PART V – EQUITIES

I *Introduction*

A *Taxonomy*

Equities, sometimes termed 'mere equities' to emphasise their relative priority against equitable interests, are rights recognised by the courts in order to prevent unfairness. Examples include estoppel ('an equity is raised' to prevent unconscionable departure from a presumption induced and relied upon by another) and using constructive trusts to 'satisfy the equity' created by domestic or other arrangements with respect to land (*Giumelli v Giumelli*). An equity is a right to bring an action for a remedy, not the remedy itself (*Latec Investments v Hotel Terrigal*).

An equity may be classified as a personal right or a personal proprietary right. When, as frequently happens, an equity is characterised as purely personal, it does not give rise to any proprietary interest. An example of such a right is the 'deserted wife's equity' recognised in *National Provincial Bank v Ainsworth*. There, the wife had an equity that was classified as personal. As a result, it was not directly enforceable against a third party mortgagee.

Sometimes, there are recognised personal equities that ultimately do give rise to a proprietary interest. An example is provided by *Inwards v Baker*, in which acquiescence to a common intention raised an equity satisfied only by the grant of an equitable life estate enforceable against third parties with notice. This equity was imbued with proprietary characteristics, despite originating out of a personal right to enforcement.

Equities may also consist of a right to bring an action for equitable remedies. For example, the equity of rectification articulated in *Smith v Jones* [1954] 1 WLR 1089 vests in a party the right to correct a document. Similarly, an equity to set aside transaction for fraud is a right to bring an action: see, eg, *Latec Investments v Hotel Terrigal* (1965) 113 CLR 265.

These technical classifications have been criticised as artificial and possibly unjustified.[1] However, they are important because the nature of a particular equity will determine its rank in priority disputes.

B *Hierarchy of Proprietary Rights*

A mere equity, being a right to bring an action to obtain an equitable remedy against another party, is situated at the bottom of the proprietary hierarchy. Legal and equitable interests will trump a mere equity in a priority dispute, so mere equities have a narrower sphere of enforceability.

1 *Legal interests*

The registered proprietor of Torrens system land is in a very strong (normally indefeasible) position. Statutory provisions state that, in the absence of fraud or another exception to indefeasibility, the registered interest will take priority over all other prior interests, including mere equities.

[1] See BMM 99–100.

2 *Equitable interests*

Equitable interests are unregistered or unregistrable interests over land which directly confer proprietary rights upon the rights-bearer. In general, there are equitable equivalents for every legal interest, as well as several distinct breeds of equitable rights created by trusts and the operation of doctrines of equity. Equitable interests include:

(a) Equitable fee simple
(b) Equitable mortgage
(c) Equitable lease
(d) Constructive trust
(e) Resulting trust
(f) Equity of redemption (the right of a mortgagor to recover seized property upon repayment of a debt)

3 *Mere equities*

Mere equities are proprietary but not enforceable as against a subsequent purchaser of an equitable interest for value without notice of the equity. They include:

(a) Proprietary estoppel (equity of acquiescence)
(b) Promissory estoppel [??? What about equitable estoppel?]
(c) Equity of rectification
(d) Equity to have a transaction set aside for fraud

4 *Personal equities*

Personal equities are *jures in personam*. They are not enforceable against the world at large and do not generally embody proprietary characteristics.

An example of a personal equity is the deserted wife's equity. This right is not enforceable *in rem*, but is enforceable as against the husband.

5 *Contract*

Contracts confer personal rights only. A party may be able to obtain equitable assistance to restrain a breach (eg, specific performance), but only against the promisor and not any third party.

C *Equities and Priorities*

Priority rules govern who has the stronger proprietary right. This can determine which mortgagee has first entitlement to a bankrupt party's assets, or which unregistered party is in a stronger position when contesting a claim to land. The answer to both these questions is, when the interests are equitable, the first in time, subject to any postponing conduct (*Rice v Rice*). The significance of the proprietary taxonomy is that it gives rise to and is necessary to apply that rule:

> If the interests are otherwise equal, then prima facie the first in time is in the stronger position.

