Lecture 2: Concepts of Land

Land is a three dimensional space referable to a point on the earth's surface although land can exist above the surface and below the surface. As will be discussed in the next lecture, there is also a temporal element with an estate being a right to possess an area of land for a period for a period of time. Hence land has four dimensions, three spatial and one temporal. Also these four dimensions are not usually affected by changes to the physical condition of the land or the things attached to it i.e. if I own a house in fee simple and it is destroyed by fire my estate will continue unchanged (but with reduced market value), meaning only the contents have changed.

How far above and below the surface of the land does the right in land extend? Classic maxim of '*cuius est solum eius et usque ad coelum et ad inferos*' – the notion that a person, who owns an estate in land, has rights extending above the surface of the land to the heavens above and from the surface of the land, right down to the centre of the earth. This old adage has now been qualified and restricted in case law.

Rights in airspace

Permanent interference: *Kelsen v Imperial Tobacco Co* [1957] 2 QB 334 the plaintiff was the lessee of a tobacconist's shop consisting of a one-storey building. The defendants owned the building adjacent to Kelsen's premises and for many years had a sign on the wall of their building that encroached some 8 inches into the airspace above Kelsen's shop. McNair J gave consideration to many issues including the question of whether the lease to Kelsen included a lease of the airspace above the shop. He concluded that it did and on this basis also concluded that the intrusion of the sign into the airspace constituted a trespass. He directed that a mandatory injunction issue for the removal of the sign.

An intrusion, whether permanent or transitory, into the airspace above the surface of another's estate in land constitutes trespass, subject to the limitation as set out in *Bernstein v Skyviews* [1978] that 'a surface owner's rights in the airspace should be restricted to such height as is necessary for the ordinary use and enjoyment of the land and the structures upon it.' The facts of the case concerned a plane flying over the plaintiff's property to take photographs.

- As soon as there is incursion into the airspace below that given height, there is trespass.
- The height at which aircraft normally fly does not reach such a height as to breach the enjoyment of land and the structures on it.
- Trespass is actionable per se (do not have to prove damage) however there must be a direct interference with the use and enjoyment of the land or nominal damages will result.

Nuisance may also be claimed where there is an indirect interference with the use and enjoyment of land. It must however be proved that damage has been suffered (damage is the gist of the action).

Woollerton and Wilson v Richard Costain [1970] 1 All ER 483 the building contractors had installed a high crane on a site to assist with the building work of an important public building. There was occasional trespass to the plaintiff's property although no actual damage. Court held that an injunction be ordered but delayed until completion of the work. Illustrative the remedy may not confer actual benefit to the plaintiff.

Graham v K D Morris and Sons [1974] Qr R 1: refutes the principle in Woollerton referred to as 'the balance of convenience' as the time for asking for permission and negotiation is prior to the trespassory work and if an injunction was not granted the courts would be allowing the unlawful trespass to continue.

Rights below the surface

The surface owner's rights extend downwards sufficiently to prevent trespass by underpinning building on other person's land (*Stoneman v Lyons*), subsurface rock anchors (*Di Napoli v New Beach Apartments*) and excavating or tunnelling under (*Chicago v Troy Laundry*).

- *Edwards v Sims 24 SW 2d 619 (1929)* – adjoining owner sued in trespass as the defendant was conducting cave tours below his land. Practical judgement split the proceeds of entry into the cave system based on the perceived worth of their respective parts of the cave but did not issue an injunction to prevent the tours from being conducted.
- *Bocardo SA v Star Energy Onshore Ltd [2009] EWCA Civ 579* argument was that obtaining oil under someone else's property was a trespass but the Supreme Court only awarded nominal damages and only an insignificant fraction of the actual worth of the oil.

At common law, ownership of land includes the minerals in the soil.

- However gold and silver are 'royal' minerals that are the property of Crown by royal prerogative.

Cadia Holdings Pty Ltd v State of New South Wales [2010] HCA 27 concerned a copper mine near Orange which had no mineral reservation in its original grant. The issue arose when gold was discovered, with the question of whether the State's ownership of the gold also extended to the copper as the gold was not able to be recovered separately. The HCA held that mines can be both copper and gold. The majority viewed the law received from England was the modified law at the time which aimed to encourage owners to mine – hence the HCA held the mine to be a copper mine.

Scaffolding and cranes

Equity will act to give an injunction to restrain a threatened or apprehended interference with legal rights (i.e. trespass) so as to prevent those with deep pockets from intruding on one's land.

