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# Property Law Cram Notes

1<sup>st</sup> Edition



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**TABLE OF CONTENTS**

**1. INTRODUCTION ..... 5**  
 A. How to use Cram Notes..... 5  
 B. Abbreviations..... 5

**2. PERSONAL PROPERTY ..... 5**  
 A. Possession of goods..... 5  
     i. Actual possession .....5  
     ii. Jus tertii.....6  
 B. Tortious acts on personal property ..... 6  
     i. Trespass .....6  
     ii. Conversion.....6  
     iii. Detinue.....6  
 C. Bailment ..... 7  
     i. Gratuitous bailment .....7  
     ii. Rights against third party .....7

**3. PRIORITY OF INTERESTS IN PROPERTY..... 7**  
 A. Prior Legal v Subsequent Legal interest..... 8  
 B. Prior Legal v Subsequent Equitable interest ..... 8  
     i. Exceptions.....8  
 C. Prior Equitable v Subsequent Legal interest ..... 9  
     i. Constructive Notice.....9  
         1) Constructive notice of tenant in possession .....9  
         2) Notice of equitable interests of other residents .....9  
 D. Prior Equitable v Subsequent Equitable..... 10  
     i. Exceptions..... 10  
 E. Mere equity v Subsequent Equitable ..... 10

**4. CO-OWNERSHIP ..... 11**  
 A. Joint tenancy ..... 11  
 B. Tenancy in common ..... 11  
 C. Which is it?..... 11  
     i. Words of severance ..... 11  
     ii. Presumption in equity..... 12  
 D. Rights against other co-owners ..... 12  
     i. Claim for improvements..... 12  
     ii. Occupation rent..... 12  
     iii. Quantum of occupational rent/claim for improvements ..... 12  
 E. Severance of Joint tenancy ..... 13  
     i. Unilateral action ..... 13  
     ii. By agreement ..... 13  
     iii. Court order ..... 13

**5. REAL PROPERTY & TORRENS TITLE..... 13**  
 A. Boundaries of land..... 13  
 B. Fixtures ..... 14  
     i. Degree of annexation..... 14  
     ii. Object of annexation ..... 14  
     iii. Tenant’s fixtures..... 14



C. Possession of land (possessory title).....	15
D. Adverse possession.....	15
i. Commencement.....	16
ii. Factual possession.....	16
iii. Intention to possess.....	16
iv. Mistake as to title.....	17
v. Successive interests.....	17
vi. When does time stop running?.....	17
E. Estates.....	17
i. Types.....	17
1) Freehold.....	17
2) Leasehold.....	17
ii. Determinable limitation.....	18
iii. Condition subsequent.....	18
iv. Void contingencies.....	18
v. Doctrine of waste.....	18
F. Legal future interests.....	19
i. Types of future interests.....	19
ii. Rules for legal remainder.....	19
iii. Destruction of legal contingent remainders.....	20
G. Contracts for sale of land.....	20
i. Formalities.....	20
1) Land.....	20
ii. Is the contract incomplete? Doctrine of part performance.....	20
iii. Risk & incomplete contracts.....	21
H. The concept of indefeasibility.....	21
i. Deferred indefeasibility.....	21
ii. Immediate indefeasibility.....	22
iii. Exceptions to indefeasibility.....	22
1) Fraud.....	22
2) Omission or misdescription of easements.....	22
3) Short term tenancies.....	22
4) Rights in personam.....	23
I. The Torrens register.....	24
i. Notice.....	24
ii. Caveats.....	24
1) Caveatable interest.....	24
2) Removal.....	24
3) Compensation.....	24
4) Competing interests under caveats.....	25
<b>6. EASEMENTS.....</b>	<b>26</b>
A. Creation.....	26
i. Substantive requirements.....	26
ii. Implied grants.....	27
1) Rule in <i>Wheeldon v Burrows</i> .....	27
2) Easements of Necessity.....	27
3) Easements implied from common intention.....	28
4) Easements implied from description.....	28
iii. Implied reservation.....	28
B. Extinguishment & abandonment.....	28



