

## **Week 1: INTRODUCTION TO PROPERTY**

### **PERSONAL PROPERTY - CASE LIST**

- E v Australian Red Cross Society (1992) 31 FCR 299
- Armorie v Delamirie (1722) 93 ER 664 – Chimney Sweep - Finders

#### **Goods found IN property:**

- Hannah v Peel [1945] 1 KB 509 – Brooch in window sill
- Waverley Borough Council v Fletcher [1996] QB 334 – Detector – in ground
- Elwes v Brigg Gas Co (1886) 33 Ch D 562 – Ancient ship underground
- South Staffordshire Water Co v Sharman [1896] 2 QB 44 – Rings in pool mud

#### **Goods found ON property:**

- Bridges v Hawkesworth (1851) 21 LJ QB 75 – Money on shop floor
- Parker v British Airways Board [1982] 1 QB 1004 – Bracelet in lounge
- Chairperson, National Crime Authority v Flack (1998) 86 FCR16 – Money in wardrobe
  
- City of London Corp v Appleyard [1963] 1 WLR 982
- Byrne v Hoare [1965] Qd R 135
- Re Wasserberg; Union of London & Smiths Bank Ltd v Wasserberg [1915] 1 Ch 195
- Moorehouse v Angus & Robertson (No 1) Pty Ltd [1981] 1 NSWLR 700
- Calabrese v Miuccio [1984] 1 Qd R 430
- Gross v Lewis Hillman [1969] 3 All ER 1476
- Dickinson v Burrell (1866) LR 1 Eq 337
- LUDWIG MISNER v AUSTRALIAN CAPITAL TERRITORY [2000] ACTSC 87 (austlii)
- Cochrane v Moore (1890) 25 QBD 57
- Corin v Patton (1990) 169 CLR 540
- Re Rose [1949] Ch 78, [1952] Ch 499
- Glegg v Bromley [1912] 3 KB 474
- Campbells Cash and Carry Pty Limited v Fostif Pty Limited; Australian Liquor Marketers Pty Limited v Berney [2006] HCA 41
- Norman v FCT (1963) 109 CLR 9