LJP Investments Pty Ltd v Howard Chia Investments Pty Ltd (No 2) (1989): an injunction was issued to restrain the erection of scaffolding that encroached on the plaintiffs land.

- Test: 'I think the relevant test is not whether the incursion actually interferes with the occupier's actual use of land at the time, but rather whether it is of a nature and at a height which may interfere with any ordinary uses of the land which the occupier may see fit to undertake.'
- *LJP Investments Pty Ltd* (No 3) held in terms of exemplary damages: ' ….I think it should be made clear to developers that they cannot expect to do better by an unlawful trespass than by paying the price demanded by an adjoining owner, at least unless the price demanded is clearly unreasonable.' Part of the reasoning was because the developer could be constructed without trespassing on LJP's land.

Bendal Pty Ltd v Mirvac Projects Pty Ltd (1993): an injunction was issued to restrain a crane jib despite the project being 5 weeks to completion. The undue hardship argument was ignored given the defendant's obtained savings and as the trespass was of their own wrongdoing.

Aircraft

- Civil Aviation (Damage by Aircraft) Act 1958 (Cth)
    - No action for trespass can be brought for flight of an aircraft over property in its ordinary passage at a reasonable height above the ground, so long as the provisions of the Air Navigation Regulations are duly complied with.
        - Where a flight is not reasonable or where it contravenes the Air Navigation Regulations, one must look at the principle *Bernstein v Skyviews*.
        - Liability may be also imposed where the aircraft strikes something (see s 10 DAA) and includes consequential or indirect harm.
- Damage by Aircraft Act 1952 (NSW) and Damage by Aircraft Act 1999 (Cth)
    - No action for trespass can be brought simply by reason of flight of aircraft over ones land. Where however damage results, the aircraft owner is liable without the injured person having to prove negligence by the aircraft.

Other issues

Conveyancing Act 1919 (NSW) s 88K: the court may impose an easement (right to go onto someone else's land) where it is reasonably necessary for the effective use or development of the land. The applicant must pay the costs of the defendant:

- The court may only make the order if it is:
  - Not inconsistent with the public interest
  - The owner of the affected land can be compensated
  - All reasonable attempts have been made by the plaintiff to obtain an easement of the kind sought but have been unsuccessful.

Boundaries can be artificial i.e. roads or be natural with reference to the shore of a river or lake. With respect to bodies of water accretion is the additional of land to the shore and erosion refers to the removal of land from the shore. Hence natural change is to the benefit and detriment of the owner.

- In NSW accretion has been excluded by statute for non-tidal lakes.

Weller v Bennett [2009] NSWCA 52 concerned work on dam which bounded two properties. The Court held there was no trespass as the dam had orginally been within the boundary and had not moved across it over time.

Fences are normally co-owned as tenants in common. However this is a rebuttable presumption if paid for by one owner. If not on boundary then fences are rendered a fixture.

- *Dividing Fences Act 1991* (NSW)

Encroachment of Buildings

The general rule is that anything constructed on the land of someone else becomes the property of that other person with this being the general common law position.

Equity tempers this right: *Ramsden v Dyson* (1866) LR 1 HL 129 states the principle if a stranger builds on someone else's land in the mistaken belief that it is that person's land, and the true owner is aware of the mistake but does nothing to prevent construction then equity will prevent the true owner from asserting title to the land.

- If a stranger builds on someone else's land knowing the true position as to ownership then equity will not assist the stranger.
- If a stranger builds on someone else's land in the mistaken belief that it is that person's land, and the true owner is aware of the mistake but does nothing to prevent construction then the equity will prevent the true owner from asserting title to the land.
- If a stranger builds on someone else's land knowing the true position as to ownership then equity will not assist the stranger
- The Court may award an irrevocable licence, a long term lease, a licence to occupy the land for a period of time, possession until the amount expended has been repaid, or may order that the building be removed within a reasonable time.

Encroachment of Buildings Act 1922 (NSW) where a building of a substantial and permanent character, encroaches on another's land (whether physically on the boundary or surface or by overhanging or intruding into the soil), the court can make orders including compensation, conveyance, transfer or lease to the adjoin owner of land over which the encroachment exists and the removal of the encroachment.

- Where the encroachment results from negligence, the value of compensation is three times the value of the land value.

The act governs that part of the building that overlaps the boundary. A building wholly on someone else's land is not caught by the act, but rather if it is built on someone else's land, there will be no possession, the only action will be under estoppel: *Amatek Ltd v Coogoorewon Pty Ltd* (1993)

- Matters that the court may consider in deciding whether to grant relief include the value of the land encroached upon, the character of the encroaching building, the loss resulting to the parties, the circumstances in which the encroachment occurred, any arrangement between the neighbours permitting the encroachment to occur and whether the neighbours knew of the encroachment when purchasing the land (see s3(3)).

