

Property Law Semester 2 2013

Marker: Evan Richards

Q1: 88

Q2: 90

Q3: 90

Q1:

Joffrey is the registered proprietor of Westeros. Gendry may argue that he has an interest in the bigger part of the south of the property, as per the agreement with Robert and Joffrey.

This agreement was not recorded in writing and therefore his interest in a portion of the fee simple of Westeros is not enforceable under Walsh v Lonsdale.

However, he may argue that the agreement has been part performed, given that his acts of digging the ditch, clearing the scrub and farming the land unequivocally and in their own nature do point towards the existence of the contract (Regent v Millet).

As a backup, Gendry (G) may argue that Joffrey (J) is estopped from denying his interest. G should argue part performance first as, if successful, he will be granted specific performance, whereas the court has discretion in giving a remedy for estoppel, and may only award damages. The essence of G's estoppel argument would be that a clear and unequivocal representation was made, and he acted to his detriment by spending his time doing labour on the farm in reliance on this representation (Giumelli; Walton Stores). Nonetheless, G is likely to be successful in part performance.

Alternatively, G may argue he has a beneficial interest in that portion of Westeros under a trust. G may argue that K's statement that he wants to sort the business out now, and direct representations about giving the land were an express declaration of trust. However, as this was not evidenced in writing as express trust must fail (s 29(b) LPA). Thus, G may argue that a constructive trust should be imposed, as given his labour on the land it is unconscionable for J, as the legal owner, to assert full and absolute rights to Westeros (Baumgartner).

It is likely that G will be successful in establishing he has an equitable interest in a portion of Westeros. As the registered proprietor, J has indefeasibility (s 69 RPA) and will not normally be bound by interests which are not recorded on the title. However, as a volunteer, it is likely to be found that he steps into the shoes of Robert, and therefore would be bound in person by G's interest arising either out of contract or trust (s 71(d) or 71(e); s 249 RPA)

(2)

Eddie is assumed to be the registered proprietor of the land, with indefeasible title (s 69 RPA). The owner of Westeros may have an easement to run water from the river to Westeros through a ditch on the land. It will be an easement if it satisfies the criteria from Riley v Pentilla:

1. Westeros is the dominant tenement and Eddie's land is the servant tenement
2. The easement must accommodate the dominant tenement in that it is reasonably necessary for its enjoyment. Although there is not much information that is arguable given Westeros is farming land and needs a water source to be used for agricultural purposes.
3. The dominant and servant tenements have different owners
4. The interest is clearly defined and not wide or vague. Right in relation to water courses is an established type of easement and is capable of forming the subject matter of the grant.

Therefore, the interest appears to satisfy the substantive criteria of an easement.

The interest has not been registered and thus is not legal (s 67 RPA). It is not in writing so is not enforceable under Walsh v Lonsdale. It may be enforceable by part performance, if the way it has been used is deemed to be a sufficient act to point unequivocally to the existence of a contract to grant an easement (Regent v Millet).

At most, there will be an equitable easement. The owner of Westeros will only be able to enforce the equitable easement against Eddie if it falls under the exception to indefeasibility under s 69(d) RPA. This again may turn on whether the access to the water was absolutely necessary, or whether there are other options available.

If the interest is not an easement it will merely be a bare licence as no consideration has been provided. Such a licence would be revocable at will, and not binding on third parties.

(3)

Stark has a registered mortgage over Westeros. Stark doesn't want to discharge the mortgage as he wants to enforce an additional term that stipulates Robert must continue to purchase feed from his sheep from Stark. It is likely that the court will consider this additional term invalid, as it is a clog on redemption (Toohey v Gunther). Equity will not permit a mortgagee, through contractual provisions, to obstruct a mortgagor's right to redeem the property.

(4) Castlemont (C)

Gendry

Gendry is the original registered proprietor of C. As he was defrauded of his title, he still has an equitable interest to get his legal title reinstated.

Henry (H)

Henry is the current registered proprietor of C. As such, he enjoys indefeasibility under s 69 RPA and is only subject to estates that are notified on the register, subject to a limited number of exceptions. Despite the fraudulent intermediary transfer to J, H will enjoy immediate indefeasibility under Breskvar v Wall.

Barry

Barry has an equitable mortgage as his interest has not been registered yet (s 67 RPA). As Henry is the registered proprietor of C, Gendry and Barry's equitable interests will only prevail if they can successfully argue an exception to H's indefeasibility. Barry does not appear to have any possible arguments against H as H's conscience was not affected with regard to B. However, G may argue that Henry has been fraudulent (s 69(a) RPA). Henry will not be affected by the fraud exception if he is a bona fide purchaser for value. This is unlikely given he only paid 75% of the true value. However, there is no evidence that H even knew of Gendry's interest in the property. Although it may be argued that as J was an 'unscrupulous' person as his best friend, Henry should have considered the matter further, this argument is unlikely to hold up. H is not likely to be found to have been party to J's fraud as he had no deliberate scheme to deprive G of his interest (cf Loke Yew).

As H does not appear to have had any knowledge of Barry and Gendry's interests, it is not likely an in personam exception would be successful.

