title

Torrens' reform proposal became the Real Property Act 1858 (SA), which came into operation in South Australia on 1 July 1858. All land in South Australia granted by the Crown after 1 July 1858 automatically came under Torrens Title, and land granted before that date could be brought under Torrens Title. Torrens himself was appointed the first Registrar-General.

The Torrens system of land registration soon spread to all the Australian colonies. Thereafter, it has spread to a number of overseas countries as well, including New Zealand, Malaysia, Singapore, Israel, Belize, and several countries in the Caribbean and Central America, together with some of the Canadian provinces and some States in the USA.

Exchange of contracts

When dealing with land under the provisions of the Real Property Act, there are a number of important points of time which must be highlighted.

It is usual conveyancing practice for the vendor to prepare a contract for sale of land together with a counterpart contract. The original is executed by the vendor and handed to the purchaser at exchange. The counterpart is executed by the purchaser and handed to the vendor at exchange. It is normal conveyancing practice for a purchaser to pay a deposit of, say, 10% at the time of exchange. To be precise, however, exchange takes place when the original contract for sale of land and its counterpart are exchanged, as distinct from the payment of any deposit.

Upon exchange of contracts, a purchaser obtains an unregistrable equitable interest in the property. This means that the purchaser is entitled to go to the Supreme Court of NSW, Equity Division, to seek an order for the equitable remedy of specific performance of the contract. It is this entitlement to obtain an order for specific performance that gives the purchaser an unregistrable equitable interest in the property from exchange of contracts. The vendor is also entitled to obtain an order for specific performance against the purchaser. Put simply, both parties are bound by their contract. Provided either is ready, willing and able to complete the contract, either is entitled to seek an order for specific performance from the Supreme Court compelling the other to complete the contract.

Completion (or settlement) of the contract

Sometimes the expression 'settlement' is used as an alternative to the expression 'completion'. Completion or settlement is the time when the vendor delivers to the purchaser an executed transfer of the property being sold. It is usual conveyancing practice for the purchaser to simultaneously hand over to the vendor a bank cheque or cheques for the balance of the proceeds of sale owed by the purchaser to the vendor. It is also normal conveyancing practice for the vendor to hand to the purchaser not only an executed transfer but also the certificate of title. The delivery of these documents will enable the purchaser ultimately to become registered.

Lodgement in registrable form

Having completed the contract for sale of land, a purchaser should immediately lodge the transfer, accompanied by the certificate of title, with the Registrar-General. A dealing, when lodged, must be in registrable form. For instance, the name of the transferor in a transfer must be identical to the name of the registered proprietor in the First Schedule. Similarly, the name of the mortgagor in a mortgage, or the name of the lessor in a lease, must coincide with the name of the registered proprietor in the First Schedule.

For instance, the registered proprietor might be 'Mary Smith'. If a transfer is lodged for registration where the vendor or transferor is described as 'Mary Ann Smith' or 'Maria Smith' or 'Mary Brown' (because Mary Smith has married a Mr Brown and has changed her name accordingly), then the Registrar-General will decline to register such a transfer until satisfied that 'Mary Smith', 'Mary Ann Smith', 'Maria Smith' or 'Mary Brown' are one and the same person.

Another situation that may lead to a dealing not being in registrable form is where, for example, a transfer is lodged for registration, which is not expressed to be subject to, say, a registered lease or, say, a registered easement, in circumstances where such a lease or such an easement is registered in the Second Schedule of the certificate of title. Until the transfer is remedied by expressly stating that it is subject to the said lease or subject to the said easement, the Registrar-General will decline to register the transfer.

A dealing must be expressed to be subject to all dealings which remain registered in the Second Schedule after the dealing is registered. One cannot register a transfer which is not subject to a registered easement or a registered lease if it is envisaged that upon registration of the transfer, any registered easement or registered lease is to remain on the Register. On the other hand, one can only register a transfer which is not subject to a registered easement or subject to a registered lease if it is envisaged that upon registration of the transfer, any registered easement or registered lease is to be discharged.

Registration of the transfer

Once the dealing has been lodged, the transfer will be registered. Now that all Certificates of Title in New South Wales are recorded electronically, registration should occur within 24 hours of lodgement, assuming the dealing is in registrable form. This is to be contrasted with the position when registration was carried out manually, when there was several months' delay between lodgement and registration. In *IAC (Finance) Pty Ltd v Courtenay* (1963) at 570, Kitto J of the High Court, in speaking of a delay of seven months, observed that 'the profession had apparently become used to long delays in that office', referring to the practice of the Land Titles Office of New South Wales as it was then known.

INDEFEASIBILITY OF TITLE

Title by registration

The Register is basic to the operation of the Real Property Act.

Torrens Title has been described as a system of 'title by registration' by Sir Garfield Barwick in the High Court Case of *Breskvar v Wall* (1971) at 385. In so observing, His Honour drew a distinction between Torrens Title and Old System Title, describing the latter as a system where, *inter alia*, it was possible to register title. Barwick CJ at 385–86 stated the law as follows:

> The Torrens System ... is not a system of registration of title but a system of title by registration. That which the certificate of title describes is not the title which the registered proprietor formerly had, or which but for registration would have had. The title it certifies is not historical or derivative. It is the title which registration itself has vested in the proprietor. Consequently, registration, which results from a void instrument, is effective according to the terms of the registration. It matters not what the cause or reason for which the instrument is void.

Indefeasibility of title

There are three sections of the Real Property Act that are fundamental to the creation of Torrens Title in New South Wales: ss 41, 42 and 43. They provide as follows:

> (41) No dealing, until registered in the manner provided by this Act, shall be effectual to pass any estate or interest in any land under the provisions of this Act, or to render such land liable as security for the payment of money, but upon the registration of any dealing in the manner provided by this Act, the estate or interest specified in such dealing shall pass ...
>
> (42) Notwithstanding the existence in any other person of any estate or interest which but for this Act might be held to be paramount or to have priority, the registered proprietor for the time being of any estate or interest in land recorded in a folio of the Register shall, except in case of fraud, hold the same, subject to such other estates and interests and such entries, if any, as are recorded in that folio, but absolutely free from all other estates and interests that are not so recorded except ...
>
> (43) Except in the case of fraud, no person contracting or dealing with or taking or proposing to take a transfer from the registered proprietor of any registered estate or interest shall be required or in any manner concerned to inquire or ascertain the circumstances in or the consideration for which such registered owner or any previous registered owner of the estate or interest in question is or was registered ...

Section 41 provides that a person obtains title by registration. As Isaacs and Rich JJ in *The Commonwealth v NSW* (1980) at 342 observed:

> It is not the parties who effectively transfer the land but it is the State that does so, and in certain cases more fully than the party could. In short, a transferee seeking registration of a transfer seeks State affirmance of his position.

Section 42 states that the title received at registration is indefeasible.

Mayer v Coe (1968)

In *Mayer v Coe*, Mrs Mayer had left her certificate of title with her solicitor for safekeeping. Unbeknown to Mrs Mayer, her solicitor was dishonest. He forged Mrs Mayer's signature on a mortgage in favour of the equally innocent Mr Coe, who, believing that he was lending money to Mrs Mayer by way of first mortgage security, advanced the money to the solicitor of Mrs Mayer. The solicitor misappropriated the money and used it for his own purposes. After the mortgage in favour of Mr Coe was registered, Mrs Mayer became aware of what had happened.

Justice Street, as he then was, concluded that because Mr Coe had obtained registration, and because Mr Coe was not a party to any fraudulent activity by Mrs Mayer's solicitor, Mr Coe was entitled to 'indefeasibility' immediately upon registration, even though he had obtained registration by lodging a forged mortgage.

His Honour observed that had Mrs Mayer intervened earlier to prevent Mr Coe obtaining registration, then Mr Coe, prior to registration, would have had no interest in the land at all. Once Mr Coe had obtained registration, however, his interest in Mrs Mayer's property had acquired the quality of 'indefeasibility'.

This outcome is to be contrasted with the outcome under Old System Title, where a forgery remains a forgery. It remains void and is of no effect: *Re Cooper* (1882).

Under Torrens Title, upon registration, a person who is neither fraudulent nor the beneficiary of a fraud carried out on their behalf is entitled to rely upon s 42 of the Real Property Act 1900 (NSW) and assert indefeasibility of title, even though the dealing by which they became registered was a forgery or otherwise procured by fraud.

Section 43 of the Real Property Act

Section 43 of the Real Property Act provides that in the absence of fraud, a person who is taking an interest in a particular property under the provisions of the Real Property Act 1900 (NSW) is to assume the correctness of the Register when dealing with the registered proprietor of any estate or interest in the property. Such a person does not need to be concerned as to whether or not the person who is registered was entitled so to be.

This outcome is to be contrasted with the outcome under Old System Title. There, a person taking any interest in a property always has the concern that the person purportedly giving them title has no title to the property. The person taking an interest can be in no better position than the person from whom the interest was taken. This is well illustrated by the experience of persons who purchase motor vehicles. Frequently, having paid a significant amount of money for a motor vehicle, a purchaser discovers

that the person to whom they paid the money was not the true owner of the motor vehicle. This outcome in relation to personal property such as a motor vehicle is similar to the outcome of a real property transaction under Old System Title. It also applies to Torrens Title land, in the absence of registration.

Is indefeasibility deferred or immediate?

For many years, a debate existed as to whether indefeasibility as provided by s 42 of the Real Property Act meant 'immediate indefeasibility' or 'deferred indefeasibility'. The case of *Mayer v Coe* (1968), discussed above, illustrates how 'immediate indefeasibility' operates. That is to say, the instant Mr Coe was registered, he immediately obtained indefeasibility in relation to his registered mortgage, even though it was a forgery.

The concept of 'deferred indefeasibility', by way of contrast, means that a person who registers a void dealing does not personally acquire indefeasibility in relation to the dealing registered. Rather, the quality of indefeasibility is deferred until the person who has registered the void dealing enters into a further transaction with another person who obtains registration. Upon registration of that further interest, 'deferred indefeasibility' operates to give indefeasibility to the holder of the further interest. The concept of 'deferred indefeasibility' is based on the notion that the person who registers a void dealing cannot personally obtain indefeasibility. It is deferred.

Deferred indefeasibility was favoured by the Privy Council in *Gibbs v Messer* (1891) at 259. Their Lordships stated the law as follows:

> Although a forged transfer or mortgage which is void at common law will, when duly entered on the register, become the root of a valid title, in a *bona fide* purchaser by force of the statute, there is no enactment which makes indefeasible the registered right of the transferee or mortgagee under a null deed.

This 'deferred indefeasibility' approach was approved by two of the four High Court Judges in *Clements v Ellis* (1934). It was also followed by the Supreme Court of New South Wales in *Caldwell v Rural Bank of NSW* (1951) and the Victorian Supreme Court Case of *Davies v Ryan* (1951).

Immediate indefeasibility preferred

In 1967, the Privy Council, in an appeal from New Zealand, expressed a preference for 'immediate indefeasibility' in *Frazer v Walker* (1967). Thereafter, there have been a series of New South Wales Supreme Court authorities expressing preference for the 'immediate indefeasibility' approach: *Mayer v Coe* (1968); *Ratcliffe v Watters* (1969); *Schultz v Corwill Properties Pty Ltd* (1969); *Logue v Shoalhaven Shore Council* (1979); and *Story v Advance Bank Australia Ltd* (1993).

The High Court has also given *obiter dictum* approval to the 'immediate indefeasibility' approach in *Breskvar v Wall* (1971). In *Leros Pty Ltd v Terara Pty Ltd* (1992), at 418, Justices Mason, Dawson and McHugh appeared to assume the correctness of the 'immediate indefeasibility' interpretation. It would appear to follow that, unless the High Court is prepared to revisit the matter, indefeasibility as used in s 42 of the Real Property Act means immediate indefeasibility.

The ambit of indefeasibility

The concept of indefeasibility is far-reaching. Case law such as *Bursill Enterprises Pty Ltd v Berger Bros Trading Co* (1971); *Fels v Knowles* (1906); *Koteff v Bogdanovic* (1988); and *State Bank of New South Wales v Berowra Waters Holdings* (1986) demonstrate this. Each of these cases would have been decided differently under Old System Title or under Torrens Title in the absence of registration.

Bursill Enterprises Pty Ltd v Berger Bros Trading Co (1971)

In *Bursill Enterprises Pty Ltd v Berger Bros Trading Co*, the plaintiff's land enjoyed the benefit of a right of way over the defendant's adjoining land. A two-storey building on the plaintiff's land extended above the right of way over the defendant's land. A registered easement in favour of the plaintiff's land had been recorded over the defendant's land. In addition to making provision for the right of way, this easement gave to the predecessor in title to the plaintiff's land the right to possess all buildings erected over the right of way, together with the right to pull down such buildings and to rebuild others at a height of not less than 3.6 metres above ground level.

The High Court held that the plaintiff not only enjoyed indefeasibility in relation to the right of way but, in addition, had an indefeasible right to the airspace above the right of way occupied by the building built over the right of way.

Fels v Knowles (1906)

In *Fels v Knowles*, the registered proprietors of certain property in New Zealand were trustees. The trustees had leased the property for 14 years. The lease, which was registered, contained an option to purchase in favour of the lessee, even though the trustees had no power to sell the property. When the lessee exercised the option to purchase, the trustees refused to transfer the property, on the basis that it had no power to grant the option to purchase to the lessee.

The New Zealand court rejected this argument because, by reason of registration of the lease containing the option to purchase, the lessee had an indefeasible right to enforce the exercise of the option notwithstanding the fact that the option had been given in breach of trust.

Koteff v Bogdanovic (1988)

In *Koteff v Bogdanovic*, Mrs Bogdanovic claimed an equitable interest in a property that had been owned by Mr Koteff prior to his death. She alleged that Mr Koteff had promised, in return for her living with him and looking after him, that he would grant her a life estate over the property in her favour. In breach of that promise, which the court held was enforceable against the estate of Mr Koteff, Mr Koteff had left all his property to his son. Following the death of Mr Koteff, a Transmission Application was registered in favour of the son who became the registered proprietor.

In an action brought by Mrs Bogdanovic against the son, the court held that the indefeasibility provisions of s 42 of the Real Property Act enabled the son to prevail, even though he had received the property by way of gift. Accordingly, the principle of indefeasibility of title extends to a volunteer.

State Bank of New South Wales v Berowra Waters Holdings (1986)

In *State Bank of New South Wales v Berowra Waters Holdings*, an officer of the bank, which was the registered mortgagee of land owned by Berowra Waters Holdings, erroneously gave a payout figure for the discharge of the mortgage, which was less than the amount owed. The lesser figure was paid and a discharge of mortgage was executed by the State Bank and delivered to Berowra Waters Holdings, who registered the discharge. Having realised its error, the State Bank approached the court for an order that the discharge of mortgage be cancelled.

Justice Needham held in favour of Berowra Waters Holdings. His Honour took the view that registration of a discharge of mortgage, where the registration resulted from a mistake or inadvertence on the part of the registered mortgagee, had the effect of destroying the registered mortgage. It followed that the bank no longer had any security over the property.

EXCEPTIONS TO INDEFEASIBILITY

Unregistered interests in Torrens Title land

Although Torrens Title is a system of title by registration, there is a significant place within Torrens Title for unregistered interests. Sometimes, interests are unregistered because they are incapable of registration.

Examples of unregistrable interests include the following:

- *The interest of a purchaser arising from a contract for sale of land*: it is not possible to register a Contract for Sale of Land. Only the transfer, which is obtained at settlement, can be registered. The purchaser on exchange of contracts obtains an unregistrable equitable interest in the property purchased.

- *Mortgages created by the deposit of title deeds*: in this situation, no mortgage in writing exists. Nevertheless, a Court of Equity will hold that where a financier lends money in consideration for the title deeds of a property being deposited with the lender by the borrower, the lender enjoys the benefit of an equitable mortgage over the property with respect to which the title deeds have been deposited: *Cooney v Burns* (1922).
- *An agreement to grant a mortgage*: this is another example of an unregistrable equitable mortgage. It is enforceable by a Court of Equity in the same way as a contract for the sale of land is enforceable. An agreement to grant a mortgage includes any mortgage where the approved form has not been used: *Australian and New Zealand Banking Group Ltd v Widin* (1990).
- *Oral leases for three years or less*: under s 23B of the Conveyancing Act 1919, normally no assurance of land shall be valid to pass an interest at law unless made by deed. Section 23D of the Act, however, provides that a lease can be enforceable even if it has been made orally, provided that the following three conditions have been satisfied:
  (i) a term not exceeding three years;
  (ii) for the best rent reasonably obtainable; and
  (iii) with an immediate right to possession.
- *Written leases where an approved form is not used*: even if there is a written lease agreement, it does not automatically follow that the lease is registrable. A lease is only registrable if the form approved by the Registrar-General for registration is used. Many leases are more informal in nature. They include residential leases, which are created by using a standard form prescribed by the Residential Tenancies Act 1987 (NSW). Such leases cannot be registered under the Real Property Act.
- *Beneficiaries of interests held on trust by a trustee may or may not be in writing*: s 23C of the Conveyancing Act 1919 provides that it is not necessary for there to be any writing in relation to a resulting, implied or constructive trust. Even if there is an express trust created by deed, s 82 of the Real Property Act provides that it is not possible to register a trust deed under the provisions of that Act.

Other unregistered interests may be capable of registration, but the person who has the benefit of such an interest may choose not to register that interest, even though that person has a dealing in registrable form.

Priorities between competing interests

Priority disputes arise where two or more persons have competing interests in the same property. The parties in dispute will either have a registered interest or an unregistered interest. In considering priorities between such persons, it is necessary to contrast the position between the following four scenarios:

- earlier registered interest versus later registered interest;
- earlier registered interest versus later unregistered interest;
- earlier unregistered interest versus later registered interest; and
- earlier unregistered interest versus later unregistered interest.

Priorities between two registered interests

Where there is a question of priorities between two registered interests, it is necessary to determine whether both interests are registered in the Second Schedule of the certificate of title or whether one is registered in the First and the other in the Second Schedule. In the situation where both are registered in the Second Schedule, s 36(9) of the Real Property Act provides that priority goes to the interest that is registered first, and not according to the dates of the dealings.

On the other hand, where the question of priorities is between an interest registered in the First Schedule and one registered in the Second Schedule, then the interest registered in the Second Schedule will prevail over that in the First.

The only exception to the above, in relation to the order of priorities between two registered interests, is where the holder of a registered interest that would normally be subject to the holder of the other registered interest can point to an exception to indefeasibility. This is discussed below under the heading 'The various exceptions to indefeasibility'.

Priorities between a registered and an unregistered interest

The combined effect of ss 41 and 42 of the Real Property Act gives priority to the holder of a registered interest over the holder of an unregistered interest unless the latter can rely upon an exception to indefeasibility.

The various exceptions to indefeasibility

There are a series of exceptions to indefeasibility. Many of these are to be found in ss 42 and 43 of the Real Property Act. There are, however, other exceptions to indefeasibility besides those listed in ss 42 and 43. It is proposed to discuss the exceptions to indefeasibility in the following order:

- fraud;
- personal equities;
- prior folio;
- omitted or misdescribed easement;
- omitted or misdescribed profit *à prendre*;
- wrong description of boundaries;
- short term tenancy;

- other legislation inconsistent with the Real Property Act;
- possessory title.

Fraud

Each of ss 42 and 43 of the Real Property Act recognise fraud as an exception to indefeasibility. The cases state that notice of itself does not equal fraud: *Wicks v Bennett* (1921); *Leros Pty Ltd v Terara Pty Ltd* (1992). It is necessary, in order to establish fraud, to prove that there has been 'some personal dishonesty' or 'some moral turpitude': *Stuart v Kingston* (1929).

Breskvar v Wall (1971)

It is possible for the fraud of an agent to be imputed to a principal, as seen in the case of *Breskvar v Wall*. There, a grandfather dishonestly persuaded the Breskvars to execute a transfer, in circumstances where the Breskvars were not selling the property but were mortgaging it. The grandfather inserted the name of his grandson, Wall, who became registered.

The High Court took the view that the fraud of the grandfather was imputed to the grandson and as a result as between the Breskvars and Wall, the Breskvars were entitled to be reinstated to the register.

Unfortunately for the Breskvars, Wall had subsequently created an interest in favour of Alban Pty Ltd who had no notice of the existence of the Breskvars' right to have the transfer in favour of Wall reversed.

In these circumstances, the decision of the High Court was that the Breskvars by reason of their conduct in signing the transfer, when they were not selling the property, should be postponed as against the more innocent Alban Pty Ltd, in circumstances where the latter had no notice of the dishonesty carried out by the grandfather on behalf of his grandson.

Schultz v Corwill Properties Pty Ltd (1969)

Breskvar v Wall needs to be contrasted with the *Schultz v Corwill Properties Pty Ltd*. In this case, Mrs Schultz had money to invest by way of first mortgage security. Her solicitor, a Mr Galea, recommended that she advance the money to Corwill Properties Pty Ltd. Mr Galea was also the solicitor for that company. He misappropriated the money and caused the company seal to be affixed without authority. In the meantime, Mrs Schultz had passed away and her husband became executor of her estate. Subsequently, he was persuaded to execute a discharge of mortgage on the ground that the property was about to be sold by Corwill Properties. The dishonest Mr Galea caused the discharge to be registered, without the loan being repaid.

When the matter came before the Supreme Court, it was argued on behalf of Mr Schultz that Mr Galea was the agent for Corwill Properties when the discharge was obtained and registered, and accordingly the fraud by Mr Galea should be imputed to Corwill Properties.

Justice Street rejected the submission and held that Mr Galea was acting on a 'frolic' of his own. Accordingly, there was no fraud by Corwill Properties. The state of the register determined the outcome of the priorities between the parties.

Loke Yew v Port Swettenham Rubber Co (1913)

An example of what is fraud is found in the Privy Council decision of *Loke Yew v Port Swettenham Rubber Co.* This case, which went on appeal to the Privy Council, arose in Selangor, which is part of modern-day Malaysia. Selangor, like the various States of Australia, had introduced a Torrens Title of land ownership.

Eusope owned significant holdings of land, part of which he had previously sold to Loke Yew. Loke Yew had never bothered to register the transfer in his favour. Subsequently, Eusope negotiated with the managing director of the Port Swettenham Rubber Co to sell the balance of his land. Eusope explained that part of the land had previously been sold to Loke Yew. The managing director persuaded Eusope to execute a Transfer of all the land (including the block already sold to Loke Yew) in favour of the Port Swettenham Rubber Co. Eusope was assured that the company would recognise Loke Yew's interest. This assurance was false.

Upon registration of the transfer in favour of the Port Swettenham Rubber Co, the latter moved to have Loke Yew evicted.

The Privy Council was of the view that the Port Swettenham Rubber Co had acted fraudulently in making an assurance that it never intended to keep and, accordingly, their registered interest was subject to the unregistered interest of Loke Yew.

National Commercial Banking Corp of Australia Ltd v Hedley (1984)

In saying that there must be moral turpitude on the part of the person who is registered, it need not involve a conscious decision before registration to defraud the person who holds the unregistered interest.

In *National Commercial Banking Corp of Australia Ltd v Hedley* (1984), the bank had registered a mortgage over property owned by Mr and Mrs Hedley. Unfortunately for the bank, the bank officer who had purported to witness the signature of Mrs Hedley had not in fact witnessed her signature. Unbeknown to the officer, Mrs Hedley's signature had been forged by her husband. The bank proceeded to register this mortgage in circumstances where, although the bank officer did not actually know that Mrs Hedley's signature had been forged, he was aware that he had not witnessed her signature.

It was held by Justice Hodgson that the bank could not rely upon the principles of indefeasible title by registration where the bank officer had only actually witnessed the signature of the husband, but had purported to witness the signatures of both Mr and Mrs Hedley. His Honour took the view

that it would be fraudulent for the bank to rely upon its registered mortgage in circumstances where the bank had passed off to the Registrar-General as properly witnessed a mortgage which was known by certain officers of the bank not to be properly witnessed.

Assets Co Ltd v Mere Roihi (the Assets Case) (1905)

Until 1988, the accepted law in relation to fraud as an exception to indefeasibility was that fraud meant actual fraud and not constructive or equitable fraud. In the *Assets Case* (1905), the Privy Council, when hearing an appeal from the Supreme Court of New Zealand, held that there is only fraud where the fraud was brought home to the person whose registered title is being challenged or, alternatively, where the fraud was brought home to the agent of that person.

This case is authority that it is not fraud to be unaware of some legislative impediment that should have disentitled the person now registered from becoming registered.

In the *Assets Case*, the Assets Co purchased land from certain indigenous persons in breach of the Native Land Act 1873. However, the Privy Council took the view that the registered proprietor, the Assets Co Ltd, had purchased the land on a *bona fide* basis and was not aware of the breach at the time they registered the transfer.

Bahr v Nicolay (1988)

The *Assets Case* must now be considered in the light of the High Court decision in *Bahr v Nicolay* (1988). There, the High Court of Australia was hearing an appeal arising from a land transaction in Western Australia. In earlier years, Mr and Mrs Bahr owned certain property which, at a certain point in time, they sold to Mr Nicolay. It would appear that the Bahrs were keen to retain the property but, by reason of their financial circumstances, found it necessary to sell their property to Mr Nicolay. The transaction was unusual in that Mr Nicolay, having purchased the property for $32,000, agreed to lease the property back to Mr and Mrs Bahr for a term of three years and, further, gave an option to re-purchase the property for the sum of $45,000, upon the expiration of the three year lease, to Mr and Mrs Bahr.

During the three year period, Mr Nicolay sold the property to Mr and Mrs Thompson for $40,000. A condition of the contract of sale between Mr Nicolay and Mr and Mrs Thompson was that the latter acknowledged the arrangement between Mr Nicolay and the Bahrs. After registration of the transfer from Mr Nicolay to the Thompsons, the Thompsons confirmed with the Bahrs that they were prepared to resell the property to the Bahrs for $45,000 if the Bahrs exercised the option that they had been given by Mr Nicolay. Subsequently, it would appear that the value of the property greatly increased. The legal advice received by Mr and Mrs Thompson was to the effect that, as registered proprietors, they were not subject to the

unregistered interest of the Bahrs and, accordingly, were not obliged to sell the property to Mr and Mrs Bahr.

In the High Court, the five Justices unanimously found in favour of the Bahrs. They determined that the Thompsons, although the registered proprietors, were subject to the unregistered interest of the Bahrs. They were of the view that the effect of the Thompsons acknowledging the arrangement between the Bahrs and Mr Nicolay was that the Thompsons had agreed to be subject to the Bahrs' interest. Although the five Judges came to the same view as to the outcome, their process of reasoning was different.

The judgments of Mason and Dawson JJ in Bahr v Nicolay (1988)

Justices Mason and Dawson relied on fraud as an exception to indefeasibility to find in favour of the Bahrs. While reaffirming that notice of an existing unregistered interest was not in itself fraud, and that fraud involves some element of 'personal dishonesty' or 'moral turpitude', Their Honours held that some kinds of equitable fraud fall within the statutory concept of fraud as an exception to indefeasibility.

They, at 614, rejected the reasoning of the Lord Buckmaster in the *Assets Case* (1905) that 'Fraud ... means actual fraud, dishonesty of some sort, not what is called constructive or equitable fraud ...'.

Although Their Honours acknowledged that previous cases in the High Court had limited fraud to the situation where the fraud or dishonesty on the part on the registered proprietor had taken place prior to registration, they held that there was no reason why fraud as an exception to indefeasibility should be so limited. At p 615 of the judgment, they asked this question:

> And granted that an exception is to be made for Baud, why should the exception not embrace fraudulent conduct arising from the dishonest repudiation of a prior interest which the registered proprietor has acknowledged or has agreed to recognise as a basis for obtaining title, as well as fraudulent conduct which enables him to obtain title or registration?

Their Honours, at 615–16, concluded as follows:

> The repudiation is fraudulent because it has as its object the destruction of the unregistered interest notwithstanding that the preservation of the unregistered interest was the foundation or assumption underlying the execution of the transfer. For the same reason the subsequent repudiation by a transferee of property of a limited beneficial interest in that property is fraudulent, when the transferee took the property on terms that the limited beneficial interest would be retained by the transferor.

The judgments of Wilson, Brennan and Toohey JJ in Bahr v Nicolay (1988)

The other three judges in *Bahr v Nicolay* were not prepared to extend fraud as an exception to indefeasibility to situations where any intention to renege on an assurance previously given was only formed post-registration. So far as the meaning of fraud in real property legislation is concerned, Justices Wilson, Brennan and Toohey rejected the approach of Justices Mason and Dawson on the basis that the fraudulent intent must have been formed prior to registration.

Their Honours took the view that it is not fraudulent to depart after registration from an assurance given prior to registration, where the court is satisfied that there was no intention before registration to depart from that assurance. They applied the personal equities exception to indefeasibility, which is discussed below under the heading 'Personal equities'.

For present purposes, it should be noted that the basis of Justices Wilson, Brennan and Toohey's reasoning was to the effect that a trustee/beneficiary relationship was created between the Thompsons as trustees and the Bahrs as beneficiaries, when the Thompsons agreed with Mr Nicolay to take subject to the Bahrs' option to purchase.

Personal equities

There is no provision for this exception to indefeasibility in the Real Property Act. Nevertheless, the courts have repeatedly recognised this exception, using various phrases to describe this exception to indefeasibility. These phrases include 'right *in personam*', 'right in person', 'personal right', 'equitable right', 'equitable obligation' and 'personal equity'. Each of these phrases means the same thing for purposes of this exception. For convenience, the phrase 'personal equity' is consistently used in this book.

Both the Privy Council and the High Court of Australia have recognised the 'personal equity' exception to indefeasibility. The Privy Council did so in *Frazer v Walker* (1967) at 585 where their Lordships observed:

> [Indefeasibility of Title] in no way denies the right of a plaintiff to bring against a register proprietor a claim in personam, founded in law or in equity, for such relief as a court acting *in personam* may grant.

Barry v Heider (1914)

The High Court first recognised the existence of and applied this exception to the facts in *Barry v Heider*, where a registered proprietor had foolishly executed a transfer when mortgaging his property to a villain named Schmidt. Armed with the executed transfer and also the certificate of title, Mr Schmidt represented to a Mr Heider that he, Mr Schmidt, had purchased the property from Mr Barry. Based on this misrepresentation, Mr Heider lent money to Mr Schmidt and secured this loan by taking a mortgage from Mr

Schmidt. Before the mortgage in favour of Mr Heider was registered, Mr Barry became aware of what had happened.

In the High Court, it was contended on behalf of Mr Barry that, as he was registered and as Mr Heider was unregistered, Mr Barry should prevail.

The High Court rejected this contention and held that the registered Mr Barry was subject to the unregistered Mr Heider, by reason of the 'personal equity' exception to indefeasibility. The High Court held that this exception arises where:

- a registered person has created the unregistered interest; and/or
- a registered person has engaged in conduct which has contributed to the creation of the unregistered interest.

Although Mr Barry had not created the interest of Mr Heider, the High Court held that the conduct of Mr Barry in executing a transfer when not intending to sell was conduct which had contributed to the creation of the unregistered interest.

Personal equities in Bahr v Nicolay (1988)

The High Court again found the existence of a 'personal equity' in *Bahr v Nicolay* (1988), the facts of which have already been outlined above. *Bahr v Nicolay* illustrates the existence of the 'personal equity' exception to indefeasibility where a registered person (the Thompsons) agrees with a second person (Mr Nicolay) to be subject to a third unregistered person (the Bahrs).

Justices Wilson, Brennan and Toohey held as follows:

- Because the Thompsons had agreed with Mr Nicolay to 'acknowledge' the option agreement between Mr Nicolay and the Bahrs, this amounted to an agreement by the Thompsons with Mr Nicolay to be subject to the Bahrs.
- When the Thompsons purchased the property from Mr Nicolay, they were purchasing on trust for such interests as the Bahrs continued to hold in the property.
- The unregistered Bahrs were entitled to rely on the 'personal equity' exception to indefeasibility as against the registered Thompsons, by reason of the fact that the Thompsons held the property on trust for the Bahrs' unregistered interests.

Mercantile Mutual Life Insurance Co Ltd v Gosper (MMI v Gosper) (1991)

A more controversial example of the 'personal equity' exception had been found to exist in *MMI v Gosper*, in which the New South Wales Court of Appeal, by a 2:1 majority, found the existence of the 'personal equity' exception to indefeasibility, in circumstances where the majority were of the view that the registered mortgagee, MMI, had owed a fiduciary obligation and breached the obligation owed to the mortgagor, Mrs Gosper.

Mrs Gosper had previously created a registered mortgage in favour of MMI, securing a debt of $265,000. Unbeknown to Mrs Gosper, her late husband had arranged for a further sum of $285,000 being advanced by MMI to his business. This had the effect of increasing the secured debt to $550,000. Her husband negotiated this without her knowledge or consent. Unbeknown to MMI, he also forged Mrs Gosper's signature on the variation of mortgage, which was subsequently registered.

Mahoney JA (with whose conclusions Kirby P, as he then was, agreed) took the view that as there was a pre-existing relationship between the mortgagor and the mortgagee at the time the forged variation of mortgage was registered, MMI, as mortgagee, owed a fiduciary obligation to Mrs Gosper, as mortgagor, not to use the certificate of title without the authority of Mrs Gosper. As MMI had procured the registration of the forged mortgage by using the certificate of title without the authority of Mrs Gosper, MMI had breached its fiduciary obligation to Mrs Gosper.

The difficulty created by the reasoning of Mahoney JA is that where there is no pre-existing relationship between the mortgagor and the mortgagee, the mortgagee on registration acquires immediate indefeasibility, and no exception to indefeasibility is available. One might rhetorically ask why there should be such a difference in outcome.

Although Kirby P agreed with the outcome determined by Mahoney JA, His Honour focused on the failure of MMI to deal directly with Mrs Gosper as distinct from dealing with her late husband. With respect to Kirby P, the 'personal equity' exception cannot arise by reason of the failure of the mortgagee to negotiate directly with the mortgagor. If the majority decision is justifiable, it must be upon the basis enunciated by Mahoney JA for the reasons developed by Professor Butt at p 2,082, footnote 451.

Meagher JA, in dissent, was critical of his judicial colleagues in this case. He expressed the view that *Mayer v Coe* (1968) was applicable and that there was no 'personal equity' exception to indefeasibility available to Mrs Gosper on the facts of this case. Meagher JA took the view that upon registration of the variation of mortgage, MMI immediately acquired indefeasibility of title.

The observation by Windeyer J

A helpful discussion concerning the differences between the judges in *MMI v Gosper* (1991) is found in the unreported *obiter dicta* of Windeyer J in *Tanzone v Westpac Banking Corp* (1999) NSW Supreme Court on 26 May. Justice Windeyer, although acknowledging that he was bound by the majority in *MMI v Gosper*, observed, as a matter of conveyancing practice, that the consent of a mortgagor to the registration of a variation of mortgage is not sought by the mortgagee prior to the latter attending to the registration of the variation, because the mortgagee already has possession of the certificate of title and the mortgagor, having seemingly executed the variation, has nothing further to do to assist the mortgagee in obtaining

registration of the variation. In these circumstances, Windeyer J stated that no fiduciary obligation could have been owed by MMI to Mrs Gosper in *MMI v Gosper*.

We await a further decision by either the High Court or the Court of Appeal of the Supreme Court of New South Wales before it is clear whether or not *MMI v Gosper* was correctly decided.

Grgic v ANZ Bank (1994)

In *Grgic v ANZ Bank*, it was argued that *MMI v Gosper* (1991) was incorrectly decided. The Court of Appeal of the Supreme Court of New South Wales in *Grgic* determined that it was unnecessary to decide the correctness or otherwise of *MMI v Gosper* (1991) because it was distinguishable on the facts. In *Grgic*, Mr Grgic was the registered proprietor of certain Torrens Title land. His wife and son negotiated a loan with the bank, which was to be secured by a mortgage over the property owned by Mr Grgic.

After the bank officer had approved the loan, he asked the wife and son to bring Mr Grgic to the bank with them, so that the bank officer could witness his signature. Instead, the wife and son brought an impostor to the bank. The bank officer proceeded to witness the impostor purporting to sign as Mr Grgic. The bank thereafter registered the mortgage, being unaware of the dishonesty of Mrs Grgic and her son.

It was held that *Mayer v Coe* (1968) should be applied to the facts of *Grgic*. *MMI v Gosper* (1991) was distinguished on the basis that in *Grgic*, unlike in *MMI v Gosper*, there was no pre-existing relationship between the mortgagor and the mortgagee and, accordingly, there was no duty owed and no duty breached by the mortgagee vis à vis the mortgagor.

Snowlong Pty Ltd v Choe (1991)

Frequently, the 'personal equity' exception and the fraud exception are both available. In *Bahr v Nicolay* (1988), we have seen certain justices of the High Court apply one exception to indefeasibility, while the other justices applied the other exception.

In *Snowlong Pty Ltd v Choe* (1991), Wood J was faced with a landlord/vendor who was subject to an unregistered lease. This landlord/vendor proceeded to sell the property to a purchaser, who purchased subject to the unregistered lease. Upon registration, the purchaser endeavoured to evict the lessee, on the basis that the lessee was unregistered and the purchaser was registered. This contention was rejected.

Wood J, as he then was, held that the lessee could rely upon both the fraud and the 'personal equity' exceptions to indefeasibility. The purchaser was fraudulent in purchasing subject to a lease to which it had no intention of being subject. The purchaser was subject to a 'personal equity' arising

from the purchaser's agreement with the landlord/vendor to be subject to the lease.

Prior folio

This exception to indefeasibility envisages an error by the Registrar-General whereby two distinct Certificates of Title have been created with respect to the same block of land. In this unlikely event, s 42(1)(a) of the Real Property Act provides that the folio which is created later will be subject to the prior folio.

Omitted or misdescribed easement

Old System Title, over many years, has recognised the enforceability of easements by implication and easements by prescription, by the owner of one block of land, known as the dominant tenement, against the owner of another block of land, known as the servient tenement (see Chapter 9 for more detail).

Examples of unwritten easements include:

- easements of support;
- easements enabling rainwater to be discharged over a neighbour's land where there are semi-detached houses or terraces;
- drainage easements which typically arise in relation to neighbouring blocks of land where the higher block discharges storm water onto the lower block; and
- rights of way or rights of passageway enabling access to and from a public road over neighbouring land.

At the time of creation of Torrens Title in New South Wales, it was recognised that it would be very difficult to expect all such easements to be reduced to writing and registered. Instead, it was decided to create an exception to indefeasibility where such easements were 'omitted or misdescribed'. Previously, the 'omitted or misdescribed easements' exception was dealt with in s 42(1)(b) of the Real Property Act. In 1995, this exception became s 42(1)(a1) of the Act.

An easement will be omitted within the meaning of s 42(1)(a1) if it was created over the servient tenement when Old System Title governed that land. When the servient tenement was converted to Torrens Title, this exception to indefeasibility operated to ensure that the easement created when the land was governed by Old System Title remains enforceable: *James v Stevenson* (1893); *Beck v Auerbach* (1986); *Dobbie v Davidson* (1991).

A different situation giving rise to an 'omitted or misdescribed easement' is where an easement was created over a servient tenement which at all times was Torrens Title land, but where, by reason of some error on the part of the Registrar-General, the easement, which was initially recorded on the title, was subsequently left off the title: *James v Registrar-General* (1967).

It should be noted that an easement created over Torrens Title land as distinct from Old System Title land is not 'validly created' within the meaning of s 42(1)(a1) unless it was registered or unless, in the case of an easement created pursuant to a registered s 88B plan of subdivision, the plan was registered.

The only exception to this is illustrated by the High Court decision in *Dabbs v Seaman* (1925), in which a certificate of title of the respondent's Torrens Title land referred to a '20 feet lane'. There was no mention in either the transfer or the certificate of title of any easement. The High Court held that the appellant was entitled to use the '20 foot lane' as a right of way.

Omitted or misdescribed profit à prendre

A profit *à prendre* is the right to enter upon land and remove the soil or its produce (eg, turf, timber or crops). Section 42(1)(b) creates an exception to indefeasibility where a profit *à prendre* has been omitted. It follows that profits *à prendre*, even though unregistered, will prevail over registered interests.

As with easements that have been omitted or misdescribed, where a profit of *à prendre* was created over land under Old System Title that was left off the title when that land was then converted to Torrens Title, there is an omitted profit *à prendre*, which remains enforceable.

On the other hand, where the profit of *à prendre* was created over Torrens Title Land, then it is only omitted where all steps have been taken, including the execution of necessary documents and the lodging of them for registration.

Wrong description of boundaries

Occasionally, the boundaries of a block of Torrens Title land have been wrongly described in the Register. Section 42(1)(c) addresses this situation and provides that an application can be made to have the error rectified: *Michael v Onisiforou* (1977).

Short term tenancy

Section 42(1)(d), which was enacted in 1930, protects unregistered lessees, whether oral or in writing, where the period of the lease, together with any option to renew the lease, is less than or equal to three years.

Section 23D of the Conveyancing Act 1919 provides that an oral lease is enforceable provided that:

- the period of the lease is three years or less;
- it is for the best rent reasonably obtainable; and
- there is an immediate right to possession.

It follows that the protection afforded by s 42(1)(d) of the Real Property Act extends to both written and oral leases, provided that the total period of the

lease, together with the period of any option to renew, is not greater than three years and provided that the competing registered interest was acquired with notice, whether actual, constructive or imputed, of the lease.

Meaning of 'notice'

Actual notice means actual knowledge of the relevant facts; it must be personally within that person's knowledge.

Constructive notice involves a consideration of what would have been known if a person had carried out all the enquiries that a reasonable person should have carried out. For instance, in *Marsden v Campbell* (1897), a purchaser of a property had actual notice that the vendor's mortgagee was grazing sheep on the property being purchased. The purchaser was not actually aware that the mortgagee was grazing sheep on the property, because he was also the lessee of the property.

The Supreme Court of New South Wales held as follows:

- If the purchaser had made all the enquiries that a reasonable person in his position should have made, such as asking the mortgagee the basis upon which the property was being used for grazing animals, then the purchaser would have had notice of the lease.
- Accordingly, the purchaser had constructive notice of the lease.

Usually, the occupation of land by some person other than the vendor's family will amount to constructive notice of that person's interest in the land: *Hunt v Luck* (1902); *Hodgson v Marks* (1971).

In more recent times, the House of Lords in *Williams and Glyn's Bank Ltd v Boland* (1981) has held that notice of the possession of a property by a wife or a *de facto* wife of the vendor may be constructive notice that the wife or the de facto has an interest in the land being purchased and inquire of them as to what rights they have to be in possession.

While there may be some practical impediments to making such an inquiry (for example, the frailty of an aged and bedridden person), the cases on constructive notice place a fairly onerous responsibility on a person taking an interest in land to make such inquiries.

Imputed notice is the notice of an agent, whether actual or constructive, which is imputed to the principal. It may be the notice of the solicitor or of the accountant or of the spouse or of an employee of the principal.

Section 164 of the Conveyancing Act provides that notice includes actual, constructive and imputed notice. This section also provides that a person taking an interest in land will be deemed to have constructive notice of such information as would be revealed by a search of the register and of any file kept by the Australian Securities Commission.

The Clyne cases

Section 42(1)(d) has been applied to the situation where:

- a purchaser acquired property, knowing that it was being occupied by a person other than the vendor: *Clyne v Lowe* (1968); and
- a mortgagee acquired a mortgage knowing that it was being occupied by a person other than the mortgagor: *United Starr-Bowkett Co-operative Building Society (No 11) Ltd v Clyne* (1967).

In *Clyne v Lowe* (1968), the purchaser did not actually know the name of the occupant nor did the purchaser actually know the precise details of the lease. The court, however, applied s 42(1)(d) to the facts and determined that the purchaser 'had such notice, that is constructive notice, because of his failure to inquire from the person in fact in possession as to her title or rights' (at 437).

Alcova Holdings Pty Ltd v Pandarlo Pty Ltd (1988)

It seems unusual that the period applicable to this exception to indefeasibility is a total of three years, which includes not only the original period of a lease but also any other period of any further option or options to renew the lease. This is to be contrasted with requirements of s 53 of the Real Property Act, which only requires a lease exceeding three years to be registered as distinct from a lease where the period of the lease plus any option to renew exceeds three years.

This raises the question of what happens in the situation where the original lease period has expired and the current lease is actually the result of an option to renew.

In *Alcova Holdings Pty Ltd v Pandarlo Pty Ltd* (1988), a tenant of Torrens Title Land entered into possession under an unregistered lease for two years, which contained an option for renewal for a further two year period. After the option was exercised, the landlord sold the property to a purchaser who became registered with full actual knowledge of the facts. Although the option had been exercised, the vendor had not granted a new lease at the time of the sale of the purchaser. The purchaser, upon registration, refused to exercise a new lease with the tenant.

Justice Bryson had to decide whether the lease in question was an equitable lease for two years (ie, the period of the lease to be renewed, in which case s 42(1)(d) would enable the tenant to prevail over the purchaser) or whether the total period was four years (ie, two years plus two years, in which case s 42(1)(d) would have no application). His Honour found in favour of the former, observing as follows:

> The circumstance that the tenancy was created pursuant to the exercise of an option, and that in an earlier stage of the history of the relationship between the plaintiff and its first landlord there was a term of two years and also an agreement or option for an additional term which when added to the original term exceeded three years is no longer of importance; it would have been of high importance if the freehold had been transferred during the first two years because registration would have defeated the option. Whether it would have

> also defeated the then current balance of the original term of two years is a question which I need not address. [at 63]

As Justice Bryson has observed, it is not clear whether s 42(1)(d) will extend to the situation where the total period of lease plus any option exceeds three years and where the original lease has not expired.

Other legislation inconsistent with the Real Property Act

Where the Real Property Act is inconsistent with either later New South Wales or Commonwealth legislation, then, unless there is a clear intention to the contrary, the inconsistent legislation will prevail over the provisions of the Real Property Act. The High Court in *South Eastern Drainage Board v Savings Bank of SA* (1939) explained the rule of statutory constructions as follows:

> The question upon which our decision must turn is whether in the enactments creating the statutory charges, such a clear intention is expressed to include land under the Real Property Act and to give to the charges an absolute and indefeasible priority over all other interests that notwithstanding [the other legislation] no course is open but to allow the intention so expressed in the later enactments to be paramount over the earlier Real Property Act. In my opinion, this question ought to be answered that such an intention so plainly appears that no other course is open. [at 627–28]

In *Pratten v Warringah Shire Council* (1969), the New South Wales Supreme Court was faced with the question of whether or not Mr Pratten, the registered proprietor of a block of land, owned that land subject only to such interests as were registered on the certificate of title, or whether the land was also subject to certain provisions of the Local Government Act 1919 (NSW), enacted after the Real Property Act, which gave the Warringah Shire Council the benefit of a 3 metre wide drainage easement. The Supreme Court held that there was an exception to indefeasibility in favour of the Council by reason of the later legislation.

In addition to New South Wales legislation overriding the Real Property Act, validly enacted Commonwealth legislation will also override the Act. Examples of this include the Family Law Act 1975 (Cth) and the Bankruptcy Act 1966 (Cth). A person may be the registered proprietor of land in New South Wales under the provisions of the Real Property Act but, under the Family Law Act, this person will be subject to the rights of a spouse or former spouse in the property pursuant to the Family Law Act or subject to the rights of a trustee in bankruptcy pursuant to the Bankruptcy Act.

Possessory title

Although the right of adverse possession has always existed under Old System Title, there was no similar right in relation to Torrens Title land until 1979. Section 45 of the Real Property Act precluded the operation of possessory title under that Act.

In 1979, the New South Wales Parliament amended the Real Property Act, and a new part known as Pt 6A was enacted. Part 6A sets out a statutory framework introducing possessory title to Torrens Title land.

An application for possessory title is made pursuant to s 45D of the Act. Crown land is exempt from the application of possessory title, under s 45D(3). Section 45D of the Act limits the application of possessory title to whole parcels of land. By comparison, the Old System Title position allows strips of a block of land to be subject to adverse possession, even though the parcel of land as a whole is not.

Section 45E states that the Registrar-General may grant the application if satisfied that various requirements have been met. Under s 45C, those engaging in negotiations with the registered proprietor need not concern themselves about the possibility that, upon registration of their interests, they might become subject to some possessory title application.

The policy inherent in Pt 6A of the Act is that registered interests remain indefeasible until altered by a possessory title application.

For a successful possessory title application to be made, it is necessary to demonstrate in the case of possession commenced on or after 1 January 1971 that there has been 12 years of continued adverse possession. In the case of adverse possession commencing prior to 1 January 1971, a 20 year period of continued adverse possession must be shown.

In *Mulcahy v Curramore Pty Ltd* (1974), Bowen CJ in Eq, as he then was, at 475, held that the possession must be 'Open, not in secret; peaceful, not by force; and adverse, not by consent of the true owner'. The onus of proving the acquisition of title by adverse possession is on the person asserting possessory title: *Wagama Pty Ltd v Harris* (1969).

Whether or not there has been adverse possession depends upon the circumstances of each case. This was recognised by Lord O'Hagan of the House of Lords in *Lord Advocate v Lord Lovat* (1880) at 288, where His Lordship observed that regard must be given to:

> The character and value of the property, the suitable and natural mode, of using it, [and] the course of conduct which the [registered proprietor] must be reasonably expected to follow with a due regard for his own interest.

