

REAL PROPERTY SEPTEMBER 2013 EXAM GUIDE**Question 1**

In 2010 Lawrence purchased an old property for \$1 million and borrowed \$750,000 from Katherine. The property was under the *Real Property Act* and the mortgage was registered. The property consisted of lot A on which was constructed a single storey shop, lot B on which was constructed a residential flat, and lot C which served as a car park for the shop and the flat.

In 1995, Lawrence defaulted in his payments under the mortgage and Katherine took possession of the property. The market value of the property had fallen since its purchase and Katherine decided to carry out improvements to the property in an effort to increase the rental return to try and meet the amounts due under the mortgage.

Katherine engaged a consultant to advise her on how she should renovate the buildings but the consultant said that the properties were in such bad repair that they were not able to be renovated and should be demolished and rebuilt. Katherine had plans prepared for a new building consisting of 3 ground floor shops and 2 upstairs flats. The 3 lots were consolidated into 1 and the car park area remained as it was but was sealed.

Katherine spent \$600,000.00 on the building work. After the work was completed and Katherine had let the shops and the flats, Lawrence approached Katherine and said that he has now won Lotto and can pay out the mortgage.

Katherine reacted poorly to the news and quickly advertised the property for sale. She had minimal lead time and only gave a week's notice for the auction. The property wasn't advertised. At the auction she had her uncle Dave bid on her behalf and she 'sold' the property to him for \$1m which was well below market price. The contract has not yet been completed.

(a) Can Lawrence prevent the sale to Dave from completing? (10 marks)

This question concerned the duty of mortgagees when exercising the power of sale. The old dispute was between the duty of good faith and the duty of reasonable care but the dispute has been settled by s 111A CA in favour of a duty to seek the market price. The duty has clearly been broken here as is illustrated by the short lead time for advertising and the fact it was sold to uncle Dave. see cases such as *Foregard v Shanahan*; *ANZ v Bangadilly*; *Pendlebury*.

The next issue is whether the sale can be injuncted. Previously the answer would have been yes as the interest of the purchaser prior to settlement is equitable (*Lysaght*) and in the competition between the interests of the mortgagor (which is equitable) and the mortgagee the first in time would ordinarily prevail. However, *Hotel Terrigal* says that the equitable interest of the mortgagor is only a mere equity which should lose. Nevertheless Dave has notice, given his complicity in the dodgy

purchase. So in the past the answer would have been that Lawrence could injure the sale to Dave.

However, the new s111A(4) says that the “title of the purchaser cannot be challenged on the ground that the mortgagee or chargee has committed a breach of any duty imposed by this section.” On one reading that would mean that the sale could not be injuncted as the equitable title of Dave cannot be challenged. However, “title” probably means legal title or registered interest would leave the law unchanged from its current position.

Very few students discussed this issue and the question was answered poorly.

(b) If Lawrence can prevent the sale to Dave, what can Katherine recover from Lawrence on a discharge? (10 marks)

The rule in *Southwell v Roberts* would prevent Katherine from recovering the extra amounts she spent on demolishing and rebuilding. While she has a right to make improvements she cannot improve the mortgagor out of his property.

Most students answered this correctly but some brought up irrelevant materials such as the right to a receiver.

(b) What mortgage remedy should Katherine have used and how could she have employed it? (10 marks)

Katherine should have foreclosed and then she would have become the owner and would have been fully entitled to build on the property. The differences between foreclosure and the power of sale should have been discussed as dealt with in *Southwell*.

Question 2

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

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

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

Meanwhile Ben used the blank transfer and CT to remove Ron’s name from the register and registered the property into his own name. Using the property as

security he then attempted to borrow money off the North Ryde Bank, a local community bank. Ben executed a mortgage in their favour and the Bank took possession of the CT and the mortgage dealing. The settlement was late on a Friday and the documents weren't lodged for registration.

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

(a) What is the nature of Ron's interest, Ben's interest, Rosemary's interest and the bank's interest? (10 marks)

Ron has an equitable interest as the wrongly deregistered owner: *Breskvar*. Ben is registered but clearly defeasible due to his fraud: *Breskvar*. Rosemary has a legal lease as per s 23D(2) CA and the s 53 RPA. The bank could try to argue for a s43A legal interest but it would fail as the transfer is tainted by Ben's fraud, leaving it with an equitable claim: see *Jonray, Diemasters*. Alternatively, if it were argued that the dealing is not tainted by fraud (as Ben is the RP), the bank would have a legal interest as it has a dealing registrable.

Most students did not answer this question with any detail.

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

It is probable that Ron will get the property back. Rosemary should not be effected at all by this as Ron created the lease and subject to an in personam in her favour. Ben's legal interest will be taken off him and his equitable interest will be subject to damages caused by his fraud. The bank's interest is equitable but later in time than Ron's. However Ron did create the problem through his negligent signing of a blank transfer: *Breskvar*. The bank's equitable interest would be stronger than Ron's. If it had been decided that the bank had a legal interest it could be argued that it was a bona fide purchaser for value without notice: *IAC Finance*. The result would therefore be the same: Ron is the owner but subject to the bank's mortgage.