Barry v Gendry

- priority dispute between equitable interests
- Gendry's conduct of putting the certificate of title in his drawer in front of Joffrey may be considered arm's length conduct (arguable) (Abigail v Lapin)
- Gendry's natural priority in time may be postponed
- This will not be relevant if H is the new RP with indefeasible title as he will not be subject to either interest

Question 2

Michael

Michael has signed a valid contract for the purchase of Fisher Farm (FF) and therefore has an equitable interest under the estate contract (Lysaght v Edwards)

Phrynie (P)

P did sign the Memorandum of Transfer voluntarily, though it is highly likely the transaction would be set aside on the grounds of undue influence. P was clearly in a very vulnerable situation - she was intoxicated, inebriated and her infatuation with Jack meant she fully trusted his judgement. Clearly, he took unconscionable advantage of her weak position (Amadio; Bridgewater v Leahy). Thus, on the face of it, the transaction would be set aside. P would have an in personal claim against Jack, as he was the person involved with the vitiating factor. P may bring action against J for her loss.

Jack as the registered proprietor has indefeasible title (s 69 RPA) subject to exceptions. He had a deliberate scheme to deprive P of her interest (Loke Yew) and was thus fraudulent. His title is defeasible and P's equitable interest can prevail. However, Michael has come in as an innocent third party, complicating the matter.

Almond Bank

Almond has a registered mortgage over the land for the value of \$200 000. In granting the mortgage they did not inspect the property, trusting that Jack was trustworthy and honest. However, whether they had notice of P's interest or not is irrelevant given that they are now registered. As a third party purchaser under the sale by the mortgagee, M is protected from a claim by P, even prior to registration (RPA s 134). P will thus not be able to recover her property. She may only seek compensation from Jack. As she has essentially been defrauded of her interest and loss in as a result of Michael being a bona fide purchaser for value, she may seek compensation under the legislation (RPA) from the assurance pool.

2.

Vitner's Bank (V)

Vitners appear to have an equitable mortgage over Fishers Farm for the value of \$150 000. The mortgage is equitable as it is not registered (s 67 RPA) though it is in writing and is signed.

Vitner and Michael will have a priority dispute. Michael will want to take property fee of Vitner's mortgage. In a priority dispute between a prior equitable interest and subsequent equitable interest the court will scrutinise the conduct of both parties in determining which should prevail (Heid v Reliance). V will argue that as their interest was created first in time, it should prevail. However, as per Rice v Rice, this applies only where the competing equities are equal and therefore M will assert that he has a better interest in the circumstances. Given that V did not take the certificate of title or caveat its interest, it may not be seen to have taken legitimate steps to protect itself (J & H Just Holdings; P-to-P v Shavan). V may argue that there was a valid reason why they hadn't obtained the title deeds, as they had made a number of requests and P had not complied. However, there is no apparent reason why they did not caveat (cf Jacobs v Platt Nominees). Especially given that P retained the certificate of title and it was within her power to create subsequent mortgages over the land, the court will likely find that V's conduct in failing to caveat means its interest should be postponed to Michael.

3. Daphne

Daphne appears to have a lease over the cottage as per her agreement with Phrynie:

- Daphne is granted exclusive possession as there is nothing on the facts to suggest otherwise (Radaich v Smith)

- There is a term; up to 12 months. It is arguable that this is not sufficiently defined, as required by Prudential Assurance. I will proceed in the basis it is however, given that additional facts may indicate a periodic tenancy instead.

- There is a defined rent; \$800/month

The lease does not need to be registered to be legal as its term does not exceed one year (s 116 RPA). Even if it was for longer it would likely be enforceable in equity as there is a valid and binding contract in writing, to create an interest known to law (Walsh v Lonsdale). Therefore, Daphne has a legal lease.

Michael

As discussed previously, Michael has an equitable interest arising out of the estate contract.

Daphne and Michael

Daphne's legal lease will enjoy priority over Michael's equitable right to the fee simple. Even upon Michael becoming the registered proprietor, Daphne's prior legal lease will prevail over his subsequent legal fee simple.

4. Jonno

Daphne appears to have subleased a part of the premises to Jonno, as she has transferred less of her interest as tenant. However, there is an issue regarding exclusive possession, given that Jonno shares the kitchen with Daphne. Exclusive possession is a key characteristic of a lease (Radaich v Smith) Thus, Jonno may merely have a contractual licence to be on the premises. If so, Daphne can revoke this licence at will and Jonno would only be able to receive damages for breach of contract (Cowell Racecourse).

There is another issue, given that the agreement has not been evidenced in writing, as required by s 26(1) LPA. However, if Jonno has entered into possession of the premises and begun to pay rent, these will likely be considered sufficient acts of part performance (Brough v Nettleton). Nonetheless, this will not be relevant if he is not found to have been granted a leasehold interest.