Examples of acts that have been held to indicate adverse possession include:

- maintaining fences, which is frequently regarded as evidence of possession: *Re Riley* (1964); *Mulcahy v Curramore Pty Ltd* (1974);
- the grazing of animals on property or cultivating the land: *Hanarnett v Green (2)* (1883); and
- the payment of rates has also been seen as an act of adverse possession: *Kirby v Cowderoy* (1912).

Time ceases to run against the registered proprietor if the adverse possessor abandons possession. Being away from the property does not *per se* amount to abandonment: *Nicholas v Andrew* (1920).

Sometimes the 12 or 20 year period will be made up of a series of possessors: *Mulcahy v Curramore Pty Ltd* (1974). These adverse possessors may be dependent upon each other, in which case the person in possession on the 12th or 20th anniversary of commencement of the adverse possession is entitled to possessory title.

On the other hand, if the series of adverse possessors are independent of each other, the title goes to the first of those adverse possessors who enjoyed possession within the 12 or 20 year period.

THE TORRENS ASSURANCE FUND

Registration under Torrens Title confers indefeasibility of title even where no title would have passed under the general law, but can, however, work harshly on those who have been deprived of their land, by reason of the operation of indefeasibility.

The purpose of the Torrens Assurance Fund is 'to compensate persons who, without any fault of their own, may have been deprived of their property': *Williams v Papworth* (1900) at 568.

The 'Torrens Assurance Fund' is financed in part by levies on dealings, caveats and withdrawal of caveats lodged under the Real Property Act. Shortfalls are met from the Consolidated Fund.

Section 120 of the Real Property Act creates a statutory cause of action in damages for persons who suffer loss or damage in respect of an interest in land through the operation of the Act. This statutory cause of action is additional to any common law action for damages the person may have: *Registrar-General v Behn* (1980); affirmed on appeal (1981). Section 120 gives a remedy against the wrongdoer and, under s 120(1), proceedings may be taken where the loss or damage arises from:

- fraud;
- any error, misdescription or omission in the Register;
- the land being brought under the Act; or
- the registration (other than under s 45E) of some other person as proprietor.

Section 129 gives a remedy against the Torrens Assurance Fund, whereby compensation is payable for loss or damage in respect of an interest in land suffered as a result of the operation of the Act, where the loss or damage arises from any of the following:

- any act or omission of the Registrar-General in executing or performing his or her functions or duties under the Act in relation to the land;
- the registration (otherwise than under s 45E) of some other person as proprietor of an interest in the land;
- any error, misdescription or omission in the Register in relation to the land;

- the land having been brought under the Act;
- the person having been deprived of an interest in the land as a consequence of fraud; or
- an error or omission in an official search in relation to the land.

Section 129(2) precludes compensation, to the extent that:

- the loss or damage is a consequence of the claimant's act or omission;
- the loss or damage results from the fraud or neglect of a solicitor, licensed conveyancer or real estate agent, and is compensable under a professional indemnity policy;
- the claimant has failed to mitigate the loss or damage;
- the loss or damage has been offset by a benefit;
- the loss or damage arises because of an error or misdescription on the measurement of land;
- the loss or damage arises from the breach of trust by a registered proprietor, or from the inclusion of the same land in two or more grants.

The loss must have been sustained by registration: *Northside Developments Pty Ltd v Registrar-General* (1990).

The fraud must be 'brought home to' the person who has become registered through the fraud: *Registrar of Titles (WA) v Franzon* (1975). For instance, no action lies under s 120(1) against an innocent person who has become registered through the fraud of a third party for whose actions the innocent person is not legally responsible: *Registrar-General v Behn* (1980); affirmed on appeal (1981).

Under s 129(1)(e), the Torrens Assurance Fund is available to a person who has been 'deprived' of an interest in land. A partial deprivation is enough, as where the holder of a fee simple finds the land encumbered by a registered mortgage: *Registrar of Titles (WA) v Franzon* (1975).

An 'interest in land' includes:

- an unregistered interest, such as that of a purchaser under a contract for sale: *Robinson v Registrar-General* (1983);
- a mortgagee under a mortgage by deposit of title deeds: *Tolley and Co Ltd v Byrne* (1902). For the holder of an unregistered interest to be 'deprived' of the interest for the purposes of s 129, it is not necessary for the interest to have been extinguished; it is sufficient for it to have been outranked in priority by other interests: *Heid v Connell Investments Pty Ltd* (1987).

A claimant is entitled to be put back into the same position as the claimant would have been in had the loss not occurred: *Registrar of Titles (WA) v Spencer* (1909). A claimant who has been deprived of the whole of the land is entitled to be compensated for the whole of its value, which is calculated as at the date of the trial: *Registrar-General v Behn* (1980), affirmed on appeal (1981).

4 TORRENS TITLE: PRIORITIES BETWEEN UNREGISTERED INTERESTS

You should be familiar with the following areas:

- characterising unregistered interests
- the operation of caveats
- unregistered legal and equitable interests distinguished and
- postponing conduct

CHARACTERISING UNREGISTERED INTERESTS

The Real Property Act 1900 is largely silent as regards the determination of competing priorities where each holds an unregistered interest. As a result, it is necessary to have regard to principles that have been developed by the case law with respect to Old System Title land.

Priorities under Old System Title and also priorities between competing unregistered interests under Torrens Title involve an identification of whether interests are legal or equitable. An interest classified as legal under Old Systems Title will not necessarily be so classified under Torrens Title. Likewise, an interest that is classified as equitable under Old System Title will not necessarily be equitable under Torrens Title. Although there are some similarities in the classification of legal and equitable interests under both systems of land ownership, there are also important differences, which must be kept in mind.

Notice of an earlier interest always defeats the holder of a later interest

Where the later of two competing unregistered interests under Torrens Title had actual, constructive or imputed notice of the earlier interest at the

time the later interest was acquired, the later interest will be subject to that earlier interest. A full discussion of the meaning of actual, constructive and imputed notice can be found under the heading 'Meaning of notice' in Chapter 3.

Competing unregistered legal interests

In relation to competing legal interests, assuming that the holder of the later interest had no actual, constructive or imputed notice of the earlier interest at the time the later interest was acquired, and assuming there has been no disentitling conduct on the part of the person who holds the earlier legal interest, priority goes to the person holding the earlier legal interest, by reason of the rule '*nemo dot quod non habet*' ('a person cannot convey an interest which he or she does not have'). These assumptions are often referred to as 'the equities are equal'.

Competing unregistered equitable interests

In relation to competing equitable interests, assuming the equities are equal, priority is based on time, by reason of the equitable maxim '*qui prior est tempore potior est jure*' (ie, 'first in time prevails').

The requirement that there has been no disentitling conduct on the part of the person who holds the earlier interest is based on the principle that in determining priorities between competing interests in a property, the court is obliged to identify 'the best equity': *Heid v Reliance Finance Corp Pty Ltd* (1983) at 341 and *Abigail v Lapin* (1930) at 185–86.

In *Heid*, Justices Mason and Deane, having stated the importance of determining who has 'the better equity', at 341 expressed the following view:

> It will always be necessary to characterise the conduct of the holder of the earlier interest in order to determine whether, in all the circumstances, that conduct is such that in fairness and in justice, the earlier interest should be postponed to the later interest.

Their Honours proceeded to state that:

> Whose is the better equity, bearing in mind the conduct of both parties, the question of any negligence on the part of the prior claimant, the effect of any representation as possibly raising an estoppel and whether it could be said that the conduct of the first or prior owner has enabled such a representation to be made ...

The law in relation to what is postponing conduct and in relation to who has the 'better equity' is discussed below under the heading 'Postponing conduct'.

Competition between a legal and an equitable interest

In relation to the competition between a legal and an equitable interest, the applicable rule, assuming the equities are equal, is that where 'the equities are equal, the law prevails': *Pilcher v Rawlins* (1872).

In competition between a legal interest taken without notice of the earlier interest, and a later created equitable interest in the same land, the legal interest prevails if it has been acquired by a purchaser for value, in good faith (*bona fide*), and without notice of the earlier equitable interest. This is in accordance with the maxim 'where the equities [the merits of the case] are equal, the law prevails': *Pilcher v Rawlins* (1872). Regarding value, value means consideration in money or money's worth. It need not equal the full value of the property, but it must be more than merely nominal: *Bassett v Nosworthy* (1673). As to good faith, in many situations, proving lack of notice satisfies the requirement of good faith, but good faith is nevertheless a separate criterion which, depending on the circumstances, may need to be satisfied even though absence of notice is proved: *Pilcher v Rawlins* (1872), As to notice, it may be actual, constructive or imputed. The relevant time at which the legal interest holder must have no notice is the time the consideration is paid for acquiring the legal interest. It is irrelevant that the legal interest is not actually got in until later, by which time notice exists: *Pilcher v Rawlins* (1872).

The priority enjoyed by a *bona fide* purchaser of the legal estate for value without notice extends also to persons claiming through that purchaser, even persons who take with notice of the earlier equitable ingress or are mere volunteers. This principle is sometimes called the rule in *Wilkes v Spooner* (1911), where, at 487, it was stated that:

> In justice to the owner of the land who had no notice when he acquired the land, it would not be right to hamper his power of dealing with his own land, because certain persons, who possibly would be the only customers for the land likely to pay the best prior, have such notice.

THE OPERATION OF CAVEATS

Many unregistered interests are unregistered because they are unregistrable. For instance, a purchaser who has exchanged contracts does not have an interest that is capable of registration. Only a transfer can be registered, and a transfer is not delivered to a purchaser until settlement.

A second example of an unregistrable interest is a beneficiary under a trust. Under s 82 of the Real Property Act, a trust deed cannot be registered assuming such a deed exists. Further, many trust relationships are not created by deed. Section 23C of the Conveyancing Act 1919 recognises the possibility of implied or resulting trusts and also constructive trusts being created without there being any writing.

Whilst some mortgages are in registrable form, there are at least three types of mortgage that are incapable of registration. The first is a mortgage created by the deposit of title deeds, which does not even involve a written mortgage. Rather, it involves recognition by equity that where title deeds are deposited as consideration for a loan, there will be an equitable mortgage in favour of the lender. Secondly, a loan agreement where the borrower agrees in return for being lent money to create a mortgage over their property is not capable of registration. Once again, equity recognises such a mortgage to be equitable. Thirdly, a mortgage may be created between lender and borrower but not on an approved form. Once again, the mortgage is binding between the parties but is incapable of registration.

In the case of leases, it is possible for a lease to be enforceable even though there is no writing and the agreement is oral. Section 23D of the Conveyancing Act provides where a lease does not exceed three years, and is for the best rent reasonably obtainable, and there is an immediate right to possession, such a lease is enforceable although oral. Further and in addition, many leases, although in writing, are not in registrable form so far as the Land and Property Information NSW (LPI) is concerned.

It was out of a concern for persons who have unregistered interests and also persons who have registrable interests but choose not to register their interest to be protected that Parliament has created the concept of a caveat.

Part 7A of the Real Property Act

Under Torrens Title, it is possible for the holder of an unregistered interest to lodge a caveat claiming an interest in a particular parcel of land: see Pt 7A of the Real Property Act, comprising ss 74A–74R.

Under Old Systems Title, there is no equivalent concept to a caveat, which is a creation of the Real Property Act.

The operation of s 74H

The purpose of a caveat is to give to a person who has an unregistered interest in a property the ability to protect that interest from the harshness of indefeasibility of title, which is enjoyed by a later interest which is registered, assuming there is no exception to indefeasibility available to the holder of the earlier unregistered interest.

Section 74H of the Real Property Act provides that a caveat operates to prevent dealings that are subsequently lodged from obtaining registration. In the absence of a caveat precluding the later interest from becoming registered, the later interest would be registered and upon registration would enjoy the benefit of immediate indefeasibility of title.

The operation of s 74F

Pursuant to s 74F, a person who claims to be entitled to a legal or an equitable estate or interest in land under the provisions of the Real Property Act may lodge with the Registrar-General a caveat prohibiting the recording of any dealing affecting the estate or interest to which the person claims to be entitled. Sub-section (5) of s 74F provides that the caveat must specify:

- the name of the caveator;
- where the caveator is not a body corporate, the residential address of the caveator;
- where the caveator is a body corporate, the address of the registered office of the body corporate;
- unless the Registrar-General dispenses with those particulars, the name and address of the registered proprietor concerned;
- the prescribed particulars of the legal or equitable interests to which the caveator claims to be entitled;
- the current reference allocated by the Registrar-General to the folio of register or, as the case may be, the lease, the mortgage or charge to which the caveat relates;
- where the caveat relates to only part of the land describing the folio of the register or the current lease, description of that part in the formal manner prescribed; and
- an address in New South Wales in which notices may be served to the caveator.

Case law such as *Kerabee Park Pty Ltd v Daley* (1978) and *Palmer v Wiley* (1906) was authority that the prescribed particulars of the legal or equitable estate or interests require the caveator to state:

- the precise nature of the interest (eg, is it an interest as a purchaser, a mortgagee, a lessee, etc?);
- the precise date of the interest (eg, 1 January 2003); and
- the precise nature of the interest.

The strictness of case law such as *Kerabee Park* and *Palmer* has now been modified by s 74L, which provides:

> If in any legal proceedings a question arises as to the validity of a caveat lodged under a provision of this Part, the court shall disregard any failure of the caveator to comply strictly with the requirements of this Part, and of any regulations made for the purposes of this Part, with respect to the form of the caveat.

While caveats will normally only be able to be lodged by persons who hold unregistered interests, a registered proprietor is entitled to lodge a caveat over their own property, where the interest claimed is other than the interest registered. This was allowed by Justice Needham of the New South Wales Supreme Court in *Sinclair v Hope Investments Pty Ltd* (1982), in which His

Honour allowed the registered proprietor to lodge a caveat over his own property claiming an estate or interest as a mortgagor, arising from an improper sale by the mortgagee to a purchaser.

This case should be contrasted with the approach of the Victorian Supreme Court in *Swanston Mortgage Pty Ltd v Trepan Pty Ltd* (1994), where the Victorian Full Court declined to follow the approach of Justice Needham.

With respect to the Victorian Full Court, it would seem that the better view is that of Justice Needham, because a registered proprietor has a separate interest arising from an improper sale of his or her property, over and above the estate or interest that the registered proprietor holds as the registered owner of the property.

Lapsing notices and the removal of caveats

Because a caveator is only a person who claims to hold an estate or interest in a particular block of land, it is necessary for persons who wish to challenge the validity of a caveat to be able to do so. To this end, the Real Property Act provides three different means whereby the validity of caveats can be challenged.

Pursuant to ss 74I and 74J, it is possible to serve a lapsing notice on the caveator. Such a notice will require the caveator to commence Supreme Court proceedings and obtain an extension of the caveat within 21 days of the date on which the notice was served, which requires a caveator to act expeditiously. It also tests the legitimacy of the caveat, in that the caveator has to go to the expense of retaining lawyers who must, within 21 days, initiate proceedings and obtain orders from the Supreme Court extending the caveat. This will typically involve the making of an urgent appearance before the duty judge of the Supreme Court in order to obtain the necessary interlocutory order to extend the caveat pending a final hearing of the matter.

Section 74I is available to a person who has lodged a dealing or a delimitation plan with the Registrar-General. Section 74J is available to the 'registered proprietor or any person who is or claims to be entitled to an estate of interest of the land to which the dealing or plan relates', regardless of whether or not the dealing or delimitation plan has been lodged with the Registrar-General.

The obligation is upon a vendor to have a caveat removed before insisting that the purchaser completes a contract for sale of land: *Godfrey Constructions Pty Ltd v Kanangra Park Pty Ltd* (1972); *National Australia Bank v Bridgehall Corp (Aust) Ltd* (1990).

The operation of s 74MA

Once the court has prevented the lapsing of a caveat by an order extending it, the caveat will remain unless a fresh lapsing notice expires or the court makes an order for removal pursuant to s 74MA: *McCosker v Lovett* (1995).

Sometimes, a person who wishes to challenge the validity of a caveat does not wish to wait the 21 days required by ss 74I and 74J when serving lapsing notices. Such a person may choose to move the court pursuant to s 74MA, which empowers the person 'who claims to be entitled to an estate or interest in land' to seek an order of removal of the caveat over the land in question. This imposes a greater cost on the person seeking to have the caveat removed as they become the moving party, which means they must draft the initiating process and supporting affidavits as well as paying the court's filing fee to commence proceedings. It is for these reasons that most persons wishing to challenge a caveat rely on the lapsing notice mechanism of ss 74I and 74J.

The operation of s 74K

Under s 74K of the Act, the Supreme Court has power to extend the operation of the caveat lodged under s 74F. The court is empowered to make 'such other orders as it seems fit' when exercising this power.

In *Jean-Pierre Cosmetics Pty Ltd v Gary Truswell & Associates Pty Ltd* (1994), Justice Young of the Supreme Court of New South Wales held that the power to extend a caveat is discretionary and that the court may choose to only extend the caveat if an undertaking as to damages has been given on behalf of the caveator.

In order to obtain an extension of a caveat, a caveator will need to satisfy the court it has a case: *Penny Nominees Pty Ltd v Fountain* (1988).

The operation of s 74O

Section 74O of the Act places restrictions on the lodgement of further caveats where earlier caveats have lapsed or have been withdrawn. It is necessary for a proposed caveator to approach the Supreme Court for leave to lodge a further caveat, which purports to be based on the same facts. If, on the other hand, the second caveat is based on a different interest in the same property, then leave need not be sought.

Damages and the operation of s 74P

Section 74P of the Act provides that where a person wrongfully and without reasonable cause lodged a caveat, or where a person procured the lapsing of such a caveat, or where a person, being a caveator, has refiled or failed to withdraw such a caveat after being requested to do so, such a person is liable to pay damages by way of compensation.

The Court of Appeal in *Beca Developments Pry Ltd v Idameneo (No 92) Pty Ltd* (1990) held that to sustain a claim under this section, it must be shown that:

- the caveator did not have a caveatable interest;
- the caveator did not have an honest belief based on reasonable grounds that a caveatable interest existed; and
- the caveator lodged the caveat deliberately to infringe the interest of the registered proprietor or other interested person.

This determination is far more onerous than what was previously thought to be sufficient to recover damages under s 74P. In his dissenting view in *Beca*, Justice Waddell, having referred to some earlier authorities, concluded that the plaintiff only needed to show that the caveat was lodged without reasonable cause and that the caveator had no caveatable interest.

The operation of ss 74Q and 74R

Section 74Q of the Act makes it clear that there is no obligation on the Registrar-General to ensure that a caveator is entitled to the subsisting estate or interest claimed in a caveat.

Section 74R of the Act empowers a caveator to apply to the Supreme Court for an injunction to prevent a dealing from being registered, whether in addition to or in lieu of the recording of a caveat.

UNREGISTERED LEGAL AND EQUITABLE INTERESTS DISTINGUISHED

Unregistered leases

Unregistered leases will either be regarded as unregistered legal interests or unregistered equitable interests. Section 53 of the Real Property Act provides that:

> When any land under the provisions of this Act is intended to be leased or demised for a life or lives or for any term of years exceeding three years, the proprietor shall execute a lease in the approved form.

It follows from this that any lease for a term exceeding three years should be registered: *Carberry v Gardiner* (1936); *APA Co Ltd v Rogers* (1943); *Leitz Leeholme Stud Pty Ltd v Robinson* (1977).

On the other hand, if a lease exceeding three years is not registered, it is still enforceable in equity, because of the agreement that exists between the parties to the lease: *Leitz Leeholme Stud Pty Ltd v Robinson* (1977); *Chan v Cresdon Pty Ltd* (1989).

Where a lease does not exceed three years, it need not be registered. Furthermore, where a lease does not exceed three years, it can be oral, provided that it is for the best rent reasonably obtainable within an immediate right to possession, under s 23D of the Conveyancing Act.

A close examination of ss 23B, 23C and 23D of the Conveyancing Act reveals a statutory framework where s 23B provides that 'no assurance of land shall be valid to pass an interest at law unless made by deed'. Section 23C of the Act creates an exception to the requirement for writing in the case of a resulting, implied or constructive trust. Section 23D creates an exception where the lease does not exceed three years, is for the best reasonably obtainable rent and there is an immediate right to possession. It follows that an unregistered lease satisfying the requirements of s 23D of the Conveyancing Act is a legal interest: Professor Butt, at p 2,079.

It follows that a lease can be registered or alternatively can be an unregistered lease. If it satisfies the requirements of s 23D of the Conveyancing Act, it is an unregistered legal interest. Otherwise, it is an unregistered equitable interest.

Even though a lease may not exceed three years, it is still possible to register that lease: *Parkinson v Braham* (1961). Furthermore, a lease which of itself does not exceed three years, and which contains an option to renew, is still a lease which does not exceed three years, even though the total period is beyond three years: *195 Crown Street Pty Ltd v Hoare* (1969).

Section 43A

The second situation in which it is possible to have an unregistered legal interest under Torrens Title is pursuant to the operation of s 43A of the Real Property Act. It should be noted that there is no comparable provision to s 43A in the Torrens Title legislation of the other States of the Commonwealth.

The rationale of s 43A

The rationale of s 43A is to endeavour, so far as is possible, to replicate the position under Old System Title of a purchaser at settlement or a first mortgagee by deed at settlement. Under Old System Title, a purchaser at settlement or a first mortgagee by deed at settlement, who has no notice, takes the legal estate. It follows that, by virtue of the operation of s 43A, a purchaser or first mortgagee at settlement who otherwise would only enjoy an unregistered equitable interest is now deemed to be holding an unregistered legal interest.

Where there is competition between an earlier unregistered equitable interest and the interest of the purchaser or first mortgagee, s 43A operates to enable the purchaser or first mortgagee at settlement to prevail because, where the equities are equal, the later legal interest will prevail over the earlier equitable interest whereas, even where the equities are equal, the earlier equitable interest will prevail over the later equitable interest.

The requirements of a 'dealing registrable'

A person who takes a 'dealing registrable' is deemed by s 43A to hold the legal estate. The expression 'dealing registrable' is not specifically defined. It is, however, possible by reference to other parts of the Act and also conveyancing practice to identify a series of requirements which must be satisfied in order for a person to be able to assert that they enjoy a 'dealing registrable' and thus be eligible for the protection of s 43A of the Act. These requirements are as follows:

- The dealing must be accompanied by the certificate of title or in the alternative by a direction to the Registrar-General to use the certificate of title, assuming the certificate of title is already in the possession of the Registrar-General: s 36(6) of the Act.
- The dealing must be either a transfer or a first mortgage, because only the person who has taken such a dealing can have possession of the certificate of title.
- A 'dealing registrable' pre-supposes that it is not yet registered, but that settlement has taken place, because it is only at settlement that a purchaser or a first mortgagee takes possession of the certificate of title and takes a 'dealing registrable'.
- The dealing must be stamped; a dealing cannot otherwise be registered. This is a requirement of all dealings lodged with the Registrar-General by reason of the Stamps Duties legislation.
- The dealing must be in an approved form, and there can be no formal defect: see Chapter 3, under the heading 'Lodgement in registrable form'. Frequently, the Registrar-General will make certain requisitions which, until complied with, result in the dealing not being registered.
- The dealing must not be void: *Mayer v Coe* (1968); *Jonray (Sydney) Pty Ltd v Partridge Brothers Pty Ltd* (1969). It should, however, be noted that while a void dealing creates no interest in the land pre registration, upon registration, what was a void dealing becomes an indefeasible dealing.
- The person taking the dealing had no notice of pre-settlement. Section 43A is prefaced with the words 'for the purposes of protection against notice': *IAC (Finance) Pty Ltd v Courtenay* (1963).
- The dealing must be the next dealing registrable: *IAC (Finance) Pty Ltd v Courtenay*.

IAC (Finance) Pty Ltd v Courtenay (1963)

There was a difference of opinion in the High Court Case of *IAC (Finance) Pty Ltd v Courtenay* (1963) between Justice Kitto on the one hand and Justice Taylor on the other. Justice Taylor was of the view that the trial judge in *Courtenay v Austin* (1961), Justice Hardie, was correct when His Honour, at 1,093, stated the law as follows:

> I am of [the] opinion that the introductory words of s 43A [ie, the words 'for the purpose only for protection against notice'] are to be construed as conferring protection, in the circumstances specified in the sub-section, against unregistered estates of interests of which no notice was aqcuired before settlement but of which notice was or might be received after settlement and before registration of the particular dealing.

Justice Kitto, on the other hand, took the view that pre-settlement notice was immaterial once the purchaser or first mortgagee had taken the dealing registrable at settlement. The High Court in the subsequent case of *Meriton Apartments Pty Ltd v McLaurin & Tait (Developments)* (1976) expressed a preference for the view of Justice Taylor, which is now considered to be the correct view on the point.

It follows that if a purchaser or a first mortgagee who otherwise would have a dealing registrable had pre-settlement notice of some other unregistered interest, then that person will not obtain the protection of s 43A.

In *IAC (Finance) Pty Ltd v Courtenay* (1963), Denton Subdivisions, the purchaser from Ms Austin, had prior notice of the interest of Mr Courtenay. It followed that Denton Subdivisions was not entitled to obtain the protection of s 43A. It also followed that the mortgagees of Denton, which were taking through Denton Subdivisions (ie, Hermes Trading & Investment Pty Ltd and IAC (Finance) Pty Ltd), were also not able to enjoy the benefit of s 43A protection.

The requirement that the dealing must be the next dealing to be registered

Many conveyancing transactions involve a multiplicity of parties and a multiplicity of transactions. For instance, frequently when a purchaser settles a sale, a first mortgagee and possibly several mortgagees will finance the purchaser. In this situation, it will be necessary for not only the transfer from the vendor to the purchaser to be delivered at settlement but any mortgages also to be delivered at settlement. In this situation, the person taking the dealing registrable is the purchaser from the vendor. No mortgage from the purchaser to the mortgagee can be registered until the transfer from the vendor to the purchaser is first registered.

Similarly, where the vendor who is transferring to the purchaser is subject to a registered mortgage, the discharge from the vendor's mortgagee must first be registered before it is possible to register the transfer from the vendor to the purchaser freed from the vendor's mortgage. The dealing registrable within the meaning of s 43A in this situation is the discharge from the vendor's mortgagee to the vendor.

In determining the applicability of s 43A, it is necessary to appreciate that it is only the person taking the next dealing to be registered who can directly derive the protection of s 43A. If the person taking the next dealing to be

registered cannot enjoy its protection, then nobody can enjoy the protection of s 43A. This is illustrated by the outcome in *IAC (Finance) Pty Ltd v Courtenay* (1963).

Jonray (Sydney) v Partridge Bros Pty Ltd (1967)

On the other hand, if the person taking the next dealing to be registered does comply with the requirements of s 43A, then not only does that person enjoy the benefits and the protection of s 43A but, further, that person is able to pass on those benefits and protection to such person or persons standing in their shoes. The New South Wales Court of Appeal in *Jonray (Sydney) v Partridge Bros Pty Ltd* (1967) discussed this in detail. The view of that court has, in turn, been approved by the High Court in *Meriton Apartments Pty Ltd v McLaurin & Tait (Developments)* (1976).

In *Jonray*, Australian Express was the registered proprietor of certain land under the Real Property Act, subject to a mortgage in favour of a Mr Bamberger. Australian Express entered into a contract for sale in favour of Mr and Mrs Moore, subject to the Bamberger mortgage. In other words, Mr and Mrs Moore were purchasing subject to the vendor's mortgage. Some time later, Mr and Mrs Moore as vendors entered into a contract for the sale of the subject property to Jonray (Sydney) Pty Ltd. After exchange and prior to settlement, a dispute arose between Mr and Mrs Moore on the one hand and Jonray (Sydney) Pty Ltd on the other as to whether Mr and Mrs Moore were obliged to discharge the Bamberger mortgage as a condition precedent to requiring Jonray (Sydney) Pty Ltd to settle its sale. On behalf of Jonray (Sydney) Pty Ltd it was argued that Jonray would only enjoy the benefits of s 43A protection in the sense that it was taking the next dealing to be registered, if the discharge was registered prior to the settlement of the sale from the Moores to Jonray.

The Court of Appeal rejected this submission and held that there was no obligation on Mr and Mrs Moore to give to Jonray (Sydney) Pty Ltd at settlement a 'dealing registrable' within the meaning of s 43A. All that the Moores were required to do was hand over whatever documents were necessary to enable Jonray to obtain registration. On the facts of this case, the relevant documents were the transfer from Australian Express to Jonray at the direction of the Moores and the discharge of the Bamberger mortgage, together with the certificate of title of the property.

The 'successive effect doctrine'

The New South Wales Court of Appeal discussed the 'successive effect doctrine' articulated in the Old System Title case *Wilkes v Spooner* (1911). In discussing the principle laid down in *Wilkes v Spooner*, the Court of Appeal observed that once a legal estate has passed into the hands of a purchaser for value without notice of an outstanding equitable interest, the protection extends to any purchaser claiming through such a purchaser,

even though that person takes with notice of the outstanding equitable interest, unless that person procured by their own fraud, the conveyance of the title from the vendor or unless that person has participated in a breach of trust.

On the facts before it, the New South Wales Court of Appeal held that the ultimate purchaser, Jonray, would be entitled to the protection of s 43A 'against a defect in the discharge of mortgage arising from an equity or equitable interest, providing no notice of the defect was possessed by the mortgagor [Australian Express] when it took the registrable mortgage'.

Because the phrase 'a dealing registrable' is not defined in s 43A or in the Act itself, the New South Wales Court of Appeal in *Jonray*, at 572, expressed the following view:

> ... any conveyancing practice under the general law must be adapted to the provisions of the Act to enable the protection given by the Act to be retained and any conveyancing practice under the general law which operates to weaken that protection must be discarded on the ground that it is unreasonable.

The successive effect doctrine says that where a person derives the benefit of s 43A protection, and is deemed to take the legal estate for value without notice, then all persons claiming under and through that person have the same benefit, 'whether or not they have notice or whether or not they were a purchaser for value, provided they did not participate in the original breach of trust': *Stapleford Colliery Co* (1880).

One situation where the decision in *Jonray* will not apply is in the situation where the ultimate purchaser had entered into a contract with their vendor requiring the vendor to ensure that the ultimate purchaser is given 'a dealing registrable' within the meaning of s 43A at settlement of the sale from the vendor to the ultimate purchaser. An example of this is the High Court Decision in *Rands Developments Pty Ltd v Davis* (1979).

The provisions of s 43A of the Real Property Act are available in appropriate circumstances to protect a person taking a dealing registrable against a prior unregistered interest of which there was no notice. On the other hand, it should be noted that s 43A is not available to confer protection against any interest that is subsequently created because s 43A is neither necessary nor designed to protect the holder of an earlier unregistered interest against a subsequent unregistered interest.

POSTPONING CONDUCT

Justices Mason and Deane observed in *Heid v Reliance Finance Corp Pty Ltd* (1983) that the court, when determining priorities between competing unregistered interests, is required to determine 'the better equity' by 'an examination in relevant circumstances'. Their Honours, at 341, stated:

> ... it will always be necessary to characterise the conduct of a holder of an earlier interest in order to determine whether, in all the circumstances, that conduct is such that, in fairness and in justice, the earlier interest should be postponed at a later interest ...

Circumstances where a beneficiary is postponed by reason of the conduct of their trustee

It should be noted that a beneficiary's equitable interest under a trust is not postponed to a later equitable interest created by the trustee in breach of trust, because a beneficiary is entitled to assume, in the absence of any reason to think otherwise, that the trustee will not abuse their position to create interests inconsistent with that of the beneficiary: *Shropshire Union Railways and Canal Co v R* (1875).

On the other hand, where the trustee fails to obtain the title deeds and that failure allows later equitable interests to be created in favour of a third party, the beneficiary's rights under the trust are no better than those of the trustee, so that if the trustee's interest is subject to the third party's equitable interest, then the beneficiary's equitable interest is also subject to the third party's interest: *Walker v Linom* (1907); *Lloyds Bank v Bullock* (1896).

The beneficiary's interest will be postponed where the beneficiary personally engages in conduct allowing a later interest to be acquired in the belief that the beneficiary's interest did not exist: *Shropshire Union Railways and Canal Co v R* (1875).

Different kinds of postponing conduct

The case law has recognised six different examples of postponing conduct by the holder of an earlier unregistered interest that has resulted in the earlier interest being postponed to a later interest. The first five of these six examples were recognised by the courts in the context of Old System Title land, and apply equally as between the holders of competing unregistered interests in relation to Torrens Title land. The sixth example of postponing conduct relates to a failure to caveat. The concept of a caveat is unique to Torrens Title land and, accordingly, this example of postponing conduct is limited to Torrens Title land.

The reason why case law developed in the context of Old System Title in relation to what is postponing conduct is equally applicable to Torrens Title land, in that the Real Property Act, which has created Torrens Title, is silent in relation to determining priorities between competing unregistered interests, except for the operation of s 43A, which deems the holder of a 'dealing registrable' to have the legal estate.

By reason of this silence, the courts have found it necessary to apply case law developed in the context of Old System Title to Torrens Title land, in relation to what is postponing conduct.

The different examples of postponing conduct are discussed under the following headings:

- The failure of a purchaser or first mortgagee at settlement to take possession of the title deeds.
- The failure of a purchaser or first mortgagee to retain possession of the title deeds by an act of gross negligence.
- The premature release by a purchaser or first mortgagee of the possession of the title deeds, prior to the purchaser selling or the first mortgage being discharged and the inclusion of a receipt clause stating that the proceeds of sale have been received when that is not the case.
- The execution of a dealing which does not truly reflect the transaction, such as the execution of a transfer by a registered proprietor who has mortgaged but not sold a property.
- The failure of the holder of an unregistered interest to caveat, where that person was not in a position to take possession of the title deeds.

The failure of a purchaser or first mortgagee at settlement to take possession of the title deeds

This kind of postponing conduct was well illustrated by the Old Systems Title case of *Walker v Linom* (1907), where a trustee of certain property failed to take possession of the title deed of all property subject to the trust. This enabled the vendor of the property to enter into a new, later conveyance. The failure of the trustee to take possession of the title deeds when purchasing the property from the vendor amounted to postponing conduct as against the holder of the later interest.

The failure of a purchaser or first mortgagee to retain possession of the title deeds by an act of gross negligence

This is illustrated by the Old Systems Title case of *Northern Counties of England Fire Insurance Co v Whipp* (1984), in which an insurance company lent money to an employee and took a mortgage over his property. The title deeds of the property were kept in the company's safe. Dishonestly, and in total breach of his obligations as an employee, the mortgagor uplifted the title deeds and proceeded to enter into a later inconsistent transaction.

It was argued on behalf of the holder of the later transaction that the mortgagee should be postponed because of its failure to retain the title deeds. On the facts of the case, the court rejected this argument. Because there was no gross negligence on the part of the employer, there was no postponing conduct. The court acknowledged that the outcome would have been different where the person who normally uses the title deeds was acting within their authority as an employee at the time.

The premature release by a purchaser or first mortgagee of the possession of the title deeds, prior to the purchaser selling or the first mortgage being discharged and the inclusion of a receipt clause stating that the proceeds of sale have been received when that is not the case

These two examples of postponing conduct arose in both *Heid v Reliance Finance Corp Pty Ltd* (1983) and *Lloyds Bank v Bullock* (1896).

Heid v Reliance Finance Corp Pty Ltd (1983)

In *Heid v Reliance Finance Corp Pty Ltd*, Mr Heid was the registered proprietor of certain Torrens Title land. He sold it to a company, Connell Investments Pty Ltd, for the sum of $165,000, of which:

- $15,000 was a deposit immediately released by the purchaser to the vendor;
- $50,000 was to be provided by Mr Heid as vendor finance to be secured by a second mortgage; and
- the balance ($100,000) was to be paid to Mr Heid on settlement.

Connell Investments was one of a group of companies controlled by a Mr McKay, who had business dealings with Mr Heid over many years. Mr McKay introduced Mr Heid to a Mr Gibby, an employee of the group of companies, as a 'solicitor of the Supreme Court of NSW'. In fact, Mr Gibby was not a solicitor. Mr Heid was persuaded to use Mr Gibby to do the legal work relating to his sale of the property. With this in mind, Mr Heid executed a transfer in favour of Connell Investments and handed the executed transfer together with the certificate of title to Mr Gibby, prior to settlement and prior to being paid the balance of the purchase moneys. Mr Heid handed over these documents because he was proposing to go overseas; whilst Mr Heid was overseas, Connell Investments entered into some five mortgages.

At the time of entering into the first mortgage with Reliance Finance Corp, Connell Investments was not yet registered. As a result, Reliance could not obtain s 43A protection, because the next dealing registrable was the transfer in favour of Connell, which was only too well aware that Mr Heid had not been fully paid.

When Reliance advanced the money to Connell Investments, it assumed that Mr Heid had been fully paid as per the transfer from Mr Heid to Connell, which said as much. When Mr Heid returned from overseas several months later, he discovered that the $100,000 he was supposed to receive at settlement had not been paid. He also discovered that the series of mortgages had been created by Connell in favour of Reliance and the other mortgagees.

The trial judge found in favour of Mr Heid on the grounds that there was no postponing conduct involved in handing over an executed transfer saying that the proceeds of sale had been fully received from the purchaser and in handing over the certificate of title. The trial judge took the view that this

conduct by Mr Heid was no different from that which was carried out every day of the week by vendors of properties, who executed transfers saying that they have been fully paid and who also handed certificates of title to their solicitors to act on their behalf at settlement.

The New South Wales Court of Appeal decision

On appeal to the New South Wales Court of Appeal, the decision of the trial judge was reversed on the grounds that when Mr Gibby was dealing with Mr Heid, he was doing so in his capacity as the solicitor for Connell and not as the solicitor for Mr Heid. Accordingly, when Mr Heid handed the executed transfer and the certificate of title to Mr Gibby, he was giving those documents to the purchaser *prematurely*.

Justice Hope discussed the situation where one solicitor acts for both parties in a transaction. He observed that sometimes:

- the solicitor is truly the solicitor for the vendor, with the purchaser choosing to use the vendor's solicitor, whether for convenience or to save money;
- the solicitor is genuinely the solicitor for both parties to the transaction. This is likely to be the case where both parties have been rendered accounts for the services provided. Normally, there will be some history where the same solicitor has, in the past, acted for each party; and
- the solicitor is truly the solicitor for the purchaser, and the vendor has chosen, for whatever reason, to use the purchaser's solicitor.

The Court of Appeal unanimously held that Mr Heid had chosen, for whatever reason, to use the purchaser's solicitor.

The High Court decision

The outcome in the Court of Appeal was affirmed by the High Court on Appeal. Their Honours, however, took different approaches from that which was taken by the Court of Appeal.

Justices Mason and Deane took the view that Mr Heid was postponed, in circumstances where he had given the executed transfer and also the certificate of title to Mr Gibby, whom he knew to be an employee of the McKay group of companies. Their Honours held that it was irrelevant to consider whether Mr Gibby was a solicitor and, if so, on whose behalf he was acting, because Mr Heid knew that Mr Gibby was an employee of the purchasing group of companies.

Chief Justice Gibbs and Justices Wilson and Murphy arrived at the same outcome by applying the doctrine of estoppel. Their Honours held that the execution of a receipt clause containing a statement that the purchase price had been fully paid amounted to a representation which rendered it unconscionable for Mr Heid to depart from what he had represented so far as reliance was concerned.

The view of Their Honours is a reminder of the extent to which the courts are expanding the doctrine of estoppel. In years to come, it is possible that the doctrine of estoppel could be increasingly applied to circumstances that hitherto have been held to amount to postponing conduct.

Lloyds Bank v Bullock (1896)

A second case which recognises that it is postponing conduct for a vendor to execute a receipt clause in a conveyance, and deliver the conveyance to the purchaser when the proceeds of sale have not been received, is *Lloyds Bank v Bullock* (1896). In this case, the owner of Old System Title land created a first mortgage by deed in favour of a building society. It followed under Old System Title that the building society possessed the legal estate and the owner enjoyed an equitable interest. See Chapter 5 for a discussion of why this is so.

Upon the death of the owner, his son, as executor, was persuaded to sell the father's property to the family solicitor, who had also been, for many years, the solicitor for the building society. The dishonest solicitor asked the building society to execute a discharge of mortgage (which under Old System Title is a Deed of Reconveyance) on the basis that the solicitor would attend to the discharge of the mortgage on behalf of the building society. The dishonest solicitor also persuaded the son to sign and give to the solicitor a Deed of Conveyance in which there was a receipt clause whereby the son stated that he had received the proceeds of sale from the solicitor. This, of course, had not occurred.

Next, the dishonest solicitor showed the executed discharge of mortgage, the Deed of Conveyance and the Title deeds to Lloyds Bank, who proceeded to lend money to the dishonest solicitor in return for taking what the bank thought was a first mortgage over the property.

From the above statement of facts, it followed that the building society had the legal estate; the son, as executor, together with the beneficiaries of the will (one of whom was Mrs Bullock) had an equitable interest in the property; and Lloyds Bank had a later equitable interest (although it erroneously thought it held the legal estate, because the building society had discharged its mortgage).

The court held that when the building society executed the discharge of mortgage and gave it to the solicitor, it did so '*in escrow*'. This means the building society had only executed the document on the basis that it was only to operate once the money had been repaid. As this condition was never fulfilled, because of the solicitor's dishonesty, the building society retained the legal estate.

Further, the building society had not engaged in postponing conduct, because they delivered the executed document to their solicitor, to attend settlement on *their* behalf. The building society was not aware that their solicitor was purchasing from the estate of the late father.

On the other hand, the court held that the son had engaged in postponing conduct, because he had executed the Deed of Conveyance and

delivered it to the solicitor in circumstances where the son knew that the solicitor was also the purchaser. The court held that, in so doing, the son was guilty of postponing conduct because he had delivered the conveyance including the receipt clause to the other party to the transaction.

Further, because the son, as trustee, was not acting in breach of trust, or seeking to defraud the beneficiaries, the beneficiaries' rights under the trust were no better than those of the trustee, so that if the trustee's interest was subject to the third party's equitable interest, then the beneficiaries' equitable interest was also subject to the third party's interest.

As a result, it was held that the order of priorities was: first, the building society; followed by the bank; and only after they were fully paid was the estate of the deceased father entitled to any interest in the property.

The execution of a dealing which does not truly reflect the transaction, such as the execution of a transfer by a registered proprietor who has mortgaged but not sold a property

This example of postponing conduct is illustrated by the High Court case of *Breskvar v Wall* (1971). In that case, Mr and Mrs Breskvar were the registered proprietors of Torrens Title land. They borrowed money from a Mr Petrie who persuaded them to execute a blank transfer as 'security' for the loan. The dishonest Mr Petrie proceeded to insert the name of his grandson, Mr Wall, into the transfer as the transferee. The transfer was registered. Some time later, Mr Wall transferred the property to Alban Pty Ltd. Prior to registration of the Alban transfer, Mr and Mrs Breskvar became aware of what had happened and the matter went to court.

The High Court held that the fraud of the grandfather should be imputed to the grandson because the grandfather had acted on behalf of or for the benefit of the grandson. It followed that, between the unregistered Breskars and the registered Wall, the unregistered Breskvars would prevail by reason of the fraud exception to indefeasibility.

As between the competing unregistered interests of the Breskvars and Alban, however, the Breskvars were postponed because they had held out that they had sold, and Alban, not unreasonably, had assumed that to be the true position.

The failure of the holder of an unregistered interest to caveat, where that person was not in a position to take possession of the title deeds

It should be noted that the lodging of a caveat does not improve one's priority. Rather, it is the failure to caveat which can amount to postponing conduct: *Butler v Fairclough* (1917).

Butler v Fairclough (1917)

In *Butler v Fairclough*, the High Court held, in relation to Torrens Title land, that a person who has an unregistered second mortgage is guilty of postponing conduct if that person fails to either register or caveat. It should be noted that, as second mortgagee, the holder of this interest will not have possession of the certificate of title.

In this case, the register proprietor was a man named Good. Mr Good was subject to a registered mortgage. On 30 June 1915, he entered into a second mortgage in favour of Mr Butler, and this second mortgage was not registered. Two days later, Mr Good sold the property to Mr Fairclough, subject to the first mortgage, but making no mention of the second mortgage.

On 7 July, Mr Butler lodged a caveat to protect the second mortgage. On 12 July, Mr Fairclough lodged the transfer.

The lawyers initially advising Mr Fairclough erroneously thought that the caveat lodged on 7 July entitled Mr Butler to priority as against the transfer of Mr Fairclough, which was not lodged until 12 July. Subsequent legal advice, however, was to the effect that the failure of Mr Butler to register or caveat between 30 June and 2 July amounted to postponing conduct. The High Court upheld this view.

The observations of Sir Owen Dixon

The decision in *Butler v Fairclough* has come in for some criticism, mainly on the basis that but for the enactment of the caveat provisions in the Real Property Act there would be no postponing conduct. Further, if the failure of Butler to caveat was a failure between 30 June and 2 July 1915, then would there have been postponing conduct if the failure to caveat had been over a lesser period and, if so, what lesser period? Some of these concerns were expressed by Sir Owen Dixon in *Abigail v Lapin* (1930) at 204–05. Notwithstanding these concerns, it has not, to date, been overruled by the High Court and must be taken to be good law.

J & H Just (Holdings) Pty Ltd v Bank of New South Wales (1971)

In *J & H Just (Holdings) Pty Ltd v Bank of New South Wales*, the High Court held that a first mortgagee of Torrens Title land who has not registered, nor caveated, but has taken possession of the certificate of title is not postponed because, by taking possession of the certificate of title, the first mortgagee has made it impossible for a later interest to be registered.

The High Court distinguished *Butler v Fairclough* (1917) because in that case, the mortgagee who failed to register or caveat was a second mortgagee who, accordingly, did not have possession of the certificate of title.

It should also be noted that when the same case was before the New South Wales Court of Appeal in *J & H Just (Holdings) Pty Ltd v Bank of New*

South Wales (1970), that court came to the same result but, on the basis that the later interest had constructive notice of the first mortgage, by reason of the fact that the first mortgagee had possession of the certificate of title and, accordingly, the holder of the later interest should have made enquiries of the person in possession of the certificate of title as to whether the custodian of the Certificate of Title held any interest in the land and, if so, what interest was held.

It seems to the writer that the outcome whereby the earlier unregistered first mortgage is entitled to prevail is justifiable on either of these two bases.

From *Butler v Fairclough* (1917) and *J & H Just (Holdings) Pty Ltd v Bank of New South Wales* (1971), it follows that a second or subsequent mortgagee must register or caveat or be postponed: *Person to Person Financial Services Pty Ltd v Sharari* (1984).

The obligation on a purchaser to caveat

It is unclear whether or not a purchaser upon exchange of contracts will be regarded as guilty of postponing conduct if failing to caveat. In Victoria for many years, it was thought that such a failure amounted to postponing conduct: *Osmanoski v Rose* (1974). More recent Victorian authorities have questioned the correctness of this view. In *Jacobs v Platt Nominees* (1990), the Victorian Court distinguished *Osmanoski* on the grounds that the holder of the earlier interest in *Jacobs*, having taken an option to purchase from her parent's family company, was not guilty of postponing conduct for failing to caveat because she had no reason to suspect the dishonesty of her father. See also *Avco Financial Services Ltd v Fishman* (1993).

It is unclear how the New South Wales courts will rule on this point. The essence of the decision in *Butler v Fairclough* (1917) is whether or not the failure to caveat, when considered in the light of all the circumstances, allowed the holder of the later interest mistakenly to assume that there was no earlier unregistered interest. Confined to its facts, *Butler v Fairclough* only relates to second and subsequent mortgages. On the other hand, it does appear to be authority for a broader principle that extends to holders of unregistered interests as a purchaser.

The obligation on a beneficiary under a trust to caveat

It is also unclear whether the courts will be prepared to extend *Butler v Fairclough* (1917) to beneficiaries under a trust who have failed to protect their interest by recording a caveat. Section 82 of the Real Property Act enables beneficiaries of a trust deed to cause the Registrar-General to record a caveat to protect their interest. They are also entitled to lodge a caveat pursuant to s 74F of the Act.

In these circumstances it is arguable that, having regard to:

- the importance of the Register in relation to Torrens Title land;
- the fact that a person who is a beneficiary under a trust cannot be registered; and
- the fact that s 43 of the Real Property Act provides that a person taking an interest in land is entitled to assume the correctness of the Register, without looking behind it,

any failure to protect that unregistrable interest by caveating or otherwise (by, eg, taking possession of the certificate of title) will amount to postponing conduct.

5 OLD SYSTEM TITLE

You should be familiar with the following areas:

- the good chain of title and the abstract of title
- priorities between competing interests
- deeds
- the register of deeds
- the operation of s 184G of the Conveyancing Act 1919
- converting Old System Title land to Torrens Title

THE GOOD CHAIN OF TITLE AND THE ABSTRACT OF TITLE

Ownership of Old System Title land can only be proved with absolute certainty by tracing, in an unbroken chain, all documents affecting the land all the way back to the Crown grant.

In England, investigations back to the Crown grant have proved difficult. The English courts adopted a rule, derived from the established practice of conveyancers, which required an owner wishing to sell land to trace the title back in an unbroken chain to an acceptable documentary starting point at least 60 years before the contract for sale.

