



ANU LAW STUDENTS' SOCIETY

LAWS2204 Property 1st Semester 2011

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Question 1 (84/100)

Part (a)

Unless otherwise stated, all statutory provisions refer to the Conveyancing Act 1919 (NSW).

Carl (C) v Ben (B)

B had settled with Amy (A) and so is the legal fee simple holder. ✓

C has an equitable interest in the shop arising under a specifically enforceable contract and a “mere equity” in estoppel. ✓ great

(a) Does C have an interest under a specifically enforceable contract (SEC)?

Bunny Industries would hold that C would have an equitable interest arising under a constructive trust if the contract with A was specifically enforceable, ie the remedy of specific performance would be available. ✓

1. Is the contract valid?

There is certainty of subject matter (live there for the rest of your life), there is consideration (work for next to nothing), but there is a family relationship between A and C as cousins. So I query if there is a valid contract for no intention to create legal relations. More facts are needed to ascertain A and C’s relation. Assume contract valid. ✓ could have looked @ strict v relaxed test

2. Is the contract enforceable?

The contract is in writing and thus satisfied s 54A(1) CA. ✓

3. Is the contract specifically enforceable?

There appears to be nothing that would prevent the contract from being specifically enforceable: it is generally assumed that damages are not adequate remedy in relation to interests in land. The party seeking specific performance (C) is ready, willing and able to perform. In fact, he has already performed by running A’s shop for “next to nothing”. There is no condition precedent and no equitable bars to specific performance (delay, clean hands etc.) Thus P has a SEC. ✓

In *Tanwar*, the High Court in obiter comments threw into doubt the Bunny analysis of the interest a purchaser receives when they have a SEC. In particular, the High Court dislikes the analogy of the constructive trust. The High Court did recognise that the purchaser receives an equitable interest, but seems to prefer to talk about it as some sort of equitable lien. Accordingly, we’ll continue to apply Bunny until the High Court next decides. ✓ excellent

Thus, A holds the legal interest on constructive trust for C. On this basis C has an equitable interest (full equitable interest) (assuming contract is valid). ✓

Even if contract is invalid, C has a mere equity arising in estoppel. ✓

Estoppel?

If an owner allows another to suffer detriment under an expectation created or encouraged by the owner that he will have an interest in the land, then a mere equity will be recognised in that person (Crabb). ✓

Expectation of interest?

The letter identified probably a licence for life-long occupation like in Inwards. ✓

Created by the owner?

Satisfied. A wrote the letter. ✓

Detrimental reliance?

C worked presumably for 30 odd years and lived in the shop for that period of time, and for a very small wage. His detriment is comparable to junior Mr Baker in Inwards who contributed to building the house and lived in it for more than 30 years. The Court gave Baker the remedy of a license. The facts are analogous to Inwards. Further, the detriment does not have to be directed towards the land in question. ✓

Therefore, C has a “mere equity” in the shop on the basis of estoppel (Inwards).

Thus, the priority dispute is between an earlier equitable interest (or a mere equity) against a later legal interest. In both cases, the rule is the later legal interest will prevail if taken by a BFP (Pilcher v Rawlins; Latec). ✓

B was clearly a purchaser for value who has acted bona fide (apart from the notice issue). The question thus becomes whether B has notice of the earlier equitable interest/“equity”. ✓ He has a duty to investigate the chain of title and to inspect the shop. Both of these have been done. B may be fixed with constructive notice of earlier interests that these inquiries and inspections would have revealed: s 164(1)(a) CA. ✓

Investigate title documents

Under s 53(1) CA, B has an obligation to search back to a good root of title at least 30 years old. B will be fixed with notice of all documents with the chain of title back to that good root of title. Assume that B’s inspections revealed no prior interests.

Inspect the land

A purchaser will be deemed to have constructive [sic] of any interest in the land that an inspection of the land itself would have revealed.

There may be an argument that the mere presence of signs of habitation is not sufficient to give constructive notice. The shop was empty, dusty, boarded up and the power had been turned off with no fresh food. However, the fact that personal belongings belonging to C plus A's acknowledgement that C had indeed lived there would put a reasonably prudent purchaser on inquiry as to the belongings' ownership and C's actual interest in the shop. The prudent purchaser would ask about the nature of C's interest.

Since B failed to make further inquiries, he will be fixed with constructive notice of C's prior equitable interest/equity and so will be bound by that interest. ✓

Therefore B has a legal fee simple subject to C's license to live in the property as long as he wished. ✓

Delia (D) v B

B has a legal fee simple in the farm.

D prima facie has a legal interest in the property arising from adverse possession (AP).