**7. LEASES..... 28**

- A. Types of leases..... 28
- B. Creation..... 29
  - i. Legal lease..... 29
  - ii. Equitable lease..... 29
  - iii. Implied periodic lease..... 29
- C. Substantive requirements for leases..... 29
  - i. Exclusive possession..... 29
  - ii. Certainty of duration..... 30
- D. Covenants..... 30
  - i. Implied by law..... 30
    - 1) Quiet enjoyment..... 30
    - 2) Non-derogation from grant..... 30
    - 3) Fitness for habitation..... 30
    - 4) Duty to take reasonable care for safety of occupants..... 31
    - 5) Obligation to repair..... 31
  - ii. Implied by statute..... 31
  - iii. Express covenants..... 32
    - 1) To repair..... 32
    - 2) Covenant against assignment or sub-letting..... 32
- E. Assignment of leases..... 33
  - i. Privity of contract..... 33
  - ii. Privity of estate..... 33
  - iii. Assignment of lease..... 33
  - iv. Assignment of reversion..... 34
  - v. Liability following assignment..... 34
- F. Forfeiture or re-entry of lease..... 34
- G. Relief against forfeiture..... 35

**8. MORTGAGES ..... 35**

- A. Principles under Torrens system..... 35
- B. Tacking and Priority..... 36
- C. Clogs on the equity of redemption..... 36
  - i. Property remains encumbered after redemption..... 36
  - ii. Option to purchase..... 36
  - iii. Postponement of right to redeem..... 37
  - iv. Collateral advantages..... 37
  - v. Penal provisions..... 37
- D. Mortgagee’s remedies..... 38
  - i. Power of sale..... 38
    - 1) Notice..... 38
  - ii. Mortgagee’s equitable duty..... 39
    - 1) Timing..... 39
    - 2) Conduct of sale..... 39



## 1. INTRODUCTION

### A. HOW TO USE CRAM NOTES

The Property Law Cram Notes are formatted into a step-by-step guide, which you can use as a checklist in your exams to ensure that every element of the exam question is answered. You may find the Table of Contents to be a quick and useful overview of the law to be applied.

You should also answer the exam question using the ILAC method, which will ensure your answer is comprehensive.

- Issue** State the legal issue relevant to the problem
- Law** Identify the relevant case law and legislation
- Analysis** Analyse and apply the law to the legal issue. This is the most important part, so ensure your legal analysis is very thorough.
- Conclusion** Form a conclusion based on your analysis and application of the law, giving some practical advice to the hypothetical client.

It is very important to spend time perfecting your analysis section, as this is the part that examiners are most interested in. Do not worry if you reach the correct conclusion (there often isn't one clear answer) – examiners will give more weight to your legal analysis, and sometimes may even reward answers that propose an innovative and unconventional answer!

### B. ABBREVIATIONS

The Property Law Cram Notes will refer frequently to the following legislation using abbreviations.

<b>Legislation</b>	<b>Abbreviation</b>
<i>Real Property Act 1900</i> (NSW)	RPA
<i>Conveyancing Act 1919</i> (NSW)	CA

## 2. PERSONAL PROPERTY

### A. POSSESSION OF GOODS

#### i. ACTUAL POSSESSION

A person in possession of goods, even as a wrongdoer (or finder of goods), is entitled to take action against anyone interfering with their possession, unless the person interfering with such possession has a superior right or title (i.e. the true owner).

*Costello v Chief Constable*

- Actual possession protected regardless of how item was obtained (legally or otherwise)

*R v McKiernan*

- Possession is "effective ownership against the whole world except someone who can prove a better title"

*Armory v Delamirie*

- Finder in actual possession, though not an owner, has sufficient title to sue a stranger



#### **iv. MISTAKE AS TO TITLE**

*Williams v Usherwood* – enclosure is typical way of establishing possessory title under adverse possession. As the documentary title owner under mistake as to title, any temporary occupation did not amount to re-possession

*Clement v Jones* – no adverse possession – running cattle over whole area not inconsistent with use of owner of smaller area, refurbishing of smaller area by true owner asserted title (no mistake as to title as in *Williams*)

#### **v. SUCCESSIVE INTERESTS**

The remaindermen's right of recovery of land is deemed to accrue on the date on which estate should have fallen into possession e.g. A's life estate, B has remainder, X dispossesses A, B's cause of action accrues on A's death.

