OREAP-PREP Real Estate Exam Course 5

Study Notes & Practice Questions

UPDATED – 2018 Exams

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1.2 Historic Perspective

Feudal System of Tenure

- This historic System of Tenure refers to holding of land without owning it.
- The King appointed 1500 Tenants-in-Chief (Principal Tenants).
- They were Lords of Land but did not own the land and were Tenants to the King.
- They would sublet the land and pay the King for goods and services.
- This system was later replaced with the concept of Estates.
- **Estate**: The degree, quantity, nature and extent of interest or rights that a person has in real property.
- **Alienability**: The power to transfer tenure to another person during lifetime or after death.
- **Common Law**: The part of law that is based on centuries old unwritten common customs and principles of society. This part of law is not statutory in nature.
- **Heir**: The person who inherits the property rights after the death of the owner.

1.2 Estates

**Fee Simple (Freehold) Estate**

- The highest form of ownership which is generally considered Absolute Right in real property.
- It provides the most rights with least limitations and is for indeterminate period of time.
- The Bundle of Rights in Fee Simple ownership may still be subject to restrictions.
- **Fee Simple with Conditions**: Automatically terminates under certain conditions. The condition may be contrary to public policy, and hence, this type of estate is rarely found these days.
- **Fee Tail**: Restricted the inheritability of land to a limited class of heirs (eldest males). No longer valid.

**Leasehold Estate**

- An interest in land for a definite period of time.
- This estate cannot be longer than the estate from which it was granted.
- Leasehold estate is smaller than the estate from where it flows.

**Estate to Uses**

- Obtained by way of deed, will or possession.
- It flows from Trust Ownership in which the title is in the name of a registered owner but held by a trustee.

**Life Estate**

- A granter in a Deed or Will may grant an interest in the lands to someone for a lifetime.
- Life Estate ends upon the death of the Life Estate holder (Life Tenant).
- **Reversion**: If estate goes back to the grantor after end of Life Estate.
- **Remainder**: If the estate goes to a third party after end of Life Estate.
Future Estate

- The concept of Future Estates is related to Life Estates.
- If a third party (son/daughter) gets ownership by Will of the deceased but the Will also grants right to a surviving spouse until his/her death, it is a Future Estate for the third party.
- Both Life Estate and Future Estate (Remainder) have interest in property from the beginning of Life Estate.
- The person named in Remainder cannot use the property until the Life Estate exists.
- The person holding Life Estate cannot sell the estate nor can write a Will, but must meet obligations (payment of taxes, maintenance, etc.) during the tenure.
- If both Life Estate and Remainder agree, the property can be dealt with in any manner.
- Life Estate and Future Estate together make up the entire Fee Simple Estate.

1.2 Real Estate vs. Real Property

The Difference

- Real Estate: Tangible aspects of property (physical elements - land and improvements).
- Real Property: Both Tangible (physical elements - land and improvements) and Intangible (rights that accrue from ownership).
- Personal Property: Movable assets of the owner such as equipment, furniture, furnishings, etc.
- Chattels - A movable personal property usually not included in the sale price, unless specifically included in the agreement.
- Fixtures - Non-movable personal property usually included in the sale price, unless specifically excluded in the agreement.

1.3 Bundle of Rights

Rights in Fee Simple

- Bundle of Rights in Fee Simple ownership include rights to sell, lease, use, give away, enter and to refrain from using rights.
- These rights are subject to restrictions by governments or private bodies.
- Fractional Interest: Single right within the Bundle of Rights.
- Air Rights: These are Fractional Interests given to use the space above physical surface.
- Surface Rights: Ground level rights associated with using or altering the surface of the property and include removal of sand, stone, gravel, etc. Not a Fractional Interest.

- Mineral Rights: These rights are related to exploring, drilling, extracting or removing minerals (such as gas, oil, gold, silver, etc.) below the surface of land. Mineral rights are governed by the Ministry of Natural Resources.

Riparian Rights

- Riparian Rights are natural rights of owners of shoreline properties.
- Body of Water rights include access to water, exclusive access, right to increase in shoreline and the right to navigate.
- Flow of Water rights include the right to use water, right to unpolluted water and enforce water flow.
1.4 Limitations on Bundle of Rights

From Government Bodies

- Law enforcement officers may enter a property if some crime is committed.
- *Police Power*: The right of different levels of government to *regulate* division, development and use of property by *Planning Act*, *Zoning By-laws*, *Building Codes*, *Sanitary Regulations*, etc.
- *Expropriation*: Right of the government to take private property for public benefit by paying fair or *just* compensation.
- *Taxation*: Right of all levels of government to generate revenue through the taxation.
- *Escheat*: Right to have ownership returned to state if the owner dies without a will and no heir can be found.