Possession gives rise to rights (Asher; Mabo per Toohey). The paper title holder or prior possessor has a right to bring an action to regain possession under s 20 of the Civil Procedure Act. However, this right must be enforced within 12 years from the date on which a cause of action first accrues to the title holder: s 27(2) Limitation Act (LA). For the cause of action to accrue, the title holder must be out of possession and another person must be in possession: ss 28 and 38(1) LA. Prima facie the cause of action accrued to D 16 years ago. ✓

1. Did D possess the land adverse to A?

To establish AP, D requires factual possession and an intention to possess (Pye). ✓

Factual possession

There must be exclusive possession. What amounts to exclusive possession depends on the circumstances, particularly the nature of the land and the manner in which land of that nature is commonly used (Pye). ✓

The facts are analogous to Pye. In Pye, Graham had used the land for farming in the same way he used his own neighbouring land. Further, he had excluded Pye by hedges and the lack of a key to the padlock of the gate of the property. The court held that Pye had exclusive physical custody and control. On the facts, D had demonstrated acts of ownership by mowing the pasture and lived in the farm. I query if these acts are sufficient given the land is rural (eg, she should be raising stock). Nonetheless, she effectively excluded A from the property by changing locks and mending the fence ✓

Intention to possess

An intention to possess requires an intention, in one's own name and on one's own benefit, to exclude the world at large, including A (Pye). Similar to the discussion above, D's occupation of the premises coupled with changing locks and mending the fence indicated an intention to exclude everyone including A. Note though it is not necessary to have an intention "to own", just to possess and I think D satisfies intention to possess. ✓

2. Are there any "gaps" in possession?

AP must be continuous for the 12-year limitation period. A "gap" in time will stop time running against the paper title holder and resets the clock back to zero: s 38(3) LA.

Because of the 5-year lease, A has consented to D's possession in the first five years and so times started to run only 11 years ago. ✓

It is not an issue that D was away because she had not demonstrated an intention to give up her rights to the land to the world at large (Moorhouse). ✓

Thus, B has 1 more year to assert his title. B can assert his title either by physically retaking possession (not recommended) or commencing court action under s 20 of the CPA (recommended). Mere assertion of ownership is not sufficient. ✓ great

If not, B will lose priority dispute with D by virtue of the nemo dat rule (Whipps) – first in time prevails (legal v legal).

Part (b): Is the armour a fixture?

1. The the [sic] contract deal with the issue?

No. ✓

2. Degree of annexation

The chattel is bolted to the wall, there is a presumption that it is a fixture (Belgrave). Onus of rebutting the presumption lies with C by showing it was intended all along to continue a chattel.

✓

3. Purpose of annexation

The test for object is an objective one – the object is what a reasonable person would assume from circumstances (Belgrave).

- ease of removal; extent of removal
contrast Leigh v Taylor
Given alcove and bolt, probably cannot remove without damage to wall ✓
- nature of chattel
ornamental character, could not have been fixed more lightly (Leigh v Taylor)
- nature of interest in realty held by attacher
Presumably by D – not an owner of fee simple, less likely intended to be fixture
- subjective intention
owner of fee simple indicated it was fixture, merely one of factors taken into account – not determinative.

Weighing up the factors, the initial presumption that the armour is a fixture is confirmed. So B owns the armour.

great answers, well done!!

Question 2 (72/100)

In this answer, RPA refers to the Real Property Act 1900 (NSW). [Tks](#)

Greg (G) v Fred (F) ✓

F is the RP of the fee simple in Blackacre (B) ✓

G probably has a licence for exclusive occupation of B. It is unregistered.

Is it a lease? Or estoppel? ✓

G's interest is not a lease because it is not of a certain duration, or a duration capable of being rendered certain (Lace). It is not an implied periodic rent because G does not pay rent. It is neither an equitable lease arising from a specifically enforceable contract because G has no consideration (Walsh v Lonsdale). While Eve (E) may have encouraged an expectation in G of an interest in B in her letter, G did not suffer any detriment on reliance of that expectation and hence no estoppel. ✓

Thus the dispute between G and F is between a registered and unregistered interest. ✓

F is the RP of B and has immediate, indefeasible title (s 42(1) RPA, Frazer), subject to exceptions. Prima facie, it is enforceable against G. ✓

Fraud

Fraud is an express exception to indefeasibility (ss 42/43 RPA). ✓ Fraud requires some element of actual dishonesty or moral turpitude on the part of the RP (Assets v Roihi). ✓ Mere notice plus knowledge that registration will defeat an unregistered interest is not fraud for RPA purposes (s 43 RPA; Wicks v Bennett). ✓ The fraudulent conduct in question has to relate to the detraction or extinguishment of the unregistered interest, not mere general dishonesty (Grgic). ✓

