

## Real Property Examination Comments March 2014

### Question 1

Christian was a musician who owned a house at Baulkham Hills (held under the Torrens system). Christian toured for most of the year so he leased the house to his friend Oscar. They had agreed to a lease of 3 years with a 2 year option. The lease was in writing but not registered.

During the time of his tenure Oscar had bought an air conditioning unit and had it installed into the house. The motor was outside sitting on its own weight and wired into the mains. The outlet was screwed into the wall of the living room.

Christian's older sister Mollie was an alcoholic who had liver disease. She spoke to Christian and asked him to give up his work and come and care for her in her mansion at Castle Hill, which was Torrens Title land. She offered to leave him the mansion in her will in exchange for him putting his career on hiatus. Christian decided to do so.

The mansion was on a two acre property. Mollie had an agreement with her colleague Lance to allow Lance to keep his horse Franklin on the land. The agreement was in writing and it allowed for Lance to come and visit Franklin, feed him and clean up his mess in exchange for Lance keeping the fences in order at his own expense.

Mollie died two years after Christian moved in with her. Mollie's will appointed her solicitor Larry as her executor and trustee. She left everything she owned to Lance and made no mention of her agreement with Christian about the mansion. Lance has become very rude and Christian has asked him to take Franklin off the land.

It was also nearly time for Oscar to take up the option to lease Christian's house. Oscar demanded that he be given a renewed lease for 2 years but Christian now thinks he may have to move back into the Baulkham Hills house given Mollie's deception.

**(a) What is the nature of the lease to Oscar and is Christian bound to offer renew it for a further two years? (5 marks)**

The lease did not satisfy s 53 of the RPA or s 23D(2) of the CA. Both sections should have been discussed.

The lease was equitable under the rule in *Walsh v Lonsdale* which again should have been explained.

The acceptance of rent for a period would also have created a *Moore v Dimond* common law lease as modified by s 127 of the CA.

Very few students discussed all of these issues.

**(b) When lease is terminated does Oscar have a right to take the air conditioning unit with him? (5 marks)**

This was a question regarding the right of tenants to take fixtures. The law of fixtures should have been applied starting with the presumptions and then the application of the intention of annexation test. The principle that tenants can also remove fixture of domestic, trade and ornamental purposes if this does not cause structural damage should also have been discussed,

- (c) **Can Christian argue that he has a right to the mansion? What kind of right would it be and how can it be enforced? (5 marks)**

Christian's right to the mansion would be based on a claim under part 1 of the Law of Property (Miscellaneous Provisions) Act 1989 as the contract is oral. There was valuable consideration but it is arguable that the consideration was given because of love and affection in addition to the agreement so it would fail the test in *Maddison v Alderson*. Even if the claim were successful if Lance becomes registered he will be indefeasible: *Bogdonovic*.

- (d) **If Christian were to become a registered owner of the mansion would he be bound to honour the agreement with Lance about Franklin? (5 marks)**

The agreement between Lance and Franklin is a personal right in a licence: *King v David Allen; Radiach* There is no exclusive possession just a right of grazing. Nor could there be an easement or a covenant as Lance has no land which is benefitting from the agreement.

## Question 2

Roger was the registered proprietor of Brownacre, being two hectares of land at North Ryde held under the Real Property Act 1900. To finance the purchase of Brownacre Roger had borrowed money from Loane and executed a mortgage securing the amount in her favour. The mortgage was registered but after registration the certificate of title was returned to Roger.

Unfortunately Roger had a gambling problem and needed extra cash. He sought an advance from Don, who gave him money, secured by Roger giving Don possession of the certificate of title for Brownacre. No documents were executed by Don and Roger. Don never bothered to check the Register to see if there were other interests registered in relation to Brownacre.

A few days later Roger, tired of his growing debts, decided to sell Brownacre to meet his costs. He decided to rid himself of Loane's debt by forging Loane's signature on a discharge of mortgage in relation to the registered mortgage in favour of Loane. To register the forged discharge of mortgage, Roger spoke to Don and asked him to return the certificate of title. Don agreed, and Roger used the certificate of title to register the forged discharge of mortgage. Roger did not return the certificate to Don.

Two days after Roger had registered the forged discharge of mortgage, Belinda offered to purchase Brownacre from Roger for an agreed sum. Belinda inspected the property and found no evidence that it was being occupied and Roger neglected to mention the loan from Don. Belinda then exchanged contracts of sale for Brownacre with Roger.

Settlement of Roger's sale to Belinda occurred on a Friday a few weeks after their exchange of contracts. Roger and Belinda did the settlement themselves. Belinda did a final search of the register before settlement. In exchange for the cheque to Roger, Belinda received a transfer signed by Roger, and the certificate of title. Belinda then went home. She did not register her transfer.

On the Monday following the settlement of Roger's sale to Belinda, Don went to see his solicitor. Don had been worried about his loan to Roger. The solicitor advised that Don

lodge a caveat over the property. On Don's instructions the solicitor lodged a caveat that day.

Two days after Don's caveat was lodged, Belinda spoke to representatives of Macquarie Developments Ltd (MDL), a development company which was looking for property in the North Ryde area. MDL and Belinda quickly agreed upon a price, exchanged contracts and settled the matter. On settlement, Belinda handed to MDL a transfer of Brownacre from herself to MDL, the transfer of Brownacre from Roger to Belinda and the certificate of title.