#### **vi. WHEN DOES TIME STOP RUNNING?**

Time stops running when

- 1) person with cause of action asserts title (bringing action or re-entry on land), or
- 2) squatter admits existence of superior title (except willingness to pay – *Pye*)

*Mount Carmel* – mere assertion by the true owner of their title in a letter is not sufficient to stop time running.

### **E. ESTATES**

#### **i. TYPES**

All estates are alienable, at any time, for the period restricted by the estate granted.

##### **1) Freehold**

Fee simple

- greatest interest in land under common law, as it comes closest to absolute ownership
- often of indefinite duration

Fee tail

- granted to a person and only to their specified descendants (with the reversion to pass back to the grantor)
- However, they are no longer created (except in SA) – it is treated as a fee simple instead

Life estate

- interest in land granted to a person for the term of their life (life tenant)
- on death of that person, the estate reverts to the grantor
- Pur autre vie
  - life estate measured by life of another person rather than the grantee himself
  - the present life tenant transfers the life estate.

##### **2) Leasehold**

Leasehold estates – the difference between leaseholds and freeholds is the specified duration

- lease for fixed term
  - fixed period of time specified at the outset
  - expires automatically at end of period



- periodic tenancy
  - based on periods of time
  - doesn't terminate until notice given
  - implied provision that lease continues for another term of same period unless determined by notice
- tenancy at will
  - may be determined at any time by either party
  - created where owner allows tenant to take exclusive possession without agreement as to duration or rent
  - different to licence – tenant can maintain action against third party
- tenancy at sufferance
  - tenant holds over, wrongfully in possession after termination of lease
  - landlord can institute proceedings for recovery, but cannot maintain trespass
  - not adverse since initial entry was lawful

#### **ii. DETERMINABLE LIMITATION**

- An estate continues until automatically terminated by the occurrence of the event specified by grant
- automatically reverts to grantor - grantor's interest is the reversionary interest
- The event must not be one which is bound to occur
- specifies the conditions which must be present for the estate to begin and defines the parameters of the interest

#### **iii. CONDITION SUBSEQUENT**

- A condition subsequent is specified event which cuts short an already otherwise defined interest.
- The condition depends on some action/inaction on behalf of the grantee
- If the condition is breached, grantor has a right to re-enter the land – if no re-entry takes place, the grantee's estate continues

#### **iv. VOID CONTINGENCIES**

##### *Zapletal v Wright*

- A void condition subsequent can be severed from grant, with the grant remaining valid
- A void determinable limitation leads to the grant failing entirely.

A contingency may also be void for:

- void for illegality
- void for uncertainty – too vaguely defined (*Clayton v Ramsden*)
- void for immorality (*Andrews v Parker*)
- void if it unduly restricts the right to marry
- void if it substantially restricts grantee's rights of alienation - limiting clause must not take away rights of alienation (i.e. the right to dispose to someone else).

#### **v. DOCTRINE OF WASTE**

The doctrine of waste applies to regulate the conflict of interest between the life tenant and remainderman where life tenant harms the land.

##### Ameliorating waste

- conduct which alters character of land but increases its value
- nominal damages



- equity wont interfere where waste is not injurious and has a trivial effect

#### Permissive waste

- where life tenant fails to keep property in satisfactory state of repair
- life tenant not liable unless there was an obligation in the grant to repair

#### Voluntary waste

- positive act causing injury to land
- liable unless "unimpeachable for waste" - free to do whatever they pleased
- legislation – tenant unimpeachable for waste confers no legal right to commit equitable waste, unless an intention to confer such right expressly appears

#### Equitable waste

- restrain life tenants (unimpeachable for waste) who unconscionably exercise their legal rights to the prejudice of the remainderman
- acts of wanton destruction
- compelled to repair the damage (*Vane v Lord Barnard*)

## **F. LEGAL FUTURE INTERESTS**

A future interest is a right to possession of the property in the future.