This is the rule from *Rice v Rice* (see below Part VI). However, this rule applies to conflicts between two or more equitable interests, not between a mere equity and a full equitable interest. This is because equitable interests are not equivalent to mere equities.

C *Caveats*

A mere equity is an insufficient proprietary interest in land to support a caveat (*Swanston Mortgages v Trepan*). See further below Part IX.

II *Examples of Mere Equities*

A *Equity of Rectification*

The equity of rectification is the right of a party to have a document rectified to reflect the true nature of an agreement. The doctrine is articulated by *Smith v Jones*.

Smith v Jones (1954) UK HL:

Facts:

- A written lease exists between a landlord and his tenant, Smith
- Their original written lease agreement states that the tenant will bear the cost of any repairs required to be carried out on the property
- A later oral variation shifts the responsibility for repairs to the landlord: because rent is being increased, the lessor is to bear responsibilities for repairs
- The Landlord sells to Jones, who as a matter of fact has no notice of the oral variation
- Jones wants to enforce the written lease against tenant Smith to make him responsible for repairs

Issue:

- What interest does Smith have with respect to the oral variation?
- Can he enforce that right?

Reasoning:

- Smith clearly has a legal lease
- Smith also has, as against the original landlord, he has a right to have the lease rectified so as to reflect their true and agreed position: an equity of rectification
- Is Smith's equity enforceable against a subsequent owner, Jones?
    - Jones argues that he inspected the written agreement and could not be expected to conduct further investigations
    - Jones is a *bona fide* purchaser for value of the legal estate without notice of the earlier interest: no actual notice
    - Therefore, his conscience is not bound by the earlier agreement
    - Therefore, not bound by tenant's equity
    - In general law system (but not Torrens), if he had notice his conscience would have been bound
    - Constructive notice of Smith's rights?
        - Generally lessor has constructive notice of rights of tenant in possession
        - However, constructive notice doesn't extend to the equity of rectification

Decision:

- Because Jones has no actual notice of the oral variation, Smith cannot assert his equity of rectification against Jones
- Even if Jones had constructive notice, this would not be sufficient

Addendum: a clog prevents reconveyance or adds obligations upon reconveyance. Restrictive provisions in mortgages, which prevent repayment before a certain date to ensure the bank receives a minimum amount of interest, are not clogs because they only prevent early repayment, not payment in the event of a default.

B *Mortgages and Equities*

Issue: is an equity enforceable as against a subsequent mortgagee of the property?

In order to properly understand the effect of an equity upon the subsequent grant of a mortgage, the nature and features of common law and equitable mortgages must first be described.

1 *Common law mortgages*

Common law mortgages involve a transfer of fee simple title to the creditor ('the mortgagee'). In this sense, the mortgage operates as mechanism for transfer and reconveyance. The borrower ('the mortgagor') transfers his or her title to the mortgagee and ceases to be the legal owner. This transfer is subject to a covenant made by the mortgagee to return the title to the mortgagor when the money is repaid with interest. That is, the mortgagee promises to reconvey when the debt has been paid.

2 *Equitable mortgages*

In equity, the beneficial owner is the mortgagor. Equity recognises that the mortgagor, despite having lost legal title, still has a beneficial interest in the land. As they repay the loan, they increase their equity in the property.

The situation may arise that some money has been repaid but the mortgagor then defaults; in such a case, because the mortgagee has legal title, they could sell (foreclose) the property or keep it for themselves. Equity views it as unfair for the mortgagee to keep all proceeds of the repayments *and* the property being repaid, as the total of repayments may significantly exceed the amount borrowed or the amount remaining.

Consequently, in equity there exists an equity of redemption. This is a right to reconveyance of the property when outstanding debts are repaid. Foreclosure (sale of the land) cuts off the equity of redemption: legal and equitable title is then vested in the mortgagee (typically a bank). This is followed by a judicial order of sale, the proceeds of which first go to satisfy the mortgagee (by paying to them the amount owing on the loan) and any remainder going to the mortgagor (satisfying what is left of their equity of redemption).