Campbell v Crane [2009] NSWSC 363 concerned defendant who rebuilt fence causing slight encroachment. Court ordered conveyance of the strip in exchange for compensation. Easement was not appropriate in this case as that would require cooperation between the landowners.

Fixtures and chattels

A fixture is a thing which was once a chattel (personal property) but has been attached with the objective intent that it shall remain there so as to become part of the land. It is a part of accession.

The fixture (part of the land) and chattel (personal property) distinction is relevant as:

- If land is sold, fixtures pass to the buyer as part of the real property. Chattels do not pass to the buyer without express mention.
- If land is mortgaged, the mortgagee's (person lending money) security includes fixtures, whether attached before or after the mortgage but it does not include chattels.
- If a tenant affixes an item to the leased premises that becomes a fixture, the item is part of the landlord's real property (although the tenant has rights to remove it).
- On the death of a landowner, fixtures pass to those entitled to the deceased's realty, but chattels pass to those entitled to the deceased's personal property.

Distinction between a chattel and a fixture

There is a two stage test of whether an item has become a fixture:

1. The degree of annexation – this test allocates the presumption and the rebuttable burden of proof: *Holland v Hodgson* (1872) as applied in *Australian Provincial Assurance Co Ltd v Coroneo* (1938)
    - If the object is affixed to the land, prima facie it is a fixture and the onus of proof lies on the person asserting that it has remained a chattel.
    - If the object is resting on its own weight, prima facie the object is a chattel and the onus of proof lies on the person who asserts that it is a fixture.
        - Assumption is that goods merely resting on the land continue to be goods and any degree of attachment by bolts, nails and cement turns them into fixtures.
2. The objective intention of annexation – asking the essential question was the object joined to the land for its better use as a chattel or for the improvement of the land? This is an objective test looking at apparent (objective) rather than actual (subjective) intention.
    - If the affixer's intention was the better use or enjoyment of the land in the sense of furthering the use to which the land is put, then the item is likely to be a fixture.
    - If the intention was the better use or enjoyment of the item itself (as distinct from the land), then the item is likely to be a chattel.
        - The point of time at which the intention is relevant is when the item was put in position on the land.
        - Objective intention must be determined by the totality of circumstances weighing up relevant factors. It must be 'patent for all to see.'

D'Eyncourt v Gregory (1866) LR 3 Eq 382: where there is the possibility of chattels forming part of what might be called a grand 'architectural design' it is necessary to consider whether such a scheme can be said to exist. This may be sufficient to render it a fixture.

- Query whether it is an ornament installed afterwards or was it part of the house's architectural design.

Reid v Smith (1905) 3 CLR 656: the HCA held that a house erected by the lessee but resting on piers only by its own weight was no longer a chattel but had become a fixture.

Where an item has a number of constituent parts, what must be considered is the item as a whole e.g. if a machine as a whole is a fixture, then all its constituent parts may be fixtures, even though removable in themselves.

If before the sale of land the fixtures are severed so as to revert to the status of personal property, then the fixtures can be sold separately to the land. If the fixtures are not severed, the fixtures are part of the land.

Special cases – agreement between the parties

Two parties may agree as to whether an item is a fixture or chattel which will apply between them, but this will not bind third parties where the third party does not have knowledge of the prior agreement: Hobson v Gorringe (1897) 1 Ch 182

- Where a third party has notice of a prior agreement between two parties, the agreement between the two parties will be enforceable against the third party.

Standard Portland Cement Co Pty Ltd v Good (1982) 47 ALR 107 the Privy Council determined that a cement mill weighing 100 tons was a chattel and could be removed by the vendor. The contract for sale of the vendor's land contained a clause allowing the vendor to remove the mill provided such removal took place within 12 months of the date of the contract. For various reasons the mill had not been removed within that time. The Supreme Court of New South Wales found that the mill had become a fixture when the vendor had failed to remove it within the time allowed. The Privy Council allowed an appeal because: on its proper construction the contract excluded the mill from the sale, and failure by the vendor to remove with mill within 12 months could not mean ownership passed to the purchaser – rather damages was payable or an injunction ordering the vendor to remove the mill.