This documentary starting point is called the 'good root of title'. Instruments satisfying this definition include a conveyance for value of the whole legal and equitable interest in the land and a first legal mortgage. In New South Wales, the Conveyancing (Amendment) Act 1930 has now reduced this period to 30 years.

The document that the vendor supplies to the purchaser with the information about the instruments and events necessary to establish a 'good root of title' is called the 'abstract of title'. Instead of an 'abstract of title' being provided by the vendor, it is more usual for contracts for the sale of land to permit the vendor to provide a chronological list of documents and events that comprise the title, plus a photocopy of the relevant documents.

In practice, tracing title in an unbroken chain back to a good root of title not less that 30 years old gives confidence that the title is secure. However, one can never be certain. There may be some outstanding interest in the land, such as an easement or restrictive covenant, created before the date of the good root of title and discoverable only by enquiry back beyond the good root of title.

Where the purchaser discovers an outstanding interest before completing the contract, then there is a 'defect in title'. The purchaser will generally be able to refuse to complete, unless the statute of limitations has barred enforcement of the interest.

On the other hand, if the purchaser does not discover the interest until after completion, the doctrine of 'merger', by which rights under a contract for sale merge in the conveyance and cease to be enforceable, results in the purchaser being subject to the defective title.

PRIORITIES BETWEEN COMPETING INTERESTS

Competing interests in the one parcel of land may either:

- both be legal;
- both be equitable; or
- be one legal and the other equitable.

Competing legal interests

Under Old System Title, a legal interest must be created by deed (except for an oral lease which satisfies the requirements of s 23D of the Conveyancing Act). The deed operates from the date it is delivered. It follows that, between competing legal interests, priority goes to the deed that was first delivered.

Examples of legal interests under Old System Title include:

- a purchaser who at settlement has a Deed of Conveyance;
- a first mortgagee by Deed, who at settlement has a Deed of Conveyance;
- a lessee who has a Deed of Lease;
- a lessee who has the benefit of an oral lease, which satisfies each of the requirements of s 23D of the Conveyancing Act; and
- the person who owns the land, who has the benefit of a Deed of Easement.

Where two or more legal interests in the one parcel of land are inconsistent with each other, priority depends on the date on which the instruments creating the interests came into operation. The rule is '*nemo dot quod non habet*' ('a person cannot convey an interest which he or she does not have').

Frequently, what might outwardly appear to be a competition of priorities between the holders of two legal interests may in reality be a competition

between an earlier legal and a later equitable interest. If the earlier legal interest has divested the creator of that interest of the legal estate, then when the creator of the earlier interest creates the later interest, it is not recognised by the common law and at best is only an equitable interest because of the *nemo dat* rule that a person cannot convey an interest which they do not have.

Competing equitable interests

Examples of equitable interests under Old System Title land include:

- a purchaser who has exchanged contracts, but not settled;
- a second or subsequent mortgagee;
- a person who has the benefit of an agreement to grant a mortgage;
- a person who holds a mortgage secured by the deposit of title deeds;
- a person who has the benefit of an agreement to lease;
- a beneficiary under a trust; and
- a person enjoying the benefit of a restrictive covenant.

Although an earlier created equitable interest normally takes priority over an equitable interest that is created later, a court of equity regards itself as free to determine priorities by seeking the 'best equity'.

In *Heid v Reliance Finance Corp Pty Ltd* (1983), a Torrens Title case, Mason and Deane JJ said that priority between competing equitable interests is to be determined by a 'more general and flexible principle', with preference being given to what Their Honours referred to as 'the better equity'. Their Honours at 341 stated:

> Preference should be given to what is the better equity in an examination of the relevant circumstances. It will always be necessary to characterise the conduct of the holder of the earlier interest in order to determine whether, in all the circumstances, that conduct is such that, in fairness and in justice, the earlier interest should be postponed to the later interest ... To say that the question involves general considerations of fairness and justice acknowledges that, in whatever form the relevant test be stated, the overriding question is '... whose is the better equity, bearing in mind the conduct of both parties, the question of any negligence on the part of the prior claimant, the effect of any representation by the prior claimants as possibly raising an estoppel in favour of the later holders and whether it can be said that the conduct of the ... prior owner has enabled such a representation to be made?'

Where the latter of two competing interests was taken with notice, whether actual, constructive or imputed, of the earlier interest, the holder of the earlier interest will have the better equity. For a full discussion of the meaning of actual, constructive and imputed notice, see Chapter 3, under the heading 'Meaning of notice'.

Examples of postponing conduct which have resulted in the holder of the later interest being regarded as having the better equity have been considered in detail in Chapter 4, under the heading 'Postponing conduct'.

The term 'equity' is sometimes used to describe a person's right to bring an action to enforce a remedy in respect of land. This is a 'personal equity' only; it is not an interest in the land, and as a general rule cannot be maintained against third parties who have acquired an interest in the land.

The courts, however, also appear to recognise an 'equity' that is an interest in land. Sometimes it is called a 'mere equity', to distinguish it from the non-proprietary 'personal equity'. Because 'mere equities' are ancillary to interests in land, they are themselves treated as proprietary, but less than full equitable interests. They rank at the bottom of the hierarchy of proprietary interests, behind equitable interests, which in turn rank behind legal interests.

Examples of this kind of 'mere equity' are:

- the right to have a document rectified; and
- the right of a person deprived of an interest in land under a transaction entered into by mistake or procured through fraud to have the transaction set aside: *Latec Investments Ltd v Hotel Terrigal Pty Ltd* (1965), *per* Kitto J.

Assuming that 'mere equities' exist, in a competition between mere equity and a later equitable interest, the equitable interest prevails if, and only if, acquired for value and without notice of the mere equity.

In *Latec*, Taylor J was of the view that the competing interests were both equitable interests, but that the earlier interest should be postponed because of the delay in asserting its rights. During this time, the later equitable interest was created. Even on the view of Taylor J that the right of a person deprived of an interest through fraud or mistake was a full equitable interest, Taylor J was not prepared to find for the earlier interest over a later equitable interest acquired for value and without notice of it.

The holder of the earlier interest in *Latec* took several years to assert its position. In these circumstances, it would appear that the view of Taylor J was based on the delay of the holder of the earlier interest in asserting its position. On the other hand, certain academic writers, such as Professor Butt at p 1,938, have taken the view that the opinion of Taylor J is authority for a more general proposition that, 'in a competition between an equitable interest arising from the right to have a transaction set aside, and a later equitable interest, the purchaser for value will prevail over the earlier equitable interest'.

Earlier legal interest, later equitable interest

In competition between a legal interest taken without notice of the earlier interest and a later created equitable interest in the same land, the legal interest prevails if it has been acquired by a purchaser for value, in good faith (ie, *bona fide*) and without notice of the earlier equitable interest. This is

in accordance with the maxim 'where the equities [the merits of the case] are equal, the law prevails'. For a fuller treatment of this aspect of the law, see Chapter 4, under the heading 'Postponing conduct'.

Section 53(3) of the Conveyancing Act 1919 gives purchasers some protection against notice. A purchaser is not affected with notice of matters that would be discoverable by an investigation into the title earlier than the good root of title at least 30 years old, unless the purchaser actually makes such an investigation.

It is open to the holder of an equitable interest to show that the conduct of the legal interest holder has been such that the legal interest ought to be postponed to the equitable.

DEEDS

Section 38 of the Conveyancing Act has changed the common law requirements for a deed. Section 38(1) provides that 'Every deed ... shall be signed as well as sealed, and shall be attested by at least one witness not being a party to the deed; but no popular form of words shall be requisite for the attestation'. Most documents intended to be deeds are described as such, or contain the formula 'signed, sealed and delivered'.

A deed cannot take effect until it is 'delivered'. Professor Butt at pp 1,978 and 1,979 has stated the law on 'delivery' as follows:

> Delivery is any act or words showing that the party executing the deed regards it as 'presently binding'; it is any act done showing 'an intention to be bound'. The intention to be bound can be proven directly or by inference from circumstances. Whether a deed has been 'delivered' is a question of fact in all the circumstances of the case ...
>
> Delivery may be actual or constructive. Actual delivery involves physically handing over the deed. The question is then whether the grantor has intended to part with dominion and control over the instrument and vest that dominion and control in the grantee. But delivery need not involving handing over: a deed may be 'delivered' without ever leaving the possession of the executing party. This is 'constructive' delivery.
>
> Delivery is the final formality, chronologically, in executing a deed. A deed cannot be delivered until it has been signed and sealed. If the signing and sealing occurred after a purported delivery, the deed must be delivered again to become effective. Once a deed is delivered, the part delivering it cannot withdraw or resile from it ...
>
> Delivery may be unconditional or conditional. A deed delivered unconditionally comes into effect immediately. A deed delivered conditionally – '*in escrow*'. That is to say, the deed does not come into effect until the condition is fulfilled. The condition may be express; for example, until a certain day arrives, or until another party to the transaction does some act. Or the condition may be implied, as where a deed of Conveyance is delivered on the implied condition that the purchase price is paid ...

> Whether delivery is conditional or unconditional in a particular case is a question then of what the parties intended, and that intention can be gathered from their words or from circumstances before or at the time the deed is executed. An escrow may be delivered to the person intended to benefit under it [rather than to a third party], without losing conditional nature.
>
> Where a deed is delivered as in escrow but the condition remains unfulfilled, the deed never comes into operation. Nevertheless, having delivered the deed, even conditionally, the delivering party cannot withdraw or resile from it ...
>
> In Australia, it seems that if the condition remains unfulfilled, then the appropriate remedy is to seek the aid of equity to have the deed delivered up to be cancelled, and that mere lapse of time does not permit the delivery party unilaterally to renounce the deed.
>
> Once the condition is fulfilled, an escrow operates retrospectively as from the date of delivery.

THE REGISTER OF DEEDS

It has been possible to record deeds and other documents relating to land in New South Wales since the 1800s. The First Registration Act was passed in 1825, and amended in 1842. The 1825 Act (as amended) was repealed by the Registration of Deeds Act 1843, which was itself repealed by the Registration of Deed Act 1897.

The 1897 Act remained in force until it was repealed in 1984. Its substantive provisions were re-enacted in the current legislation: Div 1 of Pt 23 of the Conveyancing Act, ss 184A–184J.

Any instrument registered under the Registration of Deeds Act 1897 is deemed to have been registered under Div 1 of Pt 23 of the Conveyancing Act 1919 under the transitional provisions of the 1984 repealing Act.

Under s 184C of the Conveyancing Act 1919, the Registrar-General is required to maintain a General Register of Deeds.

The Registrar-General gives the instrument a 'distinctive reference', under s 184E, and instruments are registered in the order in which the distinctive references are allocated to them, under s 184E(5). The registration copy is retained by the Registrar-General and becomes part of the Register: s 184C(2)(b).

Under s 184D of the Conveyancing Act 1919, the Registrar-General may register 'any instrument whatever, whether affecting or relating to land or not', and 'instrument' is defined in s 7(1) of the same Act to include deeds, wills and Acts of Parliament. However, registration of an instrument that does not affect land is effective for purposes of record only; there is no priority for a registered instrument unless it deals with land.

It is not possible to register in the General Register of Deeds instruments that affect Torrens Title land where the instruments are in a form registrable in the Torrens Register and relate solely to Torrens Title land: s 184B(1).

Division 1 of Pt 23 of the Conveyancing Act does not require instruments to be registered for validity.

THE OPERATION OF S 184G OF THE CONVEYANCING ACT 1919

Section 184G(1) of the Conveyancing Act 1919 provides as follows:

> All instruments (wills excepted) affecting, or intended to affect, any lands in New South Wales which are executed or made *bona fide* and for valuable consideration, and are duly registered under the provisions of this Division ... shall have and take priority not according to their respective dates but according to the priority of the registration thereof only.

Registration gives priority to the person registered first, provided:

- the person first registered is competing with another interest which was created by instrument;
- the person first registered has taken an effective instrument;
- the person first registered has paid valuable consideration; and
- the person first registered was *bona fide*.

Competing interest was created by instrument

Section 184G(1) only applies to interests created or evidenced by instruments. As a result, an interest created without an instrument being brought into existence is not defeated by the later registration of an instrument affecting the same land.

Examples of interests that are not created or evidenced by instruments include:

- a legal lease created without writing under s 23D(2) of the Conveyancing Act;
- an equitable mortgage by the deposit of title deeds is created without writing; and
- beneficiaries under a resulting or constructive trust.

If an instrument, although not strictly required, is in fact brought into existence and left unregistered, the interest it embodies will be defeated by a competing interest embodied in an instrument that is registered.

Registered instrument must be effective

Under Torrens Title, a void dealing becomes indefeasible on registration: *Mayer v Coe* (1968). By way of comparison, under Old System Title, a void dealing remains ineffective after registration. This was recognised in *Re Cooper* (1882), where, notwithstanding registration, a Deed of Conveyance was held to be ineffective because the apparent vendor had not executed the Conveyance.

Under Old System Title, an instrument is void whenever it does not reflect the intent of the apparent creator of the instrument. Perhaps the instrument is a forgery, or perhaps the instrument has been executed on a misunderstanding as to the effect of the instrument.

Such situations should be contrasted with the position where a dishonest vendor, for example, conveys the same property twice. Both conveyances are effective in the sense that the dishonest vendor when executing each conveyance intended to sell to the respective purchaser. Which of the two purchasers ultimately prevails will turn on the applicability of s 184G of the Conveyancing Act 1919 (NSW) and on priority principles.

Valuable consideration paid by the person who is first registered

Section 184G requires the person first registered to have paid valuable consideration. This means that the person registered did not take by way of a gift and the consideration was substantial and not nominal: *Bullen v A'Beckett* (1863).

Bona fide and notice

The instruments claiming priority by registration must have been 'executed or made *bona fide*'. For the purposes of s 184G, an instrument is not executed or made *bona fide* if the person taking under it had notice, whether actual, constructive or imputed, of the earlier interest over which priority is sought by registration.

Notice received before settlement of a conveyance precludes a purchase from gaining priority by registration: *Scholes v Blunt* (1916). This is so even where the purchaser had no notice at exchange.

Notice received after settlement but before it is registered does not preclude the purchaser from gaining priority by registration: *Burrows v Crimp* (1887). This is so even where registration occurs during the course of litigation brought to determine priority between the competing interests:

> Where a person has become the owner of property, *bona fide* and honestly, and hears that there is a prior deed in existence relating to the same property, it is a perfectly honest thing for him to promptly register his conveyance. That is what the law intends. The object of the law of registration is to keep people awake, and make them alive to their duties. It will not disentitle the registering vendee to the benefit of the Act.

Thus, a mortgagee who has executed the mortgage without notice of an earlier interest, but who subsequently receives notice of that earlier interest, may nevertheless register the mortgage and obtain priority.

In the case of a purchaser who has exchanged contract and then acquires notice of an inconsistent interest, the purchaser should register the contract for sale of land and thereby get the benefit of s 184G: *Moonking Gee v Tahos* (1963).

If the purchaser proceeds to settlement, it will be done with notice: *Scholes v Blunt* (1916).

Effect on the holder of an equitable interest who is first registered

Where a purchaser registers an equitable interest and thereby obtains priority by virtue of s 184G, the holder of the equitable interest is entitled as part of the fruits of prevailing over an inconsistent interest to acquire the legal estate: *Darbyshire v Darbyshire* (1905); *Moonking Gee v Tahos* (1963).

CONVERTING OLD SYSTEM TITLE LAND TO TORRENS TITLE

Since 1 January 1863, all land in New South Wales transferred from the Crown has been governed by the provisions of the Real Property Act 1900. Land conveyed by the Crown before that date was governed by the principles of Old System Title land.

The Real Property Act provides three methods by which Old System Title land may be brought under the Act. The three methods are:

- primary application;
- qualified folio of the Register; and
- limited folio of the Register.

Primary applications

A 'primary application', under Pt 4 of the Act, enables a person with an interest in land to convert the land from Old System Title to Torrens Title land.

A primary application must be accompanied 'by such evidence and documents of title as the Registrar-General may require': s 14(4). The Registrar-General may reject a primary application if the supporting evidence is deficient: s 23(2).

The Registrar-General brings the land under the Act by creating a folio of the Register for the land: s 17(2). This is known as an 'ordinary folio', to distinguish it from a 'qualified folio' or a 'limited folio'.

Caveats against primary applications

Under s 74B(1), a person who claims an estate or interest in land which is the subject of a primary application may lodge a caveat prohibiting the land from being brought under the Act. Section 17(3)(b) states that while the caveat is in force, the land cannot be brought under the Act.

The caveat lapses three months after lodgement, unless the caveator has obtained a court order extending its operation, or has commenced court proceedings to establish title to the interest claimed: s 74C(1).

The primary applicant may request the Registrar-General to serve a notice on the caveator, giving the caveator 21 days within which to obtain a court order extending the caveat or to take proceedings to establish title to the interest claimed in the caveat. If the caveator fails to obtain a court order extending the caveat, it will lapse: s 74C(3), (4) and (5).

The court may extend the caveat's operation for such period as it thinks fit, provided it is satisfied that the caveats claim 'has or may have substance'. Alternatively, the court may dismiss the application: s 74D.

Once a caveat has lapsed or been withdrawn, following the service of a notice of the kind referred to above, any further caveat lodged by the same caveator in respect of that estate or interest and based on the same facts has no effect, unless the Supreme Court gives leave or the primary applicant consents: s 74O. The caveator may still apply for an injunction restraining the Registrar-General from bringing the land under the Act: s 74R.

Qualified Title

Rights under Qualified Title

In order to simplify and expedite the conversion of title from Old System to Torrens Title, Pt 4A introduced the concept of Qualified Title into the Real Property Act in 1967: ss 28A–28R.

Qualified Title involves a two stage conversion:

- Initially, the registered proprietor is only protected from interests created after the land came to be Qualified Title. Interests that existed while the land was under Old System Title continue to be enforceable.
- After the title ceases to be 'qualified', indefeasibility is conferred and the protection becomes absolute.

'Subsisting interests'

A qualified folio of the Register is subject to every 'subsisting interest' in the land, whether recorded in the Register or not: s 28P(1)(d).

Section 28A defines 'subsisting interest' as follows:

> (a) Any contingent or vested estate or interest in [the] land that was in existence at the date on which the qualified folio of the Register was created and would have been enforceable against the person for the time being registered in that qualified folio as the proprietor had that qualified folio not been created and had any dealing registered therein been effected by a corresponding instrument duly registered under Division 1 of Part 23 of the Conveyancing Act 1919 at the same time as the dealing became registered in the Register; and

(b) Any estate or interest in [the] land, arising by prescription or under any statute of limitations, that was in existence or in the course of being acquired at the date on which the qualified folio of the Register was created.

The Registrar-General must record in a qualified folio any subsisting interest that is apparent, but need not search or inquire about whether such interests exist: s 28I. A proprietor's Qualified Title is subject to interests that would have been enforceable against it had the land remained under Old System Title.

Lapsing of cautions

There are three ways in which a caution lapses. They are:

- 'ordinary' cautions, that is, cautions that do not contain a notation under s 28J(1A);
- cautions that contain a notation under s 28J(1A); and
- cautions that contain a notation under s 28J(1B).

Most cautions are 'ordinary cautions', which cannot lapse until at least six years and at most 12 years after the creation of the qualified folio: s 28M. In relation to an 'ordinary caution' where:

- a person, for value and without fraud, becomes registered as proprietor of an estate or interest in the land, within six years of the creation of the Qualified Title, then it lapses six years after the creation of the folio;
- a person, for value and without fraud, becomes registered as proprietor of an estate or interest in the land between six years and 12 years of the creation of the Qualified Title, then it lapses when the person becomes registered;
- no person, for value and without fraud, becomes registered as proprietor of an estate or interest in the land within 12 years of the creation of the Qualified Title, then it lapses on the 12th anniversary of the creation of the qualified folio.

The lapsing frees that particular estate or interest of any interests that affected the land while it was subject to Qualified Title: s 28MB(1).

Cautions containing a 'conveyance without value' lapse in a similar manner to 'ordinary cautions': s 28MB.

The lapsing does not defeat subsisting interests that were recorded in the qualified folio or were the subject of a caveat, or that were preserved by s 42 of the Act before the lapsing of the caution: s 28MB.

Cancelling cautions

Cautions containing a 'title based on adverse possession' notation under s 28J(1B) do not lapse; they may, however, be cancelled. The registered proprietor of the land may apply to the Registrar-General for cancellation of the caution once 12 years have elapsed since the adverse possession

began: s 28ME. The Registrar-General may then cancel the caution: s 28ME(3).

The registered proprietor can apply for the cancellation of the caution. The Registrar-General has the power to cancel the caution if satisfied that all estates and interests in the land are held free from any subsisting interests: s 28MC.

The registered proprietor can apply for the cancellation of a caution that has lapsed. The Registrar-General has the power to cancel the caution if satisfied that all estates and interests in the land are held free from any subsisting interests: s 28MD.

Caveats to protect subsisting interests

A person who claims a 'subsisting interest' in land to be the subject of a qualified folio may lodge a caveat, under ss 74A(2)(a) and 74F. Such a caveat prevents the Registrar-General from cancelling the caution recorded in the qualified folio: s 74H(2) and (5)(k). The general provisions of the Real Property Act in relation to caveats govern caveats to protect 'subsisting interests'.

Qualified Title is a hybrid title

The enforceability of 'subsisting interests' gives Qualified Title a hybrid quality. In effect, until the caution lapses or is cancelled, the title is part Torrens Title and part Old System Title.

Limited title

Limited title was introduced in 1976 by the enactment of Pt 4B of the Real Property Act. It enables the conversion to Torrens Title of land where the boundaries were insufficiently defined to permit the creation of ordinary or qualified folios.

Section 28T sets out the circumstances in which a limited folio of the Register may be created. Where the boundaries are not sufficiently defined to enable:

- an ordinary folio to be created under Pt 3;
- a qualified folio to be created under s 28C, 28D or 28E; or
- an ordinary folio to be created under s 28EA,

the Registrar-General may create an ordinary or qualified folio respectively.

Where the limited folio is a qualified folio, the provisions of Pt 4A (relating to qualified folios) apply to the limited folio: s 28T(7) and (8). If a limited folio is an ordinary folio, then the provisions of the Act give the registered proprietor an indefeasible title subject only to definition of boundaries: ss 28T(8) and 28U.

The Registrar-General may cancel the 'limitation' on the lodgement and registration of a plan of survey (a 'delimitation plan') that adequately defines the boundaries of the land: s 28V. A person claiming an estate or interest in land that is the subject of a delimitation plan may lodge a caveat against the registration of the plan: s 74F(4).

Provided the caveat remains in force, the Registrar-General cannot register a delimitation plan prohibited by it: s 74H(3). The general provisions of the Act governing caveats against dealings also govern caveats against the registration of delimitation plans.

6 CO-OWNERSHIP

You should be familiar with the following areas:

- joint tenancies and the right of survivorship
- converting a joint tenancy into a tenancy in common
- bringing the co-ownership to an end and
- rights of co-owners *inter se*

JOINT TENANCIES AND THE RIGHT OF SURVIVORSHIP

There are two types of co-ownership still in existence in New South Wales. They are a joint tenancy on the one hand and a tenancy in common on the other.

Joint tenancy

The significance of a joint tenancy is that when one joint tenant dies, that joint tenant's share reverts to the surviving joint tenant or joint tenants. This is known as the right of survivorship. It follows that if a joint tenant dies, that person's estate has no interest in the property. Accordingly, it is not governed by any will of the deceased joint tenant, nor is it governed by any rules as to intestacy if the joint tenant died without an operative will.

Surviving joint tenant

Sometimes it is uncertain who has died first. In *Hickman v Peacey* (1945), the House of Lords were faced with a joint tenancy between a husband and wife. Both joint tenants were killed in a bombing raid during the Second World War. In circumstances where it was not possible to tell who had died first, the House of Lords applied the English equivalent of s 35 of the Conveyancing Act 1919 (NSW) to determine that the older is presumed to have predeceased the younger in the absence of evidence to the contrary.

The significance of s 35 of the Conveyancing Act is best illustrated where joint tenants have different provisions in their prospective wills as to who takes their interest in the jointly held property. For instance, where a husband and wife are joint tenants, the former, in his will, may provide that on his death his interest in all real estate goes to his wife if she survives him, but otherwise to, say, his brother. The wife, for her part, may provide that her interest in all real estate goes to her husband if he survives her but otherwise to, say, her sister. Section 35 would need to be applied where there was uncertainty as to which of the joint tenants died first to determine whether the husband's brother or the wife's sister ultimately took the property.

It is possible for s 35 of the Conveyancing Act to be applied wherever it is uncertain as to which of two joint tenants predeceased the other. Usually, both will die when the incident is one such as a bombing raid or a car accident. There may, however, be situations in which the two joint tenants will die in separate circumstances. Section 35 will still apply because of the uncertainty as to which joint tenant predeceased the other.

One situation where the New South Wales Supreme Court has held that s 35 had no application was in *Halbert v Mynar* (1981), in which a husband, who was a joint tenant with his wife, disappeared, never to be seen again. There is a common law presumption that where a person disappears, they are presumed to have died seven years after the last occasion on which they were seen. The wife died during that seven year period. It was contended that s 35 should apply so that the older husband was presumed to have predeceased the younger wife. The court held that s 35 had no application as the wife died before the common law presumption came into effect.

The four unities

To create a joint tenancy, there needs to be unity of title, of interest, of possession and of time of vesting. In order for there to be a joint tenancy, the joint tenants must have acquired their title to the land under the same instrument. If, for instance, A, B and C acquired an interest in land from X, there would be unity of title between A, B and C. If, however, A transferred a one-third interest to D, then, although B, C and D would each enjoy a one-third interest, there would be no unity of title. D's interest would have been derived from A, whereas B and C's interests would have been derived from X. Any interest between B, C and D would be as tenants in common.

Unity of title means that two joint tenants must be entitled to half each, three joint tenants must be entitled to one-third each, etc. There can be no joint tenancy if the joint tenants hold interests in the land in different proportions. Where co-owners hold interests in the land in different proportions, then the co-ownership is necessarily a tenancy in common.

For A, B and C to be joint tenants, they must not only each hold a one-third interest and have each taken their interest from the same instrument,

but in addition must have taken their respective interests at the same time. If this is not the case, then once again A, B and C will be tenants in common.

Unity of possession means that each co-owner is entitled to possess the whole of the land subject to the other co-owners' equal entitlement to possess the whole of the land. It follows that where three people, say A, B and C, are joint tenants (or indeed for that matter are tenants in common), they are entitled to possess the whole of the land as distinct from possessing separate parts of the land.

Tenants in common

The essential difference between a joint tenancy and a tenancy in common is the absence of any right of survivorship. Where there is a tenancy in common, if a tenant in common wishes their interest to pass to the surviving tenant in common, they must so provide in their will: it does not happen automatically as in the case of a joint tenancy.

As to the four unities, unity of possession also exists in the tenancy in common relationship. There is, however, no unity of title, unity of interest or unity of time of vesting requirement where there is a tenancy in common. On the other hand, it may be that the co-ownership has each of the four unities present, even though the relationship is a tenancy in common rather than a joint tenancy.

Statutory presumption in favour of a tenancy in common

In the absence of clear words to the contrary, there is a statutory presumption in favour of a tenancy in common, under s 26 of the Conveyancing Act 1919 (NSW). Ideally, a contract for sale of land, or a will or an Old System Title Deed of Conveyance should either say 'to A and B as joint tenants' or 'to A and B as tenants in common'.

However, where the instrument simply provides 'A and B', then s 26 of the Conveyancing Act operates and 'A and B' is presumed to mean 'to A and B as tenants in common'. For completeness, it should be noted that a Torrens Title transfer, if registered, brings into operation s 100 of the Real Property Act 1900 (NSW), which has a statutory presumption in favour of a joint tenancy. In practice, however, the Registrar-General will not register a dealing unless it is clear whether the co-ownership is a joint tenancy or a tenancy in common.

As a transfer is typically preceded by a contract for sale and as s 26 of the Conveyancing Act applies to a contract for sale, it is most unlikely that s 100 of the Real Property Act will ever apply.

The operation of the statutory presumption in equity

The High Court in *Delehunt v Carmody* (1986) held that the operation of s 26 of the Conveyancing Act 1919 (NSW) extends to co-owners in equity. In

this case, the registered owner was found to have held the property on trust for himself and his *de facto* wife in equal one-half shares. When he died, the question arose as to whether they had held on trust as joint tenants or as tenants in common. Section 26 of the Conveyancing Act was applied. The High Court held that they were tenants in common in equity. The deceased's interest passed to the person entitled on intestacy.

CONVERTING A JOINT TENANCY TO A TENANCY IN COMMON

Sometimes a joint tenant no longer wishes the right of survivorship to operate. On other occasions, a joint tenant may wish to sell, mortgage or lease their individual interest in the land. In such circumstances it is possible for the co-ownership to continue but for the relationship between the co-owners to change from that of a joint tenancy to that of a tenancy in common.

A joint tenancy will be converted to a tenancy in common where:

- a joint tenant transfers his or her interest;
- a joint tenant mortgages his or her interest;
- a joint tenant leases his or her interest;
- the joint tenants agree to convert;
- merger where a joint tenant acquires a further interest in the land; and
- a joint tenant unlawfully kills another joint tenant.

Transfer by one joint tenant

Assume a joint tenancy between A, B and C. If A transfers his or her one-third interest to D, then there is no unity of title and no unity of time of vesting between D on the one hand, and B and C on the other hand. It follows that D is a tenant in common as to one-third and B and C are tenants in common as to the remaining two-thirds. As between B and C, however, they are still joint tenants because, as between B and C, the four unities still exist.

These principles are derived from the High Court decision in *Wright v Gibbons* (1949), in which three sisters, A, B and C, were joint tenants. A and B obtained advice as to how they could sever the joint tenancy without the knowledge of C. A transferred her one-third interest to B. B then transferred a one-third interest to A. This had the effect of destroying the unities of interest, title and time of vesting.

It is not necessary for the transfer to be registered to affect a severance. Provided an enforceable contract for valuable consideration has been

created as between A and D, there will be a severance of the joint tenancy in equity. If, however, a transfer is executed and registered, then there will be a severance of the joint tenancy at law.

Corin v Patton (1990)

This is illustrated by the High Court decision in *Corin v Patton*. In this case, the High Court was faced with a joint tenancy between a husband and a wife. The joint tenants had become estranged. After the wife was diagnosed with a terminal illness, she sought legal advice as to how she might sever the joint tenancy and ensure that, on her death, her interest in the property did not pass to her estranged husband.

The wife was advised to execute a transfer in favour of her brother and her brother was advised to execute a declaration of trust stating that he held this interest in the land on trust for his sister, the wife. It would appear that the purpose of this declaration of trust was to minimise the stamp duty payable on the transaction between the wife and her brother.

The High Court held that:

- the execution of the transfer did not sever the joint tenancy;
- there had been no severance of the joint tenancy either at law or in equity;
- there was no severance at law because the transfer from the wife to her brother was not registered, as the husband had control of the certificate of title;
- there was no severance in equity because the declaration of trust declared that the brother had no interest in equity;
- a unilateral declaration of an intention to sever the joint tenancy or other unilateral act inconsistent with the continuation of a joint tenancy does not sever the joint tenancy;
- English authorities such as *Burgess v Rawnsley* (1975), which are authority that a joint tenancy can be severed by conduct, are not good law in Australia; and
- equity will not complete an incomplete gift.

In order to satisfy the wishes of the then-terminally ill wife, it is suggested that she should have either ensured that the transfer in favour of her brother had been registered, or (if that was not possible) she should have entered into a contract with her brother for valuable consideration to sell to him some part of her one-half interest in the property. (It is possible to sell less than the entirety of one's interest in a property. The stamp duty payable on a half-share in property will be far greater than the stamp duty payable on, say, a one-hundredth interest in that property.)

Corin v Patton is authority that equity will not complete an incomplete gift. It follows that in the absence of registration, a person such as the wife, who

wishes to sever a joint tenancy, must both destroy at least one of the four unities and also create an interest enforceable in equity.

If, in *Corin v Patton*, the wife had contracted to sell to her brother for valuable consideration, say, a one-hundredth interest in the property, then there would have no longer been any unity of interest between the wife and her estranged husband.

An agreement for sale by the joint tenants, prior to the receipt of the proceeds of sale

An agreement for sale by all the joint tenants does not sever the joint tenancy until the proceeds of sale are received. Rather, the joint tenancy is converted into a joint tenancy over the proceeds of sale. As a result, if a joint tenant dies after the property has been sold but prior to the receipt of the proceeds, the surviving joint tenant, on receipt of the proceeds of sale, will be entitled to all the proceeds pursuant to the right of survivorship: *Re Allingham* (1932).

Mortgage by one joint tenant

An Old System mortgage by one joint tenant has been held to sever the joint tenancy, as it operates as a conveyance: *Re Pollard's Estate* (1863). On the other hand, a mortgage by one joint tenant of Torrens Title land does not sever the joint tenancy; as such, a mortgage operates as a charge.

Accordingly, a mortgagee who only has an interest in that part of the property held by one joint tenant runs the risk that their mortgagor will predecease the other joint tenants. An estate of a deceased joint tenant retains no interest in the property by virtue of the operation of the right of survivorship: *Lyons v Lyons* (1967).

Lease by one joint tenant – no severance

Although the law is far from certain, the Australian position appears to be that a lease by one joint tenant does not sever the joint tenancy, except for the term of the lease. A full discussion of this point is to be found in the decision of Sholl J in *Frieze v Unger* (1960).

Agreement by all the joint tenants

A transfer by all joint tenants to themselves as tenants in common converts the joint tenancy into a tenancy in common: see *Williams v Hensman* (1861); s 45A of the Conveyancing Act 1919 (NSW) and s 99 of the Real Property Act 1900 (NSW).

Severance by conduct

The English courts have recognised a separate category, known as severance by conduct, which is illustrated by the English Court of Appeal decision in *Burgess v Rawnsley* (1975).

Since *Corin v Patton* (1990) it is clear that *Burgess v Rawnsley* (1975) is not good law in Australia. In their joint judgment, Mason CJ and McHugh J at 548 held:

> There are powerful reasons for declining to adopt in Australia the approach which was taken in *Burgess v Rawnsley*.
>
> First ... the decision turned on the construction of s 36(2) of the Law of Property Act 1925 (UK), which permits the severance of a joint tenancy by notice in writing by one joint tenant to the other, rather than on the state of the pre-existing law.
>
> Secondly, as a matter of history and principle, the severance of a joint tenancy can only be brought about by the destruction of one of the so-called four unities: see Blackstone, *Commentaries on the Law of England* (1778), vol 2, pp 185–86. Unilateral action cannot destroy the unity of time, of possession or of interest unless the unity of title is also destroyed, and it can only destroy the unity of title if the title of the party acting unilaterally is transferred or otherwise dealt with or affected in a way which results in a change in the legal or equitable estates in the relevant property. A statement of intention, without more, does not affect the unity of title.
>
> Thirdly, if statements of intention were held to effect a severance, uncertainty might follow; it would become more difficult to identify precisely the ownership of interests in land which had been the subject of statements said to amount to declarations of intention.
>
> Finally, there would then be no point in maintaining as a separate means of severance the making of a mutual agreement between the joint tenants.

By way of contrast, however, it should be noted that where all joint tenants are in agreement, there will be a severance of the joint tenancy by agreement: *Williams v Hensman* (1861).

Severance by merger

A joint tenancy is severed if one of the joint tenants acquires a further interest in the land which is different from that already held as a joint tenant. An illustration of this would be where A holds a property for life, with remainder to B and C as joint tenants. If A transferred the life estate to, say, B, then the joint tenancy between B and C would be severed because there would cease to be any unity of interest between B on the one hand and C on the other.

Severance by unlawful killing

Equity does not allow a person to benefit from his or her own crime. In *Rasmanis v Jurewitsch* (1969), the New South Wales Court of Appeal affirmed Street J, as he then was, in holding that the unlawful killing by one joint tenant of another joint tenant does not sever the joint tenancy at law. Severance is, however, affected in equity by the imposition of a trust on the surviving joint tenant requiring the survivor who killed the deceased person to hold the interest that they obtained by the right of survivorship on trust for the estate of the deceased joint tenant.

In 1995, the New South Wales Parliament enacted the Forfeiture Act 1995 (NSW). This legislation precludes someone who has unlawfully killed another from benefiting from his or her crime, unless the Supreme Court pursuant to s 5 of the Act concludes that justice requires the forfeiture rule to be modified. An illustration of the application of s 5 is found in *Leneghan-Britton v Taylor* (1998).

BRINGING THE CO-OWNERSHIP TO AN END

The co-ownership relationship between either joint tenants or tenants in common can be brought to an end in one of three ways:

- by agreement to sell between the parties;
- by resumption; or
- by court order pursuant to s 66G of the Conveyancing Act 1919 (NSW).

By agreement to sell between the parties

One way in which co-ownership is brought to an end is when the co-owners sell their co-owned property. As already seen, a joint tenancy is not severed until the proceeds of sale are received and distributed: *Re Allingham* (1932).

By resumption

The Government, most likely the State Government, can resume property for the purposes of building a road or a school or some other purpose. The Government will usually pay compensation to the owners of the property.

By court order pursuant to s 66G of the Conveyancing Act 1919 (NSW)

Pursuant to s 66G of the Conveyancing Act 1919 (NSW), a co-owner is entitled to obtain an order from the court for the sale or partition of the property. 'Partition' means to terminate the co-ownership so that each co-owner becomes the sole owner of specific parts of the land.

At common law, in the absence of unanimity, it was not possible for any co-owners or even a majority of co-owners to partition the property. Courts of Equity developed a body of law enabling a co-owner to obtain an order for partition.

Both at common law and at equity there was no discretion to refuse an application for partition no matter how inconvenient or undesirable an order for partition might have been.

Division 6 of Pt 4 of the Conveyancing Act now deals with this situation. Section 66G empowers the court to appoint trustees and vest the property in them on either:

- a statutory trust for sale; or
- a statutory trust for partition.

A co-owner is entitled to approach the Supreme Court of New South Wales in its Equity Division for an order pursuant to s 66G.

Section 66F defines 'co-owner' as including a co-owner of a legal or an equitable interest or the mortgagee or incumbrancee of a co-owner's interest whether legal or equitable.

Under the statutory trust for sale, the trustees are required to sell the property and hold the proceeds on trust for the co-owners. Under the heading 'Rights of co-owners *inter se*', below, is a full discussion of how the proceeds of sale are divided between co-owners once the co-ownership has been brought to an end.

Pannizotti v Trask (1987)

In *Pannizotti v Trask*, the New South Wales Court of Appeal considered the extent to which the court has a discretion when making an order pursuant to s 66G. The court's discretion is limited. Normally, where co-owners representing one-half of the ownership of the property or more desire partition or sale, the court will so order. On the other hand, where the co-owners seeking relief have interests totalling less than half of the property, then the court will only make an order for sale or partition where it is satisfied that it is just in all the circumstances to do so.

Typically, the court has to struggle with the conflict between hardship on the minority if they are 'locked in' as against the interests of the majority who may not wish to sell.

It should be remembered that whenever the court orders sale or partition, it is open to any co-owner to purchase the property from the trustees in whom it has been vested by the s 66G order.

RIGHTS OF CO-OWNERS *INTER SE*

The rights between co-owners are very limited until the co-ownership comes to an end. Previously, we have seen that there are three circumstances in which a co-ownership, whether by way of joint tenancy or by way of tenancy in common, comes to an end. They are:

- by agreement to sell between the parties;
- by resumption;
- by court order pursuant to s 66G of the Conveyancing Act 1919 (NSW).

Prior to a co-ownership coming to an end, the enforceable rights between co-owners are limited to:

- any enforceable contract between the co-owners; and
- the entitlement of one co-owner as against the others, pursuant to s 560 of the Local Government Act 1993 (NSW), to recover from those other co-owners their share of any rates paid by the one co-owner.

Prior to a co-ownership coming to an end, a co-owner has no entitlement to recover from the other co-owners either:

- any compensation for improvements carried out on the property; or
- any occupation rent from a co-owner who is exclusively occupying the co-owned property.

On the other hand, once the co-ownership has come to an end, the Supreme Court of New South Wales, Equity Division, on the application of a co-owner, will take accounts between the co-owners. This is an equitable remedy, which *inter alia* determines:

- the quantum of any compensation for improvements carried out by a co-owner on the property; and
- the quantum of any obligation of a co-owner to pay an occupation rent if exclusively occupying the co-owned property.

The taking of accounts between co-owners is an equitable remedy developed in the context of partnership law. It is a remedy that is only available when the co-ownership comes to an end.

See, generally, *Luke v Luke* (1936); *Leigh v Dickeson* (1884); and *Forgeard v Shanahan* (1995).

Compensation for improvements when the co-ownership comes to an end

A co-owner who has spent money improving a co-owned property is entitled to be compensated for such improvements as part of the taking of accounts when the co-ownership comes to an end.

Compensation will be based on the lesser of:

- the cost incurred in making the improvements; and
- the value added by the improvements.

In *Brickwood v Young* (1905), the High Court was faced with the value added by the improvements being less than the cost incurred. In these circumstances, the court concluded that the co-owner who had improved the property should only be entitled to be compensated for the value added by the improvements.

However, this should not be taken to mean that a co-owner who has spent money improving co-owned property should always be entitled to be compensated on the basis of the value added by the improvements, regardless of whether the value of the improvements is greater or lesser than the cost incurred. Such a view misconceives the role of a Court of Equity which only compensates a co-owner to the extent of the cost incurred as the maximum compensation and, further, will only compensate to the value added where the value added is less than the cost incurred.

In *Boulter v Boulter* (1898), AH Simpson CJ in Eq held at 137:

> A Court of Equity in dividing the proceeds of sale will not allow the other co-owners to take their shares of the increased price without making an allowance for what has been expended to obtain the increased value: *Leigh v Dickeson* (1884). This course of action cannot inflict any injustice on the other co-owners for it takes nothing out of their pockets, it only prevents them putting into their pockets monies obtained by the expenditure of another persons, unless they recoup him such expenditure. In no case can the co-owner who has improved the property obtain more than his outlay, though such outlay my have trebled the value of the property. And, on the other hand, the increase in the price obtained is the limit of what he can receive, though his actual outlay may be far larger.

This approach has been expressly affirmed by the New South Wales Court of Appeal in *Forgeard v Shanahan* (1995) and by the Queensland Full Court in *McMahon v Public Curator of Queensland* (1952).

Compensation only available for improvements as distinct from maintenance

On the other hand, where a co-owner has only maintained the co-owned property, as distinct from improving it, there is no entitlement to compensation for the cost incurred.

In *McMahon v Public Curator of Queensland* (1952), the Queensland Full Court disallowed the cost incurred by a co-owner in painting the property on two earlier occasions. Compensation for the cost incurred in repainting the property on the most recent occasion was only payable insofar as it amounted to an improvement, as distinct from maintenance.

More recently, in the New South Wales Court of Appeal case of *Ryan v Dries* (2002), Hodgson JA at [66] to [67] observed:

> At 224, Meagher JA [in *Forgeard v Shanahan*] said that a co-owner who has effected repairs and maintenance to a co-owned property, as distinct from making improvements, cannot have any allowance, and he referred *inter alia* to *Leigh v Dickeson* (1884) 15 QBD 60. That case did decide, as noted in the headnote, that a co-owner of a house who expends money on ordinary repairs has no right of action against another co-owner. However, the judgment of Cotton LJ at 67 makes it clear that, if the value of a property is increased by repairs, a co-owner who paid for the repairs is entitled, in partition proceedings, for an allowance in respect of that increase in value [that is, treating repairs as no different from improvements]. Brett LJ at 65 noted that no claim for partition was made in that case, and while Lindley J did not refer to partition, he said he was of the same opinion as the other judges.
>
> In my opinion, as a matter of principle and authority, there is no difference in the application of these principles as between an increase in value to property caused by improvements and such an increase caused by ordinary repairs.

A person who seeks the aid of equity must do equity

As the taking of accounts is an equitable remedy, it is necessary for the co-owner who is seeking the aid of equity 'to do equity'. This obligation to do equity requires the co-owner who is seeking compensation for improvements to the co-owned property to set off against such compensation the value of any occupation which they have exclusively enjoyed: *Teasdale v Sanderson* (1864).

This has been explained as an application of the equitable maxim that he who seeks equity must do equity: see *In Re Jones; Farrington v Forrester* (1893) at 477–78, *per* North J; *Luke v Luke* (1936) at 313.

In *Luke v Luke* at 318, Long Innes CJ in Eq quoted from the judgment of Salmond J in *McCormick v McCormick* (1921) at 387, where Salmond J had acknowledged that there was no general right even in a partition suit to charge an occupying owner with an occupation rent and had stated the law as follows:

> I think that the obligations of co-owners to account to each other are the same in equity as at law, and are the same in a partition suit as in other proceedings, save only that in a partition suit, if an occupying owner claims an allowance for his expenditure, he can obtain it only if he consents to be charged with an occupation rent.

Long Innes CJ in Eq in *Luke v Luke* said at 318:

> To this statement of the position I would only add that, for my part, I can see no reason why the application of the maxim, he who seeks equity must do equity, should be limited to suits for partition, and I think it improbable that Salmond J was of a different opinion.

Recently, in the New South Wales Court of Appeal case of *Ryan v Dries* (2002), Hodgson JA has extended the application of this maxim to resulting or constructive trusts. His Honour at [68] observed:

> At 224, Meagher JA (in *Forgeard v Shanahan*) also said that the principles can only be applied in partition actions, administration actions, where there is a fund in court, and where the court orders sale under s 66G of the Conveyancing Act. I note that in *Luke* at 318, Long Innes CJ in Eq expressed the view that the maxim requiring the seeker of equity to do equity is not limited to suits for partition; and in my opinion, the principles may be applicable in a case where one party claims an interest in property by reason of a resulting trust or constructive trust, and the court is asked to quantify that interest.

In *Ryan v Dries* (2002), Mr Ryan lived on the property permanently and also operated a business from the property. Ms Dries stayed overnight one or two nights each weekend, until November 1997, when there was a breakdown in their relationship. Thereafter Mr Ryan was in exclusive occupation, until the property was sold. Accordingly, there was a question as to whether the usual principles relating to contributions for exclusive possession applied where the other co-owner used the property one or two days per week.

The New South Wales Court of Appeal held that these principles did apply and they assessed Ms Dries' occupancy of the property on weekends at 10% up to November 1997. It was noted by the Court of Appeal that in equity there is no limitation period on claims for contribution for improvements paid for by a co-owner vis à vis the other co-owners. Hodgson JA at [72] observed:

> I note that, even if the appellant had sought contribution at law in a cross-claim in these proceedings, he would have been limited to contribution towards payments made by him in the six years prior to commencement of these proceedings, that is, since 17 June 1993: see Limitation Act 1969, s 74. (This limit does not apply to his defensive equity, because the respondent's resulting trust case depended on transactions in 1990 (and cf Limitation Act, s 47(1)(c)), thus enabling the appellant to rely defensively on intermediate transactions.)
>
> The appellant would still have had to account for his occupation of the premises since November 1997. I note also that if the appellant is not given an accounting in these proceedings, in fresh proceedings commenced now he would be restricted by the Limitation Act to an accounting from the end of 1995 (which was six years before the co-ownership came to an end) ...

The obligation to set off the value of occupation is only a set off

As the obligation to set off the value of occupation is only a set off, where a co-owner has enjoyed exclusive occupation which is greater in value than the amount of compensation for improvements for which that person is entitled to be compensated, that person will be entitled to no compensation: *Forgeard v Shanahan* (1995).

Such a co-owner will not, however, be obliged to pay any occupation rent to the other co-owners, in excess of the entitlement to compensation for improvements because the co-owner who has not occupied the co-owned property has no entitlement to recover their share of occupation rent in the absence of a binding contract to the contrary: *Forgeard v Shanahan* (1995).

Entitlement to occupy

All co-owners have a joint entitlement to possess the land. If a co-owner chooses not to take advantage of their right of possession, then that is their decision. In the absence of a binding contract to the contrary, they have no entitlement to be compensated by another co-owner who chooses to take advantage of this right of possession: see *Forgeard v Shanahan* (1995); *Squire v Rogers* (1979).

A co-owner who is not in occupation is not entitled to sue the co-owner who is in occupation, unless expressly excluded: see *Creswell v Hedges* (1862); *Forgeard v Shanahan* (1995).

The courts have, however, recognised that the behaviour of a co-owner can be sufficiently objectionable to amount to exclusion: see *Dennis v McDonald* (1982), where a husband co-owner frequently came home in an intoxicated state and made it impractical for his wife, the other co-owner, to remain in occupation. The English Court of Appeal found that the behaviour of the husband amounted to the wrongful exclusion of the wife.

Entitlement to collect rent

At common law, a co-owner was not entitled to a refund of any rent collected by other co-owners.

The Statute of Anne was enacted in England in 1705. It provided that where a co-owner collected rent from co-owned property, they held that rent on behalf of themselves and their co-owners in proportion to their respective shares in the co-ownership.

The law in New South Wales was complicated when, on 1 January 1971, the Imperial Acts Application Act 1969 (NSW) came into effect. The New South Wales Parliament, following a recommendation by the New South Wales Law Reform Commission, enacted this legislation. This legislation repealed certain Imperial Acts, including the Statute of Anne.