3 *Torrens mortgages*

In the Torrens system, the mortgagor's right to discharge a registered mortgage is equivalent to the equity of redemption (*Re Forrest Trust* [1953] VLR 246). Torrens mortgages are different to general law mortgages because they are registered legal instruments. Effectively, they operate as charges placed upon the land, resulting in the hypothecation of a registered legal interest that runs with the land. (This is why a Torrens mortgage must be discharged before sale: otherwise a purchaser purchases the vendor's debt.)

Because the mortgage is simply a charge placed upon the property, ownership (title) does not change hands. Consequently, the mortgagor never loses legal title. One might well ask: 'what room is there left for the equity of redemption?' Indeed, in the absence of other references, it might appear that a Torrens mortgagor has no need of equitable assistance. However, all Torrens statutes nonetheless provide for the availability of a 'decree of foreclosure'. In doing so, it is widely accepted that they import the established equitable principles from common law mortgages.

In summary, the effect of an order of sale is, at common law, to transfer the legal fee simple from mortgagee (lender) to mortgagor (purchaser). Under the Torrens system, such an order transfers legal fee simple from mortgagor to purchaser.

C *Right to Set Aside for Fraud*

It is now possible to consider the effect of a subsequent mortgage upon the enforceability of any prior equities in respect of a sale preceding it. *Latec Investments* suggests that where a sale is fraudulent or in bad faith, an equity arises to have it set aside. However, if a subsequent purchaser acquires an equitable interest in the property and the party with the equity has not yet asserted it, the doctrine of notice applies and the equity is postponed to the later interest.

Latec Investments Ltd v Hotel Terrigal (in liq) (1965) HCA:

<u>Facts</u>

- A lender (mortgagee), Latec, holds a mortgage over the Hotel Terrigal ('Terrigal')
- Terrigal soon defaults on the mortgage
- In 1958, Latec (original mortgagee) purports to exercise its power of sale to realise the security
    - Latec sells the hotel to its wholly owned subsidiary (Southern Hotels)
    - It does so in such a way that may be readily characterised as fraudulent
- Latec makes no attempt to find a purchaser because it wants to sell the Hotel to a subsidiary of itself: same board of directors, wholly owned
- The sale took place after an auction which
    - was scheduled on an unfavourable day: Friday afternoon (instead of Wednesday)
    - was not well advertised
    - had an unreasonably high reserve price ($85 000)
- The highest bid at auction was $58 000, and the auctioneer advised Latec to take it (being above their valuation); however, Latec makes *no effort* to negotiate with the highest bidder
    - They failed to test what the highest bidder would have paid when negotiated with
    - Sham auction: just testing the market to see what would look plausible so they could sell it to themselves
- Being passed in at auction, the sale proceeds to Latec's subsidiary at a price slightly higher than the highest bid at sale ($60 000)
- Subsidiary becomes registered as the registered proprietor of the hotel
    - The title cannot be impeached, not subject to prior equitable interests (with some exceptions, including *fraud*)
    - The subsidiary knew that the sale was fraudulent
- The subsidiary grants an equitable security over the land to a new mortgagee, MLC Nominees
    - A floating charge (a kind of equitable security over the land)
    - (Does not specify the exact inventory included in the charge)
    - Crystallises when the debt falls to be paid and the asset needs to be realised
    - Because it is an equitable security, it cannot be registered as a legal interest
- Although Terrigal has an equity to set aside the sale on the basis of fraud, it does nothing
    - Five years after the sale, the trustee in bankruptcy of the original owner (ie the original mortgagor, Terrible) seeks to have the sale to the subsidiary set aside on the basis of fraud
    - Terrigal is in liquidation, which is why the trustee in bankruptcy brings the action

  - Terrigal has taken quite a long time to assert its rights, contrary to the equitable maxim: 'equity dislikes delay'
- Terrigal argues that the power of sale had been exercised fraudulently, giving rise to an equity to set aside the transaction

<u>Issues</u>
- How is Terrigal's interest to be characterised?
- Does it take priority over that of MLC Nominees?