Tenant's fixtures

At common law leasehold estates are entitled to remove fixtures they installed for *domestic, trade or ornamental* purposes and not for the permanent improvement of the land. There are called tenant's fixtures to distinguish them from permanent fixtures which cannot be removed.

- Was it attached so the tenant could better enjoy the leasehold estate or as a permanent improvement to the land?

A tenant can remove fixtures without committing actionable damage to the property if the fixture is installed for trade, ornamental or domestic purposes

  - Trade fixtures: fittings in a tavern, an engine and a boiler in a sawmill, trees planted by a nurseryman, petrol pumps at a service station.
  - Domestic fixtures: water pump, a kitchen range, stove, copper and grates.
  - Onamental fixtures: wood panelling, decorative chimney pieces

- The object still becomes a fixture, but the tenant can remove it.
- The tenant has to make good (fix) damage caused by removal.
- The tenant has until the determination of the lease to remove fixtures, unless the tenant continues in possession (*D'arcy v Burelli Investments Pty Ltd* (1987) 8 NSWLR 317).
- Anything left behind has become part of the land and items that have become part of the essential fabric of the land cannot be removed.

Webb v Frank Bevis Ltd [1940] 1 All ER 247 concerned a tenant who had constructed a large shed of corrugated iron supported by timber posts resting on a concrete slab. The posts were supported by iron straps embedded in the slab but bolted to the posts. The roof and sides were capable of removal in sections. The owner asserted that the slab and superstructure were one unit and must remain. The tenant asserted that the slab must stay as a fixture but that the rest of the superstructure was not a fixture and could be removed.

- Scott LJ in delivering the judgement of the Court said: 'that the concrete floor was so affixed to the ground as to become part of the soil is obvious. It was completely and permanently attached to the ground, and, secondly, it could not be detached except by being broken up and ceasing to exist as a concrete floor or as the cement and rubble out of which it had been made.'
- In regard to the superstructure was the Court said 'to a very large extent' it was a 'temporary' building, by which I understand him to mean that the object and purpose for which the company erected it were its use for such time as they might need it.'

Palumberi v Palumberi (1986) NSW ConvR 55-287 deals with a dispute between brothers where an arrangement was entered into for the sale to one brother by the other of an interest in property as tenant in common. The property comprised 2 self-contained flats. There was an exchange of letters evidencing the arrangement but nothing in the letters concerning fixtures or chattels.

- The stove and carpet were held to be fixtures but the other items claimed to be fixtures by the purchaser were found to be chattels.
- Kearney J formed the view 'it would seem from perusal of these and other authorities in the field that there has been a perceptible decline in the comparative importance of the degree or mode of annexation, with a tendency to greater emphasis being placed upon the purpose or object of annexation, or, putting it another way, the intention with which the item is placed upon land. The shift has involved a greater reliance upon the individual surrounding circumstances of the case in question as distinct from any attempt to seek to apply some simple rule or automatic solution…no standard solution is to be derived from such cases which, upon ultimate analysis, are found to turn upon their individual facts.'

Leigh v Taylor (1902) AC 157 at 162 a life tenant of a mansion affixed valuable tapestries to the walls of the drawing room. They were fastened to canvas stretched over strips of wood and nailed to the strips which were nailed to the walls. The tapestries could be removed without any 'structural injury' to the tapestry or to the land.

- The House of Lords decided that the tapestries retained their character as chattels as they could only be enjoyed as ornamental tapestries by fixing them in this way. There was 'no intention to dedicate these tapestries to the house.'
- The tapestries 'put up with that purpose and attached in that manner, did not pass with the freehold to the remainderman, but formed part of the personal estate of the tenant for life, and were removable by her executor.'

Spyer v Phillipson [1931] 2 Ch 183 a lessee of a flat for 21 years installed antique panelling, ornamental chimney pieces, and fireplaces. No structural changes were made for the panelling but slight alterations were necessary for the chimney pieces and fireplaces. When the lessee died, his executors claimed the right to remove the panelling, chimney pieces and fireplaces as tenant's fixtures. The lessor claimed that they were part of the structure and that their removal would cause damage. The Court of Appeal held that this required a consideration of what were the object and purposes of annexation and what would happen if the annexed chattel was removed. However the Court held so long as the chattel could be removed without doing irreparable damage to the demised premises, 'neither the method of attachment nor the degree of annexation, nor the quantum of damage that would be done either to the chattel itself or to the demised premises by the removal, had any bearing on the right of the tenant to remove it, except in so far as it threw light upon the question of the intention with which the tenant affixed the chattel to the demised premises.'

