

## 1. Who is the Client?

## 2. What does the Client want?

Possession = Physical control + Intention to possess: **Parker**

**Doctrine of Relativity:** The person with a prior right has a better claim in a dispute

**Jeffries v Great Western Railway:** O sold trucks to J & GWR & then went bankrupt. GWR argued that J had no right as the receiver was the rightful owner. Court couldn't let GWR argue a **ius tertii** (third party) defence, as the court only considers relevant parties rights

**Costello:** C stole a car & it was detained by police. C asked for it back. Court said even a thief can assert prior possession & can only be defeated by someone with prior possession.

**Asher:** T left property to wife until she remarried & then to daughter L. L left to A. A had better prior rights than the wife despite not having possession.

### a) An Object:

#### i. Lost and Found

Finder gains rights if they take it into **physical possession with intent to possess** & will have rights against all the world except someone with a **better right to possession**: **Flack; Parker; Under or in the land**: Owner → superior right even if they are unaware of its existence: **Elwes**

**On the land:** spectrum referred to by Donaldson J in **Parker**

- **Purely Private:** (Locked bank vault or inside house) intention to control inherent
  - **Flack:** NCA found \$433K in Mrs F's house during investigation of her son. Intention to control was inferred by the circumstances
  - **South Staffordshire v Sharnan:** Found gold rings while doing job. Occupier gets them as found on course of job.
- **Completely Public:** (Park or oval) will never have the necessary intention
- **Quasi public/private:** Will need to apply the **manifest intention** test. Requires the occupier to exercise control over the area & the things in it.
  - **Parker v British Airways:** P found a gold bracelet in airways lounge & said if owner didn't come forward to return it to him. Held BA did not have Manifest Intention despite semi & they controlled who entered, as there was **no evidence they regularly searched for lost articles**.
  - **Hibbert v McKiernan:** Lost golf balls on private club land. There was a manifest intention as they had police patrol warning off trespassing looking for balls.

**Employment:** Finder will **concede title to an employer** where the goods were **found by reason of employment**: **Armory:** Chimneysweep found jewel. Goldsmith tried to keep it.

**Byrne v Hoare** → title goes to finder when possession occurs outside scope of employment

- **Policeman was on his way to theatre for duty & found a gold ingot near exit.** Employment gave the occasion but **wasn't the effective cause** of finding. He wasn't conducting search, or given access to a private place. Was **walking like any member of the public**.
- **Willey v Synan:** P found concealed coins on a boat. Coins were **not lost**, as they had been placed there to be found. ∴ could not be found by another individual.

**Abandonment:** Need to **give up physical control plus intention** to give up to the world at large

- **Moorehouse:** Manuscripts not abandoned by mere failure to enquire about them for time.

### ii. Fixtures and Chattels:

**Chattel:** Personal property **Fixture:** Personal property that has become part of the realty

1. **Is there a contract?** If not, determine if it's a fixture or chattel by the two part **Belgrave** test: **Air conditioners slightly attached via pipes, presumed to be a fixture.** Held to be a **fixture as meant to be permanent**, and essential to use & occupancy of building.

2. **Presumption:** **Holland v Hodgson**

- If the **object is attached**, no matter how slightly, it is presumed to be a fixture
  - If the object is **resting on its own weight** it is presumed to be a chattel
3. Objective intention test's **onus of proof** is on the person who wishes otherwise: **APAC**
4. **Objective intention test:** Relevant Factors (NOT determinative)  
If factors are **evenly balanced onus hasn't** be proved.
- Identify of the fixer (who instructed it to be done)
  - The **degree of annexation** (**permanent/substantial** attachment = fixture or temporary attachment): **Australian Provincial Assurance Co:** Theatre seats had been bolted to the ground but could be removed. Seats were fixed b) but purpose of fixing was to hold seats in place not to improve the value of land (failure c)).
    - Ease of removal (Damage to the chattel or land = fixture)
    - Mode or structure of annexation?: **Leigh v Taylor**
    - Cost of removal exceed the object's value [If yes, fixture]: **Metal Manufacturers**
  - Purpose of attachment** → common understandings & usages **Metal Manufacturers** (what a reasonable person would see reason for fixing objective test)
    - The better enjoyment of the land = Fixture: **APAC**
    - Merely to steady itself, for the better use of the thing fixed = Chattel: **APAC**

**Hobson:** Gas engine had been affixed with bolts & screws to a concrete bed especially designed for it. Held to be a **fixture** despite lease hire agreement.