Meagher JA in *Forgeard v Shanahan* (1995) at 222 observed:

> It is a neat illustration of the havoc which can be wrought by high-minded but ignorant people putting litigants in NSW back into the position they would have been in before 1705 in England.

What did this comment by Meagher JA in *Forgeard v Shanahan* mean? Did it mean that the position in New South Wales was now the same as the pre-1705 position in England? Did it mean that a co-owner was not entitled to a refund of any rent collected by other co-owners?

Hutchins v Hutchins (1999) and Ryan v Dries (2002)

Bryson J in *Hutchins v Hutchins* rejected such a view. There, His Honour found that any money collected by one co-owner was impressed with a trust to hold the rent on trust for all co-owners in their proportionate shares.

His Honour stated that he did not believe that the comments by Meagher JA in *Forgeard v Shanahan* (1995) should be taken to mean that the pre-1705 common law position now operated in New South Wales. Bryson J went on to say that if he were wrong in this respect, then he would decline to follow a view of the law that excluded the operation of the law of trusts.

More recently, in the New South Wales Court of Appeal case of *Ryan v Dries* (2002), Hodgson JA at [64] to [65] has observed:

> At 222, Meagher JA said that, apart from statute, there did not seem to be any action by which one co-owner could recover a share of rent received by the other co-owner. He referred to the case of *Strelly v Winson* (1685) 1 Vern 297; 25 ER 480, which decided otherwise, but pointed out that this case had not subsequently been relied on or noticed. He noted that the same result was provided by a 1705 statute; but that this statute had been repealed in New South Wales by the Imperial Acts Application Act 1969, so that the remedy provided by the 1705 statute was not available in New South Wales.
>
> For my part, with respect, I would be prepared to act on the authority of *Strelly v Winson*, and would treat its lack of subsequent celebration as explicable by reason of the passing of the statute just 20 years later. For my part, I cannot accept that a court exercising equitable principles would not treat a co-owner of property who had collected rents paid for the use of that property as having done so as an agent for all co-owners and liable to account to other co-owners. I would respectfully agree with the statement made in the 1670s in Lord Nottingham's *Manual of Chancery Practice and Prolegomena of Chancery and Equity* (DEC Yale ed, Cambridge University Press, 1965) at p 214 that in such a case 'equity construes all receipts to the common profit, and that without great strain'.

The obligation on a co-owner to account for profits derived from the co-owned property

In determining whether a co-owner who has conducted a business on a co-owned property is obliged to account to the other co-owners for any income generated, it is necessary to make the following distinctions:

- whether the business was conducted on behalf of the co-ownership or alternatively whether it was personal to the co-owner who conducted the business; and
- whether the profits derived were profits 'from the common property *per se*' or alternatively whether they were profits derived from services rendered by the co-owner who conducted the business.

As to the first of these distinctions –whether the business was conducted on behalf of the co-ownership or alternatively whether it was personal to the co-owner who conducted the business – this is a question of fact.

As to the second of these distinctions – whether the profits derived were profits 'from the common property *per se*' or alternatively whether they were profits derived from services rendered by the co-owner who conducted the business – this is far less straightforward. This distinction has been discussed in detail by the Full Court of the Federal Court in *Squire v Rogers* (1979).

Squire v Rogers (1979)

Squire v Rogers is most significant because two of the three judges who determined this case, Brennan and Deane JJ, were subsequently members of the High Court. In the absence of High Court authority on the point, this decision has assumed considerable importance.

This case concerned some co-owned land in Darwin on which there were limited improvements. One of the co-owners continued to reside in Darwin (the active co-owner) and the other co-owner moved to the USA to reside (the passive co-owner).

On Christmas morning 1974, Cyclone Tracey destroyed much of Darwin. In the aftermath of this tragedy, the active co-owner of the property exploited a commercial opportunity by providing accommodation in flats, rooms and caravans. For this purpose, the active co-owner incurred substantial expense in constructing buildings to provide accommodation and other amenities. In the short term, considerable income was generated as the homeless people in Darwin together with members of the building industry from interstate took advantage of the accommodation available. By the time the co-ownership came to an end following the sale of the property, Darwin had been rebuilt and there was no longer much need for this kind of accommodation.

The Northern Territory Supreme Court ordered that accounts be taken. This was an appeal from that decision.

The active co-owner asserted an entitlement to be compensated for improvements carried out on the property. In circumstances where the value added by reason of these improvements was less than the cost incurred, the court ordered that the active co-owner should be compensated for the lesser value added. In relation to this issue, Justice Deane observed at 346:

> As a general rule, capital expenditure upon permanent improvements to land by one joint owner without the authority of his co-owner created a passive equity which attaches to the land. The joint owner making the improvements is not entitled to bring proceedings for contribution against his co-owner. In circumstances where his co-owner (or a successor in title of his co-owner other than a purchaser for value without notice) would otherwise unfairly benefit under an order in equity ... he is entitled to an allowance for his

> expenditure on such improvements to the extent to which they result in the present enhancement of the value.

The passive co-owner asserted an entitlement to be paid his share of the profits from the enterprise conducted on the property by the active co-owner. With respect to this claim, the court held that a distinction should be drawn between profits derived from the common property *per se* and profits derived from services rendered by the active co-owner on the common property.

In relation to this distinction, the court held that the active co-owner of the common property was entitled to retain the profits from the services rendered by him. They were his profits and his alone, in the same way as any losses would have been his losses and his alone. Deane J stated the position as follows at 345:

> The cases in which one co-owner can obtain an account of receipts from another co-owner who has had the sole use of the joint property are, except where the sole use been as a result of agreement ... limited to those cases where one co-owner has received more than his share of the rents or other revenues of the common property: see *McCormick v McCormick* [1921] NZLR 384; *Henderson v Eason* (1951) 17 QB 701; *Rees v Rees* [1931] SASR; *Luke v Luke* (1936) 36 SR (NSW) 310 at 313–14; *Scapinello v Scapinello* [1968] SASR 316.

On the other hand, the court held that the profits from the common property *per se* should be shared subject to the qualification that they should only be shared after the active co-owner was allowed to make good any shortfall between the lesser value added and the greater cost incurred.

The rationale for this qualification was that, but for the cost incurred, there would have been no profits from the common property *per se*. When a Court of Equity takes accounts, it is entitled only to require the active co-owner to account to the passive co-owner for the latter's share of the profits from the common property *per se*, after the active co-owner has been fully compensated for the costs he incurred to enable those profits to be derived. In relation to this qualification, Deane J at 348 held:

> In the present case there is no suggestion that the plaintiff was excluded from the subject land against her will. She voluntarily left it in the occupation of the defendant in the expectation that the defendant would spend money on improvements and, by so spending it, preserve their joint leasehold interest in the land ... She was aware of the defendant's activities on the land and the fact that he was effecting improvements and made no complaint in that respect. In the circumstances, the plaintiff is not entitled to a one-half share of the rents and profits which the defendant received in respect of the subject land as a result of the use of the improvements which he had effected while denying the defendant's entitlement to an allowance in respect of their cost ... If she accepts the benefit of the profit, she accepted the benefit of the profit earned, she must bear her share of the burden of earning it.

Mortgage payments as improvements

Until the recent New South Wales Court of Appeal decision in *Ryan v Dries* (2002), it was considered doubtful whether or not mortgage payments by one co-owner should be treated in the same way as compensation for improvements carried out by a co-owner with respect to co-owned land. For instance, in *Forgeard v Shanahan* (1995), Meagher JA of the New South Wales Court of Appeal discussed the point at 225. Meagher JA quoted Rolfe J, the trial judge in *Forgeard v Shanahan*, as follows:

> Whilst in the present case the mortgage payment made by the defendant did not amount to improvements in the sense of physical improvements to the land enhancing its value, they are, in my opinion, to be equated to improvements because the effect of them is to increase the value of the equity of the parties in the property and hence the amount of the proceeds distributable to them. In the present case the defendant has asserted her equity to the mortgage payments and, therefore, in my opinion, must account for rents and profits.

Meagher JA then continued:

> I have some difficulty with the last sentence I have quoted. There were no 'rents and profits', and the plaintiff was seeking an allowance in respect of an occupation fee, which is rather a different thing. This difficulty apart, I am far from convinced by His Honour's reasoning. In the case where one party is claiming an allowance for improvements and the other is seeking to charge an occupation fee, both claims can arise in partition actions (and related actions), and only in such actions. Each claim is a potential incident of a partition action. In this context, 'no rent if no improvements' makes good sense.
>
> The discharging of joint debts stands in a different position. An adjustment occasioned by such a discharge is not necessarily made in a partition action: it could be made in an action for contribution, which could be brought quite independently of a partition action (or its equivalent). In the present case, for example, the defendant could have brought an action for contribution before or after the s 66G case.
>
> In these circumstances, to equate a claim for contribution with a claim for an allowance for improvements does not seem to me to carry much conviction. However, the defendant has not cross-appealed and His Honour's decision on this point must therefore stand.

Ryan v Dries (2002)

In *Ryan v Dries*, the New South Wales Court of Appeal has held that mortgage payments by one co-owner should be treated in the same way as compensation for improvements carried out by a co-owner with respect to co-owned land.

In this case, Mr Ryan and Ms Dries were tenants in common of a property, which was purchased in September 1990. The title noted them as being tenants in common holding interest of six-sevenths and one-seventh

respectively. The purchase price of $200,000.00 was funded as follows: $120,000.00 borrowed from the National Australia Bank; $10,000.00 lent to Ms Dries by her mother; $30,000.00 advanced by Ms Dries; and $40,000.00 advanced by Mr Ryan, who also paid incidental costs connected with the purchase, totalling $9,224.08 (stamp duty $5,491.00; solicitor's fees $1,964.00; bank fees $1,634.80; and adjustment of rates $134.28). Ms Dries and Mr Ryan were equally responsible to the National Australia Bank for the $120,000 loan.

The Court of Appeal held that Ms Dries was entitled to a 43% share in the property, being the $30,000.00 advanced by Ms Dries plus $60,000.00 (one-half the mortgage advance) out of a total purchase price of $209,224.08.

The co-owned property was valued at $435,000 when the co-ownership came to an end. The Court of Appeal held that Ms Dries was entitled to $187,150, being 43% of this amount.

Mr Ryan paid all mortgage instalments and ultimately discharged the loan. A total of $195,000 was paid by Mr Ryan over the years by way of principal and interest to discharge the loan. In the absence of allowing any set off for the value of any exclusive occupancy, Mr Ryan was entitled to be compensated for $97,500, being Ms Dries' half of the mortgage instalments which he had paid on her behalf.

Mr Ryan lived on the property permanently and also operated a business from the property. Ms Dries stayed overnight one or two nights each weekend until November 1997, when there was a breakdown in their relationship. Thereafter, Mr Ryan was in exclusive occupation until the property was sold. Accordingly, there was a question as to whether the usual principles relating to contributions for exclusive possession applied where the other co-owner used the property one or two days per week.

Hodgson JA, having discussed the passages in the judgment of Meagher JA in *Forgeard v Shanahan* (1995), which are set out above, at [70] to [75] held:

> One point made by Meagher JA is that the claim for contribution in respect of the discharge of a joint debt, such as a mortgage, can be made independently of a partition action or its equivalent. Indeed, it would appear that such a claim could even be made by an action at law, without the need to seek equity at all: see Meagher, Gummow & Lehane, *Equity*, 2nd ed, paras 1001–03. If a co-owner makes a claim for contribution to mortgage payments in reliance purely on a legal right, with no reliance on equitable principles, then it would seem that the co-owner is not seeking equity and is not required to do equity. However, if the co-owner does rely on equitable principles in making such a claim, in my opinion the co-owner is seeking equity and is required to do equity, no less than if allowance for improvements was being sought.
>
> Thus, I agree with Rolfe J that, once an occupier is required to do equity because he or she is seeking equity, there is no reason to distinguish between improvements or repairs effected to the property on the one hand,

> and the reduction of a charge on the property through mortgage repayments on the other. I think this accords with what Long Innes CJ in Eq said in *Luke* at 317 …
>
> In the present case, no legal claim has been made. In essence, the appellant is relying on a defensive equity, unpleaded, to the respondent's resulting trust case …
>
> Applying these principles to the present case, I think it would have been an appealable error for the Master not to give the appellant the benefit of an equitable accounting in respect of his payment of mortgage instalments …
>
> In my opinion, the principles supported in *Luke* mean that the appellant, now claiming equity in relation to those payments, should do equity by making some appropriate adjustment in respect of his very much greater use of the property, and indeed exclusive use thereof since November 1997. This is not a case where the greater use of the property by the appellant was in any way foisted upon him, so as to make questionable the justice of requiring him to make some recompense for that greater use. I think it is clear that it was wholly in accordance with the appellant's wishes and intentions that he have by far the greater use and benefit of the property. I think some allowance should be made for the use which the respondent got from the property, which I would assess to be 10% as against the appellant's 90%, up to November 1997. From November 1997, plainly the respondent had 100% use of the property.

In the absence of subsequent case law overturning *Ryan v Dries* (2002), it must be taken to be good law on the point.

The Court of Appeal held that these principles did apply and they assessed Ms Dries' occupancy of the property on weekends at 10% up to November 1997.

Mr Ryan's possession of the property was valued at $150,000. The value of this possession up to November 1997 was $100,000 and $50,000 represented the value of the possession after that date. Accordingly, Mr Ryan had to allow Ms Dries 43% of $80,000 (being the difference between the value of his occupation and her occupation up to November 1997) plus 43% of $50,000. This amounted to a total set off of $55,900.

After deducting Ms Dries' allowance of $55,900 from Mr Ryan's claim for improvements of $97,500, Mr Ryan was entitled to $54,080 (being $41,600 plus interest) as against Ms Dries, and this meant that Ms Dries had to deduct from her 43% interest in the property valued at $435,000 (ie, $187,150) an amount of $54,080.

7 MORTGAGES

You should be familiar with the following areas:

- mortgages under Old System Title, the equity of redemption and foreclosure
- remedies available to a mortgagee and
- priorities between mortgagees where there have been further advances

MORTGAGES UNDER OLD SYSTEM TITLE, THE EQUITY OF REDEMPTION AND FORECLOSURE

A first mortgage, by deed, under Old System Title, takes the form of a conveyance of the legal estate in the mortgagor's land from the mortgagor to the mortgagee.

Although the mortgagee becomes the legal owner of the land, the mortgagor retains the right to have the property reconveyed, upon the repayment of the principal sum borrowed plus interest and plus costs (ie, the mortgage debt). This right to have the property reconveyed is known as the equity of redemption: *Santley v Wilde* (1899).

The equity of redemption is an estate in the land. It is a proprietary right, which can be conveyed, leased or mortgaged. For instance, subsequent mortgages are equitable. They involve the mortgagor mortgaging the equity of redemption.

An equitable mortgage must be:

- in writing, under s 23C of the Conveyancing Act 1919; or
- supported by sufficient acts of part performance, under s 23E of the Conveyancing Act.

An equitable mortgage may be:

- a second or subsequent mortgage of Old System Title land;
- an agreement to grant a mortgage: *Australian and New Zealand Banking Group Ltd v Widin* (1990);

- an ineffective attempt to create a legal mortgage because the document does not comply with the formalities of a deed: *Swiss Bank Corp v Lloyds Bank Ltd* (1982) at 594–95; or
- a mortgage by deposit of title deeds: *Cooney v Burns* (1922) at 224–25, 242.

Equity intervenes where the intention of the parties was to create a mortgage, but the documentation provided otherwise. In *Gurfinkel v Bentley Pty Ltd* (1966), where a mortgagor as vendor sold certain land to a mortgagee as purchaser subject to the right to repurchase within a precise time, it was held that equity looks to the substance and not to the form of the transaction. This transaction was treated as a mortgage, with the mortgagor being allowed to exercise the equity of redemption.

The equity of redemption

Kreglinger v New Patagonia Meat Cold Storage Co Ltd (1914) is authority that the equity of redemption is:

- the common law right to redeem; plus
- the equitable right to redeem.

The common law right to redeem is the contractual right of the mortgagor to have the legal title to the land reconveyed upon the payment to the mortgagee of the mortgage debt within the time specified by the mortgage.

The equitable right to redeem is the right of the mortgagor to repay the debt even after the contractual date for repayment has passed. The equitable right to redeem does not arise until the contractual right to redeem has expired. Common law is very strict about the terms of repayment. The mortgagor, at common law, loses the right to have the land reconveyed once the due date has expired: *Kreglinger v New Patagonia Meat Cold Storage Co Ltd* (1914) at 35.

Equity, however, takes the view that the mortgagor should not lose the property simply because the mortgagor was late in repaying the mortgage debt. Equity intervenes and allows a further period within which the mortgagor may redeem the debt. The equitable right to redeem does not, however, exist indefinitely. The mortgagee has the right to bring the equitable right to redeem, and thus the equity of redemption, to an end by foreclosing.

Foreclosure

Foreclosure vests the ownership and beneficial title in the land in the mortgagee. The equity of redemption comes to an end. The mortgagee owns the land free from any interest in favour of the mortgagor. The mortgage debt is also extinguished: *Fink v Robertson* (1907).

The right to foreclose is only exercised where the mortgage debt exceeds the value of the property and where it is in the mortgagee's interest to become the owner. Mortgagees are not normally attracted to becoming the

owner of the mortgaged land. They are in the business of lending money, not becoming the owner of land as a result of a defaulting mortgage. Typically, a mortgagee will only foreclose where a property in the short term is unsaleable or can only be sold for an amount considerably less than what the mortgagee believes could be realised in the medium term.

In order to foreclose, under Old System Title, or where a Torrens Title mortgage is unregistered, the mortgagee must satisfy each of the following steps:

- The mortgagor must have defaulted, that is to say the common law right to redeem has ended and the equitable right to redeem is in operation.
- A valid statutory notice must have been served pursuant to s 111 of the Conveyancing Act requiring the default to be remedied within 30 days.
- There must have been non-compliance with the statutory notice.
- The mortgaged land has must have been offered for sale by way of auction: s 99A of the Conveyancing Act.
- The highest bid at the auction must have been less than the mortgage debt: s 99A of the Conveyancing Act.
- The Supreme Court must have made a *decree nisi* under which an account is taken of the precise mortgage debt and the mortgagor is given a specified time to repay (usually six months).
- The mortgagor must have failed to repay the mortgage debt within the specified time.
- The court must have made an order for foreclosure, *absolute*.

The early discharge of a mortgage

Neither at common law nor in equity is a mortgagor entitled to redeem the mortgage debt in advance of the contractual date for repayment, unless there is an agreement to the contrary. Section 93 of the Conveyancing Act gives the mortgagor a statutory right to redeem in advance of the contractual date for repayment. However, the mortgagor must pay, in addition to any other moneys then owing under the mortgage, interest on the principal sum for the unexpired term of the mortgage.

It follows, from a commercial perspective, that the privilege of early repayment can be overridden by the imposition that interest must be paid on the principal sum up to the due date for repayment provided by the mortgage.

In practice, mortgages usually contain an 'early repayment clause', permitting the mortgagor to redeem early by repaying the principal, plus interest, up to the date of repayment, plus interest for a further specified period (eg, three months).

In *Steindlberger v Mistroni* (1992), Needham J held that an early repayment clause of this kind did not contravene s 93, because such a clause entitles the mortgagor to elect between repayment on the due date

and repayment at an earlier time. It follows that the time for redemption has arrived, leaving s 93(1) with no room to operate.

Section 93(1) only applies where a mortgagor seeks to redeem early. It does not apply where a mortgagee demands early repayment, even where the mortgagee's demand for repayment has been provoked by the mortgagor's default. The mortgagee cannot invoke s 93 to claim interest for the unexpired term of the loan and is limited to interest to the date of actual repayment only: *Wanner v Caruana* (1974).

The present state of the law tempts a mortgagor who wishes to redeem early to default deliberately in the hope that the mortgagee will demand immediate payment under the acceleration provision, thus avoiding the mortgagor's liability under s 93 to pay interest for the unexpired term of the mortgage.

A mortgagee who wishes to preserve the right to interest for the full term of the mortgage must not demand immediate repayment of the whole amount outstanding. Rather, such a mortgagee must sue only for unpaid instalments as and when they fall due, which is an unsatisfactory state of affairs.

Specific statutory provisions allow a mortgagor in particular circumstances to redeem in advance of the contractual date for payment. Such provisions include s 153 of the Liquor Act 1982 (NSW); s 136 of the Bankruptcy Act 1966 (Cth); and s 75 of the Consumer Credit Code 1975.

Penalty provisions and clogs on the equity of redemption

In *Santley v Wilde* (1899), Lord Lindley held that any provision in a mortgage preventing redemption upon the payment of the debt for which the security was given is regarded as a clog or fetter on the equity of redemption. Such a provision is void and thus unenforceable. Equity does not permit a clog on the mortgagor's right to deal with the equity of redemption, but assumes that when the mortgage debt is fully repaid, the mortgagor is free from the mortgage and any residual obligations. A provision in a mortgage which is inconsistent with this is also void: *Noakes & Co Ltd v Rice* (1902) at 30; *Samuel v Jarrah Timber and Wood Paving Corp Ltd* (1904) at 326.

Where a collateral obligation is independent of the mortgage, the arrangement may be permissible so long as the two transactions are truly independent: *Kreglinger v New Patagonia Meat Cold Storage Co Ltd* (1914). Equity looks to the substance and not to matters of form. Where a transaction takes the form of two documents but the documents are in fact part and parcel of one transaction, the transaction is void: *Toohey v Gunther* (1928).

An example of a collateral obligation that may or may not be independent is a collateral covenant where the mortgagor may be compelled to purchase goods or services exclusively from the mortgagee for a number of years. The existence of a collateral covenant is not necessarily a clog on the equity

of redemption. The court will consider the nature and effect of the covenant and the circumstances in which the covenant was given.

In *Kreglinger v New Patagonia Meat Cold Storage Co Ltd* (1914), the mortgage provided that the mortgagor would sell certain goods to the mortgagee exclusively for a period of five years from the date of the mortgage. The loan was paid off within three years. The House of Lords held that two separate contracts were in existence, one for the loan and the other for the collateral right. It was held that the latter contract did not fetter the ability of the mortgagor to redeem the mortgage. Lord Parker stated that a collateral covenant may be entered into by the parties, provided that the covenant is not unfair or unconscionable, is not in the nature of a penalty clogging the equity of redemption, and is not inconsistent with or repugnant to the contractual or equitable rights to redeem.

Both at common law and in equity, a mortgagor has no right to repay the principal before the due date unless the mortgage agreement gives the mortgagor such a right: *Hyde Management Services Pty Ltd v FAI Insurances Ltd* (1979). Provided the term is not, in the circumstances, oppressive or unconscionable, the due date may be many years later, and there may be no provision in the mortgage allowing for early repayment. This of course is subject to the operation of s 93 of the Conveyancing Act discussed above.

In *Knightsbridge Estates Trust v Byrne* (1939), a company mortgaged its properties to a friendly society to secure a loan, repayable in 80 half-yearly instalments. The mortgage could not be redeemed for 40 years. The mortgagors sought a declaration that the mortgage was a clog on the equity of redemption. The Court of Appeal held it was not a clog because the term was not in the circumstances oppressive or unconscionable.

In *Fairclough v Swan Brewery Co Ltd* (1912), a mortgage was taken over a leasehold interest that had 17 years left to run. The mortgage could not be discharged until six weeks before the expiration of the lease. The Privy Council held that this was a clog on the equity of redemption. The mortgagor was permitted to redeem upon repayment of the loan.

In *Noakes & Co Ltd v Rice* (1902), a mortgage of a leasehold estate contained a trade tie for the duration of the lease. The court held the covenant so burdened the use and enjoyment of the land after the mortgage was paid off that in fact the mortgagee was getting back a completely different property. Lord Macnaughton held at 31–32:

> It seems to me to be contrary to principle that a mortgagee should stipulate with his mortgagor that after full payment of principal, interest and costs, he should continue to receive for a definite or an indefinite period a share of the rents and profits of the mortgaged property as a result of an obligation arising from the contract when the mortgage was created.

Similarly, Lord Davey concluded on the facts of the case, at 35:

> In the first place, I do not think that the respondents' covenant to deal exclusively with the brewers continued after payment of the loan and the

redemption; and secondly, if it did, it constituted a clog or fetter which, according to well established principles, was void.

Another example of a clog on equity of redemption is where the right to redeem is restricted to a particular person. In *Salt v Marquess of Northampton* (1892), the mortgage stated that if the mortgagor died without having repaid the loan, the mortgaged property would be forfeited to the mortgagee. This was held to be a clog on the equity of redemption.

Regard should be given to the comments in *Westfield Holdings Ltd v Australian Capital Television* (1992), where the court suggested that the above-mentioned principles should be overruled by a principle of general application that the limitation on redemption should not be unfair or unconscionable in the circumstances. See also *Re Modular Design Group Pty Ltd* (1994) in this regard.

Although it is outside the scope of a book on real property, it should be noted that modern consumer protection legislation regulates collateral covenants in mortgages. See the Contracts Review Act 1980 (NSW), the Trade Practices Act 1974 (Cth) and the Industrial Relations Act 1996 (NSW).

Mortgages under Torrens Title

Under s 57 of the Real Property Act, a registered mortgage of Torrens Title land is a statutory charge and not a conveyance of the land. The registered mortgage obtains the benefits of indefeasibility of title enjoyed by all registered Torrens Title interests. Second and subsequent mortgages can also be registered.

The Torrens Title mortgagor has more than an equity of redemption. The mortgagor remains the registered proprietor of the land. Insofar as a Torrens Title Mortgage is registered, the provisions of the Real Property Act govern it. If not registered, it is governed by the Conveyancing Act. Torrens Title mortgages may be unregistered. If so, they are equitable mortgages: *Barry v Heider* (1914); *J & H Just (Holdings) Pty Ltd v Bank of New South Wales* (1971).

By analogy with the position under Old System Title, an agreement to grant a mortgage over Torrens Title land creates an equitable mortgage over that land, as does the deposit of the certificate of title as security for money advanced.

The procedure for foreclosing a registered Torrens Title mortgage is prescribed in ss 61 and 62 of the Real Property Act. Unregistered mortgagees must follow the procedure for Old System Title mortgages.

Foreclosure under Torrens Title

In order to foreclose under Torrens Title, the mortgagee must satisfy each of the following steps:

- A mortgagee can only foreclose after the mortgagor has defaulted in paying principal or interest for six months.
- The mortgagor must have defaulted, that is to say, the common law right to redeem has ended and the equitable right to redeem is in operation.
- A valid statutory notice must have been served pursuant to s 57 of the Real Property Act requiring the default to be remedied within 30 days.
- There must have been non-compliance with the statutory notice.
- The mortgaged land must have been offered for sale by way of auction: s 61 of the Real Property Act.
- The highest bid at the auction must have been less than the mortgage debt: s 61 of the Real Property Act.
- The Registrar-General must then issue the foreclosure order or the Registrar-General may require the applicant first to offer the land for sale, and then issue the order only after the land fails to be sold or the amount realised is insufficient to satisfy the debt and the expenses of the sale: s 62 of the Real Property Act.
- The Registrar-General must record the foreclosure order in the Register: s 62(3) of the Real Property Act.

An order for foreclosure vests in the applicant mortgagee the mortgagor's whole interest in the land, free from the mortgagor's equity of redemption and free from the rights of any mortgagees whose registered mortgages have less priority than the applicant's mortgage.

Penalty clauses

A mortgagor and mortgagee may validly agree, as part of a mortgage transaction, that the mortgagor will pay a premium over and above the sum advanced: *Potter v Edwards* (1857). Where any premium is conditional upon there being a default, equity regards this as an unenforceable penalty: *Strode v Parker* (1694). On the other hand, there is no objection to a provision specifying that the rate of interest payable under the mortgage be reduced if the mortgagor pays instalments on time.

There is no penalty under a clause which provides that if default occurs in any payment under the mortgage, the interest rate up to the date of default remains unchanged but a higher rate is payable for the period between the date of default and the date of repayment. The penalty lies in the retrospective imposition of additional interest for the period leading up to a default: *David Securities Pty Ltd v Commonwealth Bank of Australia* (1990) at 298–99.

A mortgage sometimes provides that where a mortgagor defaults in any payment, or fails to observe any term of the mortgage, the whole of the principal plus interest to the end of the period of the mortgage becomes immediately due and payable. In such circumstances, interest beyond the

date of repayment will be unenforceable as a penalty unless it is a genuine pre-estimate of the mortgagee's anticipated loss on default.

In *Wanner v Caruana* (1974), a mortgage provided for interest at 10%, reducible to 9% per annum, with the whole of the principal and interest to be repaid over six years. On default in any payment, there became immediately due and payable the whole of the principal then outstanding, plus interest on that principal at the rate of 10%, for the whole of the balance of the six years.

Street CJ in Eq held that the provision for the acceleration of interest was void as a penalty because the mortgagee had demanded it when the mortgagor defaulted.

The High Court in *O'Dea v Allstates Leasing System (WA) Pty Ltd* (1983) affirmed this reasoning. The High Court held that:

- no penalty exists in the case of a 'present debt' which, by the creditor's indulgence, is payable 'either in the future, or in a lesser amount, provided that certain conditions are met';
- on the other hand, the requirement imposed on the lessee, to pay further lease payments after the leased goods have been repossessed, was in the nature of a penalty and thus unenforceable.

There is no penalty where the mortgage provides that on the mortgagor's default, all future payments under the mortgage become immediately due and payable, but are to be discounted by an appropriate formula to ensure that the mortgagee receives no more than the present value of the amounts outstanding, because such a clause is a genuine pre-estimate of the mortgagee's potential loss, namely, the loss of the right to future payment: *AMEV-UDC Finance Ltd v Austin* (1986).

Whether a provision is a penalty is judged at the date of entry into the mortgage, not at the date of default: *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* (1915) at 86–87; *Citicorp Australia Ltd v Hendry* (1985).

REMEDIES AVAILABLE TO A MORTGAGEE

The right to sue on a personal covenant as a remedy available to a mortgagee

A mortgagee may sue the mortgagor for any default under the mortgage contract. This covenant is personal; it does not run with the land. Only the original mortgagor, or his or her personal representatives in the event of the mortgagor's death, will be liable in this way. If the mortgagee sells the property and the funds obtained from the sale are insufficient to cover the

mortgage debt, the mortgagee can pursue the mortgagor for the shortfall under s 100 of the Conveyancing Act.

The right to possession as a remedy available to a mortgagee

Under Old System Title, the first mortgagee by deed has the legal estate which includes a right to possess the land, even where there was no default on the part of the mortgagor: *Four Maids Ltd v Dudley Marshall (Properties) Ltd* (1957).

The mortgagee's right to possession was, however, impliedly excluded so long as the mortgagor was not in breach of the mortgage: *Esso Petroleum Co Ltd v Alstonville Properties Ltd* (1975).

Under Torrens Title, the mortgagor is entitled to retain possession until there is a default. At that point, statute confers a statutory right of possession upon the mortgagee once there is a default by the mortgagor, under s 60 of the Conveyancing Act.

The right to appoint a receiver as a remedy available to a mortgagee

Under both Old System Title and Torrens Title, where a mortgage is made by deed, the mortgagee has power to appoint a receiver once there is a default, under ss 115A and 109(1)(c) and (5) of the Conveyancing Act.

The receiver is under strict obligations to the mortgagor to act in good faith and not sacrifice the interests of the mortgagor. The receiver is entitled to:

- manage the mortgaged property;
- receive income in the name of the mortgagor or mortgagee; and
- exercise any powers delegated by the mortgagee.

The right to lease as a remedy available to a mortgagee

Under Old System Title, a mortgagee is entitled to grant a lease of the mortgaged property even where the mortgagee was not in possession. Under Torrens Title, the mortgagee's power to lease is limited to the situation where the mortgagee has entered into possession.

The right to improve the mortgaged property as a remedy available to a mortgagee

The mortgagee is under an obligation to account for any rents and profits received, including those which would have been received but for the neglect of the mortgagee, where a mortgagee does not take possession: *Fyfe v Smith* (1975).

If the mortgagee is in possession, the mortgagee is entitled to spend money preparing and improving the property to ensure that the property is in a saleable condition. The mortgagee is entitled to be reimbursed for this expenditure: *Matzner v Clyde Securities Ltd* (1975).

Any improvements must not change the character of the property. The mortgagee should ensure that the expenditure enhances the value of the property and was justifiable at the time: *Southwell v Roberts* (1940).

The right to exercise the power of sale as a remedy available to a mortgagee

The power of sale is implied by statute. Most mortgages, however, incorporate such a provision into the mortgage. See generally ss 109–12 of the Conveyancing Act in relation to Old System Title mortgages and unregistered Torrens Title mortgages and ss 57–58A of the Real Property Act in relation to registered Torrens Title mortgages. Mortgagees prefer the remedy of sale to the remedy of foreclosure because:

- the procedure in exercising the power of sale is far simpler;
- a shortfall between the sale price and the amount of the security can be recovered; and
- upon sale, the mortgagee gets the proceeds of sale rather than becoming the owner of the mortgaged property. A mortgagee cannot sell to him or herself: *Farrar v Farrars Ltd* (1888). There must be a sale of the land, not a gift or an exchange of the property for another property.

Requirements which must be satisfied

In order for a mortgagee to exercise the power of sale, there must be a default, whether in the payment of principal or interest under the mortgage or in the non-observance of any of the terms of the mortgage. This must be followed by the service of a statutory notice, prescribed by s 57 of the Real Property Act in the case of registered Torrens Title mortgages or in the form prescribed by s 111 of the Conveyancing Act in relation to unregistered Torrens Title and all Old System Title mortgages to remedy the default within 30 days, followed by non-compliance with the notice. There must be a sale, in the sense that a mortgagee cannot sell to him or herself, although it is permissible, subject to the obligation to enter into a truly independent bargain, for a mortgagee, when exercising a power of sale, to sell to a related entity: *Farrar v Farrars Ltd* (1888).

When the sale must take place

Once the above-mentioned requirements for sale have been satisfied, it is up to the mortgagee alone to determine whether the mortgaged property is or is not to be sold: *Belton v Bass, Ratcliffe and Gretton Ltd* (1922).

The rationale for this is that we all make better decisions with the benefit of hindsight. If the mortgagee could be liable for a decision to either sell once the requirements for sale had been satisfied or alternatively be liable for a decision to delay the sale until a later time, the mortgagee would face the following unenviable prospects:

- If selling straight away, the mortgagee could be liable for not delaying the sale if the market subsequently improved.
- Alternatively, if delaying the sale, the mortgagee could be liable for allowing the debt to increase if the market subsequently deteriorated.

Requirements in the statutory notice to remedy the default

The notice must call for the default to be rectified and be in writing and signed by the mortgagee or agent. The default should be described with sufficient particularity, so that the mortgagor knows exactly what is the alleged breach. For instance, if there is non-payment of principal or interest, a precise amount should be stated in the notice, although an inaccuracy in the calculation of the amount owing will not invalidate the notice: *Clarke v Japan Machine Tools Pty Ltd* (1984) at 413–14; *Network Finance Ltd v Lane* (1984).

If during the 30 day period between the service of a statutory notice and its expiry the mortgagor remedies the defect, the power of sale process is halted. If the mortgagor falls into default again, the same process must be followed with the service of another notice and the commencement of another 30 day period.

The obligation on the mortgagee when selling

The English and Australian courts enunciated two tests for the mortgagee's duty, which are arguably distinct. These tests are:

- the mortgagee must take reasonable care to obtain the best possible price; and/or
- the mortgagee must act *bona fide* and not recklessly (ie, the good faith test).

The mortgagee must take reasonable care to obtain the best possible price

In *Cuckmere Brick Co Ltd v Mutual Finance Ltd* (1971), the plaintiffs were mortgagors of certain land. Planning permission had been obtained for the construction of 100 flats or 35 houses on the land. The mortgagee, when exercising the power of sale, advertised extensively. The advertisements only referred to the potential use of the property for the construction of the houses. The advertisements did not mention the planning approval for the flats. If the information as to the planning permission for the flats had been

advertised, more buyers may have been interested and a higher price obtained.

The English Court of Appeal held that the mortgagees owed a duty to the mortgagor to take reasonable care to obtain the best possible price, *per* Lord Cairns at 978, or to obtain the true market value, *per* Lord Salmon at 966, as at the date of the sale.

This decision has been followed in many English cases, including *Standard Chartered Bank v Walker* (1982); *American Express International Banking Corp v Hurley* (1985); and *Bishop v Bonham* (1988). There has, however, been a retreat from this view in more recent years: *Parker Tweedale v Dunbar Bank plc* (1990); *China and South Sea Bank Ltd v Ten Soon Gin* (1990).

The mortgagee must act *bona fide* and not recklessly (ie, the good faith test)

By way of comparison, in *Kennedy v De Trafford* (1897), the House of Lords held that the only obligation on a mortgagee when exercising its power of sale is to act in good faith.

These differences in approach are best understood by considering a number of cases on this area of law.

Pendlebury v Colonial Mutual Life Assurance Society (1912)

In *Pendlebury v Colonial Mutual Life Assurance Society*, a mortgagee sold a block of acres of land in northwest Victoria. The land was to be sold by auction in Melbourne and was advertised in two Melbourne newspapers. The advertisement paid little regard to certain features of the property.

The High Court held that:

- the mortgagee had acted in disregard of the interests of the mortgagor;
- the mortgagee cannot act recklessly or wilfully sacrifice the interests of the mortgagor;
- if the mortgagee does so, the mortgagee will not be regarded as acting in good faith.

Griffiths CJ, at 680, observed that the mortgagee would be regarded as reckless where the mortgagee omits to take obvious precautions to ensure a fair price. Barton J endeavoured to reconcile the two tests on the basis that the duty to act in good faith includes the duty to take reasonable precautions to obtain a proper price. His Honour was of the view that the duty to act in good faith was to act fairly towards the mortgagor's interests, and this included a component requiring reasonable precautions to obtain a proper price.

On the other hand, Isaacs J held that the mortgagee's only duty was to act in good faith. He referred to Lord Herschell's statement in *Kennedy v De Trafford* (1897) that a mortgagee does not act in good faith when 'wilfully and

recklessly dealing with the property in such a manner that the interests of the mortgagor are sacrificed'. Isaacs J said it was clear that 'recklessly' could not include 'mere negligence or carelessness in carrying out the sale'.

Forsyth v Blundell (1973)

In *Forsyth v Blundell*, the majority, comprising Walsh and Mason JJ, held on the facts that the mortgagee, in realising the security, had acted with calculated indifference to the mortgagor and had recklessly sacrificed the mortgagor's interests. Accordingly, it was unnecessary to decide which line of authority was the law.

Walsh J acknowledged the contrasting lines of authority, but said that he did not think it necessary to resolve the question in this appeal. Mason J took the same view. He spoke of 'the vexed question whether the mortgagee's duty is merely to act *bona fide* or whether, in addition, he is bound to take reasonable precautions to obtain a proper price'.

Menzies J, however, stated by way of *obiter dictum*:

> I do not think that statements in some cases, that the mortgagee is under a duty to take reasonable precautions to obtain a proper price, are at odds with the rule stated by Lord Herschell. To take reasonable precautions to obtain a proper price is but a part of the duty to act in good faith. This duty to act in good faith falls far short of the Golden Rule and permits a mortgagee to sell mortgaged property on terms, which, as a shrewd property owner, he would be likely to refuse if the property were his own.

Bangadilly Pastoral Co Case (1978)

Next, in the *Bangadilly Pastoral Co Case*, the High Court set aside a mortgagee sale because there was no truly independent bargain between the mortgagee and the purchaser. In this case, it was again strictly unnecessary to determine which of the two lines of authority was to be preferred, because the sale from the first mortgagee to the purchaser was a sale between two related entities. In these circumstances, the court held that the parties to the contract must satisfy the court that there was a truly independent bargain.

Nevertheless, Jacobs J observed that good faith in this context was not concerned with the motive for exercising the power of sale, but with 'a genuine primary desire to obtain for the mortgaged property the best price obtainable consistently with the right of a mortgagee to realise his security'.

Commercial and General Acceptance Ltd v Nixon (1981)

In *Commercial and General Acceptance Ltd v Nixon*, the High Court commented on the mortgagee's duty when exercising the power of sale in the context of Queensland legislation, which imposes a reasonable precautions test. Once again, there was no need for the High Court to consider the nature of the mortgagee's duty at general law.

State Bank of New South Wales Ltd v Chia (2000)

In a recent Supreme Court of New South Wales case, Einstein J in *State Bank of New South Wales Ltd v Chia* observed that 'the *Cuckmere* test has no currency in New South Wales'.

Gomez v State Bank of New South Wales Ltd (2002)

In *Gomez v State Bank of New South Wales Ltd*, where it was contended that the Bank as the mortgagee exercising its power of sale had recklessly or willfully sacrificed the mortgagor's interest in relation to the exercise of its power of sale, the mortgagor pointed to the following aspects of the Bank's conduct:

- the brevity of the Bank's advertising campaign conducted in respect of the first property and the Bank's failure to take reasonable steps to present the first property for sale;
- the failure of the Bank to take reasonable steps to secure the leasing of the second property at the proper market rent before it was sold; and
- the marketing and selling campaign conducted by the Bank in relation to the third property was alleged to be inadequate in light of their development potential.

The Full Court of Federal Court, having referred to the above quoted observation by Einstein J, noted that there is much to be said for the view of Menzies J in *Forsyth v Blundell* (1973) that the *Pendlebury* test on the one hand and the *Cuckmere* test on the other hand may not be incompatible.

What is the obligation imposed on a mortgagee when selling?

Because of the failure of the High Court to determine precisely what is the obligation owed by a mortgagee to a mortgagor when exercising a power of sale, assuming the sale is at arm's length, unlike the *Bangadilly Pastoral Co Case* (1978), judges of the Supreme and Federal Courts have been at liberty to apply either approach.

Professor Butt, at [18,116], has helpfully collected a number of these cases. They show that most but certainly not all judges favour the less onerous good faith duty. Such judges have stressed that the mortgagee's power of sale is a remedy which enables the mortgagee to more easily realise its security. As long as the mortgagee exercises the power in good faith and does not recklessly or wilfully sacrifice the mortgagor's interests, there is no reason to interfere with the exercise of the power of sale, even if the property is sold at an undervalue.

Section 420A of the Corporations Act

Section 420A of the Corporations Act 2001 (Cth) governs the mortgagee's duty when selling where the mortgagee is a 'controller', ie, a receiver or receiver and manager or in possession of the mortgaged property to enforce a charge.

A 'controller' who exercises a power of sale over the property of a corporation must 'take all reasonable care to sell the property for not less than its market value, and, if it has no market value, then for the best price that is reasonably obtainable, having regard to the circumstances existing when the property is sold'.

Remedies available to a mortgagor complaining of an improper sale

A mortgagor asserting an improper sale can seek relief against the mortgagee by way of injunction or damages. The appropriate relief for the mortgagor will depend upon the stage the purported sale has reached and whether a third party purchaser has acquired rights in the property being sold.

An injunction can be obtained to prevent the exercise of the power of sale or to restrain the completion of any sale where a contract has been exchanged. As a general rule, however, an injunction will not be granted unless the amount of the mortgage debt, if this is not in dispute or, if disputed, the amount claimed by the mortgagee, is paid into court: *Inglis v Commonwealth Trading Bank of Australia* (1972).

In appropriate circumstances, the courts may only require a lesser amount to be paid into court, pending the final hearing to determine whether or not the mortgagee has breached the duty owed to the mortgagor: *Harvey v McWatters* (1949) at 178; *Clarke v Japan Machines (Australia) Pty Ltd (No 2)* (1984); *Henry Roach Petroleum v Credit House (Vic)* (1976).

Allfox Building Pty Ltd v Bank of Melbourne Ltd (1992)

The principles to be applied have been helpfully set out in *Allfox Building Pty Ltd v Bank of Melbourne Ltd* as follows:

- It is not the law that a mortgagee owes to his mortgagor any such duty of care as upon a breach of it would give rise to a cause of action for damages – the tort of negligence has not yet subsumed all torts, and still less has it reached the stage where it has supplanted the principles of Equity or those appropriate to Contractual promises. The remedies of a mortgagor, in a case such as this, lie in Equity and nowhere else (see *China and South Sea Bank Ltd v Tan Soon Gin* [1990] 1 AC 536).
- The general rule is that a mortgagee will not be restrained from exercising a power of sale merely because the amount due is in dispute, or because the mortgagor has commenced a redemption action, or because the

mortgagor objects to the manner in which a sale has been or is being arranged. In such cases, a mortgagee will be restrained only if the mortgagor pays the amount claimed into court unless, on the terms of the relevant mortgage, the claim is clearly excessive (see *Harvey v McWatters* [1948] 49 SR 173; *Inglis v Commonwealth Trading Bank of Australia* (1972) 126 CLR 161).

- The apparent exceptions to this general rule are limited to cases in which, either:

  (a) the validity of the mortgage is in issue; or

  (b) the present availability of the power of sale is in issue, because either:

    (i) the alleged breach of covenant which is relied upon by the mortgagee is challenged; or

    (ii) the occurrence of some other pre-condition, whether statutory, or otherwise, to the exercising of the power of sale, is in issue.

- In a case in which a mortgagor, or one who appears to be a mortgagor, seeks to challenge a threatened or actual sale by his mortgagee or apparent mortgagee, the first task is to determine whether or not the challenge is based upon the non-existence or lack of present availability of a power of sale or upon some other ground.

- If the challenge is based upon the non-existence, or lack of present availability, of the power of sale, then, as it seems to me, what is invoked is the auxiliary jurisdiction in Equity an injunction to prevent interference with one's legal rights – in which event, as it seems to me, the plaintiff is not to be required, as a condition of obtaining relief, 'to do equity', that is to say to bring money into court, or to offer to redeem (see *Mayfair Trading Co Pty Ltd v Dreyer* (1958) 101 CLR 428).

- If, however, the challenge is not based upon such a ground but, rather, is based upon fit allegedly improper exercise by the relevant mortgagee of the duties which Equity imposes on him in relation to the exercise of a vested, and presently exercisable, power of sale, this, so it seems to me, invokes the exclusive jurisdiction in Equity, in which event as it seems to me, the relevant plaintiff is required 'to do equity', that is, to bring money into court, and to seek redemption, as a condition of obtaining relief.

Remedies available to a mortgagor complaining of an improper sale, as against the purchaser

It should be noted that in a case of a 'reckless disregard' of the interests of the mortgagor, the completion of the contract would be restrained where there has been a 'reckless disregard', even though there was no untoward behaviour on the part of the purchaser.

This is illustrated by *Forsyth v Blundell* (1973), where the mortgagee entered into discussions with a potential purchaser. The mortgagee was aware that there was another purchaser willing to purchase the mortgaged property at a significantly higher price. The mortgagee sold the land to the

purchaser for a lower price without notifying the other purchaser, who would have paid more.

Even where the purchaser had no notice of any impropriety, the purchaser cannot insist on specific performance of a contract for sale in the face of an injunction obtained by the mortgagor. Such a purchaser is in a competing equities situation where the later equitable interest of the purchaser under the contract for sale competes against the earlier equitable interest of the mortgagor to have the sale set aside.

Before completion of the sale, the mortgagor was granted a declaration that the sale had not been a *bona fide* exercise of the power of sale and an injunction restraining the mortgagee from completing the sale.

A sale may also be set aside in circumstances involving fraud. In *Latec Investments v Hotel Terrigal Pty Ltd* (1965), the High Court examined conduct by a mortgagee which amounted to the destruction of the mortgagor's interest, with the object of obtaining the property for the mortgagee's group of companies.

Kitto J regarded the action as being beyond mere constructive or equitable fraud and as one of 'preference and collusion'. In such a case, the court would have set aside the sale but for the fact that the mortgagor had been slow to commence proceedings and had failed to establish the equity of redemption before a *bona fide* third party became involved.

Legislative protection to a purchaser from a mortgagee

Under the general law, purchasers of land are afforded statutory protection from adverse claims by a mortgagee under s 112 of the Conveyancing Act. Such legislation, however, will not prevent a mortgagor from bringing an action to have a contract for sale by a mortgagee set aside where there has been reckless disregard of the mortgagor's interests or fraudulent behaviour. Under Torrens Title, a purchaser who has obtained registration is protected from claims by the mortgagee, in the absence of any of the exceptions to indefeasibility.

Prior to registration, however, a purchaser will not have the benefit of indefeasibility. Where such a purchaser had notice of the impropriety of the sale at the time of the contract, that purchaser will be subject to the rights of the mortgagor: *Luckass Investments Pty Ltd v Markaroff* (1964).

PRIORITIES BETWEEN MORTGAGEES WHERE THERE HAVE BEEN FURTHER ADVANCES

Under Old System Title, an earlier legal or equitable mortgagee prevails over a later equitable mortgage, unless the earlier mortgagee is guilty of postponing conduct. An earlier equitable mortgagee will be subject to a later

legal mortgage acquired for value, in good faith and without notice of the earlier mortgage. Where there are two competing equitable mortgages, priority goes to the interest earlier in time, assuming no notice on the part of the holder of the later interest.

Under Torrens Title, a registered first mortgage will have priority as against a registered second mortgage. A registered mortgagee will have priority over an unregistered mortgagee, regardless of whether the unregistered mortgage was created prior or subsequent to the registered mortgage, unless the unregistered interest can establish an exception to indefeasibility.