From Private Sources

- Private restrictions coming from subdivisions may limit the development and use of property.
- *Deed Restrictions* typically take priority over *Zoning By-laws* and may not permit use of a property for certain purposes.
- Deed restrictions are negative in nature and run with land.
- *Restrictive Covenants* must be reasonable and not contrary to public interest.
- Easements, rights of way, etc. may also impose restrictions on intended use.

1.5 Concurrent Interest

**Right of Survivorship:**

- This right exists only in *Joint Tenancy* and not in *Tenancy in Common*.
- Upon death of one joint tenant, the surviving tenants acquire the whole interest in the property.
- The transfer to surviving Joint Tenant(s) is automatic and the property does not become *Estate of the Deceased*.
- *Exception to Right of Survivorship*: If the joint-tenancy of a matrimonial home is with someone other than spouse, the *Joint Tenancy* ends when the owner spouse dies, and his interest becomes *Estate of the Deceased*.

**Joint Tenancy**

- *Joint Tenancy* is ownership of land by two or more persons and is specifically created as such with clear intention.
- It is based on *Four Unities* and if any of them is missing the Joint-Tenancy automatically converts to Tenancy-in-Common.

- *Possession*: Each owner has *Undivided Possession* of property without any *Exclusive* rights to anyone.
- *Interest*: Each owner has *Equal Interest* in the property that is identical in nature, extent and duration.
- *Time*: Each owner must take ownership at the *Same Time*.
- *Title*: Ownership must be obtained by the *Same Document* (instrument, deed or will).
**Termination of Joint-Tenancy**

- When Joint Tenancy is terminated, it converts into Tenancy-in-Common.
- **Voluntarily:** When joint-tenants agree to sever their relationship.
- **Severance:** When a joint-tenant sells his/her interest to a third party without the consent of others. Other joint-tenants remain as such with each other but become *Tenants-in-Common* with the one who severed.
- **Partition:** By court order. Splitting the land or dividing sale proceeds if the land cannot be divided.

**Tenancy-in-Common**

- *Tenancy-in-Common* is ownership of land by two or more persons at the same time.
- These tenants may hold different interests and may acquire them at different times or different ways.
- *Tenancy-in-Common* has only one *Unity of Possession* and each tenant has same rights over the property.
- There is no *Right of Survivorship* and upon death of a tenant, the interest becomes *Estate of the Deceased*.
- Any Tenant-in-Common can deal with his/her interest in any manner e.g. sell, lease, write a will, etc.
- Tenancy-in-Common may be dissolved either by mutual agreement or by a court order.

### 1.6 Family Law Act

**Purpose**

- The *Family Law Act* recognizes equal partnership marriage relationship.
- It provides for orderly and equitable settlement of spouse’s affairs when a marriage breaks down or when a spouse dies.
- The Act includes defines *Matrimonial Home*, *Net Family Property* and methods for equalization of payments.

- *Dower Rights:* The *Family Law Act* finished this old system where the family assets were generally not owned equally.

**Matrimonial Home**

- A *Matrimonial Home* is a deemed *Primary Residence* of a family.
- A property may be owned by only one spouse and it can still be a matrimonial home.
- The spouses may also designate any property by *Joint Registration*.
- This releases other properties from the protection of Act regarding possession and consent of non-owner spouse is not necessary while selling or encumbering those properties.
- Such property is still a part of *Net Family Property* calculations for equalization.
- Typically, the seller of real property makes one of the *Nine Statements* in deed concerning the spousal relationship.
- Both spouses have equal right to possession of a *Matrimonial Home*.
- A *Domestic Contract* does not affect *Possessory Rights* of non-owner spouse.
- Designation as *Matrimonial Home* is effective in both *Joint-Tenancy* and *Tenancy-in-Common*. 
• The registered owner spouse must get informed written consent of non-owner spouse when selling or encumbering the *Matrimonial Home*.
• Non-owner spouse has right to be notified when a third party affects possessory right.

For example, if a mortgagee wants to take possession and sell the property to recover loan, the mortgagee must notify the non-owner spouse.