In Bahr v Nicolay, a contract of sale of land which contained an acknowledgement of Bahrs' interest was held to be a promise to protect. Furthermore, in Loke Yew, a promise to protect was held to be fraudulent if the purchaser had been dishonest at the time the promise was made as he had no intention to satisfy the promise from the outset. ✓✓

On the facts, F's acknowledgement of G's interest amounted to a promise to protect. While more facts are needed to establish if F had been dishonest at the time he made the promise, the quick speed at which he reneged on his promise, just 2 months after the sale was indicative that he had not intended to keep the promise in the first place – which was a factor the court took into consideration in Loke Yew. ✓

Mason CJ and Dawson J in obiter comments in Bahr noted that where a purchaser had made a promise to protect, the subsequent breaking of the promise is dishonest and so fraudulent. On the facts, F's lease of B to T was a breaking of a promise to protect G's license to exclusive possession of B. But in the case, Mason CJ and Dawson are suggesting that the RP's interest may become defeasible even at post-registration – I query this approach as it undermines the scheme of the RPA. **You're not the only one to do so.** ✓

In-personam obligation ✓

A RP is subject to in personam obligation arising in law and equity (Frazer). ✓

In Bahr, the court held that the mere fact of repudiating the promise was unconscionable ✓ when Thompson was not in financial need. The court then imposed a constructive trust on Thompson which the Bahrs could enforce against Nicolay as a matter of in personam obligation.

On the facts, it is unconscionable for F to have undertaken to be bound by G's interest and subsequently denies that interest. ✓ Further, F has no excusing factor (eg, financial need). **What about his son's eviction?** Thus, the court is likely to impose an in personam obligation on F in the form of an unconscionability constructive trust. ✓

Conclusion

Thus, while more facts are necessary to establish if F had been fraudulent at the time he acknowledged G's interests, it appears that F is bound in personam obligation to G and so is not indefeasible. ✓

Greg (G) v Tom (T)

T has an unregistered lease. Thus the priority dispute is between two competing unregistered interest. ✓

Section 43A RPA

Section 43A provides that T will gain indefeasibility before registration if he:

- (a) has legal estate
- (b) has a registrable dealing
- (c) is dealing with an RP: IAC (Finance)

(a) Legal estate?

The view of Taylor J in IAC (Finance) has prevailed (Meriton). Taylor J said that “legal estate” means an old system legal estate. Hence T could defeat G’s interest if he is a BFP at settlement.

T was clearly a purchaser for value who has acted bona fide (apart from the notice issue). The question becomes whether T has notice of G’s interest. On the facts, T had actual notice at settlement. When T agreed with F on the lease, he was informed that “Greg lived in Blackacre pursuant to an arrangement with Eve”. ✓ However, T may argue that F’s statement merely informed him of a current occupation of B, and not necessarily an interest in B. However, given that F mentioned G, the reasonably prudent purchaser would have made further inquiries of someone other than the lessor. Thus T will be fixed with constructive notice (if not actual) of G’s interest.

Thus T is not a BFP.

Registrable dealing?

No questions on the facts.

Dealing with RP?

Dealing with F who is the RP, thus satisfied.

Thus, T does not get the protection of s43A.

The inquiry then becomes between two unregistered interests. The rule is the first in time prevails ✓ unless the equities are unequal ✓ (Rice; Heid). ✓

1. Was there a causal connection between 1st in time’s conduct and 2nd in time acquiring the interest in the mistaken belief that there was no prior interest?

Where the 1st interest holder fails to lodge a caveat, the 1st interest holder is likely to be postponed (Abigail v Lapin).

In Butler v Fairclough, an agreement to execute a mortgage was held to be postponed because the caveat had not been lodged before the purchaser had paid the purchase money and received the transfer. On the facts, G did not lodge a caveat promptly upon receiving Eve’s letter. Thus, his interest is likely to be postponed. ✓

2. Is there any excusing factor for the 1st in time “ in fairness and justice”?

There is no standard conveyancing practice arising on the facts that the norm is not to caveat.
advice from lawyer?

3. Did T know of the prior interest?

As discussed under the BFP rule, T had notice of the prior interest. Notice is generally irrelevant to the question of priority between competing unregistered interests. However, notice is relevant to deciding whether, in all the circumstances, the merits are equal. ✓

So, in the case where the 1st interest holder has engaged in conduct which might otherwise have been postponing, the 2nd interest holder cannot get priority if he had notice of the existence of that earlier interest (Courtenay v Austin)

Hence G wins the priority dispute. ✓

G v Sue (S)

S no longer has an interest in the land. ✓

While she was the RP, she was indefeasible except for fraud.

While she had made a promise to protect, there is no indication on the facts that that was dishonesty made (Loke Yew). In fact, her “pangs of conscience” had F acknowledge G’s interest.

So G v S not an issue. ✓