The doctrine of tacking also affects priority between competing mortgagees. The doctrine is discussed in two parts:

- *tabula in naufragio*; and
- the rule relating to the tacking of further advances.

The doctrine of '*tabula in naufragio*' is only applicable to Old System Title mortgages and does not apply to Torrens Title mortgages. This doctrine is illustrated by assuming that X has created mortgages under the general law, first in favour of B, then C and then D.

B has a legal mortgage, while C and D have equitable mortgages. D may be concerned that if X, the mortgagor, defaults, then D will not be repaid. If D purchases B's legal mortgage and then 'tacks' onto it, D will be entitled to be repaid in priority to C: *Taylor v Russell* (1892).

An example of the tacking of further advances is where X grants a legal mortgage to B, then X grants a second equitable mortgage to C, and then X advances more money to B on the security of the same property without the knowledge of C. B is permitted to 'tack on' the further advance, by reason of B's possession of the legal estate, provided that B lacks knowledge of C's interest, at the time of the further advance: *Hopkinson v Rolt* (1861); *West v Williams* (1899).

Examples of tacking on further advances arise where B's mortgage states that the mortgagee will make further advances, up to a specified sum, on the security of the mortgaged property. On other occasions, B's mortgage does not provide for further specific advances being made, but does provide more generally that the security secures both the initial advance and any further advances.

In either situation, if X subsequently grants a mortgage to C, and then B makes a further advance, B is entitled to priority over C and may 'tack' on the further advance to the original sum, provided that at the time of making the further advance B was unaware of C's interest: *Hopkinson v Rolt* (1861); *West v Williams* (1899).

In the former situation, B will prevail over C in relation to the further advances unless B had *actual* notice of C's mortgage: *Re O'Byrne's Estate* (1885).

In the latter situation, B will only prevail over C where B had no notice of C, be it actual, constructive or imputed: *Credland v Potter* (1874).

According to Holland J in *Matzner v Clyde Securities Ltd* (1975), the above-mentioned law applicable to Old System Title also applies to Torrens Title mortgages, although His Honour distinguished this rule that further advances cannot be tacked on to the initial advance, because he held that the first mortgage was a 'building' mortgage where the further advances are utilised to improve the value of the property: *Matzner v Clyde Securities Ltd* (1975), *per* Holland J at pp 303–04.

In *Matzner v Clyde Securities Ltd* (1975), the first registered mortgage secured 'all moneys advanced'. It is suggested that the view of Holland J is inconsistent with the principle of indefeasibility that a first registered mortgage prevails over a later registered mortgage.

8 LEASES

You should be familiar with the following areas:

- the characteristics of a lease
- covenants in leases
- assignments and sub-leasing and
- termination and relief against forfeiture

THE CHARACTERISTICS OF A LEASE

The four certainties of a periodic lease

Most leases are periodic in nature. Such leases must have certainty as to:

- the parties to the lease;
- the property being leased;
- the period of the lease; and
- the price (ie, rental) to be paid for the lease.

Where the date of commencement cannot be ascertained from the provisions of the lease, the lease is void: *Caboolture Park Shopping Centre v Edelsten* (1987).

The commencement date may be implied. In *Jopling v Jopling* (1909), for instance, a lessee entered into possession and began paying rent from a particular date: the term of the lease must be certain. A firm date, or at least a precise method by which the term can be ascertained at the time of entering into the lease, is required: *Prudential Assurance Co Ltd v London Residuary Body* (1992).

Regard can be given to a collateral matter from which a period can be calculated: *Lace v Chantler* (1944); reaffirmed by the House of Lords in *Prudential Assurance Co Ltd v London Residuary Body* (1992).

Tenancies at will or at sufferance

A tenancy at will arises whenever a person, with the landlord's consent, occupies land as a tenant on the basis that either party may terminate the tenancy at any time. A tenancy at will enables either the lessor or the lessee to terminate at will without the need for prior notice.

Tenancies at will may be created by express agreement or by implication. The latter most commonly arises where a tenant 'holds over' under an expired lease with the lessor's consent but without having paid further rent on a periodic basis, or where a prospective lessee is let into possession pending a concluded agreement for the grant of a lease, without yet having paid rent on a periodic basis.

A tenancy at sufferance arises where a lessee who initially occupied the property under a valid lease remains in possession after the lease has come to an end, without the lessor's consent. A tenancy at sufferance is to be distinguished from a tenancy at will, which exists with the lessor's consent. A tenancy at sufferance arises by operation of law. A tenant at sufferance is liable to pay for 'use and occupation' as distinct from rent. A lessor may eject a tenant at sufferance at any time, without the need for prior notice. No tenancy at sufferance can arise where the occupant is in possession notwithstanding the lessor's objection. Such an occupant is a trespasser.

The requirement of exclusive possession

A lease must be distinguished from a license. The distinction turns on whether or not the occupant is granted exclusive possession. A lease confers on the lessee a right to exclusive possession of the land: *Radaich v Smith* (1959).

In *Radaich v Smith*, the relationship between the owner of the land and the occupant was described as 'a licence' but included factors such as a term of five years, a sole and exclusive right to provide refreshments, and a provision that at the end of the term the grantee would 'give up possession'.

The High Court held that:

- the substance and effect of the instrument between the parties created a leasehold interest and the relationship of lessor and lessee between the parties;
- the test when deciding whether a lease has been created is whether or not a right of exclusive possession has been granted;
- this test is to be applied to the substance rather than the form of the relationship; and
- the lessee has a right to exclude all others from the land, including the lessor.

The English courts have now endorsed this view that the test when deciding whether a lease has been created is whether or not a right of exclusive possession has been granted: *Street v Mountford* (1985), where the House of Lords expressly approved *Radaich v Smith* (1959); *AG Securities Ltd v Vaughan* (1990); *Bruton v London & Quadrant Housing Trust* (2000).

This is to be contrasted with the earlier approach of the English courts where a test based on the intention of the parties was applied: *Booker v Palmer* (1942); *Cobb v Lane* (1952); *Errington v Errington* (1952); *Isaac v Hotel de Paris* (1960).

Equitable leases

Leases which are not created by deed, and do not fall within the oral leases exception of s 23D of the Conveyancing Act 1919 (NSW), will not be enforceable at law. They may, however, be enforceable in equity, provided there is sufficient writing.

In *Walsh v Lonsdale* (1882):

- the parties entered into an agreement to grant a lease for seven years;
- the agreement stated an intention to enter into a formal lease, which was to contain a provision that the landlord could demand a year's rent in advance;
- the lessee entered into possession and started paying rent quarterly in arrears;
- no formal lease eventuated;
- the lessor sought a year's rent in advance; and
- the lessee argued that, since there was no formal lease, the agreement for lease was unenforceable at law. Under the common law, where a lease is unenforceable at law the lessee is regarded as a yearly tenant.

The Court of Appeal rejected the lessee's contention, and held that the parties had entered into a binding contract to enter into a lease. Equity would enforce this agreement.

Section 53 of the Real Property Act 1900 (NSW) requires any lease over Torrens Title land that is greater than three years to be registered. Where such a lease has not been registered, equity will regard the lease as an equitable lease: *Chan v Cresdon Pty Ltd* (1989).

In *Leitz Leeholme Stud Pty Ltd v Robinson* (1977):

- a lessee entered into possession and paid rent under a lease for a six year term;
- the lease was not registered;
- after a period of three years, the lessee vacated the premises and the lessor sued the lessee for breach of contract;

- the measure of damages claimed was the rental due for the remainder of the term of the lease. The lessee argued that a tenancy at will had arisen pursuant to statute; and
- the lease had therefore been terminated by the giving of one month's notice, thus terminating the whole legal relationship between the parties, including any contract for the lease.

The New South Wales Court of Appeal held that the agreement between the parties gave rise to an equitable lease. Glass JA, with whom Hope JA agreed, stated the position to be as follows:

> A lease of land under the Real Property Act for a term exceeding three years creates no legal term unless it is both registrable and registered ... The unregistered memorandum of lease operates merely as an agreement specifically enforceable in equity, but not itself creating a legal term in the land ... insofar as the memorandum operates as an agreement, it retains a separate identity as the repository of the substantial rights of the parties ... The purported lease, nevertheless, took effect as an executory agreement for a lease enforceable in equity, thereby entitling the lessee to a formal lease ... Accordingly, when these decisions allude to an informal lease operating as an agreement for a lease enforceable in equity, they affirm not only the availability of the equitable relief, but also the existence of a contract at law.

Unless there were sufficient acts of past performance to establish a contract for a lease, an oral agreement for lease or oral lease not satisfying s 23D of the Conveyancing Act 1919 (NSW) would be unenforceable: *Regent v Millet* (1976); *Steadman v Steadman* (1976).

Privity of contract and privity of estate

Privity of contract exists between the original lessor and the original lessee. Accordingly, the covenants in a lease are enforceable between them as a matter of contract law. These covenants remain enforceable between these parties even after they have disposed of their respective interests: *Ahern v LA Wilkinson (Northern) Ltd* (1929) at 79.

Subject to any contrary agreement between the parties:

- if a lessee assigns the lease and the assignee breaches the covenant to pay rent, the lessor can sue the original lessee for the arrears: *195 Crown Street Pty Ltd v Hoare* (1969);
- the position, however, would be different if, rather than assigning the lease, the lessee surrenders the lease and a new lease is granted to the new lessee: *195 Crown Street Pty Ltd v Hoare* (1969); and
- if the lessor assigns the reversion and the assignee of the reversion breaches a lessor's covenant in the lease, the lessee can sue the original lessor for the breach, by reason of their contractual relationship.

Privity of estate exists between parties who stand in the relationship of lessor and lessee. As a result:

- where the lessor assigns the reversion, privity of estate exists between the assignee and the lessee;
- where the lessee assigns the lease, privity of estate exists between the lessor and the lessee's assignee; and
- where both original lessor and original lessee assign their interests, privity of estate exists between their respective assignees.

An assignment is a transfer of the whole of the lessee's interest in the lease. The assignee takes the place of the lessee, and becomes the lessee to the lessor. As a result, privity of estate exists between the lessor and the assignee.

An assignment of a lease should be contrasted with a sub-lease. The latter is a transfer of something less than the whole of the lessee's interest in the lease whether in time or in space.

COVENANTS IN LEASES

The parties to a lease are subject to the provisions of the lease.

Specific legislation regulating leases

Certain lease relationships are heavily regulated by statute. They include:

- retail shopping centre leases, which are governed by the Retail Leases Act 1994 (NSW);
- residential leases, which are governed by the Residential Tenancies Act 1987 (NSW); and
- retirement village leases, which are governed by the Retirement Villages Act 1999 (NSW).

The specific provisions of these three Acts of Parliament are beyond the scope of this book: the reader should consult a specialist text.

Covenants by implication

Covenants may be implied into a lease by:

- common law principles;
- statute; or
- general contractual principles.

Two covenants that are implied by the common law are the covenant for quiet enjoyment and the covenant not to derogate from the grant. Where the lease does not expressly contain either or both of these covenants, they will be implied into the lease: *Budd Scott v Daniel* (1902).

The covenant for quiet enjoyment

A lessee has a right to occupy and enjoy the leased premises without interruption or interference from the lessor. It is a question of fact in each case as to whether or not there has been a denial of quiet enjoyment: *Todburn Pty Ltd v Taormina International Pty Ltd* (1990).

In *Martins Camera Corner PO Ltd v Hotel Mayfair Ltd* (1976), damage was caused to goods situated in the lessee's premises by water that overflowed from the lessor's blocked downpipes. The overflow was the result of poor maintenance on the part of the lessor. The court held that there had been a breach of the covenant.

Other examples where breaches of this covenant have been found include:

- the removal of the doors and windows: *Lavender v Betts* (1942);
- obstructions and repeated knocking and shouting: *Kenny v Preen* (1963);
- the carrying out of structural repairs: *Dowse v Wynyard Holdings Pty Ltd* (1962); and
- the disconnection of electricity supplies: *Perera v Vaniyar* (1953).

On the other hand, in *Southwark London Borough Council v Mills* (1999), the House of Lords was faced with a situation where the lessees complained about noise levels emanating from other apartments in a residential complex. Although the noise levels were the result of ordinary and reasonable use of the premises, there was inadequate noise insulation due to the age of the premises. The problem existed when the lessees entered into possession.

The House of Lords held that:

- regular excessive noise could amount to a substantial interference with the enjoyment of the premises;
- because the covenant for quiet enjoyment was prospective in operation, it did not extend to interference arising from factors which related to the condition of the property before the grant of the lease;
- accordingly, there would not be a breach where the interference arose from a contemplated use of premises retained by the lessor where all parties contemplated such use; and
- because the disturbance was the result of inherent structural defects in the premises which existed at the convenience of the lease and such disturbances were within the contemplation of the parties, there was no breach of the covenant.

Lord Millett at 957 observed:

> ... The covenant for quiet enjoyment is broken if the landlord or someone claiming under him does anything that substantially interferes with the tenant's title to or possession of the demised premises or with his ordinary and lawful enjoyment of the demised premises. The interference need not be

direct or physical. Nor in my opinion is it a necessary precondition of liability on the covenant that the acts alleged to constitute the breach would support an action in nuisance.

The covenant not to derogate from the grant

A lessor must not do anything that is inconsistent with the purposes for which the property is leased, unless the parties have agreed otherwise. The test is whether the premises have been rendered unfit or materially unfit for the purpose for which they were granted: *Gordon v Lidcombe Developments Pty Ltd* (1966). The rationale of this covenant is that the lessor cannot give possession with the one hand and then take away the benefit of possession with the other hand.

Examples of breaches of the covenant not to derogate from the grant include the following:

- where the lessor was found to have interfered with the access to a restaurant business conducted by the lessee on the sixth floor of a building, by allowing the lift to the restaurant to remain out of operation for several months: *Karaggianis v Malltown Pty Ltd* (1979);
- where the plaintiff's business was adversely affected by sawdust and loud industrial noise from neighbouring premises leased from the same lessor. Both leases contained an undertaking by the lessee not to cause a nuisance to any other lessee. The lessor could have enforced the covenant but did not do so: *Aussie Traveller Pty Ltd v Marklea Pty Ltd* (1998); and
- where, as a result of demolition works close to the leased property, thieves were able to enter the leased property and steal a large amount of stock: *Lend Lease Development Pty Ltd v Zemlicka* (1985).

An implied duty of good faith

The duty to act in good faith has for many years been acknowledged in relationships, such as:

- the obligations on a mortgagee upon the mortgagor's default to act in good faith;
- the *bona fide* purchaser of a legal estate; and
- the obligations of a fiduciary to act in good faith towards the principal.

Recent decisions have suggested that a duty to act in good faith should be implied into all contracts, including leases: *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992); *Hughes Aircraft Systems International v Airservices Australia* (1997); *Alcatel Australia Pty Ltd v Scarcella* (1998).

In *Alcatel Australia Pty Ltd v Scarcella*, a lessee asserted that a lessor was under a duty of good faith in respect of the performance of its obligations under the lease. The lessee claimed that the lessor had

contravened this duty by pressuring the local council to issue unreasonable orders in relation to the property.

Although the New South Wales Court of Appeal held that an implied duty of good faith had not been breached in this case, Their Honours observed:

> The decisions in *Renard Constructions* and in *Hughes Bros* were that in New South Wales, a duty of good faith, both in performing obligations and exercising rights, may by implication be imposed upon parties as part of a contract.

Covenants implied by statute

A number of covenants may be implied by statute into a lease: ss 84 and 85 of the Conveyancing Act 1919 (NSW). Section 84 of the Conveyancing Act requires the lessee to:

- keep the premises in good and tenantable repair, such as would make them reasonably fit for the occupation of a reasonably minded tenant of the class who would be likely to take them, having regard to their 'age, character and locality of the house', during the term of the lease and to yield up the premises in such repair at the end of the lease: *Proudfoot v Hart* (1890); and
- pay the rent reserved by the lease at the time specified. This alters the position under the common law where the destruction of the premises did not release the lessee from the contractual obligation to pay rent: *Paradine v Jane* (1647).

Section 84 of the Act permits the abatement of rent where there has been fire, flood, lightning and other events which render the demised premises unfit for occupation. The extent of the abatement is proportionate to the extent of the damage sustained. The lessor's rights to recover rent are suspended until the premises have been rebuilt or made fit for the occupation and use of the lessee. The lessee is not obliged to repair damage arising as a result of fire, flood, lightning, storm and tempest, or reasonable wear and tear.

Where the lessee has failed to repair, the lessor may commence proceedings against the lessee for damages for breach of s 133A(1) of the Conveyancing Act. The quantum of damages cannot exceed the amount by which the value of the reversion is diminished.

Covenants implied by the general law

A term will be implied into contract where such a term is required to give business efficacy to the lease: *Liverpool City Council v Irwin* (1977).

ASSIGNMENT AND SUB-LEASING

Assigning the lease

A lease is assigned by a lessee/assignor to an assignee when the entire interest held by the lessee/assignor is transferred to the assignee. The effect of an assignment is that:

- the assignee obtains all the benefits under the lease, such as the benefit of enjoying exclusive possession; but
- the assignee is also required to fulfil all obligations under the lease, such as the payment of rent.

The lessee/assignor needs to understand that he or she continues to be liable to the lessor for the performance of all obligations under the lease, even though as between the lessee/assignor on the one hand and the assignee on the other hand the latter is obliged to indemnify the former for any continuing liability to the lessor under the lease.

The risk for the lessee/assignor is that the assignee will not be financially able to honour its obligations to the lessor or the lessor's successor in title and hence will not be in a position to honour its obligations to the lessee/assignor.

Of course, if the lessor enters into a new lease with the proposed assignee and the old lease is surrendered, then the old lease comes to an end, there is no assignment, and the old lessee is not liable under the new lease.

Sub-leasing

A sub-lease is where the lessee retains some part of the leasehold interest, whether in time or in space. For instance, if the property leased is a three storey building with four years to run on the lease:

- there will be an assignment of the lease if the lessee transfers the exclusive right to possess all of the three storey building for all of the remaining four years to run on the lease;
- there will be a sub-lease of the lease if the lessee transfers the exclusive right to possess all of the three storey building for something less than all of the remaining four years to run on the lease;
- there will be a sub-lease of the lease if the lessee transfers the exclusive right to possess only part of the three storey building for all of the remaining four years to run on the lease; and
- there will be a sub-lease of the lease if the lessee transfers the exclusive right to possess only part of the three storey building for something less than all of the remaining four years to run on the lease.

Qualified covenants and covenants prohibiting assignments or sub-leasing

A lease may:

- prohibit assignment or sub-leasing;
- permit assignment or sub-leasing provided that the lessor's consent has been sought; or
- be silent on whether or not assignment or sub-leasing is permitted.

If a lease is silent as to the rights to assign or sub-lease, the lessee may assign or sub-lease without obtaining the consent of the lessor: *American Dairy Queen (Qld) Pty Ltd v Blue Rio Pty Ltd* (1981) at 49.

It is open to the lessor to consent to any proposed assignment or sub-lease, even where a lease prohibits an assignment or sub-lease, under ss 120 and 123 of the Conveyancing Act.

A lessor may be attracted to maintaining 'control' over their property by inserting a clause in a lease to prohibit any assignment or sub-lease. Commercially speaking, however, lessees are not normally attracted to leases that prohibit assignment or sub-lease because of a concern that they will be 'locked' in for the duration of the lease. As a result, most leases contain a covenant permitting assignment or sub-lease with the consent of the lessor. These are often referred to as 'qualified covenants'.

Requirements to satisfy a qualified covenant

A qualified covenant in a lease, governing the circumstances in which a lessee will be permitted to assign or sub-lease, is subject to the following principles:

- Where consent is to be obtained, such consent must not be unreasonably withheld, nor can the lessor demand a premium for consenting: s 132 of the Conveyancing Act.
- The lessee must seek consent even where it could not reasonably be withheld: *Barrow v Isaacs* (1891).
- The lessee must supply relevant documentation on request and must give the lessor reasonable time to consider the matter: *Wilson v Fynn* (1948).
- Where consent is unreasonably withheld, the lessee may proceed with the assignment and resist any attempt by the lessor to forfeit the lease, which is a dangerous course. More prudently, the lessee may seek a declaration from the Equity Division of the Supreme Court as to his or her rights under the lease.

Unreasonably withholding consent

The courts have taken different views as to what amounts to an unreasonable refusal to consent. The narrow view was applied in *Houlder Bros & Co v Gibbs* (1925), where the court held that the only matters to be taken into account were the suitability of the person being proposed as assignee and the proposed usage of the premises.

A broader approach was taken by the English Court of Appeal in *Bickel v Duke of Westminster* (1977), where Lord Denning stated the law as follows:

> The words of the contract are perfectly clear English words: 'such licence shall not be unreasonable withhelds.' When those words come to be applied in any particular case, I do not think the court can, or should, determine by strict rules the grounds on which a landlord may, or may not, reasonably refuse his consent. He is not limited by the contract to any particular grounds. Nor should the courts limit him.

The English Court of Appeal in *International Drilling Fluids Ltd v Louisville Investments (Uxbridge) Ltd* (1986) enunciated a series of principles dealing with the reasonableness or otherwise of a lessor's refusal to consent to an assignment or sub-lease. Professor Butt at [1,596] has conveniently summarised these principles as follows:

1. The purpose of a covenant against assigning or sub-leasing without the lessor's consent is to protect the lessor from having the premises used or occupied in an undesirable way, or by an undesirable assignee.
2. A lessor is not entitled to refuse consent on grounds unconnected with the relationship of lessor and lessee as it relates to the leased premises.
3. The lessee bears the onus of proving that any consent was refused unreasonably.
4. The lessor does not have to justify the conclusions, which led to consent being refused, if they were conclusions that a reasonable person, in the lessor's position, could have reached in all the circumstances.
5. It may be reasonable for a lessor to refuse consent having regard to the proposed usage for which the proposed assignee intends to use the premises, even though the lease does not forbid such usage.
6. Usually, lessors need consider only their own interests; but there may be cases of such imbalance between the benefit to the lessor and the detriment to the lessee if consent is refused, that it would, in all the circumstances, be unreasonable for the landlord to refuse consent.
7. Subject to the above, whether the lessor's consent is withheld unreasonably is a question of fact, having regard to all the circumstances.

From the above, it would appear that:

- withholding consent will be unreasonable if the lessor is seen to be endeavouring to gain a collateral advantage by putting into effect arrangements designed to replace the contractual relations created by the lease with other arrangements more advantageous to the lessor;

- the lessor's refusal may be reasonable where the proposed assignment would cause the lessor financial detriment. Accordingly, the lessor is entitled to consider the proposed assignee's or sub-lessee's financial capacity and willingness to perform the obligations under the lease;
- the lessor is not obliged to give reasons for refusing consent, but failure to give reasons is likely to encourage a dissatisfied lessee to challenge the withholding of consent;
- if the lessee assigns in breach of the covenant then the interest in land will still vest in the assignee. The lessor will be entitled to either forfeit the lease by serving a notice on the assignee or claim damages for breach of the original lease;
- when a lease is assigned, the lessee/assignor transfers the whole of the interest under the lease to the assignee. The assignee takes the place of the assignor/lessee;
- privity of contract, however, still exists between the lessor and the lessee. All covenants remain enforceable between them. The lessee remains liable for the assignee's breaches;
- if the assignee does not pay the rent, the lessor may sue both the lessee and the assignee for the rental owing; and
- while the assignee must indemnity the lessee for the amount recovered by the lessor, this indemnity will be worthless if the assignee is insolvent.

The assignment of the reversion

When a lessor transfers the freehold to a purchaser, this is known as assigning or transferring 'the reversion' or 'the reversionary interest' in the land. Pursuant to statute, the benefit and the burden of covenants in a lease that touch and concern the land run with the reversion: ss 117 and 118 of the Conveyancing Act.

Accordingly, on settlement of the sale from the lessor to the purchaser, the lessor transfers to the purchaser all the benefits under the lease previously enjoyed by the lessor. These benefits include any outstanding rent owed by the lessee to the lessor as at the date of settlement.

After the assignment of the reversion, the original lessor cannot sue for breaches which have occurred whether before or after the assignment. The right to sue passes to the assignee of the reversion who now, alone, has the right to sue for breaches which occurred both before and after the assignment: *Re King* (1963).

The remedies of damages and injunctions

The lessor or lessee may recover damages for breaches of the covenants of the lease by the other party. The measure of damages is calculated on contractual principles.

An injunction may be available to the lessor or lessee to restrain a breach of covenant by the other party to the lease: *Murray v Dunn* (1907).

TERMINATION AND RELIEF AGAINST FORFEITURE

Contrasting essential and non-essential terms

It is important to ascertain whether or not the term breached is an essential term. This distinction is based on the construction of the lease as a whole: *Shevill v Builders Licensing Board* (1982).

A covenant for the payment of rent does not usually amount to an essential term: *Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd* (1989). However, where the lessee's conduct is perceived to be a rejection of the lessee's obligations under the lease, the court may conclude that the lessee has repudiated the lease.

For instance, in *Wood Factory Pty Ltd v Kiritos Pty Ltd* (1985), the lessee:

- moved its plant and machinery to adjoining premises;
- only used the leased premises for storage;
- permitted an employee to reside on the premises;
- allowed the premises to fall into disrepair, making them susceptible to vandalism;
- attempted to sub-lease the premises; and
- was significantly behind in rental payments.

The New South Wales Court of Appeal held that the above-mentioned breaches indicated that the lessee did not regard itself as bound by the provisions of the lease and had thus repudiated the lease.

Where the obligations between the lessor and lessee are expressed to be essential terms of the contract, and the lessee's conduct amounts to a repudiation of the lease, the lessor may waive the breach (*Matthews v Smallwood* (1910)) or forfeit the lease and re-enter (*Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985)), or accept the repudiation and terminate the lease (*Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985); *Wood Factory Pty Ltd v Kiritos Pty Ltd* (1985)).

In *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985), the lessee had sub-let the premises in breach of a covenant of the lease; had caused physical damage to the roof, drains and electrical system; had obstructed access to the premises; and had failed to open the premises on time. Little or no attempt was made to rectify the situation and the lessees did not pay their rent for six months. The High Court found for the lessor. Mason J was of the view that the conduct amounted to both a fundamental breach and repudiation. His Honour held:

> It is not suggested that the breaches so far discussed, viewed in isolation, amounted to a repudiation or fundamental breach of the lease. It is the breach of the covenant to pay rent in associating with the other breaches, which is the central feature of the respondent's case on this issue ... In the result, the evidence supports the conclusion that the appellant's conduct accounted to a repudiation of the lease or a fundamental breach of its obligations under the lease ... Though maintaining a claim to the benefit of a contract, a party may repudiate it or commit a fundamental breach of it by refusing to perform his obligations according to its terms. [at pp 36–37]

Dawson J agreed with Mason J's judgment. Wilson and Deane JJ were of the view that the conduct amounted to a fundamental breach of contract. Brennan J regarded the conduct as repudiation.

Differences in liability between the breach of an essential and a non-essential term

In *Shevill v Builders Licensing Board* (1982), the lessee was found to have breached the obligation to pay rent. The breach, however, was held to be a breach of a non-essential term. Accordingly, although the lessor was entitled to re-enter and terminate the lease, the lessor was only entitled to recover the unpaid rent up until the date of re-entry.

On the other hand, in *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985), the lessee who had breached the obligation to pay rent was held to in breach of an essential term. Accordingly, the lessor was entitled to re-enter as an act of accepting the lessee's repudiation of the lease.

Here, the lessor was entitled to recover the unpaid rent for the balance of the term of the lease, subject to any rent collected from a new lessee during this period, or if there was a failure to mitigate loss then subject to any rent that should have been collected from a new lessee during this period.

Waiver and election

The breach of an essential term will not automatically bring the lease to an end. The lessor may waive the breach or elect not to terminate the lease by reason of the breach.

In order to establish a waiver or election, there must be an appreciation by the lessor of the lessee's breach, and that this breach makes the lease liable to forfeiture. There must also be an unequivocal act by the lessor to waive or elect: *London & County (A&D) Ltd v Wilfred Sportsman Ltd* (1971).

A waiver may be express or implied. An oral waiver will be sufficient. Waiver may occur before or a breach: Professor Butt at [15,132–15,137].

The lessor's awareness of the breach will not *per se* amount to a waiver without some positive act on the lessor's part which amounts to a waiver or election: *David Blackstone Ltd v Barnett's (West End) Ltd* (1973).

Forfeiture of a lease

The lessor's right to forfeit the lease may be exercised either by physical re-entry or by issuing a writ claiming possession in the Supreme Court. Physical re-entry involves the lessor physically re-entering the leased premises. A lessor who re-enters the premises to evict a lessee is not liable for trespass or assault: *Hemming v Stoke Popes Golf Club* (1920).

Alternatively, proceedings can be commenced in the Supreme Court claiming possession. Forfeiture occurs upon service of the notice: *Canas Property Co Ltd v KL Television Services Ltd* (1970).

It is uncertain whether a lessor who elects to accept the lessee's repudiation of the lease must also re-enter the premises in order to terminate the lessee's interest. Authorities conflict on this issue. Compare *J&C Reid v Abau Holdings Pty Ltd* (1988) and *Consolidated Developments Pty Ltd v Hold* (1986) with *Marshall v Snowy River Shire Council* (1995).

Relief against forfeiture

Equity has traditionally provided relief against forfeiture of a lease. See generally the House of Lords' decision in *Shiloh Spinners Ltd v Harding* (1973).

The court will examine the nature of the breach and the conduct of the lessee. The efforts made by the lessee to remedy the breach will be considered: *Belgravia Insurance Co v Meah* (1964); *Scala House Ltd v Forbes* (1974); *Hayes v Gunbola* (1988).

The court will need to be satisfied that the lessee will be able to fulfil his or her obligations in the future: *Hayes v Gunbola*.

Equity will usually grant relief against forfeiture for the non-payment of rent because it is considered that the right of forfeiture is security for the payment of the rent, provided that all arrears of rent and costs are paid and it is just equitable to do so: *Hayes v Gunbola*.

Mesne profits

Where the lease is validly terminated and the lessee refuses to leave, he or she is regarded as a trespasser and the lessor will be entitled to claim *mesne* profits, which are damages for the rent the lessor would have obtained if he or she had been able to re-let the premises during the duration of the trespass.

9 EASEMENTS

You should be familiar with the following areas:

- characteristics of an easement
- creating an easement
- changing the user of an easement
- extinguishing an easement and
- remedies in respect of easements

CHARACTERISTICS OF AN EASEMENT

What is an easement?

Jenks, *English Civil Law*, 4th edn, at [1,167] has defined an easement as:

> A right, of definite and limited character, annexed to the enjoyment of a corporeal hereditament ('dominant tenement') by reason whereof the occupier of another corporeal hereditament ('servient tenement') is bound to permit the person in whom the right is for the time being vested to do something on, in or over the servient tenement, other than taking corporeal substance, or whereby the owner or occupier of the servient tenement is bound to abstain from exercising one or more of the ordinary rights of ownership or occupation, or, in rare cases, to do something, for the benefit of the occupier of the dominant tenement.

Professor Woodman at 284 has stated the position as follows:

> ... It is clear that it is of the essence of an easement that the right over land conferred by it should be annexed to the ownership of land; technically, this means that an easement cannot exist in gross ie as attached to a particular person as an individual rather than to his property.
>
> There is, however, an exception under s 88A of the Conveyancing Act 1919, pursuant to which an easement may be created in favour of the Crown of a public or local authority without a dominant tenement ...
>
> The existence of an easement does not alter the substance of the land, which is subject to the easement. It is simply that that land may be used in a particular manner, or that it may not be used in a particular manner.

An easement may be either:

- positive, where the owner of the dominant tenement is allowed to do something upon the land comprising the servient tenement such as using a right of way; or
- negative, where the owner of the servient tenement is restrained from putting his land to a use otherwise allowed by the law in the interests of the owner of the dominant tenement, such as is the position with an easement of light or air.

An easement is usually a legal right. It is a right *in rem*, not a right *in personam*, and attaches to both dominant and servient tenements. An easement is enforceable by the owner from time to time of the dominant tenement against the owner from time to time of the servient tenement.

Sometimes an easement exists in equity rather than at law. For instance, an agreement to grant an easement, or an imperfect grant, which is regarded as an agreement to grant an easement, and in relation to which specific performance would be granted in equity, is an equitable easement: *ER Ives Investment Ltd v High* (1967).

An easement in equity may be defeated by a *bona fide* purchaser of the legal estate who takes for value and without notice of the easement.

Examples of easements

Gale on Easements, 16th edn, at 38, has set out a number of rights that have been recognised by the courts to be easements, which are as follows:

- Rights of way: *Drewell v Towler* (1832) 3 B & Ad 735.
- Right to place over neighbouring land clothes on lines: *Drewell v Towler* (1832) 3 B & Ad 735.
- Right to move a timber traveller through and over neighbouring land: *Harris v De Pinna* (1886) 33 Ch D 238.
- Right in working mines: *Rogers v Taylor* (1857) 1 H & N 706; see *Marshall v Borrowdale Plumbago Mines* (1892) 8 TLR 275; or quarries: *Middleton v Clarence* (1877) Ir R 11 CL 499; to make spoil banks on surface.
- Right to mix muck on a neighbour's land: *Pye v Mumford* (1848) 11 QB 666.
- Right to deposit on a neighbour's land house refuse, or trade goods: *Foster v Richmond* (1910) 9 LGR 65; *Attorney General of Southern Nigeria v John Holt & Co (Liverpool) Ltd* [1915] AC 599, 617.
- Right to place a signpost: *Hoare v Metropolitan Board of Works* (1874) LR 9 QB 296; or chicken-coops: *Smith v Gates* [1952] CPL 814; on a common.
- Right to nail fruit trees on a neighbour's wall: *Hawkins v Wallis* (1763) 2 Wils 173.

- Right to use a fascia on a neighbour's house: *Francis v Hayward* (1882) 22 Ch D 177, 182, *per* Bowen LJ.
- Right to fix a signboard on a neighbour's house: *Moody v Steggles* (1879) 12 Ch D 261; *William Hill (Southern) Limited v Cabras Ltd* (1986) 54 P&CR 42, CA.
- Right to use the chimney of a neighbour's house for the passage of smoke: *Hervey v Smith* (1855) 1 K&J 389; 22 Beav 299; see *Jones v Pritchard* [1908] 1 Ch 630.
- Right to use the kitchen of a neighbour's house for washing: *Heywood v Mallalieu* (1883) 25 Ch D 357.
- Right to use a lavatory: *Miller v Emcer Products Ltd* [1956] Ch 304; see also *West Pennine Water Board v Jon Migael (North West)* (1975) 73 LGR 420, CA.
- Right to use a coal-shed: *Wright v Macadam* [1949] 2 KB 744.
- Right of landing nets on another's land: *Gray v Bond* (1821) 2 Brod & Bing 667.
- All necessary rights to enable the grantee to obtain water from the land of the grantor: *Re Simeon* [1937] Ch 525, 537.
- Right to place a pile in the bed of a river: *Lancaster v Eve* (1859) 5 CB (NS) 717.
- Right to place stones on the foreshore for protection of adjoining land: *Philpot v Bath* [1905] WN 114.
- Right to go on the land of another to clear a millstream and repair its banks: *Beeston v Weate* (1856) 5 E & B 986; *Peter v Daniel* (1848) 5 CB 568; *Roberts v Fellowes* (1906) 94 LT 279; or to open locks in time of flood: *Simpson v Godmanchester Corp* [1897] AC 696.
- Right for the occupier of a messuage to water cattle at a pond and take water for domestic purposes: *Manning v Wasdale* (1836) 5 A & E 758.
- Right to go on a neighbour's land and draw water from a spring there: *Race v Ward* (1855) 4 E&B 702; or from a pump: *Polden v Bastard* (1865) LR 1 QB 156 (but in that case the right was not proved).
- Right to discharge rainwater by a spout or projecting eaves: *Harvey v Walters* (1872) LR 8 CP 162.
- Right to discharge polluted water into another's watercourse: *Wright v Williams* (1836) 1 M & W 77.
- Right to send water across a neighbour's land by an artificial watercourse: *Beeston v Weate* (1856) 5 E&B 986; *Abingdon Corp v James* [1940] Ch 287.
- Right to use or affect the water of a natural stream in manner not justified by a natural right, eg by damming it: *Beeston v Weate* (1856) 5 E & B 986.
- Right to place a fender in millstream to prevent waste of water: *Wood v Hewett* (1846) 8 QB 913.

- Right to commit a private nuisance by creating noise: *Elliotson v Feetham* (1835) 2 Bing NC 134; *Ball v Ray* (1873) 8 Ch App 467, 471; *Re The State Electricity Commission of Victoria & Joshua's Contract* [1940] VLR 121; or by polluting water: *Baxendale v McMurray* (1867) 2 Ch App 790; or by polluting air by smoke or smell: *Crump v Lambert* (1867) LR 3 Eq 409, 413.
- Right to a pew in a church: 'There may be annexed to a house, as appurtenant to it, by means of a faculty, the exclusive right to use a pew': *Phillips v Halliday* [1891] AC 228, 233; and see *Re St Mary's Banbury* [1986] Fam 24; *Re St Mary of Charity, Faversham* [1985] 3 WLR 924, 931; [1986] 1 All ER 1. A lost faculty will be presumed in appropriate circumstances, but for this purpose evidence is required of acts of user, eg repair, which are more consistent with a right under a faculty than with occupation by permission of or arrangement with the church authorities: *Crisp v Martin* (1876) 2 PD 15; *Halliday v Phillips* (1889) 23 QBD 48; *Stileman-Gibbard v Wilkinson* [1897] 1 QB 749. It seems that as a matter of law a right of way over consecrated ground cannot be conferred by a faculty and so any easement of way, as opposed to a licence of indefinite duration, cannot arise under the doctrine of lost modern grant: *St Martin Le Grand, York, Re* [1990] Fam 63.
- Right to construct and maintain a ventilation duct: *Wong v Beaumont Property Trust Ltd* [1965] 1 QB 173; followed in *Auerbach v Beck* [1985] 6 NSWLR 424; on appeal, 454.
- Right to enter on adjoining land to repair an outside wall: *Ward v Kirkland* [1967] Ch 194; followed in *Auerbach v Beck* [1985] 6 NSWLR 424; on appeal, 454 but there is no right to have a structure protected from the weather, which would be a negative easement: *Phipps v Pears* [1965] 1 QB 76; *Marchant v Capital & Counties Property Co Ltd* (1982) 263 EG 661 (reversed on other grounds (1983) 267 EG 843, CA) ...
- Right to use the area alongside a wharf for the loading and unloading of vessels, and possibly for breaking up vessels: *Thomas W Ward Ltd v Alexander Bruce (Grays) Ltd* [1959] 2 Lloyd's Rep 472, CA; but there is no right to maintain silt ...
- Right to receive light for a building: *Levet v Gas Light & Coke Co* [1919] 1 Ch 24; *Easton v Isted* [1903] 1 Ch 405; *Allen v Greenwood* [1979] 2 WLR 187.
- Right to receive air by a defined channel: *Bass v Gregory* (1890) 25 QBD 481.
- Right of support of buildings from land: *Dalton v Angus* (1881) 6 App Cas 740; or from buildings: *Lemaitre v Davis* (1881) 19 Ch D 281; *Waddington v Naylor* (1889) 60 LT 480.
- Right to receive a flow of water in an artificial stream: *Nuttal v Bracewell* (1866) LR 2 Ex Ch 1, 10; *Schwann v Cotton* [1916] 2 Ch 459; *Keewatin Power Co v Lake of the Woods Milling Co* [1930] AC 640.

Duration of an easement

An easement may be created for the duration of a fee simple, for life, for a term of years, or for some lesser specified period.

Contrasting easements with restrictive covenants

Restrictive covenants are covenants that restrict the use of land in a particular way for the benefit of neighbouring land. They are negative in nature, and do not bind the covenantor to do anything positive, such as the expenditure of money. In equity they have been treated as quasi-easements. They are equitable interests in land.

Contrasting easements with profits *à prendre*

A profit *à prendre* is a right to take something off another person's land: *Duke of Sutherland v Heathcote* (1892). The produce may be minerals or crops, or the wild animals existing on the land.

Contrasting easements with licences

A licence is a revocable right, enforceable under contract law, to do an act on land that would otherwise be unlawful. A licence might be a gratuitous licence, a contractual licence or a licence coupled with a grant. Except in relation to a licence coupled with a grant, a licence is personal to the licensee and is not an interest in the land.

Contrasting easements with public rights over land

These are rights over land enjoyed by the public generally and not by specific individuals. Examples include the public right to use roads and public lanes, and the public use of public parks and reserves, and of public beaches.

Contrasting easements with natural rights

These are rights enjoyed at law by the owner of land, irrespective of any grant. These rights include the right to support land in its natural and unimproved state and the rights in respect of water, which are enjoyed by the owner of land bounded by a river or stream.

The characteristics of an easement

The characteristics of an easement have been held by the English Court of Appeal in *Re Ellenborough Park* (1956) to be fourfold:

- the requirement of a dominant and servient tenement;

- the requirement that the easement must accommodate the dominant tenement;
- the requirement that the dominant and servient tenements must not be owned and occupied by the same person; and
- the requirement that an easement must be capable of forming the subject matter of a grant.

In so holding, the English Court of Appeal cited with approval *Cheshire's Modern Law of Real Property*, 12th edn at 522 where the learned authors had stated:

> ... If a right exhibits the four characteristics described above, it is an easement which will run with the dominant and against the servient tenement, even though its object may be to fulfil a purpose for which it has not hitherto been used; but if it lacks one or more of those characteristics, it may, indeed, be enforceable between the parties who create it, but it cannot, like an easement, be enforceable by or against third parties.

The requirement of a dominant and servient tenement

Assume A owns Blackacre and grants a right to use a path across Blackacre to the owner for the time being of the neighbouring property, Whiteacre. In this situation, Blackacre is the servient tenement, and Whiteacre is the dominant tenement. See *Ackroyd v Smith* (1850); *Re Maiorana and the Conveyancing Act* (1970).

If A owns Blackacre and grants a right to use a path across Blackacre to X, who owned no land at all, X would only have a licence to pass over Blackacre. There would be no easement because there would be no dominant tenement.

Apart from certain statutory provisions, which are referred to later, an easement cannot exist in gross, but only if it benefits a specific property, ie, a dominant tenement.

The requirement that the easement must accommodate the dominant tenement

An easement must benefit the dominant tenement. That is to say, there must be a nexus between the easement and the land benefited: *Bailey v Stephens* (1862); *Copeland v Greenhalf* (1952).

A right will not amount to an easement if the dominant tenement has exclusive use of the subject land: *Copeland v Greenhalf* (1952); *Bursill Enterprises Pty Ltd v Berger Bros Trading Co* (1971). In *Bursill Enterprises Pty Ltd v Berger Bros Trading Co* (1971), the High Court held that what in effect amounted to a transfer of proprietary rights in a column of airspace by giving unrestricted rights to the transferee to the exclusion of the transferor did not create an easement.

The dominant and the servient tenements do not need to physically adjoin. On the other hand, because the easement must accommodate the dominant tenement, the dominant and servient tenements must be sufficiently close that a real benefit accrues to the dominant tenement: *Todrick v Western National Omnibus Co Ltd* (1934); *Re Maiorana and the Conveyancing Act* (1970). The effect of the easement must be to give some advantage to the dominant tenement, which it would not otherwise have: *Bailey v Stephens* (1862).

It is not sufficient that the right should give to the current owner of the dominant tenement some personal advantage. Rather, the dominant tenement (ie, the land itself) must be benefited: *Hill v Tupper* (1863), where the right to hire boats on a canal did not amount to an easement.

Re Ellenborough Park (1956)

In *Re Ellenborough Park*, the owners of various parcels of land were given full enjoyment of Ellenborough Park, subject to the payment of a fair and just proportion of the expenses of keeping the Park in good order and condition.

The English Court of Appeal held that the conveyances of the parcels of land conferred on the purchasers and their successors in the title legal easements to use the pleasure ground known as Ellenborough Park subject to the obligation to pay a fair and just proportion of the costs of keeping the Park in good condition. It follows that there is no objection to the creation of an easement that is subject to an obligation to spend money on the part of the owner of the dominant tenement.

Frater v Finlay (1968)

In *Frater v Finlay* (1968) (see also 45 Australian Law Journal 105), it was held that where the successors in title to a grantor of an easement to pump water from a neighbour's well were required to maintain the pumping equipment on the basis that the grantee and his successors in title shared in the cost of maintaining the pumping equipment:

- the successors in title to a grantor of an easement are bound to perform this obligation;
- the successors in title to the grantee will have a remedy against the grantor or his successors in title if the covenant is not performed; and
- the grantor of an easement can attach to and make part of the grant a term or condition that the grantee shall contribute to the cost of repairs.

The requirement that the dominant and servient tenements must not be owned and occupied by the same person

In *Metropolitan Railway Co v Fowler* (1892), the English Court of Appeal held in relation to an easement burdening Old System Title land that:

> An easement is some right which a person has over land, which is not his own; but if the land is his own, if he has an interest in it, then his right is not an easement. You cannot have an easement over your own land.

Although an easement may be validly created in the first instance, the easement is extinguished once the dominant and servient tenements are united in common ownership and occupancy: Coke upon Littleton; see also *Buckby v Coles* (1814).

Under Old System Title, an easement is rendered unenforceable when the dominant and servient tenements are both owned and occupied by the same person. An easement, however, remains enforceable where a lessee enjoys the benefit of an easement over other land (ie, the servient tenement) owned by the lessor, whether the servient tenement is occupied by the lessor or by another lessee: *Maurice Totlz Pty Ltd v Macy's Emporium Pty Ltd* (1969).

Statutory exceptions to this requirement

There are statutory exceptions to the requirement that an easement is extinguished once there is common ownership and occupancy of the dominant and servient tenements. These exceptions have resulted in this requirement having no application where the servient tenement is governed by Torrens Title or where the easement has been created pursuant to a s 88B instrument. The statutory exceptions are:

- s 47(7) of the Real Property Act 1900, which provides that:

  > An easement recorded in the Register shall not be extinguished solely by reason of the same person becoming proprietor both of the land burdened and of the land benefited by the easement, notwithstanding any rule of law or equity in that behalf.

- s 88B(3)(c) of the Conveyancing Act 1919, which provides that an easement created pursuant to registration or recording of a plan under s 196 of the Conveyancing Act is created notwithstanding that the dominant and servient tenements are in the same ownership. Such as easement is not extinguishable by reason of the owner of the land benefited by such easement holding or acquiring a greater interest in the burdened land.

The requirement that an easement must be capable of forming the subject matter of a grant

Professor Woodman at 291 has laid down the following rules:

- The right must be within the general nature of rights capable of being created as easements.
- The right must be sufficiently definite.
- There must be a capable grantor: *Mulliner v Midland Railway Co* (1879); *Derry v Sanders* (1919).

- There must be a capable grantee: see *Re Salvin's Indenture* (1938).

Examples of rights that have been held not to be easements include:

- the right to put out pleasure boats on a lake: *Hill v Tupper* (1863);
- the right to an unspoilt view: *William Aldred's Case* (1610);
- the right of protection of a building against the weather: *Phipps v Pears* (1965); and
- the right to a general flow of air over land to a windmill or chimney: *Bryant v Lefever* (1879); *Webb v Bird* (1862).

CREATING AN EASEMENT

An easement may be created by:

- express grant or reservation;
- statute;
- implied grant or reservation; or
- prescription.

Creation of easements by express grant

Where the land is under Old System Title, an easement must be created by deed if it is to be effective at law, under s 23B of the Conveyancing Act 1919. Section 46 of the Real Property Act states that an express grant of an easement at law is effected by registration of a dealing in an approved form.

Under s 47(1) of the Real Property Act, the Registrar-General shall, in addition to any other recording required by the Act, record particulars of the dealing creating the easement in the folio of the Register of both dominant and servient tenements.

Where only the dominant tenement is under the provisions of the Real Property Act, the statement on the certificate of title is not conclusive: *Cowlishaw v Ponsford* (1928). The servient tenement is only bound if it can be demonstrated that it is burdened by an easement created by deed.

Where an instrument that came into effect on or after 1 January 1931 expressly creates an easement, the easement is only enforceable where the instrument complies with the requirements of s 88(1) of the Conveyancing Act.

Creation of easements by express reservation

This occurs when an owner conveys or transfers land, reserving an easement over it or part of it for the benefit of the land retained by the owner: *St Edmundsbury and Ipswich Diocesan Board of Finance v Clark*

(No 2) (1975); *The Mayor, Councillors and Citizens of the City of Keilor v O'Donohue* (1971).

Section 45A of the Conveyancing Act 1919 provides that a reservation operates without execution of the conveyance by the grantee of any regrant by him.

Where land is under the provisions of the Real Property Act, the reservation may be made in the memorandum of transfer by which the land is transferred. The dealing by which an easement is reserved must, like a grant, comply with the requirements of s 88(1) of the Conveyancing Act 1919.

Creation of easements by statute

Easements may be created in New South Wales by or under the following statutes:

- Section 4A of the Public Works Act 1912, by which an easement may be resumed by the Crown over the land of a private individual.
- Section 279 of the Crown Lands Consolidation Act 1913, which provides that every purchaser of Crown lands shall be entitled to a road of access to and from the lands held by him to the nearest reserved or proclaimed road, through and over any Crown lands.
- Section 88B of the Conveyancing Act 1919 provides that easements may be created by the registration or recording under s 196 of the Conveyancing Act of a plan setting out details of easements intended to be created as being for the benefit of:
  - any existing public roads or to any roads to be vested in the council upon registration of the plan;
  - easements in gross under s 88A; and
  - easements intended to be appurtenant to land or burdening land in the plan.
- Section 88K of the Conveyancing Act 1919 (NSW).