**Leigh v Taylor:** Valuable tapestries were held to be **chattels** despite substantial attachment (attached to canvas to wood and nailed to wall). Tapestries were put up by life tenant, were valuable & unlikely intended to benefit the fee simple, not possible to fix more lightly, to be enjoyed had to be displayed & attached (valueless if not displayed. Intention to use not affix).

• **Norton v Dashwood:** Couldn't be removed without damaging the brickwork & fabric.

**Palumbieri:** Stove & carpet where held to be fixtures, whereas a TV antenna was a chattel. All objects were slightly attached but the purpose of annexation differed.

**Reid v Smith:** Lessor erected house on stilts and upon end of lease landlord sought to stop lessor from removing it. Held to be a fixture – lease

b) **An Interest in Torrens Land** → Continue to Q 3

## 3. How can you get the interest they want for them?

a) **Identify the Interest. Is it Registered or Unregistered?**

**Dealings that are Registerable**

i. **Transfers of Interest which is Registered - Fee Simple and Life Estate**

**No assurance of land unless made by deed and registered.**

**s38(1) CA:** Every deed... shall be **signed** as well as **sealed** and shall be **attested** by at least one witness not being party to the contract.

**Gift inter vivos or Gift by will** → see volunteers A gift in Torrens is effective at law when registered. If the gift is not registered: Test is whether the donor has done all that is necessary to be done by the donor, to transfer the legal title according to the select mode of dealing (i.e. donee must have a registerable instrument, donor provided provision of relevant title documents so donee can proceed to registration. Donors acts must be irrevocable) 'what ought to be done': **Corin v Patton**

**Life estate:** Interest in land granted to a person for life (carved out of a larger fee simple)

- **Life tenant has all the rights of a fee simple owner** (To use it, to occupy it, to exclude others, to transfer the estate during their lifetime - *inter vivos*)
  - A **remainder**, i.e. a future gift to some other person;
  - A **reversion**, i.e. the residue of a fee simple holder's interest after he or she has granted away some lesser estate to another (ie a life estate).

• **The ordinary life estate takes the form of a simple grant 'to A for life'.** This form of grant creates an estate in land that is to last for the length of A's life.

• **Life estate *pur autre vie*** (literally, for the life of another), the **measuring of the grant's life is that of someone other than the grantee** (i.e. a third party), e.g. **'to A for the life of B' or 'to A for so long as B lives'**. A has an interest in the land lasting for the length of B's life.

**Stages in the transfer of land:** Vendor selling to Purchaser

- **Oral Agreement (Unregistered)** Bargaining amounting to an informal agreement (Relying on the fact that the oral agreement is not enforceable, the P can still be gazumped if the process takes an extended period of time) → **Contract/exchange (Unregistered)**
- → **Conveyance/Settlement/Completion (Unregistered) → Registration**

### ii. Leases including subleases; if a tenant transfers the lease/sublease, then a transfer form is used: **Conveyancing Act 1919 (NSW)**

**Proprietary aspect** (right to exclude others and enjoyment of land) and **contractual lease** allows lessor to do certain things e.g. inspect the land, creates rights and obligations between parties and usual remedies for contractual breach)