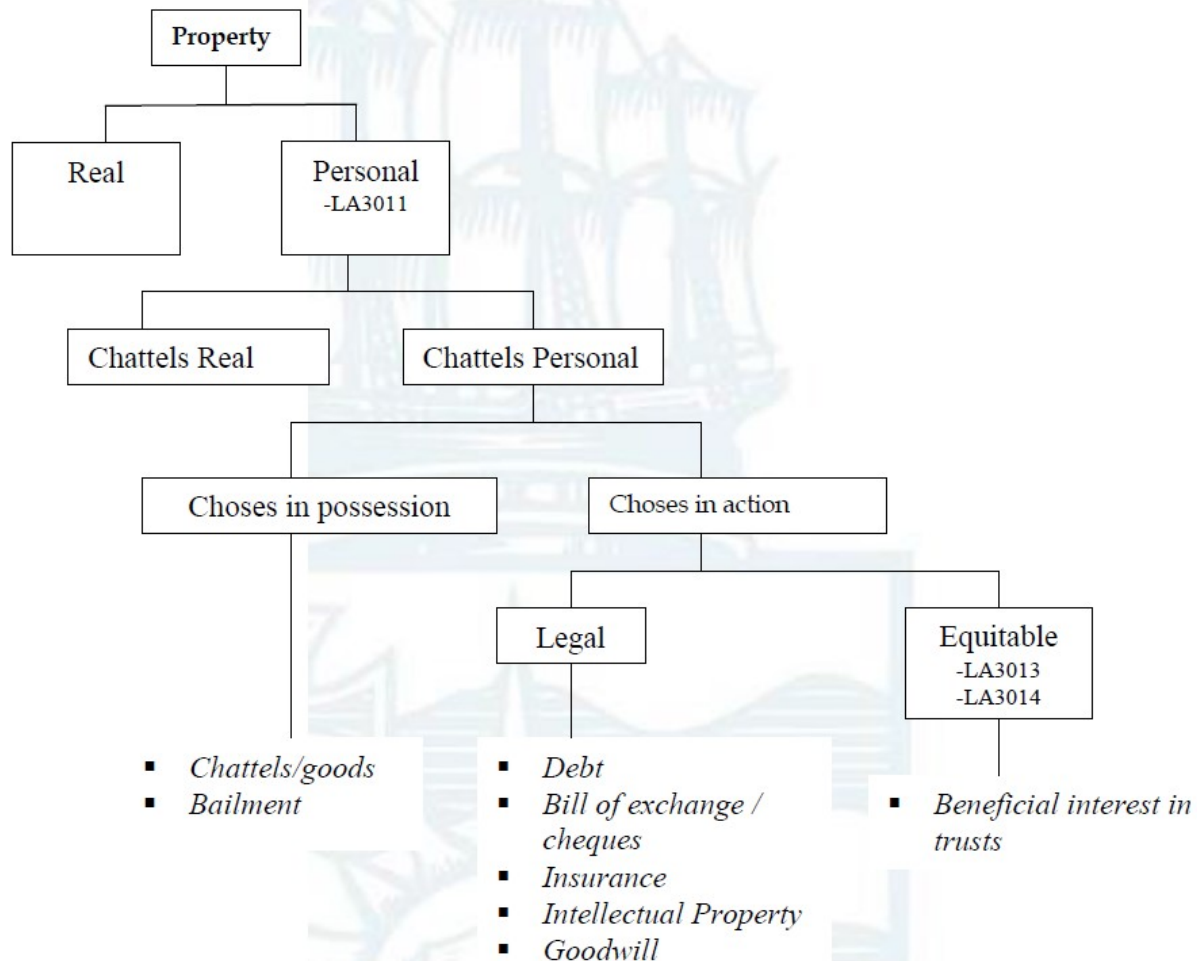
## Classifications of Property

The classification of property will help determine what area of law governs the dispute. We are primarily concerned with personal property in this course: e.g. if property is classified as a “choses in possession” (i.e. goods), then the dispute may be resolved by using the Sale of Goods Act 1896 (Qld) or the Australian Consumer Law – Schedule 2 - Competition and Consumer Act 2010 (Cth).

- a. Real property (land and all things embedded & attached)  
- Leases are personalty.
- b. Personal property (Tangible things – chattels/choses in possession & intangible things – choses in action; IP rights, debts and shares).

- Things can switch from one to another (e.g. trees).

### GENERAL PROPERTY DIAGRAM



## **Real Property**

Land includes above and below. Common law rule that land includes minerals except gold and silver which belonged to the Crown. NOW legislation states that all minerals belong to the Crown. Common law rule that land also includes airspace to extent necessary for ordinary use/enjoyment – Bernstein v Skyviews & General Ltd.

### **Extending the Concept of Real Property - Fixtures**

Fixtures are:

Chattels that have been so attached to land they have become part of the land. Test = intent to be a permanent feature – Australian Provincial Assurance Co v Coroneo. No single test – NAB v Blacker.

Look at:

1. The purpose; and
2. The degree of the annexation.

### **Is it a Fixture?**

#### **Australian Provincial Assurance Co v Coroneo:**

- Is it attached to the land by means other than its own weight?
- Was it attached with the intention that it would remain in position permanently or for an indefinite or substantial period of time?
- Can it be removed without substantial damage either to itself or to the thing to which it is attached?
- When did the parties intend title to the item to pass from seller to buyer? If they intended title to pass after installation to the premises, then it is a contract to install a fixture (Brooks Robinson Pty Ltd v Rothfield; Aristoc Industries Pty Ltd v RA Wenham (Builders) Pty Ltd) If so, the dispute is governed by the relevant real property law or contract law

If not a fixture, then not part of realty and dispute not governed by real property law. In such a case it would be a chose in possession and dispute is perhaps governed by the Sale of Goods Act 1896 (Qld) or the Australian Consumer Law – Schedule 2 - Competition and Consumer Act 2010 (Cth).

