

**Real Property**  
**March 2013**  
**Examiners Comments**

**Question 1**

Bruce was the owner of property under the Torrens system at Little Beach on the NSW Central Coast. Bruce decided to borrow some money from Gary for a business purpose. Gary agreed to lend the money and required Bruce to sign a mortgage dealing in registrable form over the Little Beach property and give Gary the certificate of title but that the mortgage would not be registered (so as to keep down costs). Gary didn't lodge a caveat as he felt like he could trust Bruce.

Bruce borrowed more funds from Andrew. Andrew provided the funds under a written agreement which was not in registrable form and told Bruce that while he didn't need a registered mortgage, he (Andrew) would lodge a caveat on the property.

Andrew also went on holidays to Brunei and ran out of time to lodge the caveat but decided to do so as soon as he returned.

Bruce then decided to sell the Little Beach property to Denise after she made a generous offer. Denise searched the title and made a physical inspection of the land. She then exchanged contracts with Bruce.

Bruce went to Gary's house and managed to retrieve the certificate of title without Gary's knowledge or consent. When the time came for settlement Denise undertook a title search and another physical inspection in the morning of the day set down for settlement and found that there were no caveats on the title nor was anyone in possession of the land. She then travelled to Sydney to complete the settlement. Some time in the intervening hours, Andrew returned home and lodged a caveat in relation to the Little Beach property. Denise completed the settlement and received the certificate of title and the transfer dealing, from Bruce. She went and had the dealing stamped and then proceeded to lodge the documents at the Department of Land and Property Information. However when she got there she was told that a caveat had been lodged by Andrew.

**(a) Now that Denise cannot become immediately registered will she be subject to Gary's mortgage?**

**(5 marks)**

*This question required students to discuss the characterisation of Gary's equitable mortgage and how they can survive in the Torrens system. It also required students to be able to use s 43A to discuss the nature of Denise's interests as a purchaser. Student did this very poorly.*

**(b) Now that Denise cannot become immediately registered will she be subject to Andrew's mortgage?**

**(5 marks)**

*This was the same exercise as in (a) except it is complicated by the nature of constructive notice and whether the caveat should count to deny Denise a share of the interest. Again this was poorly done.*

- (c) If Denise was subject to both mortgages which one would have priority?  
(10 marks)**

*This required an analysis of the cases concerning competing equitable interests and the question of whether the failure to lodge a caveat is postponing conduct. Many students dealt with this in a very cursory manner not even bother to discuss cases or limiting their analysis to Butler even though it is nearly 100 years old. Overall the question was dealt with poorly by most students.*

## **Question 2**

Cameron was a lawyer who worked in Sydney for a large law firm. Cameron owned his own house at North Rocks which was held under the old system of title. His mother Carmel rang one day and said that because she was getting old she wanted Cameron to move in with her and to live in her acreage at Castle Hill, which was held in the Torrens system of title. Carmel wasn't asking Cameron to give up his job or anything and he thought that he might be able to make some money from renting out his own home, so it was no trouble to move in with his mother. He had also been worried about his mother and how her health had deteriorated. Carmel mentioned that she was prepared to leave her house to Cameron in her will if he moved in and lived with her.

Cameron started looking for a tenant for his house in North Rocks. His friend Peter was interested in renting the property and one evening at Cameron's house they sat down and drafted up an agreement to create a lease. The agreement was drafted up on the back of a beer coaster but it stated that the lease would be for two years with an option to renew for another two years. It also set out the rent due each month and a requirement that should the tenancy come to an end Peter would have an extra month to come and collect any personal property which remained on the property. The agreement also stated that after that time all property left behind would belong to Cameron. They agreed to get the contract to a lawyer for final drafting but things moved quickly. Peter moved in and Cameron became too busy to send the agreement to a lawyer in his firm for finalisation.

Peter enjoyed living at North Rocks. He was a computer enthusiast. During his stay he attached some extra wide power boards to the walls by screwing them into the walls. He also had some very heavy stacks of computer servers (worth thousands of dollars) that he placed in one room. To prevent them from falling over Peter had to attach the stacks to special brackets which were then screwed into the walls. However, three months after Peter moved in he lost his job and quickly was unable to pay Cameron the rent. Cameron asked Peter to leave and the lease was terminated. Peter left but had no time to get the power boards and server stacks.

Carmel died three weeks later. In her will Carmel left all her property to the Catholic Church. Her will was not yet administered. The same day, Peter also asked Cameron whether he could come and collect his power boards and the server stacks from the house at North Rocks. Cameron said that they were not personal property so Peter had no rights to collect them.

All these conflicts in Cameron life made him feel ill. He was rushed to hospital where he was diagnosed with a burst appendix. He was operated on by Dr Glister. Later he returned home but was taken back to hospital after a relapse. It was discovered that Dr Glister had not removed the burst appendix but had in fact taken Cameron's kidney and sold it to a foreign recipient. Dr Glister has disappeared but police believe that he was paid over \$70,000 for the kidney and they have a good idea where he may be hiding.

