LLB 270/306 PROPERTY AND TRUSTS B ASSIGNMENT, 2007

Date Assigned: 20-22 August.
Date/Time Due: Monday, 17 September at 5 pm.
Page Limit: 10 pages. (See pages 8 - 9 of the Subject Outline regarding the prescribed page format.)
Marks allocated: 40% of the total marks for the subject. Questions 1 and 2 will each be marked out of 20 marks.

Completion and Submission of Assignment:
Your assignment must be submitted with the coversheet from the Subject Outline. Refer to pages 7 – 10 of the Subject Outline for details about:
• the method of submission of the assignment;
• the format of the assignment;
• the citation of sources and the University's policy on plagiarism;
• extensions; and
• penalties for exceeding the page limit (page 7) and lateness (pages 9 – 10).

Your answer to this assignment must be entirely your own work. Although you may discuss with others, in a general manner, the meaning of the assignment question, you must not discuss with any other person:
• how the question should be answered;
• the material that is relevant to answering the question; or
• how the answer to the question should be structured.

Without limiting these prohibitions, before your marked assignment is returned to you, you must not:
• show any part of your work in progress or your completed assignment to any other person undertaking this subject; or
• read the work in progress or completed assignment of any other person undertaking this subject.

Description and Marking Criteria:
The assignment requires you to undertake research to solve a property law problem. The general areas of law relevant to this question have been considered in Lesson Plans #1 and #2. However, the assignment may contain issues that have not been directly raised in class. You will need to go beyond the prescribed readings in order to address fully some of the issues raised in this assignment. In particular, you will need to have regard to the facts, issues and holdings of cases that have not been included in the Cases and Materials volume of the prescribed readings. As a starting point for your additional research, you are referred to the relevant texts listed on page 4 of the Subject Outline.

In assessing your answer the marker will be looking for the extent to which you have:
• identified the relevant legal issues raised by the question;
• identified the relevant legal doctrine by reference to the relevant case and statute law;
• applied the relevant legal doctrine to the specific facts of the question so as to reach correct and succinct conclusions;
• employed a concise, clear writing style incorporating rational argument; and
• researched beyond the prescribed readings.

Instructions
Answer all parts of both Questions 1 and 2. If you need further information in order to answer a question, state what additional facts you need and explain why you need them. You must cite relevant statutory and case law authority, and give reasons, in support of your answer.
Question 1 (marked out of 20 marks)
In 2005, Ahmed was the registered proprietor of a parcel of Torrens title land in New South Wales known as “Redacre”. Ahmed and Barbara entered into a written and signed agreement in which Ahmed agreed to lease Redacre to Barbara for a period of 10 years from 1 January 2006, with an option to renew for an additional term of 10 years. A lease in registered form was prepared and executed by Ahmed and Barbara and was registered. The lease gave effect to the agreement except that, due to an error, the option to renew was not included in the lease document. Barbara went into exclusive possession of Redacre on 1 January 2006.

In March 2007, Barbara, with the consent of Ahmed, granted Calvin a sublease of Redacre for a period of two years. Calvin went into exclusive possession of Redacre at the commencement of the sublease on 1 April 2007. Although the sublease was executed in registrable form, it was not registered.

In May 2007, Ahmed and Denise entered into negotiations for the sale of Redacre to Denise. Denise knew of the lease to Barbara, but not of the sublease to Calvin. (Ahmed had told Denise that Calvin was an employee of Barbara, and Denise did not make any additional enquiries.) Denise was only willing to purchase Redacre with vacant possession (that is, free from any lease). Ahmed contacted Barbara and asked Barbara if she would be willing to surrender her lease. Barbara told Ahmed to send a written offer to Barbara’s solicitor, Errol.

Following negotiations between Ahmed and Errol over the period of a week, Errol told Ahmed that Barbara was willing to surrender the lease in return for a payment of $20,000 by Ahmed to Barbara. Ahmed agreed to this. However, Errol had never communicated to Barbara the content of the negotiations with Ahmed. Instead, Errol told Barbara that Ahmed was not prepared to pay any money for the surrender of Barbara’s lease. Barbara had instructed Errol to tell Ahmed that Barbara would not agree to surrender the lease. Ahmed knew nothing of Errol’s misrepresentations to Barbara.

In June 2007, Ahmed and Denise entered into a written and signed contract for the sale of Redacre, with vacant possession, to Denise. Denise paid a 10% deposit.

On 1 August 2007, the settlement of the sale from Ahmed to Denise took place. Errol was present at the settlement. Errol handed Ahmed a surrender of Barbara’s lease, expressed to be between Barbara as lessee and Ahmed as lessor. The surrender of lease was in registrable form but, unknown to Ahmed, Errol had forged Barbara’s signature on it. On receiving the document, Ahmed gave Errol a bank cheque for $20,000 drawn in favour of the Errol’s trust account, and Errol left.