#### **1. Purpose of Annexation**

- Was it attached to the land so it could be better used or enjoyed as a chattel (it is probably not a fixture); or
- Was it affixed for the better enjoyment or permanent improvement of the land – or the building – to which it is attached (it is probably a fixture).

#### **2. Degree of Annexation**

- Was it attached to the land only by its own weight (it is probably not a fixture); or
- Can it be removed from the land without substantial damage to itself or the thing to which it is attached – the test of “injurious removal” (it is probably not a fixture).

## Interests in Land

1. Estates
2. Co-Ownership
3. Legal & equitable mortgages
4. Other equitable interests

### 1. Estates in Land

Feudal system (tenures) means Crown owns all land. People own 'interests' in the land. This is an 'estate', separate from the land itself.

- a. Freehold estates (uncertain duration).
- b. Leasehold estates (certain duration).

- **Freehold Estates**

- a. Estate in fee simple (most common & most absolute).
- b. Life estate (created by sale, gift or will to 'life tenant'). Life tenant cannot commit acts of 'waste'. When life tenant dies, the estate ceases and vests in the person entitled to 'future interest'.
  - i. Future interest when rights to land begin at a future time. May be a remainder or reversion.

- **Leasehold Estates**

Lessor grants lease to a lessee. Lease is more than a personal contract between landlord and tenant.

### 2. Co-Ownership of Land

- **Joint Tenants** – 4 Unities must exist:
  - a. Unity of Possession (Concurrent possession of whole title).
  - b. Unity of Interest (Same type of estate – same nature, same extent and same duration).
  - c. Unity of Title (Title of all must have arisen from same legal instrument e.g. will or deed).
  - d. Unity of Time (Concurrent interests must all vest at the same time).

#### **Right of survivorship:**

The final element of joint tenancy. MOST IMPORTANT. Joint tenant interest cannot be disposed of by will or via intestacy. Remaining tenant interests are enlarged – Wright v Gibbons.

#### **Severance:**

Occurs on destruction on one of the 4 unities:

1. Sale or assignment of interest – converts to tenancy in common.
  2. An agreement or course of dealing showing the tenants are mutually treating it as severed – Abela v Public Trustee.
  3. Merger – a tenant acquires an interest larger than the others (destroys unity of interest).
  4. Partition – court order compels severance.
  5. Maintenance agreement of Family Court.
- **Tenants in Common** – have unity of possession but not the other 3 unities. Termination by partition (subdivided) or sale pursuant to court order via statutory trust which divides proceeds between owners.

NOTE: If 3 owners, 2 can be joint tenants with their share and tenants in common with other share.

## **Title to Real Property**

- a. Old System Title (common law via deeds of conveyance).

- b. Torrens Title (registered title – easier – Cert. of Title).
  - i. Caveats – relate to equitable interests (unregistered interests). Caveat is a document that freezes the register.

### 3. Mortgages of Land (Legal & Equitable)

- a. Legal (recognised in law and equity). Mortgagee becomes the owner.
- b. Equitable (recognised in equity only. Creates an interest in favour of the mortgagee/creditor but not legal estate.) Mortgagee has equitable interest only.
  - i. Mortgage of equitable interest in land (e.g. second mortgage under common law title).
  - ii. Mortgage of legal interest which doesn't convey legal estate (e.g. where transaction by informal contract not deed).
    - 1. By agreement to give legal mortgage. Loan must be advanced before equity considers mortgage implied. Any agreement to assign rights in property is a valid equitable assignment as long as it is made for valuable consideration and the property is capable of being identified.
    - 2. By deposit of title deeds. But prudent course is the ensure memorandum is executed.
    - 3. By informal agreement to create equitable interest by security.

Common law position is that once that date for payment passed without payment, the estate becomes absolute in the mortgagee.

In Equity, mortgage is only a security. In equity, mortgagor has right to redeem the property after the agreed time on payment (equity of redemption). Equity has regard to intention of parties, rather than form of deed.