<u>Reasoning</u>
- All justices agreed that the:
  - Power of sale had been exercised fraudulently
  - Original owner (Terrigal) could have had the sale set aside if it had acted promptly (before the creation of the mortgage in favour of MLC)

- Complicating factor: the new mortgagee (MLC) acquired its mortgage interest (equitable security rights)
  - In good faith, for value, and without notice of Terrigal's right

- Possible ways to characterise the conflict: either
  - Terrigal has a *full equitable right* (like an equity of redemption) which <u>prevails</u> over MLC's subsequent equitable right on the basis that first in time has priority (*Rice v Rice*); or
  - Terrigal has a *mere equity*, and <u>loses</u> in a contest with a subsequent full equitable interest acquired by a bona fide purchaser for value and without notice of the prior equity
    - Court takes the second approach: the notice rule applies to these cases

- Kitto J:
  - Equity to have the transaction set aside for fraud is equivalent to a general law equity of redemption
    - Consequently, it is a full equitable interest
  - However, until it is asserted and made good it is a <u>mere equity</u>, and the notice rule applies (applying *Phillips v Phillips*)
  - At the point where the conflict here arises, the mortgagor's rights, Terrigal's right is a mere equity
  - Consequently, Terrigal is not entitled to priority against the full equitable interest of the later mortgagee
  - Relies on *Phillips v Phillips*
    - Mortgagor lost their equitable interest (equity of redemption) when the property was sold
    - Because the sale was fraudulent they have an equity to have the sale set aside
    - However, they only reacquire the equity of redemption when the court actually sets aside the sale
    - Until the sale is set aside, a mortgagor only asserts a mere equity 'which must be made good before an equitable interest can be held to exist'
      - Thus, the equitable proprietary interest is only created when the court satisfies the equity (ie, when the judgment is made)
      - Until then, the equity is distinct from, because logically antecedent to, the equitable interest
      - This is a two-step process
    - Southern is treated as the legal owner in fee simple; the mortgage is discharged against Terrigal because of the sale

- In equity, they purchase the mortgage from Terrigal
- That would normally restore to Terrigal its beneficial interest (right to reconveyance when paid)
- However, before Terrigal asserted its equity, the further equitable interest is created in MLC

- Contest is between mere equity and equitable interest; therefore, the relevant rule is the *Philips v Phillips* one
    - MLC wins in the priorities dispute
    - It is against the equity and not the consequential equitable interest that the defence (of MLC, the subsequent mortgagee) must be set up

- Relevant issues
    - What type of land is involved?
        - In Torrens land, equitable interests are off the register
        - Cf general law land?
    - Can we really talk about an equity of redemption?
        - Yes, by analogy: foreclosure exists, so equity of redemption must also be present
    - In what circumstances must an equity be made good (ie logically antecedent)?
    - Does this reasoning apply when a plaintiff asserts a right to specific performance?
    - Does it apply to a plaintiff asserting a right under a resulting trust or constructive trust?
        - Logically, it might be argued that all trusts and estoppels may be broken into two stages:
            - An equity arises
            - How is it to be satisfied?
        - Under this two-step process, an equitable interest would only arise when the court order takes place
        - If another equitable interest is created before the court order, the mere equity would lose against the subsequent full equitable interest
        - This would mean that a caveat could *not* be lodged to protect a constructive trust, etc

- Taylor J:
    - The right to set aside the transaction is equivalent to a full equitable interest
    - However, equities are not equal if one requires the assistance of the court to be asserted
    - In such cases, the notice rule applies
    - Interest was postponed to the later equitable interest
    - Mortgagor did not lose its equitable interest
    - Purchaser (subsidiary) held subject to the mortgagor's equitable interest
        - But: the new equitable mortgagee's interest prevailed because the mortgagor 'required the assistance of the court to remove an impediment to his title as a preliminary to asserting his interest'.
    - Terrigal's equity is a full proprietary interest (not a mere equity), but need the assistance of a court to assert it
        - The appropriate rule is that a *bona fide* purchaser for value without notice holds an interest unburdened by the prior equitable title ('notice rule') because Terrigal's assertion wasn't made until after MLC's interest had been created
    - Relies on *Stump v Gaby* (1852)