**Net Family Property**

• Any property purchased during marriage is equally divided.
• For properties owned by spouses before marriage, only the net increase in value since marriage is equally divided.
• Each spouse calculates the value of his/her property after deducting the net value that he/she brought into marriage, excluding the Matrimonial Home.
• The spouse with greater net value pays the other to equalize.

• *Exclusions*: Property excluded in *Domestic Contract*, amounts received from courts and insurance claims, inherited or gifted properties, etc.

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2. LEASEHOLD AND NON-OWNERSHIP INTERESTS

2.1 Leasehold Interests

Residential vs. Commercial Leasing

- *Residential Tenancies Act (RTA)* provides a wide range of rights to tenants that are usually not found in *Commercial Tenancies Act*.
- A commercial tenant primarily uses the property for running a business.
- *Hybrid Building (Mixed-Use Building)*: Refers to a structure which is commercial on main floor and apartments upstairs. It is considered commercial for lower floor but residential for upper floor.
- *Home Office*: A small home office within a residence would be treated as a residential property.

Lease vs. Agreement to Lease

- *Lease* is a contract between a landlord and a tenant where the tenant's interest is lesser than that of the landlord.
- The landlord transfers *exclusive possession* of the premises to the tenant for a period called *Term* and for a valuable consideration called *Rent*.
- The landlord must provide *Quiet Enjoyment* and there should not be *Derogation from Grant*.
- The landlord reserves an interest in land called *Reversion*.
- The tenant *may* register his leasehold interest in Land Registry Office.
- *Agreement to Lease*: Referred to as *Unsettled form of Lease* and leads to *final Lease*. It sets out terms of lease between landlord and tenant. Salespersons should attach a blank *Lease* to the *Agreement of Lease* to avoid disputes.

Agreements in Writing

- A lease of less than 3 years need not be in writing but that may not be a good practice for both the landlord and the tenant.
- In case of a dispute, courts consider the *Doctrine of Part Performance* which applies to contracts of land that are not in writing. When one party has actually performed part of the contract (occupied the premises and paid rent), and a clear evidence exists, a contract is deemed to exist.
- As per REBBA 2002, all contracts related to land must be in writing to be effective.
- Lease agreements can also be prepared under *Short Form of Leases Act* which provides for standard short wording.

2.2 Assignment of Lease and Subletting

Privity of Contract

- *Privity*: The difference between *Assignment* and *Subletting* is based on *Privity* which means that only parties to a contract can enforce it on each other.
- Typically, the tenant in commercial lease is not permitted to assign or sublet without the written consent of the landlord, which the landlord cannot withhold unreasonably.
- *Assignment*: If the tenant assigns the lease to a third party (*Assignee*), then that third party establishes Privity with the landlord, but the original tenant may not be released by the landlord.
• **Subletting:** If the tenant only conveys a portion of its leasehold interest to a third party (Subtenant), the tenant remains in Privity with landlord.
• In subletting, there is generally no Privity of contract between the landlord and the sub-tenant.
• Most commercial leases require the sub-tenant to covenant directly with the landlord.

**Preparing Lease Provisions**
• Many commercial leases allow the landlord to terminate the lease when faced with assignment or subletting situation.
• The landlord should require consent for assignment or subletting.
• The assignee or subtenant must agree to covenant directly with the landlord.
• The former tenant should not be released unless the landlord elects to do so.
• Landlords often include a provision that tenant does not get any benefit from assignment or subletting.
• The tenant also cannot receive rents more than what he pays to landlord.

2.3 **Commercial Leasing Basics**

**Continuous Use and Dark Space**
• A *Continuous Use* clause requires that the tenant continuously occupies the space, maintains substantial stock and fully staffs the business.
• *Dark Space* refers to a situation when the tenant leases a large space in a commercial complex, keeps on paying the rent but physically remains absent.
• This puts the landlord in a difficult situation if the tenant is an anchor tenant as other tenants would not be attracted to the complex.

**Fixtures vs. Trade Fixtures**
• Most commercial leases provide that any *fixture* attached to the property becomes the property of the landlord at the time of installation.
• Unless a lease specifies otherwise, a tenant who installs a *trade fixture* to the property can remove it at the end of the lease term provided that all rents have been paid in full.
• The tenant may also be required to bring the property back to its original condition and repair any damages.

**Difference Between Guarantor and Indemnifier**
• The basic difference is based on the scope of liability.
• *Guarantor:* A guarantor has limited liability and if the tenant files for bankruptcy, the guarantor is also released of his obligations.
• *Indemnifier:* Indemnifier is a covenantor in the same sense as the tenant and is liable even if the tenant files for bankruptcy.
• *Co-tenant:* The proposed guarantor becomes co-tenant and is jointly responsible for all obligations.