Estate of the mortgagor may be terminated by:

1. Foreclosure
2. Exercise by the mortgagee of their power of sale
3. Merger to the two estates

#### Mortgagee's Remedies:

1. Foreclosure – via suit in equity by order nisi which gives mortgagor 6 months to redeem and after that by order absolute.
2. Compel payment of principal – sue at law on covenant to pay in mortgage instrument.
3. Enter into possession – physical entry or legal proceedings to eject mortgagor.
4. Appoint a receiver of rents and profits
5. Exercise power of sale – via state statute but must be in good faith as mortgagor has an interest in any surplus – *Pendlebury v Colonial Mutual Life Assurance Society Ltd.* Court can grant injunction to restrain sale at undervaluation.

### 4. Other Equitable Interests in Land

- a. Sale contract
- b. Option to purchase (right to bring a binding sale contract)
- c. Agreement to lease
- d. Beneficiary under will

## **Priority of Competing Interests**

1. Where equities are equal, the law prevails.
2. BUT legal mortgagee is subject to equitable mortgage if they had notice.
3. Subject to priority of legal estate, mortgages in order of date of creation.

## **Leases**

Grant of a proprietary right for

- a. exclusive possession
- b. for fixed term

Usually in consideration of rent. Different to a license – permission to enter or occupy land.

### **Types:**

1. Fixed Term (if greater than 3 years of Torrens land, must be registered).
2. Periodic Tenancies (repeated on cyclic bases of year, month etc. until notice).
3. Tenancies at Will (either party may end at any time).
4. Tenancies at sufferance (where tenant remains in possession with consent of landlord after lease has expired – ‘hold over’ – not a true lease).

Terms:

Obligations in a lease are ‘covenants’. Covenants may also be implied by common law or legislation, including:

On landlord:

1. Covenant for quiet possession – landlord won’t interfere.
2. Covenant not to derogate from grant – landlord won’t do anything inconsistent with purpose premise let.
3. Covenant of reasonably fit for habitation – where furnished residence.

On tenant:

1. Covenant to pay rent.
2. Covenant to repair.
3. Covenant to allow landlord to enter for inspection.
4. Covenant to yield possession at end lease.

### **Assignment**

- Different to sub-lease which is when tenant grants a smaller estate than balance of term.
- No contractual liability between landlord and assignee so neither can enforce covenants.
- Assignment creates relationship of privity of estate between landlord and assignee.
- Usually deed of covenant entered that assignee will perform covenants of the original lease.
- Original tenant should seek a release, as obligations are not automatically ended.

### **Termination**

1. Expiry at end of fixed term.
2. After notice in periodic tenancy (notice = period).
3. Surrender – new lease with tenant’s agreement.
4. Forfeiture – early and non-consensual termination by landlord due to wrongful act of tenant. Formal requirements must be followed (serving notice). Statutory right of re-entry.

### **Repudiation**

Landlord can accept repudiation thereby terminating lease then claim damages.

### **Recovery of Possession**

1. Re-entry (must be peaceable and careful in case of trespass or assault if resisted).
2. Court order for possession.

## **Retail Leases**

State legislation protects tenants in commercial leases in shopping centres.

- a. Rent & outgoings – landlord can't demand payment for goodwill and key money.
- b. Outgoings – Must be specified in the lease.
- c. Compensation – for loss or damage due to failure to rectify a breakdown etc.
- d. Disputes – resolution process detailed.

## **Extending the Concept of Real Property – Emblements**

**Definition:** The produce of a crop – produced as the annual result of agricultural labour.

**Effect:** At common law an outgoing tenant whose tenure ended (other than by his or her own act) - after planting but before harvest - could re-enter the land and claim the crop.

In some cases, emblements may be chose in possession – if there is an express agreement to sever from land - and dispute is governed by Sale of Goods Act 1896 (Qld): see *Mills v Stokman* and s 3 of the Sale of Goods Act 1896 (Qld).

## **Native Title**

Common law in Australia does not CREATE native title, it RECOGNISES it. Native title is sourced in the 'traditional laws and customs' of the Aboriginal peoples.