        - New equitable mortgagee's interest was acquired in good faith without notice of the right to set aside (ie without notice of the mortgagor's interest)
        - relying on *Stump v Gaby*: a right to set aside a conveyance for fraud is a devisable interest (ie proprietary/equitable)
    - Issues: not very helpful
        - Does not identify when 'the person entitled to the earlier interest requires the assistance of the court of equity to remove an impediment to his title as a preliminary to asserting his interest'
            - [Don't they always need assistance?]
        - Does this reasoning apply when a plaintiff asserts a right to specific performance?
            - Does it apply to a plaintiff asserting a right under a resulting trust or constructive trust?

- Comparing Kitto and Taylor JJ: relying on different assertions:
    - Kitto J:
        - Mortgagor loses equitable interest, has a mere equity consisting of a right to approach the court to have the sale set aside (so notice applies)
    - Taylor J:
        - Mortgagor continues to have a full equitable interest subject to the need to have the court set aside the impediment to asserting the interest (so notice applies)

- Menzies J:
    - It is a mere equity until an action of enforcement is commenced
    - Whether the right is a mere equity depends on who is asking (ie, against whom the disputed right is being asserted)
    - Attempted to reconcile the two lines of authority relied upon by Kitto J and Taylor J
        - If devised, full equity: *Stump v Gaby*
            - If a question of the defrauded mortgagor leaving an interest in the property under a will, *Stump v Gaby* would require an affirmative answer
        - If a priority dispute, mere equity: *Phillips*
            - If a question (as here) of the defrauded mortgagor prevailing over the trustees for the debenture holders, *Phillips v Phillips* decides
    - Applies *Phillips v Phillips*:
        - the contest is between the defrauded mortgagor's equity to have the conveyance set aside and the equitable interest of the trustee for the debenture holders; and
        - the equity is not entitled to priority in that contest merely because it came into existence at an earlier time than the equitable interest of the trustee for the debenture holders

<u>Decision</u>

- Terrigal's right to set aside the transaction is recognised, but postponed to MLC (because MLC had no notice of Terrigal's interest)
- Terrigal's right is to any remaining portions of the property
- In this case, nothing
    - All justices agree that the equitable right of the original owner ranks behind the rights of the new mortgagee
    - However, the reasoning differs

Latec is authority for the proposition that the equity of a grantor to have a conveyance set aside because of the fraud of a grantee is proprietary. Thus, Hotel Terrigal had a right to have the sale set aside due to the fraud of Latec and Southern. However, their Honours were divided about how to classify the equity.

- Justice Menzies offers perhaps the most workable approach, electing to classify the right as a mere equity for the purposes of a priorities dispute, but the *Stump v Gaby* view of the right as an equitable interest may well hold sway in a dispute about whether an interest is capable of devisal;
    - His Honour ultimately held that the mere equity is subject to MLC Nominees' subsequent equitable interest, because MLC was a bona fide purchase for value without notice of Hotel Terrigal's right;

- Justice Kitto saw Hotel Terrigal's right as a mere equity until a court orders the sale set aside, at which point it ripens into a full equitable interest. His Honour agreed that MLC Nominees did not take subject to Hotel Terrigal's equity.

On the basis of these judgments, it can be clearly stated that in the event of a sale being fraudulent, a mere equity arises in favour of the defrauded ex-owner to have the sale set aside. In practice what would happen is that, once that ex-owner brings an action seeking just that, the current registered proprietor (Southern in *Latec*) will be found to hold title subject to the equitable interest of the previous owner to regain legal title upon repayment of the outstanding mortgage. This is similar to an equity of redemption.

