

REPRINT

THE UNIVERSITY OF
NEW SOUTH WALES

FACULTY OF LAW

LAWS1082 – Property and Equity 2

FINAL EXAMINATION - Session 2 2006

- Time allowed: 2 hours and 30 minutes, plus 10 minutes reading time
- Examination condition: THIS IS AN OPEN BOOK EXAMINATION.
You are permitted to bring any printed or handwritten materials into the examination room.
- Total number of questions: 2
- Value of questions: All questions are of equal value
- Questions to be answered: You should answer both questions

OTHER INSTRUCTIONS:

1. Your NAME and STUDENT ID should be written on the front of each exam booklet you use.
2. Your TEACHER'S NAME and your CLASS DAYS AND TIME should be written at the top right hand corner of each exam booklet you use.
3. Answers must be written in ink. Except where they are expressly required, pencils may be used only for drawing, sketching or graphical work. Leave a whole blank page between questions.
4. Answer each question in a separate booklet.
5. You may retain the examination paper.
6. All facts take place in New South Wales.

QUESTION ONE

Alice and Luigi are registered proprietors of 33 Acacia Avenue, Randford, NSW. The property comprises a lock-up shop on the ground floor, from which they operate a very profitable delicatessen business, and a residential part on the two upper floors. The property is held under the Torrens system. Until 1976, Alice and Luigi owned the property next door as well, number 35 Acacia Avenue, but they sold it at that time to Jessica who has run a bakery there ever since. When number 35 was sold, it did not have its own rear lane access, though it abutted the lane. Jessica therefore was confident that the local council would allow her to have her own access point as number 33 did. While waiting for their decision on her development application, she used the driveway over 33 for flour and bread deliveries to her own lot with Alice and Luigi's consent. When the council refused to approve the application, as they have continued to do, she carried on using Alice and Luigi's driveway with their permission.

Shortly after Jessica moved in, she experienced flooding problems at the back of the bakery. Her plumber resolved the problem by connecting a drainage pipe to another pipe running across the back of Alice and Luigi's land (without their knowledge) to take away stormwater and waste water from Jessica's land. Alice and Luigi first discovered this when their pipe became blocked in 1982. They asked Jessica to remove it, and have done so on a number of occasions since, but she has ignored them.

By early in 2006, Alice and Luigi had grown tired of running the delicatessen and decided to spend some extended time with relatives overseas. They agreed to have a 2 year break from the business. They then struck a deal with a former business associate and good friend, Dmitri, which involved granting him a lease of the lock-up shop for the 2 year period, while allowing their adult son Tom to house-sit the upper floors for the period they will be away. On January 15, 2006, they shook hands on the arrangement, agreeing on a rent of \$4000 per month, payable in advance. They informed Dmitri that they would get onto their solicitor to draw up a formal lease in due course, but they took no further action on this promise. Nonetheless, he moved in on February 1, 2006, started paying rent immediately, and opened for business the following week.

Just before their departure in late February, Luigi, worried that the trip might cost far more than their savings allow, approached the ABC Bank seeking a loan of \$50,000. The bank was happy to oblige, particularly when he told them that he was planning to use the money to finance renovations in number 33. Luigi did not tell Alice, however, because their savings had been greatly depleted because of many gambling debts. Nor did he inform the bank of Dmitri's presence. Instead, he forged Alice's signature on the mortgage documents and the memorandum of mortgage, and handed these to the bank with the certificate of title on February 20. The bank registered the mortgage immediately.

Luigi's gambling problems recurred while overseas, and he stopped paying the instalments on the mortgage in June. The bank duly served a section 57 notice on July 21. When the notice period expired, they proceeded to exercise their power of sale. Dmitri was horrified by this series of events which he discovered on September 30 when real estate agents for the bank arrived to instal a huge "For Sale" sign on the awning above the lock-shop.

Advise Jessica, Tom, Dmitri and Alice of their rights, if any, (i) against the bank, which is planning to sell number 33 with vacant possession, and (ii) against any future registered purchaser from the bank.

[50%]

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QUESTION TWO

Lionel Smallweed is the registered proprietor of 1 Green Lane, Chesneywold, NSW. He agreed to grant a lease of the premises to Molly Kenge and Emanuel Carboy, who were in business together as landscape gardeners. They planned to make this their business premises. The deed of lease was expressed to be granted to "Molly Kenge and Emanuel Carboy for a term of 5 years". It contains covenants to the following effect:

- 1) that they will put and keep the premises in a state of repair, and in particular renovate the bathroom and toilet to working order;
- 2) that they will not cause a nuisance or annoyance to their neighbours.

A memorandum of lease was executed by the parties on February 1, 2005, handed to Smallweed, but is never registered. The consideration for the lease was expressed to be a premium of \$75,000 which they jointly paid contributing equal amounts. The lease also required them to pay all rates and taxes. The premium was paid on February 1, 2005.

Unfortunately, since taking possession, the business has been going steadily downhill. This led eventually to a number of serious and violent disagreements about the direction of the business, and ultimately Molly, fearing for her safety, had an apprehended violence order (AVO) served on Emanuel in July 2005 stipulating that he was not to come within 100 metres of the premises until further notice.

Despite this traumatic event, Molly decided to make a go of the business by herself, and contracted with builders and renovators finally to put the premises into a viable state, as they have done. She spent \$10,000 in the process, as well as paying \$1,000 in council rates. Emanuel refused to have any part of the business. But by July 2006 she had had enough, as the business was still insufficiently profitable. She approached a local businesswoman, Emily Jelliby, whom she heard needed premises for her business as a video store (this use of the premises is permitted by the lease). Emily offered Molly \$50,000 for an assignment of the lease which was now the going rate for such premises in the presently depressed market. She contacted Emanuel, and put the proposal to him. He agreed that it was for the best on the understanding that he would receive a half share of the proceeds of sale. They signed an agreement to assign the lease, and a memorandum of transfer of lease. They notified Lionel who consented to the assignment. He took the memorandum of assignment of lease, promised to register it, but forgot to do so, leaving the documents in his safe. As she was keen to move in immediately, Emily arranged for a bank cheque for this amount to be deposited in Molly's bank account on August 20. She took possession on September 1.

From the moment Emily takes possession, she played loud music throughout the day, which seemed to be popular with her clientele, but which caused trade to "Swots Inc", the coaching college next door, to drop significantly. The college is also a tenant of Lionel Smallweed.

Your advice is sought in relation to the following questions:

- 1) Molly refuses to hand over any of the amount paid to her by Emily to Emanuel, saying that she deserves all of it. What claim, if any, does he on that sum?
- 2) Lionel wishes to terminate Emily's lease by taking physical possession of the premises and changing the locks. Can he do so?
- 3) What remedies, if any, does the college have against Lionel?
- 4) What would the college's position be if Lionel had entered into a contract to sell the reversion to Tulkinghorn? Would it make a difference if the sale to Tulkinghorn had been completed and he is now registered?

[50%]