TOPIC 1: CONCEPTS OF PROPERTY

Features of Property

Case: *Milirrpum v Nabalco* (1971)

Facts: The Federal Government granted mining leases to the defendant without consulting the plaintiffs, Aboriginal people. The plaintiffs brought an action, seeking to protect their right to perform their sacred rituals on a piece of land leased to the defendant. *The plaintiffs were not claiming they owned the land, but were merely seeking to enforce their right to perform their rituals on the land.**

Issues:

- ✓ *Do the aboriginal people have land rights based in English common law?*

Held:

(Blackburn J):

The plaintiffs have a connection to the land, but not a proprietary one under common law. Granted, the Aboriginal clans established a recognisable system of law providing for a relationship between themselves and the land, but the doctrine of communal native title has never formed part of the law of Australia. Under common law, a proprietary relationship implies the right to use and enjoy the right, to exclude others, and the right to alienate. Here:

- The plaintiffs did not use the land; they did not cultivate it, own it, or possess it.
- The plaintiffs did not exclude other groups from using the land; other tribes were welcome to use it.
- The plaintiffs did not alienate the land; they had no ability to transfer, sell or dispose of the land.

Thus, the plaintiffs did not have a proprietary right under English common law, but merely a religious relationship with the land – *Defendant successful.*

"I think that property in its many forms, generally implies the right to use or enjoy, the right to exclude others, and the right to alienate. I do not say that all these rights must co-exist before there can be a proprietary interest, or deny that each of them may be subject to qualifications" (Blackburn J)

***Note:** This was pre Mabo; Native Title did not exist.

Property Rights v Contractual Rights

Case: *King v David Allen & Sons Billposting* (1916)

Facts: King owned premises on which he wished to build a theatre. He entered into an agreement with David Allen (DA) wherein DA had the license to post billpostings on the side of the theatre's external wall. The license was to last for a term of 4 years from the day of the theatre's construction, thereafter terminable on 6 month's notice. King undertook that while the license remained in force, he would not permit any other person to post bills or posters on the external wall.

2 months later, King granted a lease over the building to another company. This lease was to last 40 years. The trustee of the company agreed that when the new company was registered, they would ratify the agreement with DA. However, when the lease was finally executed, no mention was made to the standing agreement with DA.

The theatre was finally completed a year later. Pursuant to the agreement, DA sought to post their bills on the theatre wall. However, they were forcibly prevented by the company's workers. DA then sought to sue King to continue their use of the building's wall. However, in order to enforce their rights against the new property owner, DA had to show they a proprietary right – otherwise they could not enforce their right at a proprietary level.

Issue:

- ✓ *Did DA have a proprietary right over the building's external wall?*

Held:

DA is seeking to show they had an easement over the building in being allowed to use the property. But an easement does not exist unless the party is present. In this case, DA was not present. They then sought to create a new property right, but that failed as well.

DA's right in this instance was merely contractual. Their contractual right could not be enforced against King, (a) because it is an inferior right to a property right, and (b) King had already transferred property rights to the company. Furthermore, the new lease was in place for another 40 years, so DA could not re-negotiate it quickly with the new company.

Therefore, DA is able to attain compensation, but must cease use of the building.

RECOGNITION OF NEW FORMS OF PROPRIETARY INTERESTS – COURTS

Restrictive Covenants

Case: *Tulk v Moxhay* (1848)

Facts: In 1808, Tulk, the owner of several parcels of land in Leicester Square, sold a plot to another party. In the contract of sale, a covenant was made to keep the Garden Square uncovered with buildings so that it could remain a 'pleasure ground'. Over the following years, the land was sold several times to new parties, and eventually to Moxhay.

Moxhay was aware of the covenant from the original contract of sale. However, he sought to develop the land, claiming that he was not privy to the original contract and therefore unbound by it.

Upon hearing about this, Tulk sought to sue Moxhay. However, to enforce his property right in the original contract of sale, he had to show an existing proprietary right over the land as he was not party to the most recent contract of sale with Moxhay.