#### 1. Substantive Requirements

##### i. Certainty of Duration

- **Rule:** A valid lease must be of a duration that is certain or able to be rendered **certain** at the time the lease takes effect.
  - **Lease** for a term of a definite number of years;
  - **Periodic tenancy** is implied on the basis that the tenant is in possession (no lease document) & makes periodic payments of rent. The law implies a new lease for each period for which rent is paid ∴ Still certainty of duration
- **Terminates upon a future event that may or may not happen isn't certain** e.g. **If a lease is granted until the land is required for road widening purposes: Prudential Assurance** or for the duration of the war: **Lace v Chantler**
- The **duration of the lessee's lease cannot exceed the lessors interest**.
- **Exceptions:**
  - A **tenancy at will** (continued until terminated by either party) **Berrisford** Usually where parties are negotiating the terms of the lease & the tenant has already entered into possession.
  - **Life tenancy is recognised by common law** because lives are not of fixed duration.
- If the maximum duration is specified & it is specified that the lease will end if an event occurs in the period of time there is certainty of duration.
- **NOTE:** A lease less than 3 years is an exception to the RPA indefeasibility.

##### ii. Exclusive Possession: distinguishes licence from a lease

- A lease differs from a licence as it involves a property right (if this is not included, it is a licence and a mere contractual right to enter or use a defined space)
- **Rule:** A lease has exclusive possession if they can exclude strangers & the landlord from the premises & maintain an action of ejectment or trespass → look at language not title
  - Has the lessee been given exclusive possession of a **clearly defined area**? If yes, lease.
  - Has the grantee been **given control over how the area is being used & the ability to exclude others**? i.e. Did the parties intended the instrument to confer possession?
- **Radaich:** S owned theatre with adjoining rooms. Had an arrangement with R that she could use rooms to run a milk bar. Deed gave R exclusive licence to provide refreshments in distinct rooms. Transaction is a lease relies on intention as ascertained by what rights the instrument creates. If the rights are of a tenant then cannot claim that R isn't a tenant. S precluded from rooms, R had exclusive control ∴ lease

#### 2. Formalities

a) **No assurance of land unless there is a formal written lease** i.e. by deed: **s23B(1).**

- **s53 RPA** leases over 3 years must be registered. Check to see if registered or not.
- Written leases where the approved form is not used may still have an unregistered equitable interest → **See Equitable Interests above**

b) **Creation of leases orally (by parol) are unregistered: s23D(1) CA** all interests in land created by parol and not put in writing or sign will have the same effect of tenancy at will

- **s23D(2) CA Oral leases for three years or less.** Normally there is a requirement for writing. This is forgiven if: 1) The term of lease is no greater than **3 years** 2) It is for **market rent** 3) The lessee has an **immediate right to possession**.

c) **Equitable lease arising under a specifically enforceable contract** i.e. Doesn't meet the legal requirement of writing (no deed nor registered) & is for a term longer than 3 years **Walsh**

- **Tanwar** does not apply ∴ you can refer to constructive trusts.
- A **written agreement** to lease applies only if the **agreement for lease is complete & enforceable on usual contract principles: Walsh v Lonsdale** Agreement about a lease, the lessee had given consideration but the grant of the lease had not yet been formalised as a deed. It was not enforceable at law but equity perceives it as 'done what ought to be done' ∴ Contract can have specific performance & give effect to agreement.
  - Could be problematic under Torrens system if the grantor, sells the property. If the lease is longer than 3 years there is an issue of indefeasibility against the new RP (not enforceable against them)
- **Part performance:** could be enforceable in equity. E.g. The lessee entering into possession of the land and paying rent is sufficient for enforcing the lease against the other party.

d) **Implied leases based on possession are unregistered: s23E(C) CA**

i. **Implied tenancy at will s23D CA:** Tenant is in possession, during negotiations for agreement which have not yet concluded

- Lease can be terminated at anytime by any party (no need for prior notice)
  - Relies on a period of reasonable notice before it is effectively determined: **Landale**
  - **1 month** notice applies to a tenancy at will when longer than a year
- **Dockrill:** Written lease with option to renew 1Nov1941. T renewed but with no further written lease but remained in possessing and paying rent. L died – executors accepted rent then stopped after 1Nov1943. Tenancy ended at end of 2 year period without notice – if wanted to terminate before 1Nov1943 had to give notice as it was tenancy at will. If tenancy expires, no notice is required even if s127(1) applies.

ii. **Implied Periodic Tenancies:** Period/duration is determined in respect to the period which rent is paid