Section 88B of the Conveyancing Act 1919

When creating a folio of the Register kept under the Real Property Act for land benefited or burdened by an easement created by s 88B, the Registrar-General is obliged to record such easement: s 88B(3A). If the Registrar-General fails to carry out the duty imposed upon him, the easement:

- comes within the *ratio* of *James v Registrar-General* (1967) because it is created in the manner prescribed by the Real Property Act, and hence comes within s 42(1)(a1); or
- is created by virtue of a supervening statute and is enforceable under the principle laid down in *Pratten v Warringah Shire Council* (1969); or

- is implied within the *ratio* of *Dabbs v Seaman* (1925) if a marking in the folio of the Register properly depicts the easement.

Section 88K of the Conveyancing Act 1919 (NSW)

Section 88K of the Conveyancing Act 1919 (NSW) provides:

(1) The Court may make an order imposing an easement over land if the easement is reasonably necessary for the effective use or development of other land that will have the benefit of the easement.

(2) Such an order may be made only if the Court is satisfied that:

(a) use of the land having the benefit of the easement will not be inconsistent with the public interest, and

(b) the owner of the land to be burdened by the easement and each other person having an estate or interest in that land that is evidenced by an instrument registered in the General Register of Deeds or the Register kept under the Real Property Act 1900 can be adequately compensated for any loss or other disadvantage that will arise from imposition of the easement, and

(c) all reasonable attempts have been made by the applicant for the order to obtain the easement or an easement having the same effect but have been unsuccessful.

(3) The Court is to specify in the order the nature and terms of the easement and such of the particulars referred to in s 88(1)(a)–(d) as are appropriate and is to identify its site by reference to a plan that is, or is capable of being, registered or recorded under Division 3 of Part 23. The terms may limit the times at which the easement applies.

(4) The Court is to provide in the order for payment by the applicant to specified persons of such compensation as the Court considers appropriate, unless the Court determines that compensation is not payable because of the special circumstances of the case.

(5) The costs of the proceedings are payable by the applicant, subject to any order of the Court to the contrary.

(6) Such an easement may be:

(a) released by the owner of the land having the benefit of it, or

(b) modified by a deed made between the owner of the land having the benefit of it and the persons for the time being having the burden of it or (in the case of land under the provisions of the Real Property Act 1900) by a dealing in the form approved under that Act giving effect to the modification.

(7) An easement imposed under this section, a release of such an easement or any modification of such an easement by a deed or dealing takes effect:

(a) if the land burdened is under the Real Property Act 1900 when the Registrar-General registers a dealing in the form approved under that Act setting out particulars of the easement, or of the release or

modification, by making such recordings in the Register kept under that Act as the Registrar-General considers appropriate, or

(b) in any other case, when a minute of the order imposing the easement or the deed of release or modification is registered in the General Register of Deeds.

(8) An easement imposed under this section has effect (for the purposes of this Act and the Real Property Act 1900) as if it was contained in a deed.

(9) Nothing in this section prevents such an easement from being extinguished or modified under s 89 by the Court.

Section 88K(1) of the Conveyancing Act 1919 permits the Supreme Court to make an order imposing an easement over land 'if the easement is reasonably necessary for the effective use or development of other land that will have the benefit of the easement'.

Under s 88K(2), no order can be made unless the court is satisfied that use of the benefited land will not be inconsistent with the public interest, that the owner of the burdened land, and those with registered interests in the burdened land, can be adequately compensated, and that the applicant has made all reasonable attempts to obtain an easement, without success.

The court may limit the times at which the easement is to apply (s 88K(3)) and may order compensation (s 88K(4)). The easement takes effect when it is registered, either in the Torrens register or (for Old System land) in the General Register of Deeds: s 88K(7).

The meaning of 'reasonably necessary' in s 88K

Section 88K provides that the grant of the easement must be 'reasonably necessary' for the effective use or development of the land to be benefited.

What is 'reasonably necessary' is to be determined objectively: *Re Seaforth Land Sales Pty Ltd (No 2)* (1977) at 321 (which was applied in *Tregoyd Gardens Pty Ltd v Jervis* (1997) at 15,853–54); *Durack v De Winton* (1998) at 16,449.

'Reasonable necessity' does not require absolute necessity. It has been held that something less will suffice: *117 York Street Pty Ltd v Proprietors Strata Plan 16123* (1998); *Durack v De Winton* (1998) at 16,448–49.

Section 88K requires the easement to be reasonably necessary for the use of the dominant land, not merely for the convenience of a particular proprietor of that land: *Hanny v Lewis* (1998) at 16,209, where an easement for inclinator refused.

However, there do appear to be two different views as to the precise meaning of the section. In this regard, Professor Butt at [1,644] has observed:

> On one view of the section, it is not for the court to judge the reasonableness or desirability of the use or development of the land for which the easement is sought, the section being potentially available for whatever kind of use or development of the dominant land is allowed by law: *Tregoyd Gardens Pty Ltd*

v Jervis (1997) 8 BPR 15,845 at 15,854. But on another view, the requirement that the easement be 'reasonably necessary for the effective use or development' of the dominant land involves an assessment of whether the proposed use or development (for which the easement sought) is reasonable compared with possible alternative uses and development: *117 York Street Pty Ltd v Proprietors Strata Plan 16123* (1998) 43 NSWLR 504 at 508–09; *Durack v De Winton* (1998) 9 BPR 16,403 at 16,449.

Durack v De Winton (1998) at 16,449, and *O'Mara v Gascoigne* (1996) at 16,358 are authority for the view that the court should be cautious when asked to create an easement pursuant to s 88K because it involves the compulsory taking of a proprietary right.

The court has no power to impose an easement unless it is satisfied that the owner of the servient land can be adequately compensated for any loss: see s 88K(2)(b) and *O'Mara v Gascoigne* (1996) at 16,358.

Compensation to be awarded to the owner of the land burdened by a s 88K easement

Compensation is determined solely by reference to the loss incurred by the servient owner, not the benefit to the dominant owner. In other words, the servient owner does not get additional compensation to reflect the benefit the dominant owner will receive from the easement: *Goodwin v Yee Holdings Pty Ltd* (1997) at 15,801; *117 York Street Pty Ltd v Proprietors Strata Plan 16123* (1998).

For instance, in *117 York Street Pty Ltd v Proprietors Strata Plan 16123* (1998), compensation of $23,000 was awarded even though, on the evidence before the court, the benefit of the easement to the dominant owner was in the range of $260,000 to $430,000. This is to be contrasted with the decision in *Wengarin Pty Ltd v Byron Shire Council* (1999) at 57,105, where it was held that compensation should include the percentage of profits to be made by an applicant from the grant of the easement.

The court is empowered to award compensation for:

- the value of the proprietary interest created (ie, the easement);
- the disturbance caused by the building activities following the grant of the easement; and
- the disturbance caused by the future need to obtain access for the purpose of maintaining the easement.

(See generally *Tregoyd Gardens Pty Ltd v Jervis* (1997) at 15,851.)

Compensation has also been awarded for:

- the loss of amenities such as peace and quiet: *Wengarin Pty Ltd v Byron Shire Council* (1999) at 57,105;
- the loss of business profit: *Katakouzinos v Roufir Pty Ltd* (1999); and
- the costs incurred in temporarily having to vacate the servient land: *Goodwin v Yee Holdings Pty Ltd* (1997) at 15,800–01.

In relation to the costs incurred in temporarily having to vacate the servient land, Professor Butt at [1,644] has stated the position in the following terms:

> Where the servient land is leased and the use of the easement will cause the tenants temporarily to vacate or will otherwise reduce the amenity or privacy of the land, then compensation may include an amount to reflect the reduced rental income from the land: *Goodwin v Yee Holdings Pty Ltd* (1997) 8 BPR 15,795 at 15,800–01; *117 York Street Pty Ltd v Proprietors Strata Plan 16123* (1998) 43 NSWLR 504 at 515–17.
>
> Indeed, this may be an appropriate measure of compensation even for land that is owner-occupied: *117 York Street Pty Ltd v Proprietors Strata Plan 16123* (1998) 43 NSWLR 504 at 516–17.
>
> In all cases, the value of any advantages flowing to the servient owner is to be deducted: *Wengarin Pty Ltd v Byron Shire Council* (1999) NSW Conv R 55-903 at 57,105.

The court, pursuant to s 88K, may require the applicant to undertake to pay for any damage that may occur to the servient land as a result of using the easement: *Katakouzinos v Roufir Pty Ltd* (1999). The owner of the land to be burdened by the easement is usually entitled by reason of s 88K(5) to the owner's costs incurred in defending the application in the absence of unreasonable conduct that has made the proceedings more expensive: *117 York Street Pty Ltd v Proprietors Strata Plan 16123* (1998) at 523–24.

Meaning of 'all reasonable efforts'

Another requirement of s 88K is that the applicant must have made 'all reasonable efforts' to negotiate with the owner of the land to be burdened as a prerequisite to any easement being created by the court. This requirement will usually be met if, when viewed objectively, the applicant's negotiations for an easement have proved fruitless and it is 'extremely unlikely that further negotiations will produce a consensus within the reasonably foreseeable future': *Coles Myer NSW Ltd v Dymocks Book Arcade Ltd* (1996) at 14,654; *Tregoyd Gardens Pty Ltd v Jervis* (1997) at 15,855.

In creating an easement, the court can grant ancillary rights necessary for its enjoyment: *117 York Street Pty Ltd v Proprietors Strata Plan 16123* (1998) at 521–22, where the servient owner was ordered to join in any necessary development application.

Creation of easements by an implied grant or reservation under Old System Title

An easement may be granted by implied grant or reservation when lands which were formerly in common ownership were subsequently severed by the common owner who conveyed part of the land and retained the residue, or conveyed parts simultaneously to different owners.

An easement arising by implication is not created by way of an instrument, is a legal interest, and cannot be defeated by a subsequent purchaser of the servient tenement.

In *Corporation of London v Riggs* (1880), it was held that where the owner of a parcel of land surrounded by his own land grants the latter land and reserves the former, the implied right to a way of necessity to and from the former land over the latter land operates by way of regrant from the grantee of the land, and is limited by the necessity which created it.

This regrant, however, does not create a right to a way of necessity for all purposes for which the former land may at any time be used. A right of way will only be created for the limited purpose of enabling the owner of the land to enjoy it in the condition it happened to be in at the time of the regrant. By way of example, if the dominant tenement was used for agricultural purposes at the time of the regrant, the owner can only claim a right of way that is suitable for the enjoyment of the land in that condition.

Wheeldon v Burrows (1879)

In *Wheeldon v Burrows*, a workshop and an adjacent piece of land belonging to the same owner were offered for sale at an auction. The workshop was not sold at the auction, and the adjacent land was soon afterwards conveyed to the purchaser. One month later, the vendor agreed to sell the workshop, which had windows overlooking and receiving light from the piece of land previously sold, to another person, and in due course conveyed the land to that other person.

The Court of Appeal held that:

- as the vendor had not conveyed the piece of land reserving the right of access of light to the windows, no such right passed to the purchaser of the workshop;
- the purchaser of the piece of land could build so as to obstruct the windows of the workshop; and
- whatever might have been the position had both lots been sold at the same time by auction, there was no implied reservation of any right over the piece of land first sold in these circumstances.

Creation of an easement by implication where the vendor retains the 'quasi-dominant' tenement

Subject to easements of necessity or common intention and also subject to easements created by s 88K of the Conveyancing Act 1919 (NSW), an easement is not implied in favour of a vendor because a vendor is in a position to reserve expressly such rights: *Wheeldon v Burrows* (1879); Corporation of *London v Riggs* (1880).

Easements of necessity

Easements of necessity arise where the grantor would be completely landlocked without the right of way, and would have no means of access: see *Gibson v M'George* (1866).

In *Wong v Beaumont Property Trust Ltd* (1965), an easement of necessity was implied to erect a ventilation duct to the roof of a restaurant. This was implied in favour of the grantee even though the parties did not realise the necessity at the time of the grant.

In *North Sydney Printing Pty Ltd v Sabemo Investment Corp Pty Ltd* (1971), it was held that a right of way of necessity arises in order to give effect to an actual or presumed intention. In this case, the intention was to sell the land to a third party. Accordingly, the right of way was not implied. In coming to this view, the Supreme Court of New South Wales held that it was not open to the court to impose an easement of necessity over Torrens Title land even though the effect of the decision was to render the adjoining land (which was asserting the existence of the easement of necessity) landlocked.

On the other hand, difficulties can arise where there are differing actual intentions on the part of the parties. An intention must be presumed on the part of the common owner that it was intended that there would be access to the land conveyed by him before the grant or reservation of a way of necessity can be implied.

The party entitled to the right of way is entitled to select the particular strip of land to be affected: *Bolton v Bolton* (1879); *Pearson v Spencer* (1861). The selection must be made in a reasonable manner: *Pearson v Spencer*. Having been selected, the route cannot be changed: *Deacon v South-Eastern Railway Co* (1889).

See, further, the operation of s 88K of the Conveyancing Act 1919 (NSW), which is discussed above under the heading 'Section 88K of the Conveyancing Act 1919 (NSW)' above.

Easements of common intention

Easements that are necessary to carry out a common intention will be implied in favour of a grantor. An easement depends on the common intention of the parties. There may be circumstances other than easements of necessity in which it is only common sense to imply such reservation: *Mayor, etc,* of *Perth v Halle* (1911).

Creation of an easement by implication where the vendor retains the 'quasi-servient' tenement

Where the grantee acquires the 'quasi-dominant' tenement, easements are more readily implied. They will certainly be implied where there is an easement of necessity and/or an easement of common intention. *Wheeldon v Burrows* (1879) is authority that an easement will be implied where:

- the use is continuous and apparent;
- it is necessary to the reasonable enjoyment of the land granted; and
- it is and also must have been at the time of the grant used by the grantor for the benefit of the part of the land granted.

Continuous

The word 'continuous' is intended to designate permanent as opposed to temporary rights, and does not require incessant use of the right: *Suffield v Brown* (1864).

Apparent

The word 'apparent' is directed towards something that is showing on the servient tenement and is discoverable on a careful inspection by a party conversant with the subject. Examples identified by Professor Woodman at 301 are:

- a drain: *Pyer v Carter* (1857);
- water courses through visible pipes: *Schwann v Cotton* (1916);
- a built road: *Brown v Alabaster* (1887);
- a worn track: *Hansford v Jago* (1921); and
- windows enjoying light: *Phillips v Low* (1892).

Reasonable enjoyment

It is clear from the decision in *Wheeldon v Burrows* (1879) that the particular use involves a reasonable use of the property granted, and is not intended to suggest any concept of necessity.

The sale of the dominant and servient tenements at the same time

Where separate parcels of land held by the same owner are disposed of at the same time, each parcel acquires, by implication, the same easements over any other parcel as it would have acquired had that other parcel been retained by the common vendor: *Swansborough v Coventry* (1832).

It may be difficult to determine whether the parcels are disposed of at the same time, where the sales were by way of contracts, as it is only the conveyance that is usually in the public domain. The rights of the parties depend on the circumstances in which, including the dates on which, the contracts were made, and not on the dates of the conveyances, this view being justified by *White v Taylor (No 2)* (1969).

Implied easements under Torrens Title

Section 42(1)(a1) of the Real Property Act 1900 (NSW) provides that a registered proprietor, except in the case of fraud, holds his or her estate in the land subject to such estates and interests as are recorded in the folio of the Register but absolutely free from all other estates and interests that are not so recorded except, *inter alia*, 'in the case of the omission or misdescription of any right-of-way or other easement created in or existing upon any land'.

Section 42(1)(a1) protects the following easements:

- easements which subsisted at the time when land is brought under the provisions of the Real Property Act but not recorded in the Register: *James v Stevenson* (1893); *Jobson v Nankervis* (1943); and
- easements validly created in accordance with the provisions of the Act after the land is brought under the provisions of the Act but omitted from or misdescribed in the Register: *James v Registrar-General* (1967); *Pratten v Warringah Shire Council* (1969).

In each of *Australian Hi-Fi Publications Pty Ltd v Gehl* (1979); *Beck v Auerbach* (1986); and *Dobbie v Davidson* (1991), the New South Wales Court of Appeal held that:

- an easement by implication which was created over a servient tenement when the servient tenement was under Old System Title remains enforceable after the servient tenement is converted to Torrens Title by reason of the operation of s 42(1)(a1); but
- an easement by implication cannot be created over a servient tenement which is Torrens Title land at the time of creation of the easement by implication.

In regard to easements created by implication, the exception in s 42(1)(a1) applies only to easements created before the land is brought under the provisions of the Act and to the limited class of easements by implication referred to in *Dabbs v Seaman* (1925).

Dabbs v Seaman (1925)

Dabbs v Seaman is an unusual case, where properties under the Real Property Act were transferred to the registered proprietor by the reference to a plan showing the subject land to be bounded on one side by a strip of land marked '20 foot lane'. The certificate of title showed a similar plan. The High Court held that the registered proprietor was entitled to a right of way over the strip of land.

Creation of easements by prescription

Professor Woodman at 304 has observed:

> Originally, at common law, proof of enjoyment of an incorporeal right 'from time immemorial', which became fixed at 1189, was sufficient evidence of title, and enjoyment as of right for a period of 20 years was conclusive evidence of enjoyment from time immemorial unless evidence of commencement of the enjoyment at a date later than 1189 was given. Such evidence could take the form of proof of unity of ownership and occupation at some time since that date. To obviate these difficulties the Courts of England developed the doctrine of 'lost modern grant' whereby juries were permitted, and later required, to presume from 20 years uninterrupted enjoyment of a right, and in most cases quite contrary to the truth, the existence of an express grant which had been lost. Although this was a pure fiction, the doctrine was applied in England in numerous cases from the latter part of the

18th century onwards, and was endorsed by the House of Lords in 1881: *Dalton v Angus* (1881) 6 App Cas 740; *Gardner v Hodgson's Kingston Brewery Co Ltd* [1903] AC 229.

Obviously, proof that an easement by prescription had existed since 1189 is not appropriate in Australia: *Hamilton v Joyce* (1984) at 287; *Dewhirst v Edwards* (1983).

Delohery v Permanent Trustee Co of NSW (1904)

The High Court of Australia in the early days of its history established the law as to prescription in New South Wales in *Delohery v Permanent Trustee Co of NSW* (1904). There the court held that the 'lost modern grant' was appropriate. The High Court held that:

- the law had become settled in England long ago that the right to uninterrupted access of light over the land of another might be acquired by 'long' and continual possession without any formal instrument;
- the interpretation of the word 'long' had, by degrees, been altered by judicial decisions and had come to mean unexplained enjoyment for a period of 20 years or upwards;
- the law of prescription as to ancient lights was a law that could be applied in New South Wales within the requirement of 9 Geo IV c 83 – the Constitution Act of 1828 – and consequently;
- the law of prescription became part of the law of the colony at that time, even if it had not been brought with the first colonists;
- the lost modern grant doctrine had been established in England by 1828, if not by 1788, and so became part of New South Wales law;
- an easement by prescription was based on public policy;
- the doctrine of the lost grant was artificial and designed to give effect to a substantial right; and
- the basis of this right was 'a grant or agreement on the part of the owner of the adjoining land, using those terms in the sense, not of an actual document which has been lost, but in the sense of a contractual obligation, which is implied by law from proved or admitted facts'.

Requirements of a prescriptive easement

Prescription depends upon the acquiescence of the owner of the servient tenement. Professor Woodman suggests at 305 that it must be proved that the servient owner had:

- knowledge of the acts done: *Lloyds Bank Ltd v Dalton* (1942); *Diment v NH Foot Ltd* (1974); *Oakley v Boston* (1975); *Tehidy Minerals Ltd v Norman* (1971); but see *Davies v Du Paver* (1953);
- power to stop the acts or to sue in respect of them; and
- a failure to exercise such a power: *Dalton v Angus* (1881); *Sturges v Bridgman* (1879).

Gardner v Hodgson's Kingston Brewery Co Ltd (1903), where it was held that a licence to do the act under consideration will defeat a claim by prescription, is authority that the exercise or enjoyment of a right required to satisfy the doctrine of prescription must be neither by force, nor by secrecy, nor by licence or permission.

Easements by prescription under Torrens Title

In each of *Australian Hi-Fi Publications Pty Ltd v Gehl* (1979); *Beck v Auerbach* (1986); and *Dobbie v Davidson* (1991), the New South Wales Court of Appeal has held that:

- an easement by prescription that was created over a servient tenement when the servient tenement was under Old System Title remains enforceable after the servient tenement is converted to Torrens Title by reason of the operation of s 42(1)(a1); but
- an easement by prescription cannot be created over a servient tenement that is Torrens Title land at the time of creation of the easement by prescription.

Ancillary rights

The grant of an easement carries with it all ancillary rights reasonably necessary for its exercise and enjoyment: *Pwllbach Colliery Co Ltd v Professor Professor Woodman* (1915) at 646; *Jones v Pritchard* (1908) at 639.

Hemmes Hermitage Pty Ltd v Abdurahman (1991) is authority that, in relation to Torrens Title land, the implication of ancillary rights is not precluded by their absence from the Register.

Professor Butt has given the following examples of ancillary rights reasonably necessary for the exercise and enjoyment of prescriptive easements at [1,678]:

- An easement for the passage of overhead power lines conferred a right to place towers on the surface to support the lines: *Central Electricity Generating Board v Jennaway* (1959) at 945.
- A right to insist that the servient owner keep the surface clear of structures that may create danger: *Prospect County Council v Cross* (1990).
- A right to graze sheep on another's land (strictly, a profit *à prendre*) carried with it the right to place water troughs on the land: *White v Taylor (No 2)* (1969) at 196–98.
- An easement for the support of a building by another building entitled the dominant owner to enter the servient tenement and carry out repairs to ensure continued support: *Jones v Pritchard* (1908) at 637–38.

- An easement for the installation of sub-surface rock anchors carried with it a right to have the surrounding soil remain undisturbed: *Pennant Hills Golf Club Ltd v Roads and Traffic Authority of NSW* (1997).
- An easement to maintain a wall entitled the dominant owner to enter and erect temporary scaffolding to repair the wall (but not to add further storeys): *Mercantile General Life Reassurance Co of Australia Ltd v Permanent Trustee Australia Ltd* (1988) at 9,541–42.
- A right of footway to the door of a house included the right to lay a flagstone: *Gerrald v Cooke* (1806).
- A right of carriageway included the right to pave so much of its length as was reasonably necessary for its enjoyment: *Senhouse v Christian* (1787); *Newcomen v Coulsen* (1877) at 143; but not its whole length: *Butler v Muddle* (1995).
- A right of way through a basement included the right to illuminate it: *Owners of Strata Plan No 48754 v Anderson* (1999).
- A right of footway included the right to install stairs where the path was steep or slippery: *Hanny v Lewis* (1998) at 16,208.
- A right of footway as a means of access to a supermarket included the right for customers to push trolleys along the path and a limited right for the shopkeeper to stack trolleys on the path: *Soames-Forsythe Properties Ltd v Tesco Stores Ltd* (1991).
- An easement for business vehicles to 'pass and repass' along a right of way as a means of access to business premises on the dominant tenement may carry with it the incidental right to stop and unload goods for the business: *Bulstrode v Lambert* (1953) at 1,070–01; *McIlwraith v Grady* (1968); *Deanshaw v Marshall* (1978); *Robmet Investments Pty Ltd v Don Chen Pty Ltd* (1997).
- An easement for business vehicles to 'pass and repass' along a right of way as a means of access to business premises on the dominant tenement may carry with it the incidental right to park: *Masters v Snell* (1979).

Easements in gross

At common law there could not be an easement in gross (ie, an easement without a dominant tenement): *Ackroyd v Smith* (1850); *Municipal District of Concord v Coles* (1905).

Section 88A(1) of the Conveyancing Act 1919 now permits an easement to be created in favour of the Crown or of any public or local authority constituted by Act of Parliament, without the Crown or authority owning land, which enjoys any benefit from the easement.

An easement in gross may be created by registration of a plan of subdivision to s 88B(3)(b); this is also the case where it is intended to create easements as appurtenant to any public roads shown in the plan or roads vested in the council, under s 88B(3)(a).

CHANGING THE USER OF AN EASEMENT

The extent to which an easement may be used, including possible changes of use of an easement, depends on whether the easement was created by express grant, by implication or by prescription.

Changing or extending the use of an easement by implication

It is not possible to extend the use of an easement by implication: *Corporation of London v Riggs* (1880). In this case, an easement of necessity arose when the dominant tenement was used for agricultural purposes. It was held that the owner of the dominant tenement could not change the use of the land into building land as its consequent change in use would attract great numbers of people who would use the way.

Another case demonstrating the limitations imposed on an easement by implication is *Milner's Safe Co Ltd v Great Northern and City Railway* (1907), in which the character of the dominant tenement was changed by building a railway station with the natural extension in the number of people using it. At the time of the grant, the use was for ordinary business purposes only, and hence use by railway passengers was excessive.

Changing or extending the use of a prescriptive easement

The use of a right of way by prescription cannot be changed or extended. Examples of this include:

- a change in use of the land benefited by the right of way from land for agriculture to land used for large-scale residential developments: *Wimbledon and Putney Commons Conservators v Dixon* (1875); and
- a change in use of the land benefited by the right of way from land for agriculture to land used for a caravan park: *RPC Holdings Ltd v Rogers* (1953).

On the other hand, the mere intensification of use of the land benefited is not to be regarded as a change or extension of use, provided that there is no substantial increase in the burden imposed on the servient tenement: *British Railways Board v Glass* (1965) at 562. Examples of this include:

- a prescriptive right of support, involving a change in the nature of the building on the land benefited from, say, a house to a hotel: *Lloyds Bank Ltd v Dalton* (1942); and
- an easement allowing for overhanging eaves, where significant alterations to the building on the benefited land would not, of themselves, lead to the loss of the easement: *Harvey v Walters* (1873).

A prescriptive easement to discharge surface water from the land benefited onto the land burdened, where the use of the land benefited was changed from use as a farm to use as a large-scale residential complex, would not

lead to loss of the easement, provided that the development did not substantially increase the quantity of water involved: *Atwood v Bovis Homes Ltd* (2001).

It is not permissible to extend the use of an easement created by prescription. The right of use is limited to that which was necessary for the purposes of the dominant tenement at the time of creation of the easement. Regard, however, must be had to the particular right which is claimed: *RPC Holdings Ltd v Rogers* (1953); *Bartholomew v Staheli* (1948); *British Railways Board v Glass* (1965).

In *RPC Holdings Ltd v Rogers* (1953), the defendant had acquired property on which was situated a caravan park, adjacent to a golf course. The plaintiffs were the lessees and occupiers of the golf course. The defendant claimed a right of way for all purposes across the plaintiffs' land sufficient for the passage of caravans, vehicles and pedestrians.

The court found that the defendant had proved that a right of way over a defined track had been established by prescription at common law, but was confined to use in connection with agriculture. It was held that the extent of the right of way was therefore limited to agricultural purposes and its use in the manner proposed would constitute an unjustifiable increase in the burden of the easement.

In *Bartholomew v Staheli* (1948), a prescriptive easement came into existence when the dominant tenement was used for farming. The use of the property was changed from farming to the establishment of a nudist colony. The court observed that 'The easement for access to a tranquil home and farm was converted into a turbulent route to reach a hilarious nudist colony'. It was held to be an excessive use of the right of way.

In *British Railways Board v Glass* (1965), it was held that the increased patronage of a right of way over the plaintiff's railway created by prescription to access a camping ground was permissible.

Changing or extending the use of an express easement

Where an easement is created expressly and in writing, the extent of use depends upon the construction of the grant. If the grant is widely expressed, the court will give the grant its full meaning.

An express easement 'for all purposes'

The court will not cut down the extent of use by reference to use of the dominant tenement at the time of the grant. For instance, a grant of right of way 'for all purposes' in favour of land upon which is erected a dwelling house will not restrict the use of the way to purposes of a dwelling house; if he builds a factory on the land, the way can be used for the purposes of the factory: *White v Grand Hotel, Eastbourne, Ltd* (1913); *Lock v Abercester Ltd* (1939); *Todrick v Western National Omnibus Co Ltd* (1934).

Gale on Easements, 16th edn, at 326 states that:

> It appears now to be settled that, subject to any restriction to be gathered from the words of the grant of the surrounding circumstances, a right of way may be used, in the manner authorised by the grant, for any purpose and to any extent for the time being required for the enjoyment of the dominant tenement or any part of it, irrespective of the purpose for which the dominant tenement was used at the date of the grant.

It follows that a right of way granted for general purposes is not to be restricted to such purposes as were reasonably required at the date of the grant. An example of this principle is to be found in *White v Grand Hotel, Eastbourne, Ltd* (1913), where a house was converted into a private hotel. There the court held that this extension of use of the right of way did not affect the increased number of occupants of the dominant tenement from using a right of way 'for all purposes'.

The proposed use will be excessive if the particular mode of use is such as a prudent and rational man would not adopt if the way had been over his own land, and not the land of another, or if it causes wanton, capricious and causeless injury to the owner of the servient tenement. In such circumstances, an injunction is available to restrain such use: *Todrick v Western National Omnibus Co Ltd* (1934); *British Railways Board v Glass* (1965); *Jelbert v Davis* (1968).

Acts incidental to the use of the easement, such as, for example, loading and unloading of vehicles upon a right of way giving access to commercial premises will be permitted: *Bulstrode v Lambert* (1953).

Whether or not a proposed change or extension of use of an easement created expressly 'for all purposes' is permissible turns on the precise facts and circumstances of the case. The best way to understand the approach of the courts in these cases is to be aware of their facts and circumstances, together with the decision in each such case.

Todrick v Western National Omnibus Co Ltd (1934)

In *Todrick v Western National Omnibus Co Ltd*, the dominant tenement had previously been used for agricultural purposes. The new owner was a bus company, which built a garage for its buses. A concrete ramp was constructed on the right of way to cater for the heavy vehicles being used by the bus company. This concrete ramp significantly curtailed access to the garage on the plaintiff's land.

The plaintiff objected to the building of the ramp and claimed that there had been an excessive use of the right of way both by reason of the building of the ramp and by reason of the use for buses, which only cleared the right of way by 2 cm.

It was held by the Court of Appeal that:

- it was unnecessary for there to be any physical contiguity between the servient tenement and the dominant tenement;

- it was sufficient that a right of way benefited the dominant tenement; and
- there had been excessive use in regard both to the building of the ramp and to the use of the right of way for buses, having regard to the lack of clearance of the buses when passing within the strip of land designated as the right of way.

White v Grand Hotel, Eastbourne, Ltd (1913)

In *White v Grand Hotel, Eastbourne, Ltd*, the defendant's predecessor in title was granted a right of way over the plaintiffs' property. At the time of the grant, the premises were used as a private dwelling house and garden, but had recently been converted into a garage and premises used in conjunction with the defendants' hotel business.

The plaintiffs objected to the use of the right of way by hotel visitors and also objected to the defendants' conduct in altering the gateway to facilitate the passage of vehicles. The plaintiffs sought an injunction restraining the defendants from using the private road as a carriageway for the passage of motorcars and other vehicles and for an order that the defendants should rebuild part of a wall that had been pulled down. In relation to the proposed change of user, Cozens-Hardy MR held:

> The plaintiff's main point was ... that it was only a right of way for what I may call domestic purposes as distinct from trade purposes; and that it was only for such use as could reasonably be expected to be in the contemplation of the parties at the time when the defendants' house, St Vincent Lodge, was a private residence, and ought not to be altered now that St Vincent Lodge is turned into a garage.
>
> We ... have come to the conclusion that there is no ground for limiting the right of way in the manner suggested. It is not a right of way claimed by prescription. It is a right of way claimed under a grant, and, that being so, the only thing that the court has to do is to construe the grant; and unless there is some limitation to be found in the grant, in the nature of the width of the road or something of that kind, full effect must be given to the grant, and we cannot consider the subsequent user as in any way sufficient to cut down the generality of the grant.

In relation to the proposal to alter the gateway to facilitate the passage of vehicles through the gate in the position of the nine foot gate which formerly stood there, His Lordship held that the defendants had no right to do this, and that the plaintiffs were entitled to an injunction to restrain them from exercising a right of way through a new and wider gate, recently erected.

Jelbert v Davis (1968)

In *Jelbert v Davis*, the plaintiff took a conveyance of land, 'together with the right of way at all times and for all purposes over the driveway retained by the vendor leading to the main road in common with all other persons having the like right subject to the purchaser or his successors in title paying a

proper proportion of the cost of repairing and maintaining it in repair'. At the time of the grant, the plaintiff used his land for agricultural purposes.

The plaintiff later obtained planning approval to establish a camping area of up to 200 sites. The owners of the servient tenements (the defendants in the action) over which the right of way existed objected to the use of the land by cars and caravans and put up notices saying 'Private drive. No entry to campers or caravans'.

The plaintiff brought proceedings for nuisance and slander of title. The owners of the servient tenements counterclaimed for an injunction restraining the plaintiff from using the right of way in connection with the tourist caravan camping site. Lord Denning MR reasoned:

> What is the extent of that right when the land is changed from agricultural use to a caravan and camping site? The change will mean no doubt that a *different* kind of vehicle will be used for different purposes. But that change is, by itself, quite permissible.
>
> It is covered by words of the grant 'at all times and for all purposes' ...
>
> In my opinion a grant in these terms does not authorise an unlimited use of the way. Although the right is granted 'at all times and for all purposes', nevertheless it is not a sole right. It is a right 'in common with all other persons having the like right'. It must not be used so as to interfere unreasonably with the use by those other persons, that is, with their use of it as they do now, or as they may do lawfully in the future. The only way in which the rights of all can be reconciled is by holding that none of them must use the way excessively ...
>
> The question thus turns on the facts and circumstances of the particular case. Is the proposed use so extensive as to be outside the reasonable contemplation of the parties at the time the grant was made? This way is 180 yards long. As you enter from the road there are stone gateposts. They are only 10 feet apart. Once you are through the gateposts and come into the drive, there is a hard metalled way. It widens out from 10 feet at the gateposts up to 14 feet, 6 inches and 15 feet inside ... It is bordered by trees for the whole of the 180 yards of its length. If 200 units, such as caravans, dormobiles or cars, used this caravan site, there would be 600 people there. All those people may go out in a car two or three times a day. In the morning to the beach. In the afternoon for an outing; and such alike. All of them would be using this driveway.
>
> It seems to me that use on that scale would interfere greatly with the rights of [the defendants. The second defendant] lives at the lodge at the end of the driveway. He has his grandchildren there in the summer ...
>
> I must say that, on the evidence, I think that if this caravan site is used to its full intensity for 200 units, there would be such congestion that it would interfere with the reasonable use by [the defendants] or their own right of way, and it would be a nuisance to them.

Bulstrode v Lambert (1953)

In *Bulstrode v Lambert*, the vendor expressly reserved in a conveyance of a house and yard for 'the vendor his tenants and workmen and others expressly authorised by him the right to pass and repass with or without vehicles over and along' the yard.

The plaintiff, a successor in title to the vendor, claimed that in order to bring furniture to and from the auction rooms, he was entitled to bring pantechnicons into the defendant's yard and to load and unload them. The defendant claimed that the loading and unloading of large vans in the yard interfered with his café business, car hire service and access to his conveniences.

Lord Upjohn held:

> The vendor and his workmen and others authorised by him are entitled to use that way for that purpose, and it seems to me quite clear that the whole object and purpose of this reservation was to give the plaintiff an alternative means of getting to his business premises; and that means, in the particular case of an auction mart, bringing goods to those premises; furniture and the like for sale on those premises ...
>
> I am satisfied that on its true construction the plaintiff is entitled to bring upon this yard pantechnicons and other heavy vehicles and to transport from those vehicles furniture and other chattels, by the door at the end of the yard, into the auction mart ...
>
> If, owing to the existence of the garage, it is impossible to get a van right up to the door, I see nothing to prevent the plaintiff using that part of the yard on which the van can be brought, and then transporting the furniture by hand, past the garage, into the mart ...
>
> Bringing in vans no doubt causes great inconvenience to the defendant, and the plaintiff is under duty to minimise that ...
>
> In my judgment, therefore, the vehicles must be entitled to remain in the yard for such time as is necessary to enable the plaintiff to enjoy his easement of bringing vehicles into the yard; that is, for such time as it takes to load or unload the vehicles. It is only an incident of the right of way expressly granted and may be described as ancillary to that easement, because without that right he cannot substantially enjoy that which has been reserved to him ...

VT Engineering Ltd v Richard Barland & Co Ltd (1968)

In *VT Engineering Ltd v Richard Barland & Co Ltd*, the court was faced with a landlord who had granted his tenant a right of way 'at all times and for all purposes' over a roadway leading to the tenant's premises. The tenant used the roadway for bringing materials to the premises and transporting large and heavy structural steel units after having them loaded onto trucks.

The landlord was restrained from erecting a new building with a passageway or tunnel giving access to the tenant's premises, as the tenant complained that, instead of an open space with no restriction on height,

there would be the tunnel with a roof some 3 metres high and with pillars at intervals restricting manoeuvres.

Lord Megarry held that:

- whilst to require a lateral swing space of indefinite dimensions would be unjustifiable, the tenant's entitlement to vertical swing space in a right of way previously open to the skies would be severely curtailed in a tunnel 3 metres high; and
- the court should grant an injunction restraining the landlord from building as planned because the proposed building would interfere substantially with the rights of the tenant.

The right of way should remain free from obstruction to such a height as is reasonable in all the circumstances.

Obligations on the owners of the dominant and servient tenements

In the absence of some express agreement, the owner of the servient tenement is:

- under no obligation to do anything to make the right of way suitable for use or to keep it in repair, such obligation falling upon the owner of the dominant tenement: *Newcomen v Coulsen* (1877);
- under an obligation, however, to allow the owner or occupier of the dominant tenement uninterrupted use and entry to take make it suitable for the exercise of the rights and for maintaining it in a fit condition for such use: *Jones v Pritchard* (1908).

If the owner of the servient tenement places an obstruction across a right of way, the owner of the dominant tenement may, if the obstruction does not allow easy removal, deviate around the obstruction in order to connect the two parts of the way: *Selby v Nettlefold* (1873). The deviation must be done in a reasonable manner and the right to do so continues so long as the obstruction remains: *Selby v Nettlefold*.

If there is a substantial interference with the enjoyment by the dominant owner of a right of way, the owner of the servient tenement will be liable in damages or by way of injunction to the dominant owner: *Saint v Jenner* (1973).

EXTINGUISHMENT OF EASEMENTS

Easements may be extinguished by:

- express release;
- implied release;

- operation of law; or
- order of the court.

Express release

Where the land is under Old System Title, an express release of an easement must be by deed, under s 23B(1) of the Conveyancing Act 1919. Where the land is under the provisions of the Real Property Act, express release, either wholly or partly, is effected by 'a transfer registered under this Act and altered as the circumstances of the case may require', under s 47(6). Where the easement is equitable, it may be released for value by writing (in the absence of a Deed), under s 23C(1)(c) of the Conveyancing Act 1919.

The abandonment of an easement under Torrens Title

In 1995, the Real Property Act 1900 (NSW) was amended to provide that the Registrar-General may treat an easement as abandoned if satisfied that it has not been used for at least 20 years: s 49(2). If so satisfied, the Registrar-General may cancel the recording of the easement in the Register: s 49(1).

Implied release

Prior to the 1995 amendment to the Real Property Act 1900 (NSW), there was no such power to abandon if satisfied that it an easement had not been used for at least 20 years. Since the 1995 amendment, however, an implied release within 20 years will only be established by evidence indicating an intention on the part of the owner of the dominant tenement to release the right. Non-use is not by itself sufficient: *Ward v Ward* (1857); although non-use for a sufficiently long period may raise a presumption of abandonment: *Treweeke v 36 Wolseley Road Pty Ltd* (1973).

Non-use coupled with surrounding circumstances indicating an intention of not resuming use will raise a strong presumption of abandonment, and hence release: *Swan v Sinclair* (1924). However, the whole of the surrounding circumstances must be considered and it becomes a question of fact whether the acts done indicate an intention to abandon.

Treweeke v 36 Wolseley Road Pty Ltd (1973)

In *Treweeke v 36 Wolseley Road Pty Ltd*, there was a subdivision of land into two blocks in 1927. A three feet wide right of way was notified on the certificate of title of each block, which was granted along a boundary of the servient tenement to the water on which the servient tenement fronted.

The relevant facts as to the right of way were as follows:

- The right of way was at no time used as a means of access to the water.

- There were natural obstructions to its use, and steps would be needed to make the right of way passable.
- The owner of the servient tenement had at various times and without objection from the owner of the dominant tenement built structures and planted bushes which crossed the right of way and were obstacles to its use.
- One of the structures that protruded into the right of way was a swimming pool.
- Another structure that had been constructed was a dividing fence, which was within the dominant tenement.
- The occupants of the dominant tenement had used other tracks to get to the waterfront, one over another property and one through the servient tenement, which involved passage over the right of way for some distance.
- The former track was closed off in 1967. The use of each of these tracks was a trespass.
- In 1968, the owner of the dominant tenement claimed that the construction of the swimming pool was a wrongful obstruction of the right of way.
- In 1971, the owner of the servient tenement brought proceedings, claiming under s 89(3) of the Conveyancing Act 1919 a declaration that the land was not affected by the easement or a declaration that the easement was not enforceable by any person, or an order under s 89(1) for extinguishment of the easement.

The majority of the court affirmed the decision of the Supreme Court of New South Wales. Their Honours held that the evidence, when considered in its entirety, led to an inference that abandonment should not be drawn. One of the majority was Mason J, who reasoned as follows:

> Non-use may be referable to the absence of a need to use the right of way and the use of an alternate and more attractive means of access; then it may be thought that the non-use indicates, not so much an intention to abandon the right of way, as a preference for the alternative means of access so long as it remains available. This, so it seems to me, but for the evidence of acquiescence or standing by, is the conclusion which should be reached here where the persons having the benefit of the easement had no right to use the alternative means of access which was therefore liable to be terminated at any time ...
>
> Acquiescence in, and failure to object to, the placing by the owner of the servient tenement of obstructions on the site of a right of way which are inconsistent with the exercise of rights by persons having the benefit of the right of way may lead to an inference that they intend to abandon it. The question here is whether that inference should be drawn ...
>
> To my mind, the inference that should be drawn is that the persons having the benefit of the easement preferred to resort to the alternative means of access to the waterfront so long as it remained available that, during that time, they

had no objection to the use by the appellant of the site of the easement for her own purposes ...

The construction of the swimming pool athwart the end of the right of way stands in a somewhat different position in that it involved greater expenditure on the part of the appellant. However, it occupies only a small section of the right of way and for the most part it is the subject of land leased from the Maritime Service Board ...

When the evidence is considered in its entirety, an inference of abandonment should not be drawn. In my view the non-use and other acts and omissions of the respondent and its predecessors were equally consistent with the existence of an intention not to use the right of way whilst an alternative means of access remained available.

Although dissenting, Walsh J said, in considering the question of abandonment:

It is no doubt convenient to discuss separately different aspects of the facts, such as:

(1) the length of time during which a failure to use the right of way and to make a claim to use it continued;

(2) the effect of obstacles to its use already existing at the time of its grant;

(3) the effect of the creation by the appellant of further obstacles to its use and of the acquiescence therein by the respondent or its predecessors in title;

(4) the failure of the respondent or its predecessors in title to take any action to render the right of way available for use;

(5) the effect of the contribution by the respondent and by one of its predecessors in title towards the cost of a fence which cut off ready access to the right of way; and

(6) the effect of the availability of another path from the dominant tenement to the waterfront.

But in the end a decision has to be taken as to the inferences to be drawn from the whole of the relevant evidence, taking into account all the matters of fact, which may tend towards or against a conclusion that the easement may reasonably be considered to have been abandoned. Each of the circumstances upon which an applicant seeks to rely may be insufficient in itself to support that conclusion, yet in their cumulative effect the circumstances may show that it is the right conclusion.

The Strata Plan case

The difficulty of proving abandonment of a right of way within the meaning of s 89 was also considered in *Proprietors Strata Plan No 9968 v Proprietors Strata Plan No 11173* (1979), and the court, although taking into account acts or omissions of registered proprietors who were predecessors in title of the present registered proprietor, and the fact that the proprietor of the dominant tenement had recently purchased when the easement was still recorded in the Register, held that there had been no abandonment.

Operation of law

At common law, this occurs when there is common ownership and occupancy of the dominant and servient tenements because one of the essential characteristics of an easement is that the dominant and servient tenements must not be fully owned and occupied by the same person: see *Coke upon Littleton*; *Metropolitan Railway Co v Fowler* (1892); *Bolton v Bolton* (1879).

The common law provision must now be considered in light of:

- s 88B(3)(c)(iii) of the Conveyancing Act, which provides an easement created pursuant to registration or recording of a plan under s 196 of the Conveyancing Act 1919 is not extinguished by reason of the owner of the land benefited by such easement holding or acquiring a greater interest in the land burdened thereby; and
- s 47(7) of the Real Property Act, which provides that an easement recorded in the Register shall not be extinguished solely by reason of the same person becoming proprietor both of the land burdened and of the land benefited by the easement, notwithstanding any rule of law or equity in that behalf.

Order of the court

This is a statutory form of extinguishment pursuant to s 89 of the Conveyancing Act 1919 (NSW). This section is as follows:

> (1) Where land is subject to an easement or a profit *à prendre* or to a restriction or an obligation arising under covenant or otherwise as to the user thereof, the Court may from time to time, on the application of any person interested in the land, by order modify or wholly or partially extinguish the easement, profit *à prendre*, restriction or obligation upon being satisfied:
>
> (a) that by reason of change in the user of any land having the benefit of the easement, profit *à prendre*, restriction or obligation, or in the character of the neighbourhood or other circumstances of the case which the Court may deem material, the easement, or restriction ought to be deemed obsolete, or that the continued existence thereof would impede the reasonable user of the land subject to the easement, profit *à prendre*, restriction or obligation without securing practical benefit to the persons entitled to the easement or profit *à prendre* or to the benefit of the restriction or obligation, or would, unless modified, so impede such user, or
>
> (b) that the persons of the age of eighteen years or upwards and of full capacity for the time being or from time to time entitled to the easement or profit *à prendre* or to the benefit of the restriction, whether in respect of estates in fee simple or any lesser estates or interests in the land to which the easement, the profit *à prendre* or the benefit of the restriction is annexed, have agreed to the easement, profit *à prendre*, restriction or obligation being modified or wholly or

partially extinguished, or by their acts or omissions may reasonably be considered to have abandoned the easement or profit *à prendre* wholly or in part or waived the benefit of the restriction wholly or in part,

(b1) in the case of an obligation:

(i) that the prescribed authority entitled to the benefit of the obligation has agreed to the obligation's being modified or wholly or partially extinguished or by its acts or omissions may reasonably be considered to have waived the benefit of the obligation wholly or in part, or

(ii) that the obligation has become unreasonably expensive or unreasonably onerous to perform when compared with the benefit of its performance to the authority, or

(c) that the proposed modification or extinguishment will not substantially injure the persons entitled to the easement or profit *à prendre*, or to the benefit of the restriction or obligation.

(2) Where any proceedings are instituted to enforce an easement, profit *à prendre*, restriction or obligation, or to enforce any rights arising out of a breach of any restriction or obligation, any person against whom the proceedings are instituted may in such proceedings apply to the Court for an order under this section.

(3) The Court may on the application of any person interested make an order declaring whether or not in any particular case any land is affected by an easement, profit *à prendre*, restriction or obligation, and the nature and extent thereof, and whether the same is enforceable, and if so by whom.

(4) Notice of any application made under this section shall, if the Court so directs, be given to the council of the area (within the meaning of the Local Government Act 1993) in which the land is situated, and to such other persons and in such manner, whether by advertisement or otherwise, as may be prescribed by rules of court or as the Court may order.

(5) An order under this section shall, when registered as in this section provided, be binding on all persons, whether of full age or capacity or not, then entitled or thereafter becoming entitled to the easement or profit *à prendre*, or interested in enforcing the restriction or obligation and whether such persons are parties to the proceedings or have been served with notice or not.

(6) This section applies to easements, profits *à prendre* and restrictions existing at the commencement of the Conveyancing (Amendment) Act 1930, or coming into existence after such commencement.

(7) An order under this section affecting land not under the provisions of the Real Property Act 1900 may be registered in the General Register of Deeds. No such order shall release or bind any land until it is so registered.

(8) This section applies to land under the provisions of the Real Property Act 1900, and the Registrar-General shall, on application made in the form

approved under that Act, make all necessary recordings in the Register kept under that Act for giving effect to the order. For the purposes of this sub-section, a grant, certificate of title or duplicate registered dealing that is not in the possession of the Registrar-General shall be deemed to be wrongfully retained within the meaning of s 136 of the Real Property Act 1900.

(9) In the case of land which is not under the provisions of the Real Property Act 1900, a memorandum of such order shall be endorsed on such of the instruments of title as the Court directs.