Issue:

- ✓ *Did Tulk have a proprietary right over the land on which to sue Moxhay?*

Held:

Tulk still holds a proprietary interest over the land in the form of a restrictive covenant. This is for 2 reasons:

1) Moxhay knew of the restrictive covenant when he purchased the land; and
2) Moxhay knew the amount of money he paid for the land was low compared to its value. Moxhay did not pay a large enough sum to attain the right to build; in fact, he paid a lower sum precisely because he was merely purchasing the land, not the right to build on it.

Native Title

Case: *Mabo v Queensland (No 2)* (1992)

Facts: In 1879, the Murray Islands had been annexed to Queensland. In 1882, the Queensland Government reserved the islands for native inhabitants. However, in that same year, the government had also leased portions of the islands to non-natives.

Then in 1985, the Queensland Parliament passed the *Queensland Coast Islands Declaration Act* which declared that, on annexation in 1879, the lands vested in the State of Queensland were free from all other rights, interests and claims whatsoever. In *Mabo v Queensland (No 1)*, this Act was held to be invalid as it was inconsistent with the *Racial Discrimination Act 1975* (Cth).

In 1992, 3 members of the Meriam people, of the Murray Islands, sought a declaration that they had land rights which weren't extinguished at the time of Settlement. The Queensland Government argued that when the Murray Islands were annexed, the Crown acquired absolute ownership of the land, and that no other rights could exist unless granted by the Crown.

Issue:

- ✓ *Were the Meriam peoples' rights over the Murray Islands extinguished at the time of Settlement and annexation?*

Held:

The Crown's sovereignty carried beneficial ownership only over areas where no native title to the land in fact existed. The Crown's ultimate sovereignty empowered it to appropriate land to itself or alienate land to others. However, until the land was appropriated or alienated, any traditional native interests in the land that existed under native law or custom existed continued in existence.

Thus, the acquisition of property by the Crown in Australia did not automatically extinguish native title. The mere acquisition of sovereignty was not an exclusion of the existence of native title. The common law could accommodate native customary title as something in existence prior to acquisition.

Furthermore, it was false to describe Australia as a settled colony on the basis that it was without settled inhabitants or settled law. There was a subtle and elaborate system of rules in force amongst indigenous people of Australia prior to the acquisition of sovereignty by the Crown. Therefore, the rule that Crown ownership subsisted in the lands of the acquired territory cannot be sustained.

Property in Spectacle

Case: *Victoria Park Racing v Taylor* (1937)

Facts: The plaintiff owned Victoria Park, a racing track which charged admissions to people who placed bets on the races. The racecourse was surrounded by a high fence. Taylor, who had a house adjacent to the racecourse, allowed a radio broadcasting station to construct a 5m high platform from which someone could see into the course and broadcast the races and information about the horses on the ground.

Attendance at the ground plummeted shortly afterwards. The plaintiff claimed that on-track betting was lower as a result of the broadcasting, as people who had previously come to the track were now listening on the radio instead. The plaintiff applied to the NSW Supreme Court for an injunction on the basis, of amongst other things, non-natural use of property. It was common ground that the mere construction of a platform constituted no breach of building or zoning regulations. An injunction was denied, and the case was appealed to the High Court.

Issue:

- ✓ *Did Victoria Park Racing have a proprietary right over the races on their property?*

Held:

(Latham CJ):

Victoria Park claimed they had a 'property in spectacle'. But that is not enough; a spectacle cannot be owned in any ordinary sense of the word. This would entail asking people to 'unsee' what have seen and never speak of it. This would be ludicrous, extending their proprietary right too far.

But even if there were any legal principle which prevented one person from gaining an advantage for himself or causing damage to another by describing a spectacle produced by that person, the rights of the latter person can only be described as property in a metaphorical sense. A principle cannot be based upon a metaphor.

Which Victoria Park had a right in the commercial value of their event, the method of enforcement – through a property right – would create a far too onerous responsibility on society. Victoria Park could have simply erected a higher fence; asking the law to do so is too far a stretch.