Question 3

George

The issue is whether Anne and Sue held the land as joint tenants or tenants in common. If they were joint tenants, Sue would have the right of survivorship (*jus accrescendi*) and on Anne's death she would take the entire property as her own. However, if Sue and Anne held as tenants in common, Anne could devise her share in the property in her will to George. From the facts, the title deed shows that they are joint tenants. However, it is noted that on purchasing the property Anne and Sue contributed unequally (40% and 60%). This is a circumstance in which equity will presume a tenancy in common (Malayan Credit). Sue may argue that what is on the legal title should be enforced, although this would render the intervention of equity redundant and thus George may prevail. If so George will have a right to a 40% share in the property.

Anton

Anton has been granted a right to 'tramp all over the land' and to 'take gum leaves.' Anton may encounter difficulty in asserting that he has a proprietary right. There is no evidence that he has exclusive possession so he does not have a lease (Radaich v Smith). He does not have an easement either, given that there is no dominant tenement on the facts, and the right is too wide and vague. Anton may have a profit with regard to taking the gum leaves, which are naturally occurring on the property. Anton would be unlikely to want to enforce this on its own, given that he appears to only use the leaves to attract koalas to the area. Therefore, as Anton does not have a lease or easement, he will only have a bare licence. This licence will be revocable at will, so Sue will be able to successfully get Anton off the land. After giving Anton a reasonable amount of time to collect his belongings, Anton would become a trespasser and be able to be removed using reasonable force (McPhaill v Persons).

Alternatively, Anton may pursue a claim in estoppel. This would be based on the fact that Anne and Sue represented to him that he would be able to use the land for his koala watching. He would

argue that he acted on this representation with substantial detriment, given that he purchased \$7000 worth of equipment. Sue may argue that as he was an 'avid koala watcher' he may have brought this equipment elsewhere (national parks etc). Anton may rebut this argument given that his 'enthusiasm grew' when Sue made her representation which likely induced him to buy the equipment. Further, he may in fact have no other use for the equipment. If successful, Anton will be awarded the minimum equity to avoid loss, which is likely only damages.

May

May has been granted a right to occupying the South-West corner of the property, and to build an access road across the land to access that corner from a public road.

With regard to occupying a portion of the land, May does not appear to have exclusive possession as she only occupies it during races. Therefore, she does not have a lease (Radaich v Smith). Further, there is no term specified on the facts (Prudential Assurance) or rent. May likely has a bare licence, revocable at will by Sue.

May is also likely to have difficulty establishing that the right of way via the access road is an easement. Although May does own property adjacent to Anne and Sue's, there is no clear dominant tenement on the facts. Further, the access is for a recreational purpose and does not 'accommodate' the land in the sense that it is reasonably necessary for its enjoyment. Even though the track is likely for May's business, this will not save it as (Hill v Tupper) as the access road does not improve the access, usability or amenity of the dominant tenement. May is likely to have a bare licence with regard to the access road.

Stands

In determining who has the right to the stands, it must be determined whether they are fixtures or fittings. From the facts, they are resting in holes in the ground but are not attached. This gives rise to the presumption that the chattel is not a fixture, as it is only 'attached' by its own weight. This presumption applies even whether the chattel is embedded in the soil (Ewles v Maw). Sue will argue that the stands are a fixture because May intended to be set in contract, though the actual intention of the parties is merely one piece of evidence (Emmanuel v CS). Given that they are not attached, the court may consider relevant the fact that removal would not damage either the land or the stands themselves (Metal Manufacturers). Sue may argue that the fact they were going to be concreted suggests they were intended to be permanent and that they were there to benefit the real estate. These arguments are unlikely to be sufficient to rebut the presumption, given that no further evidence of permanence is available, and the stands can be easily removed.

Though unlikely, if it was found the stands were fixtures and May did have a lease over that portion of the land, as a tenant, she could remove them as they relate to trade and are not structural (Concept Projects v McKay).

William (W)

William may have a lease over the shed

- There appears to be exclusive possession as there is a lock mechanism on the shed (Radaich v Smith)
- There is a defined term of a year (Prudential Assurance)
- There is consideration; Anne and Sue may stay in W's caravan park for free. A monetary rent is not required for a lease.

There is no evidence the formalities have been complied with. For a legal lease the interest must be conveyed by deed (s 28 LPA). However, as the lease is for a term not exceeding 3 years it is legal (s 30(2) LPA).

W may also have an equitable fee simple over the South-east corner of Anne and Sue's land. This is not a legal right as it has not been conveyed by deed (s 28 LPA).

Alternatively, W may have a lease. There appears to be exclusive possession and there is consideration W cutting the lawn and doing maintenance work. However, there does not appear to be a term. Further facts may be used to establish a potential periodic tenancy.

W may also raise a claim in estoppel given that he has acted in substantial detriment to Anne and Sue's representation, by building a shed. The representation that W had a 'legal right' was clear and unequivocal. Thus, it may be considered unconscionable for Sue to resile from the promise (Walton Stores).

Sue

In summary, considering all of the issues discussed the likely outcomes are as follows:

- Sue can get Anton off the land
- May can keep the stands
- George will have a 40% share in the property and George and Sue will hold as tenants in common
- William may succeed in a claim in estoppel regarding the right to the south-east corner of the land
- William may be able to enforce his lease over the shed against Sue as it is a legal interest.