### **i. TYPES OF FUTURE INTERESTS**

Remainder – fee simple in remainder

- grant of future interest, after the interest in possession has come to an end
- more than one remainder is possible – remaindermen
- particular estate – one grantee's interest

Reversions – fee simple reversion

- remaining interest held by grantor after granting a lesser estate to another
- a remainder may defeat the reversion (i.e. if the remainder disposes of entire interest of the grantor)

Vested/Contingent remainders

- Vested – one that is bound to take effect upon possession
- Contingent – may or may not take effect

A future interest is vested if –

- 1) precise identity of the remainderman is known
- 2) no condition precedent to the interest falling into possession apart from the regular determination of the prior estate.
- 3) If there is doubt, court leans in favour of a vested interest.

### **ii. RULES FOR LEGAL REMAINDER**

- 1) A remainder must be supported by a prior particular estate of freehold created by the same interest (e.g. Lease to A, remainder to B – there is no remainder under lease)
- 2) Any remainder which, if it were to take effect, would leave a gap in seisin, was void – remainder needed to vest prior to determination of prior estate
- 3) Any remainder which cut short the prior particular estate was void – i.e. cannot limit duration of the preceding particular estate, need natural determination
- 4) A remainder after a fee simple estate was void (as a fee simple is unrestrained in duration)





### iii. DESTRUCTION OF LEGAL CONTINGENT REMAINDERS

- natural destruction – remainder fails on usual operation of legal remainder rules
- artificial destruction
  - prior estate forfeited – e.g. tortious conveyance
  - merger – A gives B life estate, remainder to B’s son. A conveys to B his interest in reversion, which merges with B’s life estate – grant is determined, and at the time, B has no son, so the remainder is void because it can’t vest.
  - surrendered – if life tenant surrendered estate to reversioner

## G. CONTRACTS FOR SALE OF LAND

### i. FORMALITIES

#### 1) Land

Section 23C of the CA provides that no interest in land can be created or disposed of except:

- by writing signed by the person creating or conveying the interest, or by the person’s agent who is lawfully authorised in writing
- or by will
- or by operation of law.

In addition, a declaration of trust respecting any land must be *manifested and proved* by some writing signed by a person who is able to declare such trust or by the person’s will (s 23(1)(b)).

Section 54A provides that contracts for sale of land are to be in writing. No contract for sale of land can be enforced unless the agreement (or some memorandum or note) is in writing, and signed by the parties or their agents (s 54A(1)). The requirements of s 54A include (*Toogood v Mills* (1896))

- description of land
- identification of parties
- reference to the transaction

In relation to a sufficient memorandum or note in writing under s 54A CA (*ANZ v Widin*)

- s 23C and s54A – the writing must describe the subject matter (i.e. the land must be referred to)
- A note signed by a party referring *specifically* to another *document* or *transaction* allows the other document to be read together with the signed document (and thus not fall foul of s 54A writing requirements)
  - *Timmis v Moreland* – parol evidence can be used to explain transaction referred to and identify any document relating to the transaction.
  - Reference can be express or implied
  - Reference must ultimately be to an existing document (*Long v Millar*)

### ii. IS THE CONTRACT INCOMPLETE? DOCTRINE OF PART PERFORMANCE

Where the writing requirements of s 54A are not satisfied, parties may be bound in equity under the doctrine of part performance.

*Mason v Clarke*

- Where there is insufficient memorandum, part performance of an oral agreement is sufficient, where the work done and expense incurred were **exclusively referable** to the oral agreement



*McBride v Sandland*

- act of PP relied on must be unequivocally and in its own nature referable to "some such agreement as that alleged" (some contract of the general nature of that alleged)
- act done on the faith of the agreement, by one party privy, and permitted by the other
- act done under agreed terms of a completed agreement and by force of that agreement

*Kingswood Estate v Anderson*

- The act need only suggest existence of alleged contract, not the exact terms.
- E.g. disputed term of tenancy - actual occupation of tenant could be referable to any kind of tenancy, but held enough to for parol evidence as to terms