Human Body and Body Parts

Case: *Bazley v Wesley Monash IVF* (2010)

Facts: The applicant's husband gave semen samples to the respondent in 2009, under the knowledge that he was dying. A small fee was required to hold the sperm, which the husband paid. He made statements indicating an intention to have more children, but no direction had been given about the use of sperm after death. However, he did appointed the applicant as a principal beneficiary of his estate.

Shortly after, the applicant's husband died. The applicant later informed the respondent of her husband's death and asked that they retain the semen samples. The respondent replied indicating that they were unable to store the samples of a deceased person where there was no directive from the deceased giving consent to the use of the samples. The respondent advised that in the absence of any directive, they were prevented from continuing to store the husband's sperm or from using it in a treatment procedure to procure pregnancy.

The applicant then sought an order from the Court requiring the respondent to continue holding and maintaining her husband's sperm, claiming that it was part of her husband's property and belonged to her, as she was the primary beneficiary of his estate.

Issue:

- ✓ *Was sperm extracted and stored capable of being described as 'property'?*

Held:

There was a possessory right that existed in the sperm that formed part of the husband's estate. Considering the applicant is the primary beneficiary of the husband's estate, the applicant has a proprietary right in the sperm and may request the respondent hold and maintain it. However, the agreement could come to an end if the fee for holding is not paid or the contract not maintained as required.

Case: *Moore v Regents of University of California* (1990)

Facts: After being diagnosed with leukaemia, Moore was referred to the Medical Centre of the University of California (UCLA). At UCLA, Dr. Golde hospitalised Moore and performed diagnostic tests, withdrawing bloody and other bodily substances, eventually forming Moore's diagnosis. All defendants (i.e. doctors involved in the testing) knew that certain blood products and components derived from these procedures were commercially and scientifically valuable.

Golde later recommended Moore's spleen be removed to slow down the progress of the disease. Upon Golde's representations, *Moore signed a written consent authorising the procedure*, which said the hospital could dispose of any severed tissue by cremation. Unrelated to Moore's medical care, Golde and Quan - a researcher employed by the defendant - made provisions so that portions of Moore's spleen would be taken to a separate research facility. *Golde and Quan never informed or obtained Moore's consent to conduct research using Moore's spleen*.

Moore's spleen was eventually removed. Thereafter, he returned to UCLA for further medical testing on a number of occasions, where Golde withdrew additional samples of blood and bodily samples. Throughout the time he was under Golde's care, Moore was unaware the defendants conducted research on Moore's cells in the hope of obtaining financial benefits and commercial advantages.

Eventually, Golde established a cell line which he applied for a patent on. The patent was issued with the defendants named as the assignee and inventors. The clinical potential was unknown at the time, but the research formed part of an industry worth approximately $3bn over the following 10 years.

Moore eventually found out about this, and sought to sue the defendant, claiming they had converted his proprietary right over his cells.

Issue:

- ✓ *Did Moore continue to have possessory and ownership interests in his cells after they were removed from his body?*

Held:

(Panelli J):

Moore is claiming that he, as a person, had an absolute right to the unique products of his body. This argument must be rejected precisely because the products were not unique! Moore then claimed that his spleen should be protected as property in order to protect his privacy and dignity. Again, this argument must be rejected because his property was already protected by informed consent, which safeguarded his privacy and dignity. Lastly, Moore does not have any rights over the discovery because the property at issue is not his cells, but rather the cell line created from his cells.

The court must also consider the policy behind having cells considered property. Because conversion of property, as Moore has claimed the defendants have committed, is a strict liability tort, extending property rights to include organs could have a chilling effect on medical research. Laboratories doing research receive a large volume of medical samples, and cannot be expected to know or discover whether somewhere along the line their samples were illegally converted.

Accordingly, Moore has no property rights to his discarded cells or any profits made from them. ***However, Golde did have an obligation to reveal his financial interest in the materials harvested from Moore. Moore is allowed to bring a claim for injury sustained as a result of Golde's failure to disclose the circumstances***.