**Answer the following questions:**

**(a) Does Cameron have a property interest in his mother's house? (5 marks)**

*This question required students to discuss the doctrine of part performance. There is an issue with the nature of the consideration and whether it is being provided because Cameron loves his mother as per Maddison. Most student did not pick up on this issue*

**(b) Did Peter have a lease of the North rocks property and, if so, what kind was it? (5 marks)**

*This required a discussion of s 23D(2) and the issue of oral but legal leases under old system. Most students discuss the section sensibly.*

**(c) Is Peter entitled to return and get the power boards and the servers? (5 marks)**

*This was a fixtures question which required students to apply the intention test. Students did this well.*

**(d) What property rights does Cameron have over his missing kidney and how can they be enforced? (5 marks)**

*This was a question on whether human tissue is property. Yearworth suggests that tissue can be property even when it does not satisfy the rule in Doodeward. In Australia more recent cases have applied Yearworth such as Re Edwards.*

### **Question 3**

Lawrence and Andrew were brothers. Lawrence owned a property at Avoca in which he lived which was held under Torrens title. Lawrence had two mortgages on the property neither of which were registered. The first created mortgage was to Lorraine, Lawrence's mother. The second mortgage was to the Central Coast Bank, for a business purpose. Lorraine had protected her interest by lodging a caveat. The Central Coast Bank had possession of Lawrence's Certificate of Title.

The title had a covenant on the land which required all the "heirs and assigns" of the land to keep the fences in good repair. This covenant was expressed to be for the benefit of the owner of adjoining land which was currently owned by John. The covenant was noted on both titles.

Meanwhile, Andrew had fallen on hard times and had asked whether he could live in the house with Lawrence for a year while he got his act together. Lawrence was distrustful of Andrew (he had been let down before by his brother), but he agreed to allow Andrew to live in the property on the following conditions:

- (i) that Andrew only stay for 12 months starting on a certain date;
- (ii) that Andrew could be asked to leave after seven days' notice;
- (iii) that Andrew could not have guests unless they were approved by Lawrence; and
- (iv) that Andrew pay \$200 per week.

Lawrence commenced renovations on the property and wanted to completely redo the landscaping in the backyard. He borrowed further funds from his mother for that purpose.

Unfortunately, 6 months after Andrew moved in Lawrence died in a car accident. Lawrence had left all of his property to Gina, his girlfriend, via the will.

**(a) If Gina sells the property can Lorraine claim the entire debt that she was owed by Lawrence under the mortgage, including the later advance? Must Lorraine wait until after the mortgage to the Central Coast Bank has been paid out before she can claim the later advance?**

**(5 marks)**

*This question was about taking under the rule in *Hopkison v Rolt* and the expansion of that rule in *Matzner v Clyde Securities*. This main issue is the issue of notice of the second mortgage prior to the second advance but *Matzner* says this does not prevent tacking if the money is to be used for building purposes. Most students dealt with this well.*

**(b) Does Andrew have a lease of the property and will the new owner be subject to his lease?**

**(5 marks)**

*There is no lease as there is no exclusive possession: *Radiach*. Mosts student did not discuss this issue at all.*

**(c) John has now contacted Gina about the fences which are in a state of disrepair. Can John demand that the fences be repaired?**

**(10 marks)**

*This is an issue regarding a positive covenant. The burden of the covenant will not pass at law or in equity as it is positive. The rule in *Tulk* cannot be applied.*

**Question 4**

Max was the proprietor of old system land near Shelley Beach. Max's land also has the benefit of "a right of way for all purposes, to go pass and repass at all times" over his neighbour, Doug's, land. This right of way allows him easy access to the beach and it was registered in the deeds registration system.

About 24 years ago Doug had approached Max about the sunlight that came across Max's property in the afternoon and asked Max if he would agree to keep the hedge on his property to no more than 2 metres high so that the light could pass onto Doug's land. Max agreed on the basis that Doug would pay him \$2000 and that Doug would be responsible for pruning the hedge. Nothing was put into writing. Every six months Doug trimmed the hedge and life was great.

In 2012 Max sold the land to Rick, 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. Rick also devised a fitness programme which involved his customers jogging and bicycling across the right of way to the beach. To facilitate this, he wanted to upgrade the right of way, which is presently a sandy path, by converting it to a bitumen cycle track.

Doug is most distressed by Rick's plan. The Lands Department have also indicated that all the properties in the area are to be converted into the Torrens system.

**(a) Can Doug prevent Rick from using the right of way for the clients of the spa?**

**(5 marks)**

*The right of way is an easement. The change in the use of the tenement and the increase in use was an invitation to discuss cases such as Jelbert and White. The wording comes from Westfield. It is arguable that the change in both use of the tenement and increase is a breach.*

**(b) Can Doug prevent Rick from upgrading the right of way and can Rick require Doug to remove [a] fallen tree?**

**(5 marks)**

*The upgrade issue was based on the right of the servient tenement to continue to use the pathway. The upgrade is likely not to offend the terms of the easement. In terms of the fallen tree the grammatical error ("the" rather than "a") meant that I gave all students full marks for that part.*

**(c) Can Doug still go onto Rick's land to trim the hedge?**

**(5 marks)**

*This question concerned a negative easement for light. It is also an equitable easement under the doctrine of part performance. The paying of the money AND the pruning are supportive of their being a contract which is specifically performable. It was not an easement by prescription as many thought as there was permission.*

(d) If after the conversion the agreements concerning the right of way and the hedge are not recorded, will they still be enforceable once the properties are in the Torrens system?

(5 marks)

*Yes these easement should be noted on the register and if they were not they would be protected by s 42(1)(a1): Dobbie v Davidson. This was done well by most.*