New Zealand Government Property Corp v H M & S Ltd [1982] QB 1145 a tenant occupied premises under a lease. It was held on appeal that at common law a tenant had a right to remove tenant's fixtures from demised premises so long as he was in possession as a tenant.

- 'If a tenant surrenders his lease and vacates the premises without removing the tenant's fixtures, then he is held to have abandoned them. But if he surrenders his lease, either expressly or by operation of law, and remains in possession under a new lease, it is a question of construction of the instrument of surrender whether or not he has also given up his right to remove his fixtures. If nothing is said, then the common law rule applies, and he retains his right to remove the fixtures so long as he is in possession as a tenant.'

There is a statutory scheme in place which deals with short-term residential tenancies and the tenant's rights to install and remove fixtures: *Residential Tenancies Act.* Usually this requires consent for both installation and removal of the fixture.

Lecture 3: Tenure, estates and title

Interests in land

There are three interests in land:

1. Legal rights: rights enforced at common law by the King's Bench (rights in rem)
    - Entitlement to a writ in respect of the land itself in real actions
2. Equitable rights: rights enforced in equity by the Chancellor (rights in personam)
    - Recognition that the holder of the legal estate has personal obligations to hold or transfer land for/to the beneficiary.
3. Personal rights: rights to damages for breach of an obligation under tort or contract e.g. trespass or debt.

In medieval England there existed a feudal pyramid structure with services due to the Crown in exchange for land. At one time, tenants that wanted to transfer land needed their lord's permission and also required to pay a fine. Subinfeudation resulted where the tenants would remain in the feudal chain, receive services and their new tenants and remit a portion to their lord.

- *Quia Emptores 1290* abolished fines for transfers and subinfeudation. Note the statute does not affect the way in which Crown deals with its own land hence when the Crown grants land the recipient does not replace the Crown but acquires tenure as a tenant in chief.
- *Tenures Abolition Act 1660 (UK)* converted most tenures (military service, serjeanty and frankalmoin) to socage. Under the modern tenure relationship landowners despite being tenants of the Crown are not required to perform services and the land is freely alienable without the Crown's permission.

The legal regime under which people own land in Australia is called tenure which means that the Crown is (at least formally) the owner of all land in Australia and all private owners are tenants of the Crown.

- The doctrines of tenure and estate underpin modern land law.

The doctrine of estates

The King was the owner of land and there was a process called subinfeudation in which the King gave tenure in land to the lords in exchange for fealty and promises of other services who then gave land to lesser tenants in exchange for services.

Individuals did not own the land itself, but rather were 'seised of' an 'estate' (i.e. the right to a possessory interest in land as a tenant). Where 'seised of' refers to the right to possession and 'estate' refers to the interest conferred in land.

Definitions of seisin:

- Seisin is the right to possession of land which gives valid title against everyone except those with a prior claim. Seisin must always be in abeyance (it must always be possible to identify a person entitled to possession of the land.
- Seisin is transferred through a 'feoffment with livery of seisin' by words or a grant usually in the form of a public ceremony (which served an evidentiary purpose).

Seisin used to be a synonym for possession but has evolved into a term of art associated with freehold estates to distinguish them from leasehold estates.

Coupled with the concept of tenure is the idea that people do not own the land itself but have estates in the land. An estate in land is the right to possess land as a tenant for a period of time. Estates are usually classified according to how long they last, freehold estates which last for indefinite periods and leasehold estates which last for definite periods.

- It is possible to carve out a 'lesser' estate and grant it to someone else.

1. Freehold estates – last for indefinite periods measured in lifetimes. A person who has a freehold estate is said to be 'seised of that estate.' There are three kinds of freehold estates:
    a) Legal fee simple estate: is the greatest right to land recognised under common law. 'Fee' means the estate is inheritable and 'simple' means it is not qualified in any way.
        - The fee simple = life estate + remainder
        - The fee simple can be held in co-ownership
        - The fee simple estate is the greatest right to land recognized at common law. 'Fee' means that the estate is inheritable and 'simple' means that it is not qualified in any way.
        - A fee simple estate is created by a grant of land to a tenant (tenant in fee simple) and her or his heirs.
        - The fee simple estate lasts as long as the tenant and any of her or his heirs survive (this includes collateral heirs such as a brother and not merely lineal heirs). On the death of the last heir, the estate comes to an end and the land escheats (returns) to the Crown or the grantor from whom the tenant held tenure. The tenant is however able to transfer/dispose of the fee simple estate before the tenant dies and not allow the heirs to gain title (either by disposition during life ('inter vivos' or by will).