Most of the case law on s 89 has been concerned with the extinguishment or modification of restrictive covenants, as distinct from easements. Accordingly, it is proposed to discuss the law relating to s 89 in Chapter 11, under the heading 'Court order pursuant to s 89 of the Conveyancing Act'.

There have, however, been a number of cases that have specifically considered the application of s 89 to the extinguishment of easements.

Pieper v Edwards (1982)

In *Pieper v Edwards*, the New South Wales Court of Appeal held that s 89(1)(b) could be relied upon to extinguish a right of way in circumstances where there had been an agreement by the predecessor in title to the owner of the dominant tenement to surrender the easement. The court so held, even though this agreement had not been recorded on the register.

In coming to this view, the court held that its power on an application under s 89 was discretionary. In so holding, it approved of the reasoning of Mason J, as he then was, in *Treweeke v 36 Wolseley Road Pty Ltd* (1973).

The New South Wales Court of Appeal held that factors that may be relevant to the exercise of that discretion include the history of the property as such, the conduct of the owners of both the dominant and servient tenements, the acts of a prior registered proprietor and the state of the register. No one factor should be regarded as decisive: the Court of Appeal rejected the submission by the appellant that the state of the register was conclusive.

This case raises the concern that a person may purchase land which has the benefit of an easement in circumstances where there is no knowledge of an agreement having been previously entered into by a predecessor in title to surrender the easement, which agreement has not been recorded on the register: See generally the case notes by Professor Butt in (1982) 56 ALJ 667 and (1981) 55 ALJ 885.

Manly Properties Pty Ltd v Castrisos (1973)

In *Manly Properties Pty Ltd v Castrisos*, the court was of the opinion that it should tend against unduly restricting the operation and the language of s 89 lest the remedy that the legislature obviously intended to exist should be

eaten away. The section is designed to relieve a landowner wholly or partly from the burden of restrictions and easements whilst at the same time recognising the legal rights of the owners of the dominant tenement and ensuring that they will not be unduly prejudiced by the proposals of the applicant.

Section 28 of the Environmental Planning and Assessment Act 1979

The New South Wales Court of Appeal has held that covenants may be overridden by s 28 of the Environmental Planning and Assessment Act 1979 (NSW): see *Coshott v Ludwig* (1997), where it was held that a consent authority could displace a 'regulatory instrument' to the extent necessary to permit the development of land.

As a 'regulatory instrument' is defined in s 28(1) to include an 'agreement, covenant or instrument', it would appear that this principle extends to easements: *Doe v Cogente Pty Ltd* (1997). Cowdroy AJ in the New South Wales Court of Appeal expressly refrained from deciding this point.

REMEDIES IN RESPECT OF EASEMENTS

The remedies available in respect of an interference with an easement are abatement, injunction and /or damages.

Abatement

The owner of the dominant tenement may remove an obstruction to a right of way. The courts do not, however, look with favour upon abatement: *Lagan Navigation Co v Lambeg Bleaching, Dyeing and Finishing Co Ltd* (1927).

Although the obstruction may be moved without notice to the servient owner, care must be taken in using this remedy as it may lead to a breach of the peace: *Perry v Fitzhowe* (1846); *Davies v Williams* (1851); *Hill v Cock* (1872).

Injunction

The usual remedy sought will be an injunction against the continuance of interference with the easement: *Arndale (Kilkenny) Pty Ltd v Gaetjens* (1970). An injunction will not be granted where the interference is temporary or trivial: *FCA Finance Pty Ltd v Moreton Central Sugar Mill Co Ltd* (1975). Excessive use, however, will be restrained: *Todrick v Western National Omnibus Co Ltd* (1934); *Jelbert v Davis* (1968).

Damages

In addition to an injunction, damages may be sought where there has been a substantial interference with the enjoyment of the easement: *Saint v Jenner* (1973).

Remedies in respect of rights of way

Under s 181A of the Conveyancing Act 1919, the language required for the creation of a right of way, whether in lands under Old System Title or the Real Property Act, may be reduced by the use of the words 'right of carriage way' and 'right of footway' which have the extended meanings set out in Schedule VIII to the Act. It should be noted that 'carriageway' includes the right to pass on foot.

Remedies in respect of rights of support

An owner of land has a natural right to so much support from a neighbour's land as will maintain his own land, unencumbered by buildings, as its natural level: *Backhouse v Bonomi* (1861). This right of support exists both in regard to adjoining and subjacent land.

An additional right to support of buildings may be acquired by an easement, and an easement of support by an adjoining building may exist in favour of a building: *Dalton v Angus* (1881). If the withdrawal of support would have caused actionable damage even if there were no buildings on the land, the damages recoverable include any damage to the buildings: *Redland Bricks Ltd v Morris* (1970); *Evans v Balog* (1976); *Fennell v Robson Excavations Pty Ltd* (1977).

A common example of an easement of support occurs in the case of a party wall (ie, a wall common to two separate buildings). Four different situations, outlined by Fry J in *Watson v Gray* (1880), may arise:

- the adjoining owners as tenant in common may own the wall and the land on which it is erected;
- the wall may be divided longitudinally into two strips, one belonging to each of the adjoining owners;
- the wall may belong to one owner but subject to an easement in favour of the other to have it maintained as a dividing wall; and
- the wall may be divided longitudinally, each half being subject to an easement of support in favour of the other half and the building attached thereto.

The first two scenarios are unsatisfactory to both owners because there is nothing to prevent one owner from removing his portion of the wall, provided he does so with due care, even though the result is that insufficient support is left for his neighbour's wall and building: *Mayfair Property Co v Johnston* (1894).

Accordingly, the only safe way of creating a party wall is to follow the scheme of the fourth scenario in which there would exist a liability for damage caused by removal of support: *Upjohn v Seymour Estates Ltd* (1938). The third scenario, of course, does not give rise to any question of a party wall and the owner of the dominant tenement relies simply upon the terms of the grant of the easement.

Section 181B of the Conveyancing Act

Section 181B of the Conveyancing Act 1919 deals with the construction of the expression 'party wall' in assurances of land. This section contemplates an assurance of land made by a person entitled to assure or create easements in respect of a wall built, or to be built, on a common boundary between that land and adjoining land, so that the boundary passes longitudinally through the wall.

If in such an assurance the wall is described as a 'party wall', that expression means, in the absence of a contrary intention, a wall severed vertically and longitudinally with separate ownership of the severed portions, with cross-easements entitling each of the persons entitled to a portion to have the whole wall continued so that each building supported has the support of the whole wall, and the assurance operates to create appropriate easements accordingly.

Section 181B(3) applies to dealings under the Real Property Act as well as to assurances of land under Old System Title.

Having regard to the general principles of English law relating to the ownership, creation and alienation of estates in land, it appears that s 181B only applies where the conveyor, prior to conveyance, was the owner of both parcels of land; it could not operate where the wall is built on the common boundary by arrangement between adjoining owners, since neither would be entitled to create easements in respect of the whole wall.

The section would operate, for example, where the conveyance described the land conveyed as bounded on one side by 'the centre of a nine-inch party wall'.

10 POSITIVE COVENANTS

You should be familiar with the following areas:

- the nature of a positive covenant
- a positive obligation as part of an easement and
- the enforceability of positive covenants by successors in title to the original covenantee

THE NATURE OF A POSITIVE COVENANT

A covenant is an agreement that creates an obligation. It is created by deed. It may be:

- positive, requiring the performance of some positive act or the payment of money; or
- negative or restrictive, restricting the commission of certain acts.

Restrictive covenants are dealt with in Chapter 11.

The *covenantor* is the person subject to the obligation or burden. The *covenantee* is the person receiving the benefit of a covenant. The law of contract governs the obligations and rights of the parties to a contract or covenant. However, where the covenant is made in respect of land, the benefit and the burden of the covenant *may* affect subsequent owners of the land even though they were not parties to the original covenant.

Austerberry v Corp of Oldham (1885) is authority that:

- the benefit of a covenant relating to land runs with the land, whether the covenant is positive or negative; but
- the burden of a covenant does not run with the land if the covenant is positive.

A POSITIVE COVENANT AS PART OF AN EASEMENT

Frater v Finlay (1968)

In *Frater v Finlay* (which is discussed in a case note in (1971) 45 Australian Law Journal 105), the grant of an easement to take water from a neighbour's well provided that the cost of keeping the equipment, such as the pipes and tanks, should be shared by the owners of the dominant and servient tenements. In this case, both dominant and servient tenements were governed by the provisions of the Torrens system.

The court held that a requirement to contribute to the cost of maintenance was an integral part of the easement. The court held that to take a benefit under the deed creating the easement imposed an obligation on the owners of both the dominant and servient tenements to perform the covenants contained in the easement.

The requirement of 'reciprocity' between benefit and burden means that a successor in title who accepts benefits under a deed or transaction is not required to accept *every* burden the deed or transaction imposes. The burden must be 'relevant to' the exercise of the benefit: *Rhone v Stephens* (1994) at 322.

Halsall v Brizell (1957)

In *Halsall v Brizell*, purchasers of certain lots entered into covenants that, *inter alia*, required contribution towards the costs of repair of roads for the benefit of the several plots of land, and the purchasers were not entitled to the use of the roads unless they contributed towards such costs.

The English court held that the burden of this positive covenant ran with the land because:

- where a person named in a deed as a party does not execute it but accepts its benefit, that person will then be bound to observe the covenants on his part expressed in it, although that person has not executed it; and
- a person cannot both approbate and reprobate: *Codrington v Codrington* (1875).

The 'benefit and burden' principle in Halsall v Brizell

The 'benefit and burden' principle is a principle by which a person who takes the benefit of a transaction must also bear any burdens imposed by that transaction. The principle derives from the ancient law of deeds that a party who claims benefits conferred by a deed must also submit to the burdens imposed by the deed.

The obligation to contribute in return for accepting the benefit is an 'intrinsic part' of the rights acquired by the successor in title, and has been called the 'conditional benefits' principle: *Tito v Waddell (No 2)* (1977) at 290, 296–99.

Whether an obligation of this kind has been created is a question of construing the instrument that created the interest. The more closely the obligations are linked to the right acquired, the easier it is to construe the instrument as granting a conditional right: *Tito v Waddell (No 2)* (1977).

If an easement is created that benefits a parcel of land, and the owner of the benefited land, by the terms of the instrument creating the easement, has covenanted to contribute to the cost of maintaining the easement, then a successor in title of the benefited land who uses the easement must also contribute to its maintenance in accordance with the instrument: *ER Ives Investment Ltd v High* (1967) at 394, 399–400; *Tito v Waddell (No 2)* (1977) at 292–96, 302–03; *Rufa Pty Ltd v Cross* (1981) at 371.

This principle has been criticised as an unjustified extension of the true principle which, it is said, applies only to the original named parties to the deed: *Tito v Waddell (No 2)* (1977) at 294–95.

The House of Lords in *Rhone v Stephens* (1994) at 322 (which was applied by McHugh J in *Gallagher v Rainbow* (1994) at 647–48), while denying that the principle required a person taking any benefit under a conveyance to accept any burden under the conveyance, has endorsed its application in situations such as *Halsall v Brizell*. Their Lordships have taken the view that where the enjoyment of the benefit is made conditional on assuming the burden, the benefit and burden are genuinely reciprocal.

THE ENFORCEABILITY OF POSITIVE COVENANTS BY SUCCESSORS IN TITLE TO THE ORIGINAL COVENANTEE

The benefit at law

The proposition that the benefit of a covenant 'runs with the land' means that the covenant may be enforced not only by the covenantee but also by any successors in title as owners of the land against the covenantor either at law by an action for damages or in equity by an injunction.

The original covenantee under contract law can enforce the benefit of an express covenant against the covenantor, unless that benefit has been expressly assigned to another person. This is based upon normal contractual principles, and does not involve any question of 'running with the land'.

Enforceability by successors in title

The two situations in which successors in title to the original covenantee may be entitled to the benefit of the covenant are where:

- the covenant may be annexed to the land acquired by them; and
- the benefit of the covenant may be expressly assigned to them.

Successors in title to the original covenantee will be entitled to the benefit of the covenant whether or not the covenant was expressed to be made for the benefit, provided that:

- such an intention has not been excluded by the original contracting parties: s 70 of the Conveyancing Act 1919;
- the covenant 'touches and concerns' the land of the covenantee: *Rogers v Hosegood* (1900); *Re Ballard's Conveyance* (1937); *Zetland (Marquess of) v Driver* (1939); *Ellison v O'Neill* (1968); and
- the covenantee owns the land to which the covenant relates, at the time when the covenant was created: *Rogers v Hosegood* (1900); *Kerridge v Foley* (1964).

The operation of ss 70 and 70A of the Conveyancing Act

Section 70 of the Conveyancing Act, which applies to covenants created on or after 1 January 1931, provides:

> (1) A covenant relating to any land of the covenantee shall be deemed to be made with the covenantee and the covenantee's successors in title and the persons deriving title under the covenantee or them, and shall have effect as if such successors and other persons were expressed. For the purposes of this subsection in connection with covenants restrictive of the user of land 'successors in title' shall be deemed to include the owners and occupiers for the time being of the land of the covenantee intended to be benefited.
>
> (2) This section applies to covenants whether express or implied under this or any other Act made or implied after the commencement of the Conveyancing (Amendment) Act 1930, but the repeal of the section for which this section is substituted does not affect the operation of covenants to which the repealed section applied.

Section 70A of the Conveyancing Act 1919 (NSW) provides:

> (1) A covenant relating to any land of a covenantor or capable of being bound by the covenantor by covenant shall, unless a contrary intention is expressed, be deemed to be made by the covenantor on behalf of himself or herself and the covenantor's successors in title, and the persons deriving title under the covenantor or the covenantor's successors in title, and, subject as aforesaid, shall have effect as if such successors and other persons were expressed. This sub-section extends to a covenant to do some act relating to the land, notwithstanding that the subject matter may not be in existence when the covenant is made.

(2) For the purposes of this section in connection with covenants restrictive of the user of land successors in title shall be deemed to include the owners and occupiers for the time being of such land.

(3) This section applies only to covenants made or implied after the commencement of the Conveyancing (Amendment) Act 1930.

Section 70 of the Conveyancing Act 1919 states that a covenant shall be deemed to be made with the covenantee and his successors in title. It follows that a person who is an assignee of the original covenantee may personally be regarded as an original covenantee.

Prior to the enactment of ss 70 and 70A of the Conveyancing Act 1919, whether a covenant was intended to be for the benefit of the land was a question of law, which was dependent upon the construction of the covenant: *Chambers v Randall* (1923); *Reid v Bickerstaff* (1909).

Section 70A(1) does not affect the common law rule enunciated in *Austerberry v Corp of Oldham* (1885) that the burden of a covenant does not run with the land if the covenant is positive: *Rhone v Stephens* (1994) at 321–22.

This has resulted in the following unfortunate consequence articulated by Professor Butt at [1,708]:

> Once it is accepted that at common law a covenant cannot bind successors in title even where it purports to do so expressly [as where the covenantor expressly binds himself or herself and successors in title], then nor can it bind successors in title where [in the language of s 70A(1)] it is deemed to be made on behalf of the covenantor and his or her successors in title.
>
> On this view, s 70A(1) is merely a statutory shorthand provision, intended to affirm that the covenantor remains contractually liable to the covenantee if the covenantor's successors in title fail to abide by the terms of the covenant ... *Tophams Ltd v Earl of Sefton* [1967] 1 AC 50 at 73, 81.

Further, s 36C of the Conveyancing Act 1919 provides that a person may take the benefit of a covenant respecting land, even though not named as a party to the covenant.

An assignee can be in no better position than the original covenantee. An assignee must:

- show that the covenant was in fact annexed to the land which was retained by the original covenantee;
- show that he or she is the assignee of the benefit of the covenant in that he or she has acquired land to which the benefit of the covenant is annexed; and
- retain land to which the benefit of the covenant is annexed.

Section 36C of the Conveyancing Act 1919 (NSW) provides:

(a) A person may take an immediate or other interest in land or other property, or the benefit of any condition, right of entry, covenant, or agreement over or respecting land or other property, although the person may not be named as a party to the assurance or other instrument.

(b) Such person may sue, and shall be entitled to all rights and remedies in respect thereof as if he or she had been named as a party to the assurance or other instrument.

Professor Woodman at 326 has commented in relation to the English equivalent of s 36C (ie, s 56 of the Law of Property Act 1925) that:

> Just as, under the first part of the section, a person cannot benefit by a conveyance unless it purports *to* be made to him [as grantee] so he cannot benefit by a covenant which does not purport to be with him [as covenantee]: *Re Foster* [1938] 3 All ER 357, 365; *White v Bijou Mansions Ltd* [1937] Ch 610; [1938] Ch 351.
>
> On this view, if A covenants with B that A will convey land to C, B can enforce the covenant but C cannot; for B is a covenantee, but C is merely a third party.
>
> But if A's covenant is expressed to be made with B and C, C can enforce it as well as B, even though B was a party to the deed and C was not: *Stromdale & Ball Ltd v Burden* [1952] Ch 223 is a borderline case.
>
> This interpretation follows the sound principle that a promisor should be liable only to those whom he chooses to engage himself. The Court of Appeal, however, has asserted that s 56 enables a mere third party, not being a promisee, to enforce a contract made for his benefit: *Beswick v Beswick* [1966] Ch 538 (CA); [1968] AC 58 (HL).

'Touch and concern'

The requirement that the covenant 'touch and concern' the land was explained in *Rogers v Hosegood* (1900). In this case, the England Court of Appeal:

- adopted the definition laid down in *Congleton Corp v Pattison* (1808) that the covenant must either affect the land as regards mode of occupation, or it must be such as, *per se*, and not merely from collateral circumstances, affects the value of the land;
- held that when the benefit has been clearly annexed to one piece of land, it passes by the assignment of that land, and may be said to run with it without proof of any special bargain or representation on the assignment.

Professor Woodman at 327–29 has conveniently summarised the following principles in relation to the 'touch and concern' requirement:

(1) A covenant does not touch and concern the land of the covenantee, and is not effectively annexed thereto, if the area of land is greater than can reasonably be benefited: *Re Ballard's Conveyance* [1937] Ch 473; *Lane Cove Municipal Council v Hurdis Pty Ltd* (1955) 55 SR (NSW) 434; *Bohn v Miller Bros Pty Ltd* [1953] VLR 354; *Marten v Flight Refueling Ltd* [1962] Ch 115; *Leicester (Earl of) v Wells-Next-The-Sea Urban District Council* [1973] Ch 110.

In *Re Ballard's Conveyance* [1937] Ch 473, the covenant was expressed to be for the benefit of the 'owners from time to time of the Childwickbury estate', which was about 1,700 acres in extent, and it was held that the

benefit of a covenant could not run with the estate even in favour of someone acquiring the whole of the estate, because the covenant did not 'touch and concern' the whole; it was also held that the covenant could not be severed by the court.

The difficulties in this aspect of the matter were well illustrated in *Ellison v O'Neill* (1968) 88 WN (Pt 1) (NSW) 213; on the one hand, Wallace P considered that it was almost beyond dispute that the covenant did not touch and concern a substantial proportion of the benefited land, and on the other hand Jacobs JA saw nothing in the evidence which would lead to a conclusion that the covenant did not touch and concern the whole of the land.

(2) Although it is not necessary that the land benefited and the land burdened should be contiguous, they must be sufficiently close to confer some benefit upon the dominant tenement: *Clem Smith Nominees Pty Ltd v Farrelly & Farrelly* (1978) 20 SASR 227; *McGuigan Investments Pty Ltd v Dalwood Vineyards Pty Ltd* [1970] 1 NSWR 686; *Zetland (Marquess of) v Driver* [1939] Ch 1; *Kelly v Barrett* [1924] 2 Ch 379.

(3) A covenant does not touch and concern the land of the covenantee if it is expressed to be made for the benefit of land which has already been sold by the covenantee: *Langdale Proprietary Ltd v Sollas* [1959] VR 634; *Kerridge v Foley* (1964) 82 WN (Pt 1) (NSW) 293. This is also inherent in the statement made in *Zetland (Marquess of) v Driver* [1939] Ch 1 that the covenant must be imposed for the benefit of or to enhance the value of the land retained by the vendor, or some part of it.

(4) Although at the time of its creation a covenant may touch and concern the whole of the land of the covenantee, subsequent sub-division of the covenantee's land may render the covenant unenforceable. In *Ellison v O'Neill* (1968) 88 WN (Pt 1) (NSW) 213, the benefit of the covenant was 'appurtenant to the land in Certificate of Title Volume 7521 Folio 55' and, on a sub-division of the land comprised in the certificate of title, the majority of the Court of Appeal were unable to construe the wording of the subject covenant as meaning 'each and every part' of the land comprised in the certificate of title; it would have been easy, when drafting the covenant, to extend the benefit of the covenant to 'each and every lot into which the land benefited may hereafter be lawfully sub-divided'.

The same view had been adopted by the Supreme Court of Victoria in *Re Arcade Hotel Pty Ltd* [I962] VR 274, notwithstanding a strong dissent by Sholl J; the effect of that decision has been overcome in Victoria by the addition to the Law of Property Act 1958 of s 79A, under which, in the absence of an express provision to the contrary, the benefit of a restriction as to user annexed to land is deemed to be and always to have been annexed to the whole and to each and every part of the land capable of benefiting from such restriction.

(5) Although the courts will not sever covenants of the kind referred to in Items 1 and 3 above – see *Re Ballard's Conveyance* [1937] Ch 473; *Ellison v O'Neill* (1968) 88 WN (Pt 1) (NSW) 213 – the parties themselves may do so. In *Zetland (Marquess of) v Driver* [1939] Ch 1 the covenant was declared to be for the benefit and protection of such part or parts of the settled land as should for the time being remain unsold or as should

have been sold by the vendor or his successors in title with the express benefit of the covenants; as the covenant was, in effect, expressed to be for the benefit of the whole or any part or parts of the settled property, and not merely for the benefit of the whole land: *Re Ballard's Conveyance* [1937] Ch 473 was no authority against the enforceability of the covenant.

In *Ellison v O'Neill* (1968) 88 WN (Pt 1) (NSW) 213, Wallace P was of the opinion that any difficulty arising out of subsequent division of the land benefited could be overcome by extending the benefit of the covenant to the whole of the covenantee's land and 'each and every lot into which the land benefited may hereafter, be lawfully sub-divided': see a1so *Re Arcade Hotel Pty Ltd* [1962] VR 274; *Astley* [1966] 1 WLR 841; *Stilwell v Blackman* [1968] Ch 508; *Re Roche and the Conveyancing Act* (1960) 77 WN (NSW) 431.

Express assignment

The benefit of a covenant may pass by express assignment of the benefit by the covenantee to an assignee. In *Re Union of London & Smith's Bank Ltd's Conveyance, Miles v Easter* (1933), the Court of Appeal held that where on a sale, otherwise than under a building scheme, a restrictive covenant is taken, the benefit of which is not on the sale annexed to land retained by the covenantee so as to run with it, an assignee of the covenantee's retained land cannot enforce the covenant against an assignee (taking with notice) of the covenantor unless the assignee can prose that:

- the covenant was taken for the benefit of ascertainable land of the covenantee capable of being benefited by the covenant; or
- the assignee is an express assignee of the benefit of the covenant.

There must be a distinct agreement to the effect that the benefit of the covenant shall run to the assignee, as distinct from a mere sale of the land without reference to the covenant: *Renals v Cowlishaw* (1878); *Re Union of London & Smith's Bank Ltd's Conveyance* (1933).

11 RESTRICTIVE COVENANTS

You should be familiar with the following areas:

- the nature of a restrictive covenant
- Schemes of Development
- restrictive covenants under Torrens Title
- the operation of s 88(1) and whether a restrictive covenant which is part of a Scheme of development can comply and
- extinguishment of covenants

THE NATURE OF A RESTRICTIVE COVENANT

Tulk v Moxhay (1848)

The common law rule that the burden of a covenant does not run with the land was regarded as operating unfairly where the covenant was restrictive in nature and where the purchaser of the land burdened purchased with notice of the restriction. As a result, equity developed the rule in *Tulk v Moxhay* (1848), which is authority that, in equity, the burden of a restrictive covenant runs with the land because it is seen to be against conscience for the outcome to be otherwise where the covenant is restrictive and where the current owner purchased with notice, whether actual, constructive or imputed, of the restriction.

In *Tulk v Moxhay*, T sold a piece of land forming a square, along the side of which he owned several houses. The square was a pleasure ground, and the purchaser entered into a covenant to keep it so, and to allow the tenants of the surrounding houses to use it on payment of a reasonable rent. In the course of time, the square passed from one owner to another, until it was conveyed to M, who had notice of the covenant. M expressed his intention of building upon the square, and an injunction was granted to prevent him from so doing.

The covenant in *Tulk v Moxhay* was positive in wording – 'to maintain in an open state, uncovered with any building' – but was negative in

substance because it bound the covenantor to refrain from building without requiring him to do any positive act.

Professor Woodman has described the rule of *Tulk v Moxhay* at 330–31 as follows:

> The doctrine of *Tulk v Moxhay* is an equitable rule, founded on notice, under which Equity will restrain the breach, by the owner or occupier of particular land, of the terms of a restriction upon the user of such land imposed by covenant or agreement for value by a former owner of such land, intended for the benefit of particular land of the covenantee – ie, annexed to it – at the suit of the owner for the time being of the land intended to be benefited, unless the owner of the land subject to the burden proves that he acquired the legal estate for value without notice of the equitable interest created by the covenant. In other words, the Court of Equity, being a court of conscience, considered that a grantee of land should not be able to disregard a contractual obligation in respect of the land of which he had clear notice.

Meaning of 'restrictive'

DJ Hayton, in his article 'Restrictive covenants as property interests' (1971) 87 Law Quarterly Review 539, 540, defined a restrictive covenant as follows:

> A restrictive covenant, meeting the appropriate requirements, is an interest in property as it is enforceable against persons with whom there is neither privity of contract nor privity of estate. The original covenantee can enforce it against successors in title to the original covenantor's land, as can successors in title to the original covenantee's land where the benefit of the covenant has passed to them by virtue of the doctrine of annexation or of assignment or of development schemes. Moreover, it can pass by conveyance or by devise or by descent. However, since it was the Courts of Equity that took the step of converting a restrictive covenant from a personal interest into a property interest a restrictive covenant is an equitable interest in land.

A restrictive covenant is an interest in land. It is in the nature of an equitable negative easement: *Re Nisbet and Potts' Contract* (1906); *Reid v Bickerstaff* (1909); *London County Council v Allen* (1914).

Negative in substance

A positive covenant requires the expenditure of money. A restrictive covenant, on the other hand, must be negative in substance. Regardless of whether the wording is positive or negative, it is the substance of the covenant that must be considered. Furthermore, the substance must be negative.

A test that is often applied is whether the covenant requires expenditure of money for its performance. If this is required, then the covenant is not negative in substance: *Haywood v Brunswick Permanent Benefit BS* (1881).

A covenant to use premises as a private dwelling house only is negative in substance as it represents a prohibition against use for any other

purpose: *German v Chapman* (1877). Covenants not to carry on a certain type of business, or not to build, are negative both in form and in substance. A covenant that any building erected on the land shall not be in value less than a certain sum is enforceable as a negative covenant: *Collins v Castle* (1887).

On the other hand, a covenant 'not to let premises fall into disrepair' is negative in form but positive in substance, since its performance requires expenditure of money and it therefore does not come within the principle under discussion.

Where a covenant has both positive and negative elements in it, the negative element will bind the land even though the positive element cannot do so: *Shepherd Homes Ltd v Sandham (No 2)* (1971); *Tulk v Moxhay* (1848), where the covenant was to maintain the garden as well as not to build upon the land.

Categories of restrictive covenants

In *Osborne v Bradley* (1903), Farwell J observed that restrictive covenants commonly occur in three ways:

- covenants entered into for a vendor's personal benefit;
- covenants imposed by a vendor who sells part of the land to protect the land retained; and
- covenants imposed by a vendor upon land in a sub-division to various purchasers who are expected to mutually enjoy the benefit of, and be bound by, the restrictions.

The first scenario is personal to the vendor and is enforceable by the vendor, his or her personal representatives and express assigns of the benefit of the covenant only.

Covenants in the second scenario run with the land. They are enforceable without express assignment by the owner of the land for the time being for the benefit of which they were imposed.

The third scenario involves covenants under a common building scheme or Scheme of Development.

When will a restrictive covenant not be enforced under Old System Title?

A restrictive covenant will not be enforced against a *bona fide* purchaser of the legal estate taking for value and without notice of the covenant, nor against someone who is claiming through such a purchaser: *Wilkes v Spooner* (1911). The general rule is that a person coming to the land with notice of a restrictive covenant will be bound by it.

Restrictive covenants are only enforceable in equity. It follows that the remedies available are at the discretion of the court. Usually, an injunction to

restrain the breach of a restrictive covenant or, alternatively, equitable compensation will be granted.

The court will decline to grant relief if it would be inequitable to do so. An example of this is where the plaintiff has known of the breach for a period of five years, but took no action: *Gaskin v Balls* (1879).

Equitable grounds upon which an injunction may be refused include where:

- the plaintiff's inactivity in the face of open breaches of covenant has justified a reasonable belief that the plaintiff no longer intends to enforce the covenant: *Chatsworth Estates Co v Fewell* (1931); and
- the character of a neighbourhood has so completely changed that the covenant has become valueless: *Nwakobi v Nzekwu* (1964).

In addition, an injunction will be refused where:

- the covenant does not 'touch and concern' the land benefited by the covenant: *Re Ballard's Conveyance* (1937); *Zetland (Marquess of) v Driver* (1939); *Ellison v O'Neill* (1968);
- the plaintiff is an assignee, who is seeking to enforce a covenant which has used words that expressly exclude the operation of ss 70 and 70A of the Conveyancing Act 1919 (NSW);
- the plaintiff owns an individual lot in a sub-division of the dominant tenement, where it is presumed, in the absence of clear words to the contrary, that the covenant benefits the land as a whole as distinct from the individual parts into which the whole may later be sub-divided: *Ellison v O'Neill* (1968); *Re Arcade Hotel* (1962); *Coles Myer NSW Ltd v Dymocks Book Arcade Ltd* (1996);
- the original covenantee of the land benefited did not own the land benefited when the covenant was created: *Kerridge v Foley* (1964); or alternatively, there is a Scheme of Development or Building Scheme: *Elliston v Reacher* (1908); or
- the restrictive covenant does not comply with s 88(1) of the Conveyancing Act 1919 (NSW).

The operation of ss 70 and 70A of the Conveyancing Act

See the discussion of this area of the law in Chapter 10, under the heading 'The operation of ss 70 and 70A of the Conveyancing Act'.

'Touch and concern'

It is necessary for the covenantee or assignee of the covenantee to show that the covenant is annexed to the land retained by the covenantee. It must have been made for the benefit of the land of the covenantee, and must be capable of benefiting such land; see, for example, *Re Ballard's Conveyance* (1937); *Zetland (Marquess of) v Driver* (1939); *Ellison v O'Neill* (1968). It is a

question of construction in each case whether the benefit of a covenant is annexed to the land so as to run with it: *Zetland (Marquess of) v Driver* (1939).

The covenant must either be made for the benefit of the land, or be made with the covenantee as owner of the land if the benefit of a restrictive covenant is to run with the land: *Osborne v Bradley* (1903). Even if a clear intention to annex the benefit of the covenant to a particular area of land is shown, there will be no effective annexation if the area is greater than can reasonably be benefited (*Re Ballard's Conveyance* (1937)), although there is no difficulty if the covenant is expressed to be for the benefit of the whole or any part or parts of the settled land: *Zetland (Marquess of) v Driver* (1939).

A fuller discussion of this area of the law is to be found in the Chapter 10, under the heading 'Touch and concern'.

Sub-division of the land benefited

Where a covenant is entered into for the benefit of a parcel of land, it is presumed in the absence of clear words to the contrary that the covenant benefits the land as a whole as distinct from the individual parts into which the whole may later be sub-divided: *Ellison v O'Neill* (1968) at 221–22 *per* Walsh JA (see also at 217 *per* Wallace P; but cf at 227–30 *per* Jacobs JA); *Re Arcade Hotel* (1962); *Coles Myer NSW Ltd v Dymocks Book Arcade Ltd* (1996).

In *Ellison v O'Neill* (1968), the court held that a covenant expressed to benefit 'the land in' a certain certificate of title did not benefit the three lots into which that land was later sub-divided. It is recommended that a covenant should be expressed to benefit both the land as a whole and also 'each lot into which the land may subsequently be lawfully sub-divided' or words to similar effect, to avoid this possible risk. The onus lies on the party asserting that the benefit is intended to be annexed to a part of the land and not solely to the undivided whole: *Re Arcade Hotel* (1962).

The important matter is the purpose intended to be served by the covenant having regard to the surrounding circumstances at the time the covenant was created: *Re Gemmell Holdings Pty Ltd and the Conveyancing Act* (1970) at 374. Even where it is clear, as a matter of construction, that the parties intended the benefit to run for the sub-divided parts, that intention will not be enforced where, as a matter of fact, the covenant does not benefit those parts: *Gyarfas v Bray* (1990) at 58,876.

The *Kerridge v Foley* (1964) requirement

An aspect of the touch and concern requirement is that the original covenantee must have owned the land benefited when the covenant was created: *Kerridge v Foley* (1964). The rationale of this requirement is that there must be a nexus between the original covenantee (ie, the original

contracting party acquiring the benefit of the contract) and the land benefited.

This *Kerridge v Foley* requirement has the potential to operate unfairly where a vendor sub-divides land into, say, four lots. Assume that a vendor sub-divides land, sells it in lots, and takes a restrictive covenant from the purchaser of each lot in the sub-division. Later purchasers, as assignees of the benefit of the covenant, are able to enforce a restrictive covenant against earlier purchasers, but the reverse is not true, assuming that there is no Scheme of Development. Earlier purchasers are unable to enforce the covenant against later purchasers because the benefit of the covenant has not been annexed to their lots.

Accordingly, assume the vendor, V, sells the four lots to A, B, C and D. It is assumed that the order of sale is first to A, then to B, then to C and finally to D. Assume over time that each of A, B, C and D sell their respective lots to assignees.

The current owner of the lot sold to D is able to say that the original covenantee of the covenants taken from each of A, B, and C was the owner of the land benefited when those covenants were created, because V owned the lot subsequently sold to D when the covenants were created with each of A, B and C. Accordingly, the current owner of the lots sold to D can say that the *Kerridge v Foley* requirement has been satisfied, and can enforce the benefit of the restrictive covenants which burdened the land sold to each of A, B and C.

The converse is not so. None of the current owners of the lots sold by V to A or B or C satisfy the *Kerridge v Foley* requirement because, when the original covenantee of each of these covenants, V, took the benefit of covenants over the lot sold to D, V, by reason of the assumptions made earlier, no longer owned any of the lots sold to A or B or C.

Whereas the current owner of the lot sold to D satisfied the *Kerridge v Foley* requirement and, accordingly, could enforce the benefit of the covenants sold to any of A, B and C, the current owners of these three lots, by not satisfying the *Kerridge v Foley* requirement, cannot enforce a restrictive covenant against the owner of the land sold to D.

It is for this reason that courts of equity developed the concept of a Scheme of Development or building scheme to overcome the harshness of the rule that the original covenantee must have owned the land benefited when the covenant was created.

SCHEMES OF DEVELOPMENT

A Scheme of Development (or a building scheme as it is often known) is an equitable modification of the rule that the original covenantee must have owned the land benefited when the covenant was created.

A Scheme of Development is a local law for the estate: *Reid v Bickerstaff* (1909). The existence or otherwise of a Scheme of Development is a question of fact: *Osborne v Bradley* (1903).

The essence of the scheme is that each purchaser should know when purchasing from a common vendor that the covenants entered into are to be enforceable by and against the owners of the other lots, for the time being. In order to gain the benefit of these mutual covenants, a person must show that the land is held under a Scheme of Development, and such a scheme is not created merely because an owner of an estate sells it in lots.

Elliston v Reacher (1908)

In *Elliston v Reacher*, Parker J stated that the requirements for such a scheme were fourfold:

- Both the plaintiff and defendant must take their respective titles from a common vendor.
- Prior to selling the lands to which the plaintiff and defendant are respectively entitled, the estate that is subject to the Scheme of Development must have been laid out by the vendor subject to restrictions intended to be imposed on all the lots, and which are consistent only with some general Scheme of Development.
- Each lot was sold by the common vendor to the initial purchaser on the basis that each lot was burdened for the benefit of each other lot.
- The current owners (ie, the plaintiff and the defendant) purchased their lots on the basis that the restrictions subject to which the purchases were made were for the benefit of the other lots included in the general scheme.

The Court of Appeal approved the view of Parker J, and the covenants were held to be enforceable even though not signed by any of the purchasers.

The modifications of Elliston v Reacher

The stringency of the four *Elliston v Reacher* requirements has been modified by subsequent case law. With the central concept being reciprocity of obligations, the four requirements have been seen to be a guide rather than a formula requiring strict compliance: *Re Application of Poltava Pty Ltd* (1982) at 167.

In *Baxter v Four Oaks Properties Ltd* (1965), where a vendor sub-divided lots according to the size required by individual purchasers, it was held that it was not necessary to satisfy the second requirement of *Elliston v Reacher* (ie, the requirement that prior to selling the lands the common vendor had laid out the estate in lots).

A Scheme of Development may be created by the collaboration of two or more landowners, each owning part of the subject land and each taking the

common form of covenant on the transfer of their respective lots: *Re Mack and the Conveyancing Act* (1975); *Re Dolphin's Conveyance* (1970).

In *Re Dolphin's Conveyance*, there were two successive vendors, the second taking over after the first died. In *Re Mack and the Conveyancing Act*, the land to be sub-divided was owned by two common vendors, and it was held that there can be a Scheme of Development even though there was no single common vendor, but two or more vendors.

As Professor Butt has observed at [1,766]:

> What is crucial is that each purchaser from the common vendor accepted that the covenants the purchaser gave were to ensure for the benefit of the vendor and those deriving title from the vendor, and that the purchaser correspondingly would enjoy the benefit of similar covenants entered into by all other purchasers: *Jamaica Mutual Life Assurance Society v Hillsborough Ltd* [1989] 1 WLR 1101 at 1106 (PC).

RESTRICTIVE COVENANTS UNDER TORRENS TITLE

Professor Woodman, at 345, has observed:

> Restrictive covenants are at first sight awkward intruders on the Torrens system. When that system was first designed the law relating to restrictive covenants was in its infancy, *Tulk v Moxhay* (1848) 2 Ph 744; 41 ER 1143 having been decided only in 1848.
>
> One of the basic principles of the Torrens system is that equitable interests should be kept behind a curtain and that, generally speaking, notice is irrelevant when considering the title of a registered proprietor; that registered proprietor holds his estate subject to those estates and interests as are recorded in the Register, and subject to the exceptions to indefeasibility of title.
>
> On the other hand, the law of restrictive covenants is based upon notice and, as the late Mr Baalman said: 'A branch of law which rests so heavily on the doctrine of notice cannot be grafted on to a tree which repudiates the doctrine without impairing the general health of the tree': *The Torrens System in New South Wales*, 1st edn, 197; 2nd edn, 239.

The notice requirement, when the restrictive covenant is under Torrens Title

Above, under the heading 'When will a restrictive covenant not be enforced under Old System Title?', it was observed that a restrictive covenant will not be enforced against a *bona fide* purchaser of the legal estate taking for value and without notice of the covenant, or against someone who is claiming through such a purchaser: *Wilkes v Spooner* (1911), because the general rule is that a person coming to the land with notice of a restrictive covenant will be bound by it.

The central features of Torrens Title are the Register and the concept of indefeasibility. Notice *per se* is not an exception to indefeasibility. Accordingly, under Torrens Title, a restrictive covenant will not be enforced against a registered purchaser, whether or not the registered purchaser had notice of the restrictive covenant, provided that the purchaser is not subject to any exception to indefeasibility.

Of course, where a restrictive covenant is already recorded on the Register, a purchaser will have notice of the restrictive covenant.

The operation of s 88(3) of the Conveyancing Act

Section 88(3) of the Conveyancing Act 1919 (NSW) provides:

> This section applies to land under the provisions of the Real Property Act 1900, and in respect thereof:
>
> (a) the Registrar-General shall have, and shall be deemed always to have had, power to record a restriction referred to in sub-section (1), in such manner as the Registrar-General considers appropriate, in the folio of the Register kept under that Act that relates to the land subject to the burden of the restriction, to record in like manner any dealing purporting to affect the operation of a restriction so recorded and to record in like manner any release, variation or modification of the restriction;
>
> (b) a recording in the Register kept under that Act of any such restriction shall not give the restriction any greater operation than it has under the dealing creating it; and
>
> (c) a restriction so recorded is an interest within the meaning of section 42 of that Act.

It follows that a restrictive covenant is simply a recording in the Register. Being recorded does not *per se* create an enforceable restrictive covenant.

The requirements that must be satisfied if a restrictive covenant burdening Torrens Title land is to be enforceable

To be enforceable it is necessary for the covenant to satisfy each of the following requirements:

- It must be restrictive within the meaning of *Tulk v Moxhay* (1848).
- The owner of the land burdened by the restrictive covenant must have purchased with notice of the restrictive covenant: *Tulk v Moxhay* (1848). Of course, where a restrictive covenant is already recorded on the Register, a purchaser will have notice of the restrictive covenant.
- The covenant must be registered because (subject to s 88B of the Conveyancing Act 1919 (NSW), which is discussed below under the heading 'The operation of s 88B'), in the absence of registration of the restrictive covenant, the owner of the land burdened has an indefeasible interest which prevails over unregistered interests, even if the owner of the land burdened purchased with notice of the restriction.

- The covenant, as a matter of construction, must not have used words that expressly exclude the operation of ss 70 and 70A of the Conveyancing Act 1919 (NSW): see above under the heading 'The operation of ss 70 and 70A of the Conveyancing Act'.
- The covenant must 'touch and concern' the land benefited: *Re Ballard's Conveyance* (1937); *Zetland (Marquess of) v Driver* (1939); *Ellison v O'Neill* (1968). Also, see above under the heading 'Touch and concern'.
- Where the land benefited by a covenant has been sub-divided, there must be clear words to the effect that the covenant benefits not only the land as a whole, but also the individual parts into which the whole has been sub-divided: *Ellison v O'Neill* (1968); *Re Arcade Hotel* (1962); *Coles Myer NSW Ltd v Dymocks Book Arcade Ltd* (1996). Also see above, under the heading 'Sub-division of the land benefited'.
- The original covenantee must have owned the land benefited at the time the covenant was created: *Kerridge v Foley* (1964); or alternatively there is a Scheme of Development or building scheme which overcomes the *Kerridge v Foley* (1964) requirement: *Elliston v Reacher* (1908). See above under the headings 'The *Kerridge v Foley* (1964) requirement' and 'Schemes of development'.
- The restrictive covenant must comply with s 88(1) of the Conveyancing Act 1919 (NSW): see below under the heading 'Compliance with s 88(1) where the covenant is recorded under s 88(3)'.

Equitable grounds upon which an injunction to restrain the breach of a restrictive covenant or alternatively equitable compensation may be refused include where:

- the plaintiff's inactivity in the face of open breaches of covenant has justified a reasonable belief that the plaintiff no longer intends to enforce the covenant: *Chatsworth Estates Co v Fewell* (1931); and
- where the character of a neighbourhood has so completely changed that the covenant has become valueless: *Nwakobi v Nzekwu* (1964).

Compliance with s 88(1) where the covenant is recorded under s 88(3)

Section 88(1) of the Conveyancing Act 1919 provides:

> (1) Whenever, in any deed of mortgage which is expressed to be made in pursuance of this Act, or in any mortgage under the Real Property Act 1900, the mortgagor employs the form of words contained in the first column of Part 1 of the Fourth Schedule, and distinguished by a number therein, such form of words shall imply a covenant by the mortgagor for himself or herself, his or her executors, administrators, and assigns, with the mortgagee, his or her executors, administrators, and assigns, in the terms contained in the second column of the said Schedule, and distinguished by the corresponding number.

(2) There may be introduced into, or annexed to, any form in the said first column any addition to, exception from, or qualification of the same; or any words in such column may be struck out or omitted; and a proviso which would give effect to the intention indicated by such addition, exception, qualification, striking out, or omission shall be taken to be added to the corresponding form in the second column.

(3) This section applies only to deeds made after the commencement of this Act and to mortgages made under the Real Property Act 1900, after the commencement of the Conveyancing (Amendment) Act 1930.

Section 88(1) of the Conveyancing Act 1919 provides that a restriction as to use of land or an easement may not be enforced against any person interested in the land, and *not being a party to its creation* – ie, the original covenantor – unless the instrument creating it clearly indicates:

- the land benefited by the restriction;
- the land burdened by the restriction;
- the persons (if any) having the right to release, vary or modify the restriction, other than the persons having, in the absence of agreement to the contrary, the right by law to release, vary or modify the restriction; and
- the persons (if any) whose consent to a release, variation or modification of the restriction is stipulated for.

Section 88(1) took effect in its present form on 1 January 1931. This section does not alter the law as to the substance of restrictive covenants, and applies to land both under Old System and Torrens Title.

Section 88(1) is only concerned with:

- restrictive covenants (ie, covenants enforceable in equity), since the burden of positive covenants does not run with the land at common law: *Re Louis and the Conveyancing Act* (1971) at 179;
- restrictions which are 'contained in an instrument';
- the persons *against* whom the restriction may be enforced, not the persons *by* whom it may be enforced, and it applies only where the restriction is enforced against a person who is not a party to its creation. Accordingly, the requirements of s 88(1) do not need to be satisfied where the covenant is enforced against the original covenantor.

Release, vary or modify

The owners of lots that enjoy the benefit of a restrictive covenant are usually necessary parties to any release, variation or modification of the restriction. Section 88(1), however, is designed to cover the situation where other persons are given rights to release, vary or modify.

Examples of situation where other persons are given rights to release, vary or modify include:

- a covenant that may be varied, released or modified by or with the consent of the transferor or its successors: *Re Barry and the Conveyancing Act* (1961);
- a covenant that may be released, varied or modified by the transferor or its executors, administrators or assigns: *Re Redmond and the Conveyancing Act* (1965); *Ellison v O'Neill* (1968).

Professor Woodman in *The Law of Real Property in New South Wales* at 341 suggests that:

> In the majority of cases, a statement that the covenant may be released, varied or modified by the 'transferor or his successors' is probably intended to mean that the action may be taken by the transferor whilst he is still the owner of the land benefited or by his successors in title when he has disposed of that land. If this is the intention, the words 'transferor or his successors' indicate the persons having by law the right to release, vary or modify the restriction, and there is no need to include such statement in the restriction ...
>
> In the absence of very clear drafting, the identification of the person or persons who may have rights in regard to the release, variation or modification of a restriction may prove rather difficult. With some diffidence, it is suggested that, whenever the word 'transferor' is used, either alone or in conjunction with other words, all persons holding land benefited by the covenant are necessary parties to its release, variation or modification.
>
> Technically, under s 88(1)(c) there appears to be no objection to the right of release being given exclusively to the covenantee or some third party, and, if so, an appropriate form of release, variation or modification will be effective: *Whitehouse v Hugh* [1906] 1 Ch 253; [1906] 2 Ch 283; *Mayner v Payne* [1914] 2 Ch 555; *Jones v Sherwood Hills Pty Ltd* [1975] NSWSC (unreported); and this applies also in the case of a Scheme of Development: *Elliston v Reacher* [1908] 2 Ch 374; [1908] 2 Ch 665.
>
> However, it can be argued that to give rights, in regard to restrictive covenants, of any kind to a third party is in conflict with the fundamental principles relating to the enforcement of such covenants. It has already been stated that a covenantee must retain some land, which can be protected by the restrictive covenantor: *Formby v Barker* [1903] 2 Ch 539; *Chambers v Randall* [1923] 1 Ch 149, 157; and an independent third party would not come within such description.
>
> There is also the further practical consideration that a purchaser of land, to which the benefit of a restrictive covenant is annexed, will show a marked lack of enthusiasm for a situation in which that covenant may be released, varied or modified without any reference to him, and the appropriate warning is found in *Jones v Sherwood Hills Pty Ltd* [1975] NSWSC (unreported); (1978) 52 Australian Law Journal 223.

Clearly indicated

To comply with the provisions of s 88(1), it must be possible to clearly identify the land to be benefited. This raises a difficult question, which is

discussed below under the heading 'Whether or not a restrictive covenant which is part of a Scheme of Development can comply with s 88(1)'.

The rationale of s 88(1) is to enable successors in title to land, where they are not themselves parties to a covenant, to be able to see clearly set out details of easements and covenants affecting their land. The phrase 'clearly indicated' as used in s 88(1) means 'point to' rather than 'state': *Goodwin v Papadopoulos* (1985) at 56,420, where the New South Wales Court of Appeal affirmed the correctness of *Papadopoulos v Goodwin* (1982) at 417, *per* Wootten J on this point. In this case, it was held to be sufficient that the instrument in question referred to another instrument in which the matters are clearly indicated.

Kerridge v Foley (1964) and s 88(1)

In *Kerridge v Foley*, it was held that the land benefited by the restrictive covenant was the whole of the land in a specified plan. The restrictive covenant provided that only one house should be erected upon each 40 feet (ie, 12 metres) of frontage to a particular street, and the frontage of the land burdened was 49 feet (ie, 14.7 metres).