**Rent Provisions**
• *Increases in Rent:* The *Commercial Tenancies Act* does not regulate rent increases.
• **Interest on Deposit**: The landlord is not required to pay interest on security deposits, unless otherwise agreed in lease.
• **Change the Locks**: If rent is not paid, the landlord may change the locks of the unit on the 16th day after the due date.
• The landlord should not forcibly enter the premises and should allow the tenant to remove their property.
• **Selling Tenant’s Property**: The landlord may, without giving any notice to the tenant, seize and dispose of tenant’s property.
• **Notice**: The landlord must notify the tenant of distress and the amount required to remedy before selling the assets.
• **Appraisal**: The landlord must also hold the property for minimum 5 days and get at least two appraisals before selling.
• Any surplus amount from the sale should be given back to the tenant.
• Subtenant’s property cannot be sized or sold by the landlord.

**Landlord and Tenant Rights**

• Tenants have the right to **Quiet Enjoyment** of leased property and are protected from any interference or threats by the landlord.
• A breach of contract occurs if the landlord deprives the tenant of use of premises, provided the tenant is not in default.
• Landlords and tenants have the right to apply to **Small Claims Court** (less than $25,000) or to **Superior Court of Justice** to seek damages in case of non-fulfillment of obligations under the lease.
• Landlords must notify the tenant in writing of specific breaches of the lease and allow a reasonable time to comply.
• The landlord may have the right to terminate lease if the tenant fails to fulfill obligations.
• Tenants must pay the rent on due date and **cannot hold back rent** when the landlord fails to fulfill obligations.

**Termination of Lease**

• **Month-to-Month**: Either the landlord or the tenant can terminate the tenancy with at least one-month notice in writing.
• **Fixed Term Lease**: Once the term of the lease ends, the tenant must vacate the premises.
• **Overholding**: An overholding tenant may have to pay two months of rent for every month they occupy the premises after the expiry of the lease.

**2.4 Miscellaneous Non-Ownership Interests**

**Easements**

• An **Easement** is a right enjoyed by one land owner over the land of another.
• An easement or right-of-way may be granted for a limited time or forever.
• **Dominant Tenement** is the land owner who gets benefit and **Servient Tenement** is the land owner who suffers the burden.
• Separate ownership of land must exist to create an easement and there must be a clear objective.
• Once created, the easement binds to land and to subsequent owners if the property is sold.
• Easements must be supported by a survey and fully described when selling the property.
• **Easement by Express Grant** refers to creation by mutual consent when one land owner agrees to grant this privilege to another owner.

• **Easement by Implication (Necessity)** refers to creation of easement when it becomes absolute necessity. This *Implied Grant* may be for mutual support such as shared docks which are necessary for reasonable use of a shoreline property.

• **Easement by Prescription (Squatter’s Rights)** is created when someone had used a right-of-way for a long period of time (*Adverse Possession*).

• **Easement by Statute** is for groups to provide public utility services. This does not require a dominant tenement.

• An easement can be terminated by three methods:
  
  (i) Release by dominant tenement,
  (ii) When the purpose is over, and
  (iii) Merger of properties.

**Other Non-Ownership Interests**

• **Appurtenance**: Something outside the property but belongs to it and adds to its greater interest, utilization or value.

• **Encroachment**: Unauthorized intrusion onto the lands of another owner. It is sometimes granted by *Encroachment Agreement* that may be registered against the title of both properties. This agreement may provide that the encroachment must be removed if something happens in future (damage/destruction/fire, etc.).

• **Encumbrance**: An outstanding claim or lien against a property. A *lien* is a right of encumbrance.

• **Mutual/Shared Drive**: A strip of shared land which is an easement on each property and is used as a joint driveway. It is a common cause of confusion and/or litigation between neighbours.

• **Access Road**: These are private roads leading to cottage or rural properties. Survey is essential to clearly identify such rights-of-way.

• **Profit a Prendre**: A right to enter a property based on a written agreement and take something from it such as crops, minerals, timber, sand, gravel, etc.

• **Mineral Rights**: Rights associated with extracting minerals located below the surface of land. Activities include exploration, drilling or extraction of oil, silver, gold and other precious metals. Mineral rights are granted by *Ministry of Natural Resources*.

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