Dissent –

(Mosk J):

Moore could have been denied some property rights and given others. At the very least, Moore had the right to do with his own tissue what the defendants did with it; that is, as soon as the tissue was removed, Moore at least had the right to choose to sell it to a laboratory or have it destroyed.

But in order to prove damages from informed consent, Moore would have to show that he, and a reasonable person in his position, would not have consented to the produce had he/they been properly informed. Chances of proving damages this way are slim.

Finally, Moore can only sue his doctor for failing to adequately inform him; it is unlikely he will be able to sue the University as a body for exploiting him.

Digital Media

Case: *Fairstar Heavy Transport v Adkins* (2012)

Facts: Adkins was the former CEO of Fairstar. However, he was not directly employed by Fairstar, but rather through the contract of employment with Adkin's service company. When Adkin's employment was terminated, Fairstar wanted to retrieve and read all electronic business correspondence stored on his personal computer.

Fairstar claimed they had an enforceable proprietary claim to the content of the emails held by Adkins because they were sent and received by him whilst acting on Fairstar's behalf.

Issue:

- ✓ *Did Fairstar have a proprietary claim over Adkin's work emails sent from his personal computer?*

Held:

The contents of emails are to be considered 'information', not 'property' which can be legally owned. Putting this aside, the former relationship between Adkins and Fairstar was one of principal and agent. As a general rule, a principal is entitled to require production by the agent of documents relating to the affairs of the principal. Materials held and stored on a computer which may be displayed in readable form are in principle covered by the same incidents of agency as apply to paper documents. The form of recording or storage does not detract from the substantive right the principal has against the agent to access their content.

Thus, Adkins was under a duty as a former agent of Fairstar to allow Fairstar to inspect business emails sent or received by him relating to the company. Termination of the agency did not terminate the duty binding Adkins to Fairstar.

DOCTRINE OF FIXTURES

Object of Annexation

Case: *Belgrave Nominees v Barlin Scott Airconditioning* (1984)

Facts: The plaintiff contracted with a builder to get major renovations done in a commercial building. Included within these renovations was the installation of air-conditioning units. The builder sub-contracted with the defendant for installation of these air-conditioners, with payment the builder's responsibility. Thus, there was no contractual relationship between the plaintiff and defendant.

The builder shortly afterwards went into liquidation and stopped paying the defendant. In the intervening period, the plaintiff contracted with a new builder, who also sub-contracted with the defendant. Nevertheless, immediately after payment for their work by the initial builder ceased, the defendant stopped working and proceeded to remove their installations, which were still partially connected.

The new builder, arguing trespass and interference with land, sought an injunction against the defendant to return and reinstall the air-conditioning units. The defendant argued that the units were chattels, and therefore their own property, not that of the plaintiff.

Issue:

- ✓ *Were the air-conditioning units chattels or fixtures?*

Held:

The general rule, pursuant to *Holland v Hodgson*, is that if an article is attached to land by something more than its own weight, it is a fixture, unless the intention shows that it was a chattel. Thus, attachment gives rise to the presumption that the object is a fixture, and the burden of proof lies with the person trying to prove the object is in fact a chattel. Even the smallest amount of attachment gives rise to the presumption of fixture.

In this case, the units were sufficiently annexed to the buildings to make them fixtures. They were already connected to the water system, and had the ability of attachment to the electricity system. Thus, there is a presumption that the units are fixtures, and the defendant has failed to discharge their burden of proving otherwise. The plaintiff may obtain an injunction compelling the defendant to complete their work.

Case: *NAB v Blacker* (2000)

Facts: NAB had a mortgage over the defendant's dairy farm. The terms of the mortgage defined what was considered property on the land; namely, all plant and machinery fixed to the land, or subsequently fixed to the land.

Later on, NAB called upon the mortgage as security. There was an issue surrounding the pump of the irrigation system and whether it was affixed to the land.

Issue:

- ✓ *Was the irrigation pump a fixture on the land, or chattel?*

Held:

(Conti J):

The court considered a multitude of events – the nature of the pump, whether it was attached permanently or temporarily (it was not permanently attached, but the system could not function without it being positioned in a specific place), whether its removal would damage the land etc.