Other cases where part performance was found

- deposit of title deeds (mortgage) (*Russel v Russel*)
- payment of purchase price and making improvements (*Pejovic v Malinic*)
- taking possession of land (*Regent v Millett*)

Note → mere payment of purchase money is insufficient (*Britain v Rossiter*)

### **iii. RISK & INCOMPLETE CONTRACTS**

*Lysaght v Edwards*

- after entering into contract, the risk flows to purchaser due to their equitable interest

*Ziel*

- bare trustee vendor's insurance policy does not cover fully paid purchaser, as vendor no longer has any insurable interest + no right to assign policy to purchaser

However, under s 66J-66O CA, the risk of damage does not pass to purchaser until the transaction complete or at an agreed time.

## **H. THE CONCEPT OF INDEFEASIBILITY**

The concept of indefeasibility arises from s 42 of the RPA. Section 42 provides that except for situations of fraud, the registered proprietor holds their interest as recorded on the Register absolutely free from all unregistered interests except for a prior folio or an omission or misdescription when the land was brought under the RPA (i.e. Torrens title).

In addition, under s 43, except for situations of fraud, no person dealing upon the Register "shall be affect by notice direct or constructive of any trust or unregistered interest". Note that knowledge of an unregistered interest is not fraud in itself.

### **i. DEFERRED INDEFEASIBILITY**

Deferred indefeasibility provides that registration is not decisive of the registered proprietor's title, as it can be defeated subsequently where fraud is shown. The views of deferred indefeasibility are provided in the following cases:

*Gibbs v Messer*

- "those who deal, not with the registered proprietor, but with a forger who uses his name, do not transact on the faith of the register; and they cannot by registration of a forged deed acquire a valid title in their own person" although can pass a valid right to 3<sup>rd</sup> parties



landlord may exercise either a

- right of re-entry
- right to forfeiture (which is hard to exercise, but easy to arise)
- right of peaceful re-entry (self-help or by issue and service of writ) (*Billson*)

Such a right of re-entry or forfeiture is implied by s 85(1)(d) CA into every lease unless expressly excluded.

- This section provides that if rent is in arrears for a month, or any other covenants have been breached for two months, then the landlord has right to determine the lease.

*Moore v Ullcoats*

- Facts: the landlord asked for permission to inspect, suggesting that the person was still recognised as a tenant by the landlord and that the lease was still ongoing.
- The landlord must make an unequivocal demand for possession so as to determine the lease
- The landlord has right to waive forfeiture (implied/express)
  - acceptance of rent – right to forfeit will be waived if rent is accepted after breach and the landlord knows of the breach
  - even if lease says a breach of a covenant will void the lease, it is only voidable at the landlord's option (*Rede*)

The landlord must give notice of an opportunity to remedy pursuant to s 129 CA before exercising a right of re-entry or forfeiture. This section applies to all leases. Section 129 CA provides that the notice must:

- (a) specify the particular breach complained of, and
- (b) if the breach is capable of remedy, requiring the lessee to remedy the breach, and
- (c) require the lessee to pay compensation for breach,

## **G. RELIEF AGAINST FORFEITURE**

Where the landlord has exercised the right of forfeiture, the tenant can apply to the court to stop the landlord proceeding with their right.

*Stieper v Deviot*

- relief against forfeiture is a statutory power of the court to grant equitable relief (s 129(2) CA)
- equitable relief is discretionary
  - The court will consider the "conduct of the lessee in relation to the subject matter of the lease and such as to affect the interest of the lessor"
  - The court will not force a tenant onto the landlord, especially where the tenant is unable to regularly pay rent on time
  - Where s 129 notice was required but defective, relief will be granted (*Dalla Costa*)
  - However, there is no relief where 3<sup>rd</sup> parties have intervened (*Gill v Lewis*)

## **8. MORTGAGES**

### **A. PRINCIPLES UNDER TORRENS SYSTEM**

The equity of redemption for mortgages is not a mere equity, but is a fully fledged equitable estate in land.