The remainder of the settlement then took place. Denise handed Ahmed a bank cheque for the outstanding balance of the purchase price. Ahmed handed to Denise: (i) the surrender of lease; (ii) a transfer (in registrable form and expressed to be free from any prior encumbrance) of the fee simple in Redacre from Ahmed to Denise; and (iii) the certificate of title for Redacre.

Prior to settlement, Denise had searched the folio of the register for Redacre. The search had shown Barbara’s lease, but indicated that no other dealing had been registered and that no caveat had been lodged. However, three days after settlement, when Denise went to lodge the surrender of lease and the transfer for registration, Denise discovered that Calvin had lodged a caveat “as a sublessee under a lease granted by Barbara”. Denise left without lodging the dealings for registration.

Errol has disappeared after “laundering” the $20,000 bank cheque through his trust account.

In light of the above facts, explain:
(a) the nature of the interest in Redacre, if any, now held by each of Ahmed, Barbara, Calvin and Denise;
(b) the priority of each person’s interest in relation to the other interests in Redacre;
(c) what action, if any, should each person now take in order to protect her/his interest in Redacre; and
(d) whether any person is entitled to claim compensation from the Torrens assurance fund.

Question 2 (marked out of 20 marks)
Ross was the registered proprietor of Torrens title land in New South Wales known as “Blueacre”.
In late 2006, Ross moved to the Philippines, leaving his twin brother, Simon, in charge of his affairs.

In January 2007, Simon got into serious financial difficulties when his business suffered a severe downturn in profitability. Simon needed to borrow money quickly, but had inadequate assets to use as security. Although he felt very guilty about doing so, Simon decided that he would assume Ross’s identity and use Blueacre as security for a loan to get his business out of trouble.

In February 2007, Simon, pretending to be Ross, applied for a loan of $250,000 from Titan Bank (“Titan”). When meeting with Una, the loans officer of Titan, Simon produced Ross’s driver’s licence (Ross and Simon looked quite similar) and other documentation (including the certificate of title for Blueacre) that Ross had left with Simon for safekeeping. Una, believing that Simon was Ross, approved the loan, subject to a mortgage being granted over Blueacre to secure repayment of the principal and interest.

In March 2007, Una prepared a mortgage in registrable form in respect of Blueacre between Ross as mortgagor and Titan as mortgagee. Among other things, the mortgage document provided that the mortgagor was required to keep Blueacre in reasonable repair, and that “the parties agree that, to the maximum extent permitted by law, the notice procedures required by s 57 of the Real Property Act do not apply to defaults by the mortgagor under this mortgage.” The mortgage did not include a provision granting the mortgagee a power of sale in respect of Blueacre. Una gave the mortgage document to Simon and gave him ample time to read the document and to seek legal advice.

Some days later, Simon went to Titan’s offices to execute the mortgage. Simon forged Ross’s signature on the mortgage in the presence of Una and Verity, another of Titan’s employees. Verity signed the mortgage attesting that Ross had executed the mortgage in Verity’s presence. Simon then handed to Una the certificate of title for Blueacre. In due course, the mortgage was executed on behalf of Titan and was subsequently registered.

In May 2007, Simon fell behind in the repayments under the mortgage. To make matters worse, the house on Blueacre caught fire and was severely damaged. The house was uninsured, and Simon could not afford to have it repaired. When Una discovered this, she hand-delivered a letter to Simon (addressed to Ross) stating that Ross was in default under the mortgage as he had not kept Blueacre in reasonable repair, and that Titan was exercising its power of sale.

Titan appointed Wendy, a real estate agent, to arrange for the sale of Blueacre. Once a week over the next 4 weeks, Wendy advertised in the local newspaper that Blueacre would be sold by auction. The advertisement was headed “Demolition Delight”, and referred to the house as being a “wreck”. Wendy also retained an experienced valuer, who valued Blueacre at $220,000.

The auction was to be held on the afternoon of Friday, 13 July 2007. On the morning of auction day, Wendy received a telephone call from Xavier, a person who said that he was willing to pay $250,000 for Blueacre, but was interstate and could not attend the auction. Xavier asked Wendy to cancel the auction and promised to exchange contracts on Monday, 6 August 2007. Wendy refused to do so. Xavier faxed a written offer to Wendy, again asking that the auction be cancelled. Wendy ignored the fax, and the auction was held that afternoon. Attendance at the auction was poor, and only two people made bids. Titan accepted the highest bid, which was $200,000. A contract for the sale of Blueacre was entered into between Titan and Yasmine, the highest bidder.

The contract was completed on 20 August 2007, and the transfer in respect of Blueacre to Yasmine was registered on the same day. At the time of the completion of the sale, the mortgage debt exceeded the sale price for Blueacre by $75,000.

Ross has returned to Australia and has discovered what has happened. Simon has fled overseas and cannot be located.

**Question 2 continues on the next page.**

In light of the above facts, explain:
(a) whether Titan was entitled to sell Blueacre;
(b) assuming that Titan was so entitled, whether it properly exercised its power of sale;
(c) whether Titan is entitled to recover the $75,000 shortfall from Ross;
(d) what action, if any, can Ross take in order to ameliorate his overall predicament.