

LEGAL PROFESSION ADMISSION BOARD

SEPTEMBER 2013

REAL PROPERTY

Time: Three Hours This paper consists of **four** questions.

Candidates are required to attempt all **four** questions.

All questions are compulsory.

All questions are of equal value.

All questions may be answered in one examination booklet.

Each page of each answer must be numbered with the appropriate question number.

Candidates must indicate which questions they have answered on the front cover of the first examination booklet.

Candidates must write their answers clearly. Lack of legibility may lead to a delay in the candidate's results being given and could, in some circumstances, result in the candidate receiving a fail grade.

This examination is worth 80% of the total marks in this subject.

Permitted Materials: This is an open book examination. Candidates may refer to any books and any printed or handwritten material they have brought into the examination room.

As some instances of cheating, plagiarism and of bringing unauthorised material into the examination room have come to the attention of the Admission Board, candidates are warned that such conduct may result in instant expulsion from the examination and may result in exclusion from all further examinations.

This examination should not be relied on as a guide to the form or content of future examinations in this subject.

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 2011, 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)
- (b) **If Lawrence can prevent the sale to Dave, what can Katherine recover from Lawrence on a discharge?** (5 marks)
- (c) **What mortgage remedy should Katherine have used and how does it differ from the power of sale?** (5 marks)

(Question 2 follows)

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)

(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)

(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 \$10,000 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 their 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 and 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.

(Question 3 continues)

(Question 3 continued)

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

(5 marks)

(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)

(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)

(d) Can Lucas enforce the agreement regarding building height on Rachel's land and if Lucas' right to restrict the building height on Rachel's is recorded in the Torrens system is it indefeasible? If it isn't, how could it be enforced?

(5 marks)

(Question 4 follows)

Question 4

Phillipa was an artist who specialised 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)
- (b) **Assuming that the artworks are property, would they pass under a valid contract of purchase of the land?** (5 marks)
- (c) **Can Clancy sell the house?** (5 marks)
- (d) **Will whoever buys the property be bound to recognise Tom's rights to paint on the wall?** (5 marks)

END OF EXAM