- Justice Taylor viewed Hotel Terrigal's interest as a full equitable one. However, because it required the assistance of a court of equity to transfer title, this contingent equitable interest loses priority to a subsequent equitable interest held by a bona fide purchaser without notice.

C *Subsequent Treatments*

The approach of Menzies J has since been approved by Meagher, Gummow and Lehane in *Equity Doctrines & Remedies* at [427]–[435]. Bradbrook, MacCallum and Moore criticise the distinctions between mere equities and equitable interests. Most academics favour the judgment of Kitto J.

Curial treatments are more difficult to characterise. Several examples follow.

Breskvar v Wall **(1971) HCA:**

<u>Reasoning</u>
- The right to have a sale set aside for fraud is implicitly treated as an equitable interest
- However, on the facts, even if it was a full equitable interest, the Breskvars lose priority to the holder of the subsequent equitable interest, so it is unnecessary

Swanston Mortgage appears to uphold the view of Kitto J, though on the facts the result would probably be the same as if Menzies J's approach was followed.

***Swanston Mortgage Pty Ltd v Trepan Investments Pty Ltd* [1994] VSC:**

<u>Reasoning</u>

- The right of a mortgagor to have a transfer from the mortgagee to a third party set aside for fraud is not an equitable interest (but rather, a personal equity)
- This approach is difficult to reconcile with *Breskvar* and *Latec*

However, with the notable exception of *Breskvar v Wall*, all cases suggest that the right to seek an equitable remedy is not in itself a full equitable interest. Instead, a mere equity arises from the moment of the fraudulent conduct and will become a full equitable interest in reconveyance upon repayment when asserted before a court.

D *Equity of Acquiescence and Trusts*

Issue: does the two-step approach (mere equity until asserted, full equitable estate once asserted) also apply to estoppels and constructive trusts? Should it?

1 *Estoppel*

Neave and Weinberg describe the consequence of a proprietary estoppel as an equity of acquiescence (see, eg, *Inwards v Baker*, above Part IV). The 'equity' in 'equity of acquiescence' refers to the right of the party in whom the assumption about land was induced to seek an equitable remedy from a court. The Court, in its discretion, decides how to satisfy the equity.

A court will often shape a remedy that takes the form of a constructive trust (*Bahr v Nicolay*), or a charge on the land to secure payment (*Giumelli v Giumelli*) if transfer of ownership would be inappropriate in the circumstances. In light of the remedial nature of an estoppel remedy, it may be thought that the interest in fact granted by the Court arises from the time of its declaration.

2 *Trusts*

While this may be the case in relation to an estoppel, in *Baumgartner* (where a constructive trust was imposed to prevent the unconscionable assertion of sole legal title), the equitable interest was stated to exist independently of the Court's declaration. However, in *Muschinski*, Deane J noted that the Court could also declare the interest to be imposed prospectively (at 615).

In essence, it appears that a party claiming an interest under a constructive or other judicially-imposed equitable remedy does not hold an equitable interest until the Court says so. Bradbrook, MacCallum and Moore conjecture that the two-step analysis of *Latec* could sensibly be applied to these situations, so that the party holds a mere equity (a right to seek judicial declaration of their equitable interest in the property). In this sense, the right is analogous to that held by a defrauded owner of land.

3 *Consequences for priorities*

The classification adopted has significant consequences for parties seeking to lodge a caveat. According to *Swanston Mortgage*, a mere equity is not a caveatable interest. Consequently, a defrauded party, or the representee in an estoppel scenario, will not be able to lodge a caveat to protect their interest.

In practice, this means that the mere equity is vulnerable to other dealings with the land unless and until the holder of the equity brings an action seeking to assert their interest in the land.