The court found that while the pumped rested on the ground, it was able to be towed and moved, and could be disconnected within 24 minutes without causing damage. Thus, the presumption is that the pump is a chattel. NAB has failed to discharge this presumption, and cannot recall the pump as part of its security in the mortgage.

"No single test is sufficient; the court ought to have regard to all circumstances. No factor has primacy, and each case turns on its own facts"

TOPIC 5: FRAGMENTATION BY REFERENCE TO THE NATURE OF TITLE

Possessory Title – Principles

Case: *Perry v Clissold* (1907)

Facts: Clissold took possession of land in 1881, without title, and fenced it. Clissold peacefully maintained possession of this land and conducted his business, without anyone bringing a better title. Perry, the Minister of Public Instruction in NSW at the time, compulsorily acquired the land to build a school. Clissold sought compensation, asserting that he had rights to the land as an adverse possessor. Perry refused, arguing that Clissold was a trespasser and had no rights to the land.

Issue:

- *Did Clissold have legitimate possessory title to the land under the doctrine of adverse possession?*

Held:

A person in possession of land, exercising the ordinary rights of ownership, has a perfectly good title against the whole world *but for the rightful owner*. However, if the rightful owner does not come forward and assert his title by law within the period prescribed by the *Statute of Limitations*, his right is forever extinguished, and the possessory owner acquires title, even if the initial acquisition was unlawful.

Additionally, the documentary title holder cannot assert the *jus tertii* defence in relation to land. The existence of a third party with superior rights has no effect on the ability of a party with only a possessory title to bring actions against the dispossessor.

In this case, Perry, the owner, had not come forward within the time specified. Accordingly, Clissold acquired title through adverse possession. The land is ordered to be returned to him.

Case: *Jeffries v The Great Western Railway Company* (1856)

Facts: In this case, both the plaintiff and defendant claimed ownership of trucks as per an assignment from a third party named Owen. The defendants seized the trucks in the plaintiff's possession, whilst Owen was still in apparent ownership.

The plaintiffs sought to bring an action in conversion. The defendants claimed their actions were valid on the basis that Owen had become bankrupt before the plaintiff took possession, meaning the trucks' ownership had already passed on to Owen's creditors and not into the ownership of the plaintiff. The defendants argued the plaintiffs could not bring an action for conversion based on the *jus tertii defence*.

Issue:

- *Which party held the possessory title in the trucks?*

Held:

The law is that a person in possession of goods has a good title against the whole world, and that one who takes them from him, having no title in himself, is a wrongdoer, and cannot defend himself by claiming that there was some title in a third party.

On this basis, eventhough the trucks belonged to a third party due to Owen's bankruptcy, the plaintiff was in their immediate possession. In other words, the mere fact that the plaintiff physically possessed the trucks, even if by wrongful possession, gave the plaintiff a requisite level of protection to rely on. The fact that the trucks 'belonged' to the creditors did not mean anyone could come in and claim them; the plaintiff still had a superior right of possession to everyone else bar the creditors.

Thus, by coming in and taking possession without a justifiable reason, the defendants are wrongdoers and cannot rely on the *jus tertii defence*. They may have been able to do so if they were agents of the creditors (because then they would have been acting on behalf of the third party with a superior right), or if the plaintiff wasn't in physical possession already, but because they were not agents of the creditors, they had no right to claim the trucks at all.

Remedies for Unlawful Possession

Case: *Jaggard v Sawyer* (1995)

Facts: Ashleigh Avenue is a private, no through road. It is privately owned and maintained by the residents of 1-10 Ashleigh Avenue, at their own expense. Because of its private nature, it is inaccessible to non-residents. People may be allowed to enter if invited, but non-residents cannot drive through of their own accord. Residents also own the path that

directly comes out of their house. Because of the presence of these paths, the residents have restrictive covenants, one which is that the part of the land unbuilt upon can only be used for the construction and maintenance of a garden.