An agent of MDL ran down to the Land Titles Office to register the two transfers. When she reached the front of the counter she was informed that Don had lodged a caveat and that the transfers could not be registered.

**a) What is the nature of MDL's interest in the land? (10 marks)**

This question required careful consideration of s 43A. MDL cannot satisfy that section as it is not immediately registrable. However, under the rule in *Wilkes v Spooner* MDL can take whatever interest Belinda has. Belinda had a s 43 A interest and was a bona fide purchaser for value and without notice. MDL will take that interest.

Very few students answer this part correctly.

**b) Will MDL be subject to Loane's mortgage? (5 marks)**

No – Loane interest is equitable as she has been deregistered: *Barry; Heid; Breskvar*. Her prior equitable interest is defeated by the successive legal interest of MDL as MDI are a bona fide purchaser for value without notice: *Pilcher*.

**b) Will MDL be subject to Don's mortgage? (5 marks)**

No – Don's interest is equitable as it is supported by part performance. His prior equitable interest is defeated by the successive legal interest of MDL as MDI are a bona fide purchaser for value without notice: *Pilcher*.

**Question 3**

Max was the registered proprietor of Real Property Act land near Little Beach. His house had a panoramic view of the ocean. The view was protected by a valid restrictive covenant which was noted on the register, and which prevented his neighbour, Craig, from erecting a building of "more than one storey from the ground". Max's land also had the benefit of "a right of way for all purposes" over Craig's land. This right of way allows him easy access to the beach and it had been created and registered in accordance with the Real Property Act and s 88(1) of the Conveyancing Act.

In 2000 Max sold his land to Matthew, who decided to convert the house into a fitness centre with gymnasium, squash courts and spa. He anticipated being able to provide services for approximately 80 customers.

Matthew had the windows in the rooms facing the sea bricked in so that those rooms could be used as squash courts. In 2012, Matthew also devised a fitness programme which involved his customers jogging and bicycling across the right of way to the beach. To facilitate this, he wants to upgrade the right of way, which is presently a sandy path, by converting it to a bitumen cycle track.

Matthew also wants Craig to clear the right of way as it is obstructed in one place by a fallen tree. Craig is most distressed by Matthew's plan. He tells you:

- (a) That he wishes to prevent Matthew using the right of way in the manner proposed;**
- (b) That he wishes to prevent any alterations to the right of way;**
- (c) That he is not prepared to remove the fallen tree; and**
- (d) That he wishes to have the burden of the restrictive covenant removed from his land.**

**Advise Craig on each of these matters (5 marks each).**

- (a) The right of way is an easement: *Ellenborough Park*. The increase in use of the right of way and the change in the nature of the dominant tenement may be enough to argue that there has been a breach of the easement: *Jelbert, Todrick*
- (b) The right of way includes a right to pave: see Butt p496. The dominant tenement holder can choose the nature of the surface materials: *Burke*. The dominant tenement holder is responsible for such changes.
- (c) If Craig is responsible for the fallen tree (ie he felled it) then this will count as an obstruction and he can be forced to remove it as it is a real and substantial interference: *Clifford v Hoare*; see Butt p 500. If however Craig is not responsible, then the job of clearing the tree is Matthew's as servient tenement holders are not responsible for the maintenance of easements (without express obligation under s 88BA). Absent that section, obligations to repair and maintain cannot bind the successor's as they are positive covenants: *Clifford v Dove*.
- (d) The final part was concerned with the passing of the benefit of the covenant. The question was also concerned with the notion that the covenant had become

obsolete with the bricking up of the windows: *Post Investments v Wilson*. Section 89 should have been discussed.

Overall this question was done poorly.

#### Question 4

Carmel was the registered proprietor of land under the Real Property Act. She sold the land to Lex for \$100,000.

On completion of the sale, Carmel was paid \$75,000 in cash and given a mortgage over the land to secure the balance of \$25,000, which was payable one year after completion. With Carmel's knowledge, her mortgage was in fact a second mortgage. On completion of the purchase Lex granted a first mortgage to Brian in order to raise moneys to buy and develop the land. Both mortgages were registered, the second mortgage (Carmel's) was registered without Brian's knowledge and consent.

Under the first mortgage, Brian advanced Lex \$50,000 on completion of his purchase and covenanted to advance a further \$25,000 if and when Lex finished stage 1 of his multi-staged development on the land. The first mortgage also provided that Brian could, in his discretion, advance additional moneys from time to time.

Eighteen months after completion of his purchase Lex, who had not paid out Carmel in the meantime, finished stage 1 of his development and called upon Brian to advance him more moneys. Brian, sensing that the land would be "worthless" if not fully developed, advanced Lex \$100,000, taking his total advance to \$150,000.

All this was to no avail. Lex was unable to finish all stages of his development, and he became bankrupt.

#### **Discuss the priorities as between Carmel's and Brian's mortgages.**

This question was concerned with the rule for tacking for further advances in *Hopkinson v Rolt*. Students should have discussed the rule and how it could be applied in the Torrens system, especially with regards to the requirement for notice: *Donnemore*. Students should also have discussed the modification and extension of the rule in *Maztner* where Holland J decided that notice was not necessary in cases where the extra payments were going towards construction costs. Most students answered this question well.