(Question 3 follows)

Question 3

Sonia and Rachel owned adjoining pieces of old system land on one side of a gorge. Sonia owned the property on the top part of one side of the gorge and Rachel owned the property on the bottom side. To avoid problems with pumping stormwater uphill Sonia asked Rachel if she could run a pipe underground downhill, through Rachel's property and into the drain in the street below. Sonia also had wonderful views of the gorge and was concerned that Rachel not build structures on the land that would impede Sonia's views. Sonia offered to pay Rachel \$10000 for the right to drain stormwater and the right to limit Rachel's building height to 20 metres high. Rachel agreed and

she had her brother Brian (a solicitor) draft up a deed to record agreement. The agreement said that 'Sonia and her heirs and successors would be able to enjoy the benefits of the agreement.

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

Twenty three years passed without incident. They were good neighbours and never built a fence between the properties. Sonia loved coming over to Rachel's house to talk to Feathers, the singing cockatoo. In the 24th year Sonia died. Her son, Lucas, became the owner but he did not have a good relationship with Rachel. Lucas started to run a bed and breakfast business from the house and the visitors would come down and across the boundary to see Feathers. One day, one of the visitors was drunk and taught Feathers how to say disgusting words. Rachel was very upset told Lucas not to come down or let his visitors come down across the boundary. She put up a fence. Lucas, in turn, refused to trim the hedge (which is now very tall) and will not let Rachel onto the property to trim it. Consequently her land is now permanently in shade. Rachel, in retaliation, has blocked the drainage pipe with guano from Feathers' bird cage. She also has lodged plans with Council to build an extension that will block Lucas' views of the valley.

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

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

Lucas has a legal easement in accordance with s 23B. The rights should survive conversion and will in any event be protected by s 42(1)(a1) as the easement was legal an valid prior to conversion: *Dobbie*.

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

I would appear that Rachel never gave her permission to Sonia or Lucas to come onto her land. It could be argued that they have an easement via prescription due to the length of time, the use and the fact it has been done without permission, secrecy or force. The doctrine of the lost modern grant applies in Australia: *Delohery*.

The use of the easement concerns whether the change in the nature of the dominant tenement and its increase in use is a breach: *White; Jelbert*.

Prescriptive easements are also covered by s 42(1)(d): *Dobbie*

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

This easement is equitable as a partly performed mortgage: *Maddison*. The doctrine should have been discussed and applied. Equitable leases should also be converted and are protected by s 42(1)(d).

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

The agreement is a restrictive covenant for height. The question is whether the benefit of the covenant can pass. In common law the benefit passes when the covenant touches and concerns the benefitted land and was intended to pass by the original covenantors (although this is assumed by s 70 CA). The covenant should be recorded in the conversion process but if it is not recorded the issue of the new folio and the subsequent indefeasibility will destroy the enforceability of the covenant unless sort of in personam claim can be brought against Rachel.

Most students discussed the rule in *Tulk* which was irrelevant as the question was concerned with the passing of the benefit not the burden

(Question 4 follows)

Question 4

Phillipa was an artist who specialized in installation works combining painting and sculpture. In the last three years she had commenced a project whereby she used her own skin to make leather and parchment which she then used in her artwork. Dr Peter performed plastic surgery on Phillipa to remove parts of her skin. Peter then 'cured' the tissue (by chemically processing it) and then gave it back to Phillipa for her art. She paid for the surgery and curing out of her own pocket. She found her skin to be highly malleable and wonderful to work with as a medium. She created 3 painted sculptures with the skin. These artworks created a worldwide sensation and established her reputation as an artist.

She owned land at Wamberal which was held in the Torrens system of title. She had designed a house that could also serve as a gallery for her artwork. The western wing of the house was specifically designed to showcase her works of art, in particular the series of 3 'skin' artworks. The artworks were fastened into concrete footings with screws. The artworks could be removed without damaging them or the footings.

The house also featured a large blank wall. Phillipa had hoped to create a program to license artists to come and paint on the wall during what Phillipa referred to as a 'residency agreement'. Phillipa asked for applications from local artists to be residents and she settled on Tom, who was a local urban graffiti artist. They entered into an agreement whereby Tom could come on to the property during business hours and paint on the wall. The agreement was stated to last for 3 years. The agreement specifically stated that "this agreement is a license and does not give Tom any proprietary rights over the land."

Phillipa needed money and borrowed it off Clancy. Clancy lent her \$300K and made Phillipa sign an informal mortgage agreement which was not in a registrable form. After some months Phillipa defaulted and now Clancy is threatening to sell the property to recover her money.

Clancy has met with Tom and told him that when the property is sold he will have no rights to visit the property anymore. Tom is very upset because his artwork is half-finished.

(a) Are the 3 skin artworks property?(5 marks)

Yes – they satisfy the labour and skill exception to the *res nullius* rule: *Doodeward*. The *res nullius* rule now appears to be relaxing now in any event: *Re Edwards*; *Yearworth*.

(b) Assuming that the artworks are property, would they pass under a valid contract of purchase of the land? (5 marks)

Arguably they have become fixtures due to the principle of the grand architectural design under *D'Eyncourt v Gregory*. The basic laws of fixtures needed to be discussed.

(c) Can Clancy sell the house? (5 marks)

Yes – Clancy has an equitable mortgage via the doctrine of *Walsh v Lonsdale* it is an agreement in writing but not in the form of a deed which is specifically enforceable. Some students wished to discuss the implied power of sale in s 109 CA.

(d) Will whoever buys the property be bound to recognise Tom's rights to paint on the wall? (5 marks)

No – Tom has a licence not a lease. There is no exclusive possession: *Radiach*. The contract would appear to be merely personal to Tom: *King v David Allen*.