The Jaggards lived in No. 1 (towards the front of the diagram); the Sawyers lived in No. 5 (yellow at the back). Deciding that their house was not big enough, the Sawyers sought to build another house on the additional land they owned. The built No. 5A (diagonally across from yellow), moved into it and sold No. 5. They also sought to build a road leading to this new property, as it was otherwise inaccessible. This was a violation of the covenant that land unbuilt upon could only be used for gardens.

Unhappy with these events, the Jaggards sent a letter to the Sawyers, threatening an injunction. They also approached Council to seek advice on the status of the road. Council asserted that the road was fine, and it was built. The Jaggards took the Sawyers to court, claiming trespass and breach of covenant, and sought an injunction.

Issue:

- *Was trespass and breach of covenant evident?*
- *If so, would it be appropriate to award an injunction or damages in lieu of such?*

Held:

It is clear that both trespass and breach of covenant are evident. However, the issue is whether an injunction or equitable damages should be awarded. The Court has 4 considerations in determining which is appropriate:

I. **Is the injury to the plaintiff's rights small?** – if yes, damages are appropriate; if no, an injunction may be awarded.
II. **Is the injury to the plaintiff capable of being estimated in monetary form? –** if yes, damages are appropriate; if no, an injunction may be awarded.
III. **Is the injury capable of being compensated for by a small monetary payment? –** if yes, damages are appropriate; if no, an injunction may be awarded.
IV. **Would it be oppressive to the defendant to grant an injunction?** – if yes, damages are appropriate; if no, an injunction may be awarded.

Here:

(a) The injury to the Jaggards is small. Yes, there would be an increase in traffic in the road, but only by one additional car. Upkeep costs would rise as well, but the Sawyers have pledged to contribute towards this upkeep.
(b) If the loss is one of value, it may be calculated in monetary form; if the loss is one of amenity, probably not. However, the court is able to estimate costs here based upon the additional upkeep and the loss of value.
(c) The Sawyers will be contributing towards the additional upkeep. The loss in value is likely to be small. The injury to the Jaggards can be compensated for by a small monetary payment.
(d) An injunction would be far too oppressive because the house is already built. An injunction would lead to the Sawyers being unable to access, and therefore unable to use, their newly built property.

On the basis of this assessment, damages are awarded. The house may stand, together with the driveway, and the Sawyers are allowed to use the road.

Case: *Break Fast Investments v PCH* (2007)

Facts: Break Fast and PCH owned adjoining properties. PCH was planning on developing their land. Break Fast was already using their land, owning a 12 storey building on the premises. In 2002, Break Fast had put up metal cladding around the outside of the building. At the time, PCH was for the change, asserting that it would increase the amenity of the area.

However, in 2007, PCH realised that the building's cladding was in fact encroaching on their land by 6cm. While this seemed like a small amount of land, spacing was hugely limited, and 6cm could mean the difference between PCH being able to develop the land as they wished or not. PCH asked that Break Fast remove the cladding, but Break Fast claimed it would be too oppressive to remove.

PCH took Break Fast to court, affirming and claiming that (a) they were not seeking to remove the building, but the cladding only, which was an aspect placed on after the fact; (b) the cladding was temporary and could be removed; and (c) Break Fast had willingly and knowingly put on the cladding knowing they were encroaching on PCH land.

Issue:

- *What remedy was available to PCH?*

Held: In assessing the 4 considerations established in *Jaggard*, the court found that –

I. The injury to PCH was not small; the encroachment could mean the difference between being able to develop the land as they wished or not.
II. The injury to PCH is able to be calculated in monetary form. It would constitute the value of removing the temporary cladding encroaching on their property.
III. The cost of removing the cladding would be $300,000. While this is not insignificant, it is not overly large to be detrimental for Break Fast to pay.
IV. The harm to the Break Fast by an injunction would entail removing a non-structural addition which would restore the status quo. It would not require demolition of the building or result in loss of access or other major detriment. Thus, an injunction would not impose hardship on Break Fast out of all proportion to the injury to PCH if an injunction was refused.

Based on this assessment, an injunction may be awarded. The cladding must be removed.