Under the Torrens title system, the mortgagor remains the registered proprietor of the fee simple, while the mortgagee becomes the registered proprietor of the mortgage (as a registered charge over the fee simple).

The mortgagee's registered charge includes a right to exercise their power of sale upon default, empowered by s 57 and 58 of the RPA (since the mortgagee does not have the legal title to the fee simple, the charge gives the mortgagee power to transfer the mortgagor's fee simple). Upon discharge of the mortgage (i.e. payment of money to the mortgagee), the mortgage is removed from the register by a signed discharge of mortgage.

Under Torrens title, there is no limit on the number of legal mortgages attaching to the land (since it is merely a charge). The determination of priority of legal mortgages is by the date of registration (s 42 RPA provides that each subsequent legal interest takes subject to what was already on the register)

An equitable mortgage (*Walsh v Lonsdale*) arises where there is an agreement not satisfying the formalities. The deposit of title deeds creates an equitable mortgage, involving part performance and a specifically enforceable agreement/contract. This provides an exception to the writing requirement under s 54A CA.

## **B. TACKING AND PRIORITY**

*Mercantile Credit v ANZ*

- Facts: the mortgage included an all moneys clause – i.e. that the mortgage secures all money owing now and into the future. The mortgagor takes a second mortgage with the first mortgagee's full knowledge. The first mortgagee subsequently lends more money to the mortgagor
- Does the first mortgagee gain priority over the second mortgagee over the additional money loaned?
  - If the prior mortgagee has notice of the subsequent mortgage, his priority is limited only to the amount owing under the mortgage at date of notice
  - If the prior mortgagee has actual notice of the second mortgage, further advances do not gain priority over the second mortgage

## **C. CLOGS ON THE EQUITY OF REDEMPTION**

### **i. PROPERTY REMAINS ENCUMBERED AFTER REDEMPTION**

*Noakes*

- Facts: the mortgagor, having paid back all money owed under the mortgage, received the property back in an encumbered form
- As the mortgagor didn't get the land back in the same form as when it was mortgaged, such a restriction on the right to receive the secured property free from the terms of mortgage amounts to a clog.

### **ii. OPTION TO PURCHASE**

*Jarrah*

- An option to purchase the mortgaged property is void if the option is placed within the mortgage, as it is inconsistent with the equity of redemption.
- The idea of a mortgage is that the mortgagor will get the property back at the end of the loan, so thus an option to purchase is void
  - However, if the option to purchase can only be exercised after payment of the



loan, this would be okay (*Reeve v Lisle*)

*Wily*

- The court will construe the mortgage in terms of the party's intentions – whether it is a mortgage or just an option to purchase.

### **iii. POSTPONEMENT OF RIGHT TO REDEEM**

*Knightsbridge v Byrne*

- Postponement of right to redeem isn't a clog, but rather, is just an agreed "contractual right to redeem".
- However, anything after the "contractual date for redemption" that prevents the mortgagor from redeeming after that date is a clog
- Where the right of redemption is illusory - equity will grant the right to redeem

Does date of redemption have to be reasonable?

- This is up to the contracting parties to agree and negotiate themselves
- There is no specific requirement for reasonableness
- However, an incredibly long redemption term may be invalidated.

Section 93 CA provides a statutory right to redeem the mortgage (earlier, if desired) as long as the mortgagor pays all interest and the principal amounts over the life of the term.

### **iv. COLLATERAL ADVANTAGES**

*Kreglinger v New Patagonia*

- Collateral advantages are where the mortgagee extracts a promise for something extra in return for providing a mortgage
- A collateral advantage may be stipulated in the mortgage provided
  - The parties have not acted unfairly or unconscionably/oppressively
  - It is not a penalty clogging equity of redemption
  - It is not inconsistent with right to redeem
- However, if the mortgage was paid off early, can the mortgagor keep enforcing this term?
  - This depends on the intention of parties
  - If it is a contemporaneous and collateral contract, contained in the same document, consider if the collateral advantage is in substance independent of the mortgage.