Native title is sui generis (one of a kind and peculiar to itself):

- Sometimes nearly full ownership sometimes just a right to hunt/gather food.
- Protected by legal or equitable remedies depending on the on the right/interest.
- Inalienable interest which enables rights to be undertaken despite regulatory laws, so without license.

## **Native Title Rights – Section 223 of the Native Title Act**

### ***Common law rights and interests***

(1) The expression **native title** or **native title rights and interests** means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:

- (a) The rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
- (b) The Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
- (c) The rights and interests are recognised by the common law of Australia.

Hunting, gathering and fishing covered

(2) Without limiting subsection (1), rights and interests in that subsection includes hunting, gathering, or fishing, rights and interests.

### ***Statutory rights and interests***

(3) Subject to subsections (3A) and (4), if native title rights and interests as defined by subsection (1) are, or have been at any time in the past, compulsorily converted into, or replaced by, statutory rights and interests in relation to the same land or waters that are held by or on behalf of Aboriginal peoples or Torres Strait Islanders, those statutory rights and interests are also covered by the expression native title or native title rights and interests.

Note: Subsection (3) cannot have any operation resulting from a future act that purports to convert or replace native title rights and interests unless the act is a valid future act.

Subsection (3) does not apply to statutory access rights

(3A) Subsection (3) does not apply to rights and interests conferred by Subdivision Q of Division 3 of Part 2 of this Act (which deals with statutory access rights for native title claimants).

Case not covered by subsection (3)

(4) To avoid any doubt, subsection (3) does not apply to rights and interests created by a reservation or condition (and which are not native title rights and interests):

- (a) In a pastoral lease granted before 1 January 1994; or
- (b) In legislation made before 1 July 1993, where the reservation or condition applies because of the grant of a pastoral lease before 1 January 1994.

→ 1992

**Mabo** recognised that native title is recognised by common law. Key points:

1. Australia was not terra nullius or unoccupied in 1788.
2. Native title survived the acquisition of sovereignty by the British in Australia.
3. Native title was recognised by common law and the Crown was not the owner of all land as previously thought.
4. On acquisition of sovereignty the Crown acquired a radical title which is a bare title and not complete ownership of the land.
5. Native title is recognised as a burden on the Crown's radical title.
6. A radical title is the foundation of the Crown's fundamental right to govern the country and gives the Crown the right to grant interests in the land to its citizens.
7. The doctrine of tenure continues to apply but in a limited sense.

→ 1993:

Native Title Act (Response to Mabo). Effect of Racial Discrimination Act 1975 (Cth) is that if Aboriginal people are denied rights by discriminatory laws then those rights are not lost. The right not to be arbitrarily denied property was denied. One possible interpretation is that all title granted since 1975 by government is invalid. Cth act validates Cth granted title which might have been invalid due to native title. State legislation is necessary to validate state granted title.

→ 1996: **The Wik Case**

- Held that native title is not extinguished by certain pastoral leases.

→ 1998: '10 Point Plan' and amendment to the native title act (Response to Wik).

→ 2009: More amendments.

### **Proof of Native Title**

Requires proof of a connection with the traditional land/waters in accordance with the laws and customs of the Aboriginal group.

### **Interpreted in Yorta Yorta Aboriginal Community v Victoria:**

- Must prove elements in section 223 (above).
- Focus on establishing continuity. Adaptions & changes are not fatal to continuity.
- Onerous burden of proof.

## **Personal Property**

### **Property and "Rights of Possession"**

- Ownership & possession may coexist or vest in different people.
- Definition of possession: The physical control of a thing coupled with an intention to exercise continuing control over it.
- Rights of Possessors - 'Possession is nine-tenths of the law'.

### **Armorie v Delamirie (1722) 93 ER 664**

Chimney sweep found and tried to sell a jewel.

*The possessor has greater rights to the property than anyone other than the true owner or someone deriving title through the true owner.*

### **Hannah v Peel [1945] 1 KB 509**

Soldier found a brooch in a house owned by Peel.

*As there was no evidence that the owner knew of the existence of the brooch, the soldier had a better claim by virtue of possession than anyone except the true owner who could not be found.*