Strategies to extinguish a mere equity:

- Mr Baumgartner would want to sell the property to a purchaser without notice so as to ensure that any prior equity of Mrs Baumgartner is subject to the later full equitable or legal estate

Strategies to retain a mere equity:

- Mrs Baumgartner would want to immediately bring an action to assert her equitable interest; at this point, her mere equity will mature into a full equitable interest
- When that equitable interest arises, she should place a caveat on the property so that purchasers are alerted of her interest
- However, if her initial right is only the right to approach a court, then she will not be able to lodge a caveat until the action is brought before a cour
- She might thus be the first in time holder of a mere equity but unable to compete against a subsequent purchaser of the land

Equity of redemption addendum: a clog prevents reconveyance or adds obligations upon reconveyance (eg, restrictive provisions in mortgages: not a clog because it prevents early repayment, not payment in the event of a default).

E *Hypothetical*

- Interests of Another Bank ('AB')
  - AB acquired a legal mortgage in good faith, for value and without notice of E or D's right to have the sale to MM set aside
  - Their position is akin to that of MLC in *Hotel Terrigal*
  - Any interest of E and D is therefore postponed to AB, with E and D entitled to any remaining portion of the property
  - Mortgage is registrable
  - Here, the mortgage is for $250 000, so E and D are entitled to the remaining $200 000 of its value, if sold

- Interests of Money Makers ('MM')
  - The legal owner in fee simple; the mortgage against Which Bank ('WB') for $280 000 has been discharged since the sale to MM
    - In equity, according to Kitto J, MM purchased the mortgage from E and D
    - Therefore, E and D would have a right to reconveyance when their debts were repaid (equity of redemption)
    - However, AB already has taken a subsequent equitable interest *bona fide* for value without notice
  - Their power of sale has been exercised fraudulently such that E and D could have set aside the sale
    - Like, *Latec v Hotel Terrigal*, MM failed to advertise the sale well
    - It was also scheduled on an unfavourable day when there would be few people in attendance

        - The fact that only one bid was made seems to support this lack of publicity, particularly if the hotel was a good investment opportunity
        - The fraud is even more blatant than in *Latec*: here, the property was sold for $150 000 less than what it could have been
        - Here, like *Latec*, the purchaser is a wholly owned subsidiary
    - As the registered proprietor, MM's title cannot normally be impeached
        - However, here the transaction was procured by fraud

- Interests of Elizabeth and Dang ('E' and 'D')
    - *Latec* does not provide any single approach to resolving this issue
    - Kitto J:
        - E and D's equity is equivalent to an equity of redemption, and is thus a full equitable interest
        - However, it remains a mere equity until asserted
        - Here, E and D did not even enquire about asserting it until one month after the auction, so the notice rule applied at that point: *Phillips v Phillips*
        - At this point, the equity still has not matured into a full equitable interest because no court has satisfied the equity
        - In determining priority between E and D's prior equity and AB's legal interest, the latter must prevail: *Phillips v Phillips*
    - Taylor J:
        - Here, the equity (setting aside the conveyance to MM) requires the assistance of the court to remove what would be 'an impediment to [their] title as a preliminary to asserting [their] interest', so it is an equity and the notice rule applies
        - E and D's equitable interest is therefore postponed to the legal mortgage created in favour of AB
        - Like *Latec*, here E and D haven't asserted their right until after AB's interest was created
        - Their right is proprietary and can be devised (*Stump v Gaby*)
    - Menzies J:
        - Their right to set aside the sale is still a mere equity because the right has not been asserted in a court
        - *Phillips* applies, so applying the doctrine of notice, AB's interest as registered mortgagee has priority
        - E and D's equity is not entitled to priority just because it was an earlier interest
    - Because the property is valued at $450 000, it seems likely that E and D would be entitled to something
        - Their interest as mortgagor is postponed to AB's interest as mortgagee to the extent of $250 000, but the remaining $200 000 is theirs
        - E and D are also entitled to any profit from the sale to MM ($20 000)s
        - Entitled to an account of profits
            - $300 000 for the sale minus $280 000 debts = $20 000 profit, to which E and D are entitled
            - $450 000 valuation minus $250 000 mortgaged to AB = $200 000, to which E and D are entitled

- Note: MM is likely to be tainted by the fraud of WB
- The failure of E and D to lodge a caveat may impact on their interest (see below)