*Citylands Property*

- A collateral advantage that included an enormous premium paid to mortgagee was unreasonable

### **v. PENAL PROVISIONS**

- A penal provision is a provision requiring, in the event of a default, the repayment of a sum greater than the loan, or interest at a higher rate.
- Any such penal provision has to be genuine pre-estimate of the mortgagee's loss to be sustained
  - An accelerated liability to repay the principal and interest without discount to the present value is penal (*Wanner v Caruana*)
- The mortgagor cannot, on default, retrospectively apply a higher rate of interest
  - This can be avoided by setting a higher interest, with a discount for on-time payment, which is a valid provision



- Pegging interest to CPI is not a penalty (*Charmelyn Enterprises*)

## D. MORTGAGEE'S REMEDIES

### i. POWER OF SALE

The mortgagee's power of sale arises upon:

- default in payment
- breach of covenant and a failure to remedy breach after notice is given

The statutory precondition to the exercise of power of sale is that the mortgagee needs to serve notice under s 57 of the RPA upon default of the mortgagor. If a valid s 57 notice is issued but not complied with, the power of sale arises under s 58 of the RPA. Note that without serving a s 57 notice, there is no power of sale.

If the proceeds do not cover all of mortgaged amounts, the mortgagee may sue the mortgagor for the balance on the personal covenant contained in the mortgage.

#### 1) Notice

Under s 57(3), a notice must require the mortgagor:

- to observe the covenant, agreement or condition in respect of the observance of which the mortgagor made default, or
- to pay the principal, interest or other money in respect of the payment of which the mortgagor made default, and
- The notice must notify the mortgagor that, unless the requirements of the notice are complied with within one month after service of the notice, it is proposed to exercise a power of sale in respect of the land mortgaged or charged.

*Websdale*

- Facts: the mortgagor served a notice that the mortgage payment was in default (valid), but said that the full principal was payable (incorrect interpretation of contract)
- The notice would not be satisfied by serving a notice which identified a non-existent default
  - The purpose of the notice is to bring to the mortgagor's attention the particular defaults and to give them the opportunity to remedy that default
- Under s 57(5) RPA – the mortgagor cannot demand the entire principal unless a power of sale arises (i.e. upon you serving a proper s57 notice)
- It does not matter if the mortgage provides that upon default the whole principal is owing and due. This can never be due until a s 57 notice is served, there is an opportunity to remedy, and non-compliance with the notice by the mortgagor.

As such, a notice stating that an amount is due that is not due is defective under *Websdale*

- Where the amount is misstated, the notice may however still be valid – it is a question of severity
  - if the notice is so unreasonable and so different to what the person is genuinely required to do → it is invalid
  - if the notice is only slightly misstated → valid (*Wangola* - technical defects are not necessarily a problem)
- The notice must address the issue that was breached
  - misstatement of amount owing does not make the notice defective (e.g. if you are entitled to interest but you misspecify the amount)
  - asking for something that was not owed at all is defective (*Websdale*)



- Notice that merely noting the mortgagor's defaults, but did not expressly require the mortgagor to remedy them is invalid (*Nemeth*)

## **ii. MORTGAGEE'S EQUITABLE DUTY**

### **1) Timing**

*Westpac v Kingsland*

- There is no duty owed by a mortgagee to a guarantor to exercise the power of sale at any point in time – the mortgagee may exercise if and when it so chooses.
  - Failure to assess any offers prior to deciding whether to exercise a power of sale is not breach of the duty
- Duty to guarantor is only to act in good faith when mortgagee chooses to exercise power of sale (*Pendleberry*)

### **2) Conduct of sale**

Where the mortgagee sells the property at an unreasonably low value, the mortgagor may sue the mortgagee for an account of profits (equitable remedy to common law damages). This includes lost profits, being the money that the mortgagee could have received had they complied with their equitable obligations.

In addition, a mortgagee cannot sell property under a power of sale to themselves, a spouse, or companies with a common directorship (*Lam v Wong*).



We hope you have found the Property Law Cram Notes useful for your studies. Please feel free to contact us at [www.UniCramNotes.com](http://www.UniCramNotes.com) if you have any problems, comments or suggestions!