The instrument creating the covenant stated that the land burdened was Lot 53 and the land benefited was Lots 52 and 54. The covenantee still owned Lot 52 and so, under general principles governing covenants, the covenantee could annex the benefit to that lot but, having already sold Lot 54, the covenantee was unable to annex the benefit of the covenant to that lot.

At the time of the conveyance, the vendor owned some but not all of the land in that plan. In the absence of evidence to establish a Scheme of Development, it was held that it could not be said that the instrument of conveyance clearly indicated the land to which the benefit of the restriction was appurtenant because it included land that was not benefited by the restriction.

The court was not satisfied that a certain meaning could be given to the covenant. Accordingly, as the defendants were not parties to the creation of the restriction, the restriction was not enforceable against them by virtue of the provisions of s 88(1).

Jacobs J held that, in expressing the land benefited as Lots 52 and 54, when only Lot 52 could in fact have been benefited, the instrument failed to 'clearly indicate' the land benefited for the purposes of s 88(1). The purchaser of Lot 52 was held, in the absence of a Scheme of Development, to be unable to enforce the covenant against the present owner of Lot 53, a successor of the original covenantor.

THE OPERATION OF S 88(1) AND WHETHER A RESTRICTIVE COVENANT THAT IS PART OF A SCHEME OF DEVELOPMENT CAN COMPLY

The enforceability of a restrictive covenant as 'an interest within the meaning of' s 42 of the Real Property Act is subject to compliance with the provisions of s 88(1) of the Conveyancing Act 1919. Accordingly, in order to be enforceable, a covenant must:

- be restrictive;
- be contained in an instrument;
- comply with s 88(1) insofar as it is to be enforced against a person who is not a party to its creation (the requirements of s 88(1) do not need to be satisfied where the covenant is enforced against the original covenantor); and
- comply with s 88(1) by clearly identifying the land to be benefited.

The interrelationship between a Scheme of Development and compliance with s 88(1) requires the examination of a number of cases decided at the appellate level.

Re Pirie and the Real Property Act (1961)

In *Re Pirie and the Real Property Act*, Jacobs J held that:

- the burden of a restriction which is of a kind different from that dealt with in s 88(1) of the Conveyancing Act 1919, namely restrictions of which the benefit is expressed to be annexed to other land, cannot be recorded in the Register by the Registrar-General, or be deemed to have been properly recorded by virtue of the provisions of s 88(3);
- the restrictions referred to in s 88(3) are limited to those complying with s 88(1);
- the restrictions referred to in s 88(3) are limited to those which fall within the general nature of covenants that are enforceable under the doctrine of *Tulk v Moxhay* (1848);
- mere compliance with the technical requirements of s 88(1) is not enough; and
- as the covenant in the present case was entered into before the enactment of s 88(1) and did not describe the land to which the benefit was intended to be appurtenant, the covenant was not enforceable against assigns of the original covenantor.

Pirie v Registrar-General (1962)

The case of *Re Pirie and the Real Property Act* (1961) went on appeal to the High Court, whose judgment is to be found in *Pirie v Registrar-General*

(1962). In relation to the High Court judgments, Professor Woodman at 346 has expressed the view that:

> *Pirie v Registrar-General* (1962) 109 CLR 619 is an extremely confusing case which produced a diversity of views, and it is not clear what was to be done by the Supreme Court when the matter was remitted to it by the High Court – the difficulty was solved by an application pursuant to s 89 of the Conveyancing Act 1919 in lieu of the original proceedings under s 121 of the Real Property Act.
>
> However, the majority of the Judges were of the opinion that s 88(3) relates only to a restriction of the same description as that to which s 88(1) is directed, that is to say, a restriction the benefit of which is intended to be annexed to other land, and enforceable in Equity under the doctrine of *Tulk v Moxhay* (1848) 2 Ph 774; 41 ER 1143.
>
> In this case, Kitto, Owen, Taylor and Windeyer JJ took the view that s 88(3) permits only the notification of covenants described in s 88(1). Bradbrook & Neave in their book *Easements and Restrictive Covenants in Australia*, Butterworths, 1981 at [1757] to [1760] have summarised the reasoning of the judges in *Pirie* as follows:
>
> Kitto J (at 629ff), with whom Owen J agreed, took a substantially similar view to that of Jacobs J in the Supreme Court of New South Wales. Section 88(1) applies only to an instrument, which by force of its own language discloses an intention that the benefit of the covenant should be annexed to other land. It does not apply to a covenant the benefit of which passes by virtue of the Scheme of Development doctrine or which the instrument makes assignable with other land. Section 88(3) permits only the notification of covenants coming within s 88(1) ...
>
> Windeyer and Taylor JJ accepted the wider view of s 88(1). Section 88(1) was not confined to cases of express annexation but to all cases where the covenantor intended the benefit of the covenant to pass, including the case where the benefit passed by virtue of the Scheme of Development doctrine ... Section 88(3) permitted the notification of covenants answering the description in s 88(1), that is covenants the benefit of which was intended to pass with the land. Thus a covenant the benefit of which passes by virtue of the Scheme of Development doctrine could be notified upon the Register ... The interpretation of Windeyer and Taylor JJ means that a covenant the benefit of which passes by virtue of the Scheme of Development doctrine would now have to satisfy the requirements of s 88(1), and would be capable of being notified upon the Registrar ...
>
> Menzies J (at 644) ... unlike the other members of the court he did not take the view that the restrictive covenants which could be notified upon the Register were confined to those coming within s 88(1) ... Since there was no evidence of the existence of a Scheme of Development in *Pirie's* case, all comments on the applicability of the Scheme of Development doctrine to Torrens system land are *obiter*.

Re Martyn (1965)

In *Re Martyn*, restrictive covenants had been imposed on Torrens Title land as part of an intended Scheme of Development. The dealings that created the covenants, however, contained no statement of the land to which the benefit of the covenant was appurtenant, nor did they give any indication that a Scheme of Development was intended.

In *Re Martyn*, the majority of the Full Court of the New South Wales Supreme Court, it was held by Walsh J, with whom Asprey J agreed (Hardie J dissenting):

- the covenant in question was unenforceable for breach of the requirement in s 88(1) to clearly indicate the land benefited;
- in this case, the restriction was contained in a transfer made prior to 1 July 1920, which did not state or clearly indicate if the land to be benefited was unenforceable against successors in title of the covenantor;
- this deficiency could not be overcome by recourse to the extrinsic fact of a Scheme of Development in an attempt to show the land intended to be benefited, even though in this case a common building scheme was in existence;
- s 88(3) refers only to restrictions of the type mentioned in s 88(1), which expressly requires that the instrument must clearly indicate the land to which the benefit of the covenant is appurtenant;
- this is so whether the covenant was created before or after the provisions of the Conveyancing Act 1919 came into force;
- s 88(3) only operates to enable a restriction that is created by an instrument to be enforced; and
- by way of *obiter dictum* that s 88(3) does not operate to enable a restriction in a Scheme of Development to be enforced.

Professor Butt at [1,775] has suggested that:

> Behind the decision lies the premise that rights and obligations in respect of covenants over Torrens Title land cannot be allowed to arise by implication from material extraneous to the Register. On the contrary, the Registrar-General's 'notification of the restriction' [as s 88(3) was worded at the time of the decision] must contain 'the information necessary to enable a person who subsequently searches the title to become aware of the nature and extent of the restriction which is notified', and must 'refer in some way to the circumstances upon which the enforceability of the restriction depends' ...
>
> On the facts, the dealing creating the covenant contained 'no statement, express or implied, of any circumstances showing that there was a building scheme or that there was any connection between the sale of the lot to which this [dealing] related and the sale of any other lots.
>
> *Re Martyn* does not deny the possibility of an enforceable Scheme of Development over Torrens Title land. But it makes it highly unlikely, for the

clear inference from the majority's decision is that even a covenant that complies in form with s 88(1) is not enforceable under the principles governing a Scheme of Development unless all the necessary details of the scheme and the land affected by it can be found on search of the Register.

Re Louis and the Conveyancing Act (1971)

In *Re Louis and the Conveyancing Act*, Jacobs JA maintained the view that he had previously expressed in *Re Pirie and the Real Property Act* (1961), that in relation to successors in title, s 88(3) only operates to make Torrens Title land subject to the burden of a restriction where the instrument purporting to create the restriction describes the land to which the benefit of the restriction is appurtenant.

In this case, there were 47 lots in the sub-division. They can be distinguished as follows:

- 10 lots were transferred prior to 1 July 1920. These covenants did not indicate the land to which the benefit of the restriction was appurtenant;
- 20 lots were transferred after 1 July 1920, but before transfer of the lot owned by the applicant. These covenants were stated to be appurtenant to the whole of the land comprised in the deposited plan and the language of the covenant made it clear that the land intended to be benefited was the whole of the land and each part thereof;
- one lot was owned by the applicant, who had made an application for a declaration that the covenant imposed on the lot was not enforceable or, if it was enforceable, for an order extinguishing or modifying it; and
- 16 lots were transferred after 1 July 1920, and after the transfer of the lot to the predecessor of the applicant. The covenants given by the purchasers of these lots made it clear that the land benefited was the whole of the land and each part thereof.

It was assumed, but not conceded, that the conditions necessary for the existence of a Scheme of Development had been met. This enabled certain questions of law to be determined as preliminary points.

Professor Woodman at 351–53 has identified nine principles enunciated by Jacobs JA in the course of His Honour's Reasons for Judgment. They are as follows:

(1) In regard to the lots marked D [ie, the 16 lots], the transfers were subsequent to the transfer of lot C [ie, the one lot], so that the covenants were subsequent to and complied with the provisions of s 88(1). Hence they fell within the provisions of s 88(3) and, subject to any question arising because of lack of reciprocity, would be enforced against lot C, whether or not a Scheme of Development either existed or was effective.

In such situations the existence of a Scheme of Development is not necessary since the owners of the lots have the benefit of restrictions arising from covenants, which run with the land; they are assignees of the benefit of the covenant in accordance with the doctrine of *Tulk v Moxhay*

(1848) 2 Ph 774; 41 ER 1143. It is convenient to mention here that there is an apparent conflict with the interpretation given to s 88(1)(a) in *Kerridge v Foley* (1904) 82 WN (Pt 1) (NSW) 293; the covenants were expressed to be for the benefit of the whole of the land comprised in the Deposited Plan but, as many of the lots had already been sold by the common vendor, the land to be benefited was not 'clearly indicated'.

The result seems to be that, where a Scheme of Development exists, it is no objection that covenants entered into by the respective purchasers are expressed to be for the benefit of land no longer owned by the vendor-covenantee, and this represents an exception to the interpretation of s 88(1)(a) laid down in *Kerridge v Foley* (1964) 82 WN (Pt 1) (NSW) 293. Indeed, His Honour's approach suggests that, where there is a Scheme of Development, it is necessary to indicate expressly that the benefit is annexed to all of the lots in the sub-division, including those already sold, in order that the instrument would comply with s 88(1).

(2) As to whether the doctrine of the Scheme of Development can apply to land under the Real Property Act, His Honour stated at 177: 'The subject is a difficult one but I state my conclusion at the outset – Yes, provided the restriction purports to be created by an instrument and that instrument upon which the notification of the restriction in the register is based indicates the land to which the benefit is intended to be appurtenant and all the other terms of the restriction, including the persons (if any) intended to have the right to release, vary or modify the restriction and the persons (if any) whose consent to a release, variation or modification of the restriction is intended to be stipulated for. The reasons for this conclusion were then given at length.

(3) Section 88(3) can only apply in order to subject land under the Real Property Act to the burden of a restriction when the instrument purporting to create the restriction describes the land to which the benefit of the restriction is appurtenant.

(4) Section 88(3) does not permit recording in the Register of restrictions which were wholly ineffective except between the immediate parties thereto, and which do not satisfy the terms of s 88(1).

(5) The general rule is that the benefit of restrictive covenant enures in favour of subsequent purchasers, they being assignees of the benefit of the covenant, but earlier purchasers, although bound by the burden of the covenant in favour of the vendor and subsequent purchasers, do not obtain a reciprocal benefit. This general rule, however, does not apply where a Scheme of Development extends the doctrine of *Tulk v Moxhay* (1848) 2 Ph 774; 41 ER 1143 so that earlier purchasers are not only bound by the covenants of the common scheme vis à vis the later purchasers but also have the benefit of the covenants entered into by the later purchasers.

(6) There are two different situations in which it may be necessary to involve the doctrine of the Scheme of Development:

(a) where there are the requisite intention, the necessary steps taken and the necessary notice in the parties but where the documentation is either non-existent or inadequate; and

(b) where there are the necessary intention, the necessary steps, the necessary knowledge in the parties, and adequate documentation but where the earlier purchasers cannot enjoy the benefit of the covenant. This is the situation to which the Scheme of Development doctrine is primarily directed.

(7) Section 88 is a section, which is concerned with form, not with substance, and the substantial effectiveness of a covenant remains a matter of the general principles of law and equity. If, therefore, the benefit of the restriction is not appurtenant to the whole of the land described, the restriction will have no effect: *Kerridge v Foley* (1964) 82 WN (Pt 1) (NSW) 293; although there is no objection to a restriction being made appurtenant to several parts of land: *Zetland (Marquess of) v Driver* [1939] Ch 1; *Ellison v O'Neill* (1968) 88 WN (Pt 1) (NSW) 213. In the case of a Scheme of Development, of necessity the restrictions are intended to bind the whole of the land and its several parts.

(8) Section 88(3)(b) neutralizes the effect of registration and does not codify the extent of operation of a restriction. In other words, recording in the Register does not extend the operable effect of a restriction, which still depends for its efficacy upon the relevant legal and equitable principles.

(9) There is no reason why the language of s 88(3) should not also extend to the equitable rights and duties which arise from the extension of the doctrine of *Tulk v Moxhay* (1848) 2 Ph 774; 41 ER 1143 to give the benefit of restrictive covenants to prior purchasers.

Jacobs JA formed the view that if the formal requirements of s 88(1) were satisfied and if the existence of a Scheme of Development could be proved, then a restrictive covenant will satisfy the provisions of s 88(1) and consequently be deemed to have been properly recorded by virtue of the provisions of s 88(3), even though the validity of the restrictive covenant depends upon the existence of the Scheme of Development.

On the other hand, Jacobs JA formed the view that the restrictive covenants in relation to the 10 lots which were transferred prior to 1 July 1920 and which did not indicate the land to which the benefit of the restriction was appurtenant were not enforceable, because s 88(3) only deals with the recording of restrictions where the land to be benefited is 'clearly indicated'.

Helsham J agreed with the views of Jacobs JA, whilst McLelland CJ in Eq followed the *obiter dictum* view of the majority in *Re Martyn* (1965) that s 88(3) does not operate to enable a restriction in a Scheme of Development to be enforced.

The majority of the Court of Appeal in *Re Louis and the Conveyancing Act* (1971) thus held that:

- the Registrar-General only has power to record restrictive covenants in the Register that comply with the provisions of s 88(1);
- compliance with s 88(1) requires the land benefited and burdened to be clearly indicated;

- the retrospective operation of s 88(3) is limited to the extent that the restrictive covenant that is recorded in the Register complies with the provisions of s 88(1);
- the recording in the Register of a restrictive covenant where the instrument did not clearly indicate the land to be benefited was a recording not authorised by the Act and, accordingly, the recording does not give the restriction any greater operation than it otherwise would have;
- following the decision in *Re Martyn* (1965), the Registrar-General will, on application, remove from the Register recordings of restrictive covenants that do not show an intention to annex the benefit of the covenants to ascertainable land;
- a Scheme of Development can apply to land under Torrens Title, provided that the restriction to be imposed on each lot purports to be created by an instrument, and that instrument satisfies the requirements of s 88(1) of the Conveyancing Act 1919; and
- in such a case, the restriction may be enforced not only by subsequent purchasers from the common vendor, but also by prior purchasers who are bound to depend upon proof of a Scheme of Development, provided that the person seeking to enforce the scheme is also personally bound, which will be the case provided that there is an authorised recording in the Register.

While this represents the current law in New South Wales in relation to these principles, it should be clearly noted that the majority decision in *Re Louis and the Conveyancing Act* (1971) is in conflict with *obiter* observations in *Pirie v Registrar-General* (1962) and in *Re Martyn* (1965).

Whether or not a restrictive covenant that is part of a Scheme of Development can comply with s 88(1)

From the above analysis of *Re Pirie and the Real Property Act* (1961), *Re Martyn* (1965) and *Re Louis and the Conveyancing Act* (1971), it can be seen that there is a fundamental difference of opinion as to whether or not a restrictive covenant that is part of a Scheme of Development can comply with s 88(1).

Re Pirie and the Real Property Act (1961) is the only High Court case where this question has been considered. There, Windeyer and Taylor JJ held that a restrictive covenant that complies with s 88(1) as to form satisfies s 88(1) even though it is necessary to adduce extrinsic evidence to prove the existence of a Scheme of Development.

On the other hand, Kitto and Owen JJ in *Re Pirie and the Real Property Act* (1961) held that the need to adduce extrinsic evidence to prove the existence of a Scheme of Development means that a restrictive covenant that is part of a Scheme of Development can never comply with s 88(1). The fifth judge in *Re Pirie and the Real Property Act* (1961), Menzies J, did not express a view on the point.

In *Re Martyn* (1965), the majority of the Full Court of the Supreme Court expressed *obiter dicta* in favour of the Kitto/Owen view in *Re Pirie and the Real Property Act* (1961).

In *Re Louis and the Conveyancing Act* (1971), the majority of the New South Wales Court of Appeal declined to follow the *obiter dicta* of the majority in *Re Martyn* (1965). The majority in *Re Louis and the Conveyancing Act* (1971) applied the Windeyer/Taylor view in *Re Pirie and the Real Property Act* (1961) to the facts of *Re Louis and the Conveyancing Act* (1971).

It follows that the present position in New South Wales is based on the Windeyer/Taylor view. Having said that, however, it would be open to a future High Court to revisit the matter. In such circumstances, either the Windeyer/Taylor view or the Kitto/Owen view might be preferred.

The operation of s 88B

Since 1964, it has been possible for a restrictive covenant to be created as part of a sub-division. Section 88B of the Conveyancing Act 1919 (NSW), which was enacted by the Local Government and Conveyancing (Amendment) Act 1964, has enacted a new method of sub-dividing land, which, in turn, has enabled restrictive covenants and easements to be created as part of the sub-division.

Section 88B constitutes a fundamental change in the law relating to the creation and enforceability of restrictive covenants, permitting restrictive covenants to be established by private developers. On the other hand, it has the effect of a planning law of a public character.

Since the enactment of s 88B, any restrictive covenant which is created as part of a sub-division, pursuant to s 196 of the Act and complies with the requirements of s 88 is enforceable, whether or not any of the other requirements listed above under the heading 'The requirements that must be satisfied if a restrictive covenant burdening Torrens Title land is to be enforceable' have or have not been satisfied.

A restrictive covenant created pursuant to s 88B is enforceable even though the land benefited and the land burdened may be in the same ownership at the time of registration of the plan, notwithstanding any rule of law or equity in that behalf, under s 88B(3)(c)(ii). Section 88B(3)(c)(iii) provides that any supervening unity of ownership does not extinguish the restriction, and s 88B(4) provides that restrictions as to user so created have effect as if contained in a deed.

The necessity for compliance with s 88 of the Act makes it clear that the section does not validate a covenant that would otherwise be invalid. As a result, the covenant must still touch and concern the land of the covenantee.

The Registrar-General, when creating a folio of the Register kept under the Real Property Act for land burdened by any restrictive covenant created pursuant to s 88B(3), should record the restrictive covenant in the certificate

of title of the land burdened: s 88B(3A). If, however, the Registrar-General omits to make such recording, the restriction covenant is enforceable against the registered proprietor by virtue of the decision in *Pratten v Warringah Shire Council* (1969), because the wording of s 88B makes it enforceable regardless of whether or not it has been recorded on the Register.

It follows that a prospective purchaser, when acquiring land which is part of a sub-division made under s 196 of the Conveyancing Act 1919, should search the deposited plan to ascertain whether any restrictive covenant created on registration of the plan will prevail over the otherwise indefeasible title obtained by that prospective purchaser on registration.

Other legislative amendments to the Conveyancing Act in relation to restrictive covenants

In 1972, the New South Wales Parliament amended the Conveyancing Act 1919 (NSW) by adding ss 88C and 88D to the Act. In 1976, s 88E was added.

Section 88C of the Conveyancing Act 1919

Section 88C provides that the erection of a building of brick veneer construction, where the outer wall consists of brick having a thickness of at least 76mm, does not breach a covenant whereby no building shall be erected unless having *walls* of brick.

Section 88D of the Conveyancing Act 1919

Section 88D enables any public or local authority to have the benefit of what may be described as covenants in gross. This section was directed at remedying the situation that arose in *Commissioner for Main Roads v BP Australia Ltd* (1964). There, the Commissioner for Main Roads was the registered proprietor of certain land, part of which became vested in the local council pursuant to a proclamation under s 8(1) of the Main Roads Act 1924. The balance of the land remained vested in the Commissioner, who sought to enforce the covenant against an assignee of the covenantor.

The Full Court of the Supreme Court held that:

- the Commissioner had no relevant interest in most of the land benefited; and
- the covenant could not reasonably be regarded as protecting or benefiting the remaining land vested in the Commissioner.

Section 88D(2) now provides that where the Governor considers it to be in the public interest so to do, the Governor may restrict the user of land vested in a prescribed authority (defined as the Crown, a public or local authority constituted by an Act, or a corporation prescribed for the purposes of the section), by publishing an order in the Government Gazette which:

- describes the land in a manner enabling it to be identified and specifies, in the case of land under the provisions of the Real Property Act, the reference to the folio of the Register or the registered dealing that evidences the title to that land;
- specifies the terms of the restriction; and
- specifies the prescribed authority in which the land is vested.

Such a restriction has no force unless the Registrar-General makes a recording in the Register of the restriction. The order takes effect upon being recorded or registered, but only if the land to which the restriction relates is vested in the prescribed authority specified in the order at the time when the order is recorded or registered: s 88D(5).

The restriction having taken effect, the prescribed authority specified in the order by which the restriction was imposed may enforce the restriction against a person claiming an interest in the land described in the order as if that person had entered into a binding covenant with that prescribed authority to observe the restriction: s 88D(8).

This does not authorise enforcement against a person claiming an interest in the land of such restriction where that person is a person who, at the time that restriction took effect, had acquired that interest or had acquired or become entitled to an option to purchase that interest or is a person claiming that interest through or under such a person: s 88D(9).

The order may be rescinded or revoked in relation to the whole of the land described in the order or any part thereof: s 88D(11).

A restriction as to the user of land imposed under s 88D(2) may be varied by an agreement in writing between the prescribed authority specified in the order by which the restriction was imposed and the person or persons against whom the restriction is enforceable: s 88D(13).

Section 88E of the Conveyancing Act 1919

Section 88D enabled a prescribed authority to take the benefit of a restriction as to the user of land in circumstances where, because the benefit of the restriction is not annexed to other land owned by the prescribed authority under the law as it existed prior to the enactment of s 88D, the restriction could not be enforced against successors in title to the land to which the restriction related.

Section 88E was designed to:

- extend the class of bodies capable of employing the machinery of s 88D to include corporations prescribed for the purposes of the section, such as companies formed for the purposes of conservation; and
- enable any restriction so imposed to be varied by mutual agreement between the landowner and the restricting authority.

Unlike s 88D, which enables a restriction as to user to be imposed only upon land already owned by a prescribed authority, s 88E enables a similar

restriction to be imposed by agreement between a prescribed authority and a landowner.

Sub-sections (3) and (4) provide that a restriction takes effect when it is recorded in the Register where the land is under the Real Property Act. It is enforceable by the prescribed authority against any person who is, or claims under, a signatory to the memorandum or deed which imposed the restriction as if that covenant with the prescribed authority to observe the restriction: s 88E(5). A restriction so created is an interest in the land for the purposes of s 42 of the Real Property Act: s 88E(6).

The prescribed authority entitled to enforce the restriction, and varied with the written consent of each person against whom the restriction is enforceable, may release the restriction: s 88E(7).

An injunction as a remedy for the breach of a restrictive covenant

The owner of land benefited by a covenant may seek an injunction to restrain a threatened breach of the covenant, provided that the owner is able to prove that the breach will cause 'imminent and substantial damage': Bradbrook and Neave, *Easements and Restrictive Covenants in Australia*, 2nd edn, 1981, Sydney, Butterworths, pp 456–63.

Where a breach of a covenant has already occurred, the owner of the benefited land may seek an injunction to restrain continuance of the breach: *Doherty v Allman* (1878) at 719, *per* Lord Cairns.

The court retains discretion to decline relief on equitable grounds such as laches and delay. Examples of such situations include:

- *Shepherd Homes Ltd v Sandham* (1971), where a five month delay led the court to decline to order a mandatory interlocutory injunction to remove a fence;
- *Shaw v Applegate* (1977), where acquiescence in the breach by the plaintiff and hardship for the defendant led the court to decline to grant an injunction; and
- *Marten v Flight Refuelling Ltd* (1962), where a lack of utility in making the order led the court to decline to grant an injunction.

The court may award equitable damages in lieu of granting an injunction: *Shepherd Homes Ltd v Sandham* (1971) at 346; *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* (1974).

Damages as a remedy for the breach of a restrictive covenant

Damages may be available for breach of a covenant. Where the action is taken against the original covenantor, damages should be sought at common law.

On the other hand, where the action is against a successor of the original covenantor, damages must be sought in equity. Courts of Equity have jurisdiction to grant damages in lieu of, or in addition to, an injunction: *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* (1974). See generally Bradbrook and Neave, *Easements and Restrictive Covenants in Australia*, 2nd edn, 1981, Sydney, Butterworths, pp 465–81.

EXTINGUISHMENT OF RESTRICTIVE COVENANTS

A restrictive covenant may be released by:

- express release;
- implied release;
- operation of law;
- a court order pursuant to s 89 of the Conveyancing Act; or
- the operation of s 28 of the Environmental Planning and Assessment Act 1979 (NSW).

Express release

An express release of a restrictive covenant burdening land under Old System title must be by deed, under s 23B(1) of the Conveyancing Act 1919. In relation to land under the provisions of the Real Property Act, a deed of release is executed and lodged with the Registrar-General.

Where a third party has been given a right to release, vary or modify a covenant, prospective purchasers of land with the benefit of a restrictive covenant must appreciate that they retain little control: *Elliston v Reacher* (1908); *Jones v Sherwood Hills Pty Ltd* (1975).

Implied release

A covenant may be released impliedly where:

- there has been a long course of usage which is wholly inconsistent with the continued existence of the covenant: *Hepworth v Pickles* (1900); *Bohn v Miller Bros Pty Ltd* (1953); *Attorney General of Hong Kong v Fairfax Ltd* (1997);
- the owner of the land benefited has shown a continued disregard for any breaches such as to justify a reasonable person in believing that future breaches would be ignored: *Chatsworth Estates Co v Fewell* (1931) at 231–32; or
- there has been a change in the character of the neighbourhood to such a degree that there is no longer any value left in the covenant: *Application of Fox* (1981) at 9,320.

On the other hand, mere inactivity in the face of a breach will not amount to an implied release of the covenant: *Application of Fox* at 9,320.

Operation of law

A restrictive covenant does not survive unity of ownership of the land benefited by the restriction and the land burdened thereby: *Kerridge v Foley* (1964); *Re Tiltwood, Sussex; Barrett v Bond* (1978).

This general rule does not apply in the case of schemes of development because, where a number of people have agreed that all their properties shall be subject to a 'local law' the provisions of which shall be enforceable by any owner for the time being of any part against any other owner and the whole area has never at any time come into common ownership, an action by one owner of a part against another owner of a part must fail if it can be shown that both parts were either at the inception of the scheme or at any time subsequently in common ownership: *Texaco Antilles Ltd v Kernochan* (1973); *Post Investments Pty Ltd v Wilson* (1990).

It has been held that this general rule also does not apply where the restriction as to user is created under the provisions of s 88B(3) of the Conveyancing Act 1919 or is recorded on the Register: *Post Investments Pty Ltd v Wilson* (1990). This determination is open to question. As Professor Butt has argued at [1,778]:

> Whether a restrictive covenant that is recorded in the Torrens register is extinguished when the benefited and burdened lands come into common ownership is open to dispute. At least one reported case has assumed that a covenant is extinguished in those circumstances. *Gyarfas v Bray* (1990) NSW Conv R 55-519 at 58,883.
>
> But another case has held, after careful consideration, that no extinguishment occurs, on the reasoning that under s 88(3) of the Conveyancing Act 1919, a covenant recorded in the Register is an 'interest' within s 42 of the Real Property Act, and enjoys the same protection accorded to other interests appearing in the Register. *Post Investments Pty Ltd v Wilson* (1990) 26 NSWLR 598 at 636.
>
> This reasoning seems open to the criticism that under s 88(3) covenants are merely 'recorded', not registered; their enforceability remains subject to general principles governing covenants.
>
> On the other hand, the holding reflects the view that the Torrens system is built on confidence in the Register; and it has the practical benefit of obviating retrospective searches of title to the lands benefited and burdened – searches which would otherwise be required to establish whether a covenant which appears in the Register still exists in law.

Where the land benefited and the land burdened is held under the Torrens system, the covenant should be removed from the Register upon unity of ownership. Where, however, the restrictive covenant remains on the title of the burdened land and a third party purchases the burdened land, the third party is bound by the covenant because it is still recorded on the Register,

assuming that *Re Standard and the Conveyancing Act* (1967) and *Post Investments Pty Ltd v Wilson* (1990) have been correctly decided.

A restrictive covenant extinguished by common ownership and occupancy does not revive if the land later reverts to separate ownership, unless the common owner re-creates them: *Post Investments Pty Ltd v Wilson* (1990) at 632–33; *Texaco Antilles Ltd v Kernochan* (1973) at 626.

Court order pursuant to s 89 of the Conveyancing Act

Section 89 of the Conveyancing Act 1919 (NSW) provides:

> (1) Where land is subject to an easement or a profit *à prendre* or to a restriction or an obligation arising under covenant or otherwise as to the user thereof, the Court may from time to time, on the application of any person interested in the land, by order modify or wholly or partially extinguish the easement, profit *à prendre*, restriction or obligation upon being satisfied:
>
> (a) that by reason of change in the user of any land having the benefit of the easement, profit *à prendre*, restriction or obligation, or in the character of the neighbourhood or other circumstances of the case which the Court may deem material, the easement, profit *à prendre*, restriction or an obligation ought to be deemed obsolete, or that the continued existence thereof would impede the reasonable user of the land subject to the easement, profit *à prendre*, restriction or obligation without securing practical benefit to the persons entitled to the easement or profit *à prendre* or to the benefit of the restriction or obligation, or would, unless modified, so impede such user, or
>
> (b) that the persons of the age of 18 years or upwards and of full capacity for the time being or from time to time entitled to the easement or profit *à prendre* or to the benefit of the restriction, whether in respect of estates in fee simple or any lesser estates or interests in the land to which the easement, the profit *à prendre* or the benefit of the restriction is annexed, have agreed to the easement, profit *à prendre*, restriction or obligation being modified or wholly or partially extinguished, or by their acts or omissions may reasonably be considered to have abandoned the easement or profit *à prendre* wholly or in part or waived the benefit of the restriction wholly or in part,
>
> (b1) in the case of an obligation:
>
> (i) that the prescribed authority entitled to the benefit of the obligation has agreed to the obligation's being modified or wholly or partially extinguished or by its acts or omissions may reasonably be considered to have waived the benefit of the obligation wholly or in part, or
>
> (ii) that the obligation has become unreasonably expensive or unreasonably onerous to perform when compared with the benefit of its performance to the authority, or

(c) that the proposed modification or extinguishment will not substantially injure the persons entitled to the easement or profit à prendre, or to the benefit of the restriction or obligation.

(2) Where any proceedings are instituted to enforce an easement, profit *à prendre*, restriction or obligation, or to enforce any rights arising out of a breach of any restriction or obligation, any person against whom the proceedings are instituted may in such proceedings apply to the Court for an order under this section.

(3) The Court may on the application of any person interested make an order declaring whether or not in any particular case any land is affected by an easement, profit *à prendre*, restriction or obligation, and the nature and extent thereof, and whether the same is enforceable, and if so by whom.

(4) Notice of any application made under this section shall, if the Court so directs, be given to the council of the area (within the meaning of the Local Government Act 1993) in which the land is situated, and to such other persons and in such manner, whether by advertisement or otherwise, as may be prescribed by rules of Court or as the Court may order.

(5) An order under this section shall, when registered as in this section provided, be binding on all persons, whether of full age or capacity or not, then entitled or thereafter becoming entitled to the easement or profit *à prendre*, or interested in enforcing the restriction or obligation and whether such persons are parties to the proceedings or have been served with notice or not.

(6) This section applies to easements, profits *à prendre* and restrictions existing at the commencement of the Conveyancing (Amendment) Act 1930, or coming into existence after such commencement.

(7) An order under this section affecting land not under the provisions of the Real Property Act 1900 may be registered in the General Register of Deeds. No such order shall release or bind any land until it is so registered.

(8) This section applies to land under the provisions of the Real Property Act 1900, and the Registrar-General shall, on application made in the form approved under that Act, make all necessary recordings in the Register kept under that Act for giving effect to the order. For the purposes of this sub-section, a grant, certificate of title or duplicate registered dealing that is not in the possession of the Registrar-General shall be deemed to be wrongfully retained within the meaning of section 136 of the Real Property Act 1900.

(9) In the case of land which is not under the provisions of the Real Property Act 1900, a memorandum of such order shall be endorsed on such of the instruments of title as the Court directs.

The section envisages four situations, which are:

- changes in the user of the land having the benefit of the restrictive covenant, or in the character of the neighbourhood or other

circumstances, by virtue of which the restrictive covenant is rendered obsolete;

- situations where the continued existence of the restrictive covenant will impede the reasonable user of the land subject to the restrictive covenant without securing practical benefit to the persons entitled to the benefit of the restriction;
- an agreement or waiver by persons of full age and capacity for the time being entitled to the benefit of the restrictive covenant; and
- where the modification or extinguishment will not substantially injure the persons entitled to the benefit of the restrictive covenant.

Cases such as *Re Ghey and Galton's Application* (1957); *Driscoll v Church Commissioners for England* (1957); and *Re Truman Hanbury Buxton & Co Ltd's Application* (1956) make it clear that the purpose of the section is to enable covenants which have no practical utility to the land intended to be benefited to be removed.

Meaning of the expression 'the court may'

The New South Wales Court of Appeal has held that the court retains discretion to refuse to make an order modifying or extinguishing a covenant even though one or more of the grounds under s 89 has been made out: *Pieper v Edwards* (1982).

Professor Butt at [1,789] has observed that:

> This is also the view in other jurisdictions with comparable legislation. For example, England (*Driscoll v Church Commissioners for England* [1957] 1 QB 330; *Re Ghey and Galton's Application* [1957] 2 QB 650 at 659–60), Victoria (*Greenwood v Burrows* (1992) V Conv R 54-444 at 65,193, 65,200) and New Zealand (*C Hunton Ltd v Swire* [1969] NZLR 232).

It should, however, be noted that the High Court has regarded the question as open in *Treweeke v 36 Wolseley Road Pty Ltd* (1973) at 286, 302.

This approach of the New South Wales Court of Appeal is consistent with the approach of the Western Australian Supreme Court. In *Perth Construction Pty Ltd v Mount Lawley Pty Ltd* (1955), Virtue J, in dealing with a similarly worded section, queried whether there is a discretion to refuse relief when the applicant brings himself within the words of the section and said that he was by no means satisfied that such discretion does not exist.

The New South Wales Court of Appeal approach in *Pieper v Edwards* (1982) involved a departure from the earlier New South Wales position that no discretion existed: *Re Rose Bay Bowling and Recreation Club Ltd* (1935) at 78, in which the court had held that:

- the only question for consideration was whether, on the evidence adduced, the court was or ought to have been satisfied that the case fell within one of the three paragraphs mentioned in the sub-section;

- if so, the powers given by the section ought to be exercised by the court; and
- this was so even though to do so involved interference with contractual rights and expropriation of property without compensation (ie, the word may in the section should be read as *ought* when the conditions prescribed in s 89(1)(a)(b)(c) existed).

Pieper v Edwards (1982) is authority that relevant factors in its exercise include:

- the history of the property;
- the conduct of the respective owners of the land benefited and burdened;
- the acts of prior owners;
- the state of the Register; and
- the extent to which the parties purchased on the faith of the covenant.

Who pays the legal costs of the application?

Any person interested in the land, including the original covenantor, assuming that person has retained the burdened land, may make application under s 89: *Re Markin* (1966). Usually, the applicant under s 89 will be required to pay the costs of the objectors, even where the applicant succeeds in having the covenant (or easement) modified or extinguished. The objectors are entitled to the costs of defending their proprietary rights: *Re Rose Bay Bowling and Recreation Club Ltd* (1935); *Re Spotswood* (1926); *Re Ulman* (1985); *Re Eddowes* (1991) at 396–97. The reason for this is that the applicant is asking the court to make an order for the benefit of the applicant, which involves the extinguishment or modification of another person's rights.

Meaning of the expression 'obsolete'

A restrictive covenant cannot be deemed *obsolete* as long as the object of the restrictive covenant is still capable of fulfilment and affords a real protection to those entitled to enforce it. In *Re Truman Hanbury Buxton & Co Ltd's Application* (1956), the Court of Appeal held that:

- if the character of an estate as a whole changes over time, then there will come a time when the purpose of the covenant can no longer be achieved;
- when that time comes, the covenant has become obsolete;
- on the facts of the case at the time of the application, the object of the covenant was still capable of fulfillment and afforded a real protection to those entitled to enforce it;
- it was not possible to say that the covenant had become obsolete. The change in the particular circumstances did not render the covenant obsolete.

Meaning of the expression 'not substantially injure'

In *Re Mason and the Conveyancing Act* (1960), the Supreme Court of New South Wales was faced with a restrictive covenant that provided *inter alia* that no building of more than one storey plus basement could be erected on the land. A three storey block of home units owned by the plaintiff had replaced this.

The applicants proposed to erect a three storey block of home units on the land and sought the modification of the restrictive covenant.

Evidence was adduced that:

- the immediate area had previously been predominantly one of single units of residence but that the subject land was now virtually surrounded by three storey block of home units;
- the proposed home units would decrease the value of P's land by £1,500; and
- the subject land was a block steeply sloping to the west and that if the proposed units were erected on it, the view and privacy of the occupants on the western side of the plaintiff's units would be substantially, if not wholly, excluded.

Jacobs J held that:

- 'obsolete' was defined as meaning 'incapable of fulfillment or perhaps that it serves no present useful purpose';
- in the circumstances, the covenant could not be considered obsolete or secure no practical benefit within the meaning of s 89(1)(a);
- the word 'substantial' does not mean 'large' or 'considerable', but an injury which has present substance; not a theoretical injury but something real. It is not a word which introduces a comparison between the disadvantage to the land subject to the burden of the covenant and the disadvantage to the land benefited if the restriction were modified; and
- it could not be said that the covenant could not be modified without causing some substantial injury within the meaning of s 89(1)(c).

The grounds set out in s 89(1)(c) are wide and not limited by paras (a) and (b): *Re PM Williams and the Conveyancing Act* (1958).

Meaning of the expression 'the neighbourhood'

What constitutes the neighbourhood depends upon the facts of each case: *Re AR Wilson and the Conveyancing Acts* (1949).

To whom does the court give standing to oppose an application under s 89?

The court must construe the covenant to determine who are the persons entitled to the benefit of the restriction and therefore entitled to oppose the application: *Re Spotswood* (1926); *Re Bittar* (1963). The language of

restrictive covenants is to be construed in a colloquial and ordinary sense, and not in any technical or legal sense: *Ex p High Standard Constructions Ltd* (1928).

The meaning of the expression 'the continued existence thereof would impede the reasonable use of the land'

The benefit of a covenant cannot be measured by material considerations alone. Accordingly, a person who owns property subject to the burden of a restrictive covenant is not entitled to an order under the section simply because such an order would make that person's property more enjoyable or convenient for his own use or more valuable: *Re Parimax (SA) Pty Ltd* (1954).

In order to establish that the continued existence of a restrictive covenant would impede the reasonable user of the land burdened, it must be shown that the restriction hinders in reality the reasonable user of the land, having regard to all the circumstances such as its situation, its surrounding properties and their use, and the purpose of the creation of the restrictive covenant: *Re Ghey and Galton's Application* (1957).

Paragraph (b)

Under para (b), the court may order that a covenant be modified or extinguished on the ground, *inter alia*, that the person entitled to the benefit of the covenant has agreed to modify or extinguish it. In *Pieper v Edwards* (1982), the New South Wales Court of Appeal held that s 89(1)(b) could be relied upon to extinguish a right of way in circumstances where there had been an agreement by the predecessor in title to the owner of the dominant tenement to surrender the easement. The court so held, even though this agreement had not been recorded on the register.

The New South Wales Court of Appeal held that factors that may be relevant to the exercise of that discretion include the history of the property as such, the conduct of the owners of both the dominant and servient tenements, the acts of a prior registered proprietor and the state of the register. No one factor should be regarded as decisive. The Court of Appeal rejected the submission by the appellant that the state of the register was conclusive.

This case raises the concern that a person may purchase land which has the benefit of an easement in circumstances where there is no knowledge of an agreement having previously been entered into by a predecessor in title to surrender the easement, which agreement has not been recorded on the register: see generally the case notes by Professor Butt in (1982) 56 ALJ 667 and (1981) 55 ALJ 885.

The operation of s 28 of the Environmental Planning and Assessment Act 1979 (NSW)

Section 28 provides:

> (1) In this section, 'regulatory instrument' means any Act (other than this Act), rule, regulation, by-law, ordinance, proclamation, agreement, covenant or instrument by or under whatever authority made.
>
> (2) For the purpose of enabling development to be carried out in accordance with an environmental planning instrument or in accordance with a consent granted under this Act, an environmental planning instrument may provide that, to the extent necessary to serve that purpose, a regulatory instrument specified in that environmental planning instrument shall not apply to any such development or shall apply subject to the modifications specified in that environmental planning instrument.
>
> (3) A provision referred to in sub-section (2) shall have effect according to its tenor, but only if the Governor has, before the making of the environmental planning instrument, approved of the provision.
>
> (4) Where a Minister is responsible for the administration of a regulatory instrument referred to in sub-section (2), the approval of the Governor for the purposes of sub-section (3) shall not be recommended except with the prior concurrence in writing of that Minister.
>
> (5) A declaration in the environmental planning instrument as to the approval of the Governor as referred to in sub-section (3) or the concurrence of a Minister as referred to in sub-section (4) shall be *prima facie* evidence of the approval or concurrence.

Section 28 of the Environmental Planning and Assessment Act 1979 (NSW) imposes an important brake on the power of restrictive covenants to control land use and its development. Its apparent rationale is the belief that controls on land use and its development are matters of public interest best left to local governments: Tooher, 'Restrictive covenants and public planning legislation – should the landowner feel "touched and concerned"?' (1992) 6 EPLJ 63.

Under s 28(2) of the Act, an environmental planning instrument may provide that a 'regulatory instrument' such as a restrictive covenant is not to apply: *Coshott v Ludwig* (1997), where the New South Wales Court of Appeal held that a covenant restricting the type of building on the land burdened had been overridden by the environmental planning instrument.

Section 28 does not require the environmental planning instrument to identify the particular 'regulatory instrument' that is to be overridden. It is sufficient that it identifies the category of instrument – for example, restrictive covenants: *Ludwig v Coshott* (1994) at 3, which was affirmed by the New South Wales Court of Appeal in 1997. The environmental planning instrument overrides the covenant only to the extent that it is necessary to allow the development to proceed: *Doe v Cogente Pty Ltd* (1997).

Professor Butt at [1,791] and [1,792] has summarised the law on the operation of s 28 of the Act as follows:

> Where a covenant would preclude development on the land, the existence of the covenant remains a matter that the consent authority may take into account in deciding whether to grant development consent; but if (because of s 28 and the environmental planning instrument) the covenant will not stop the development anyway, the weight to be given to the existence of the covenant would normally be slight. *Donald Crone & Associates Pty Ltd v Bathurst City Council* (Unreported, Cripps J, Land and Environment Court, 19 October 1988); *Wainwright v Canterbury Municipal Council* (Unreported, Bignold J, Land and Environment Court, 30 October 1992).
>
> Nevertheless, the provision in the environmental planning instrument that covenant is 'not to apply' to the development does not, of itself, make covenant 'obsolete' for the purposes of s 89 of the Conveyancing Act 1919: *Church v Kelly* (Unreported, SC of NSW, Master Macready, 20 September 1993, p 20).
>
> The effect of s 28, when read with the development consent, is to 'nullify' the covenant: *Coshott v Ludwig* (1997) NSW Conv R 55-810 at 56,368.
>
> In *Doe v Cogente Pty Ltd* (1997) 94 LGERA 305, Cowdroy AJ (at para 18) spoke of covenants being 'suspended or neutralized' by s 28. The precise time at which the 'nullifying' occurs may vary from case to case, but it will generally be no later than the time at which the consent becomes operative: *Owens v Longhurst* (1998) 9 BPR 16,731 at 16,733–34. The result of the nullifying will be to deprive the dominant owner of the right to enforce the covenant, which in turn will deprive the dominant owner of the right to seek damages for its breach: *Owens v Longhurst* (1998) 9 BPR 16,731.

Removal of restrictive covenants by the Registrar-General

Part 8A (ie, ss 81–81L) of the Real Property Act 1900 (NSW) empowers the Registrar-General to remove certain covenants from the Register.

This power is available on an application by the registered proprietor of the burdened land. The Registrar-General may grant the application if satisfied that the covenant is:

- a 'building materials covenant';
- a 'fencing covenant'; or
- a 'value of structures covenant'.

The covenant must fall within one of the three categories, be at least 12 years old, and be 'of a type likely to lose any practical value after 12 years of operation'. Section 81I of the Act provides:

> (1) This section applies if:
>
> (a) an application has been made to extinguish a restrictive covenant, and
>
> (b) notice of that application has been given in accordance with Division 3, and
>
> (c) the time period specified in that notice has ended, and

(d) there is no caveat (lodged before or within the relevant time period) still in force prohibiting the granting of an application to extinguish the restrictive covenant.

(2) The Registrar-General may grant the application if the Registrar-General is satisfied that the application was properly made, and that the restrictive covenant to which the application relates:

(a) is a building materials covenant, a fencing covenant or a value of structures covenant, and

(b) is of a type likely to lose any practical value after 12 years of operation, and

(c) took effect at least 12 years before the date on which the application was made.

A 'buildings material covenant' is a covenant that restricts the type, style or proportion of building materials that may be used in construction or repair. A 'fencing covenant' is a covenant that relates to liability for building or maintaining fences, or that imposes restrictions on permissible materials for fencing, or that restricts the style, height or other dimensions of fencing. A 'value of structures covenant' is a covenant that imposes a minimum value on buildings or structures.

The Registrar-General can also act on his own motion, where the covenant meets certain criteria. Section 81J of the Act provides:

(1) The Registrar-General may extinguish a restrictive covenant without receiving an application if the Registrar-General is satisfied that:

(a) the restrictive covenant is expressed to be limited in operation, and the time of its operation has expired, or

(b) the separate parcels of land that were respectively burdened and benefited by the restrictive covenant have been consolidated into a single parcel, or

(c) the restrictive covenant is personal to the covenantee or that the covenantee owned no neighbouring land in connection with which the benefits of the covenant can be enjoyed, or

(d) there is no express annexation of the benefit of the covenant to ascertainable land and the relevant covenant was created before 1 July 1920, or

(e) the restrictive covenant has no practical value or no practical application.

(2) This section does not apply if the Registrar-General has received an application under this Part to extinguish the relevant restrictive covenant and has not rejected the application under Division 2 or 3.

The second class is much wider. Section 81J of the Act empowers the Registrar-General to extinguish *any* restrictive covenant, without having received an application, if satisfied that the covenant falls within one of the following categories:

- the covenant is limited in time, which has now expired;
- the parcels of land that were burdened and benefited by the covenant have been consolidated into a single parcel;
- the covenant is personal to the covenantee, or the covenantee owned no neighbouring land benefiting from the covenant;
- there is no express annexation of the benefit of the covenant to ascertainable land and the covenant was created before 1 July 1920 (that is, the date on which the Conveyancing Act 1919 came into operation, requiring covenants to clearly identify the benefited land); and
- the covenant has no practical value or no practical application.

In relation to the last of these five categories, Professor Butt, at [1,793], has observed:

> This empowers the Registrar-General to extinguish restrictive covenants that have no 'practical value' or no 'practical application'. Though doubtless a beneficial provision, it sits uneasily with the provisions of s 89 of the Conveyancing Act 1919, which give the Supreme Court the power to extinguish covenants. An applicant under s 89 of the Conveyancing Act must run the gauntlet of complex case law on whether in the particular circumstances the court should exercise its discretion to extinguish a covenant; and in reaching its decision, the court has the advantage of adversarial argument. But s 81J gives the Registrar-General power to extinguish covenants, on grounds which appear to overlap the grounds given to the Supreme Court under s 89, and without any requirement for external scrutiny of the grounds for the decision.

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