

## 1. CLASSIFY the property

### 1.1. Real Property

**1.2. Choses in Possession** → something tangible and capable of being possessed (*Colonial Bank v Whinney*)

**1.2.1. Transfer of ownership** → requires **delivery** – *Gamer's Motor Centre* – voluntary transfer of possession from one person to another: (i) **actual delivery**; (ii) **constructive delivery** – change in character of possession; (iii) **symbolic delivery** – usually where chattel is incapable practically of actual delivery e.g. handing keys to house/car

By sale

- Is the contract a 'contract of sale of goods' within the [Sale of Goods Act](#)?
  - 'Goods': [s 5](#) → all chattels personal other than things in action and money
  - 'Contract of sale of goods': [s 6](#) → 'contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price'. *Helby v Matthews* → notion of 'agreement to buy'
    - Requirements of the contract: [s 8](#) → in writing (with or without seal), or word of mouth, or part writing and part word of mouth, or may be implied by the conduct of the parties
    - Whether such a contract exists: *Robinson v Graves* – what is the substance of the contract? Distinguish between sale of goods and contract for labour and materials. Production of something to be sold? Or for the exercise of skill and it was only incidental that some materials would have to pass?
    - Give effect to the terms of the contract and the intention of parties: *McEntire v Crossley*
- **When does property pass** under a contract of sale of goods?
  - Starting point → property passes **when the parties intended it to pass** ([s 22\(1\) SGA](#)). Look to (i) terms of contract, (ii) conduct of parties and (iii) circumstances of the case ([s 22\(2\)](#))
  - Subject to **ascertainment** ([SGA, s 21; Goldcorp](#)) – where contract is for an unascertained good, no property passes until the goods are ascertained
  - Goods can be
    - Specific – identified and agreed upon when contract of sale is made
    - Unascertained – unidentified goods, includes future goods by description
    - Ascertained – goods which were unidentified when contract was made, but subsequently identified
  - **Default rules** [s 23](#) → where intention cannot be determined
    - Rule 1 – **specific goods** in a deliverable state – property passes when the contract is made. Immaterial whether time of payment or time of delivery are postponed
    - Rule 5 – **unascertained or future goods** by description – 5(1) passes to buyer when the goods of that description and in a deliverable state are unconditionally appropriated to the contract either by the seller with the assent of the buyer or by the buyer with the assent of the seller
      - Assent may be express or implied, and may be given either before or after the appropriation is made.
      - *Carols Federspiel* → **unconditional appropriation** – look to: common intention to irrevocably attach the contract to the goods; agreement of parties; actual

or constructive delivery; documents that suggest goods are at the seller's risk are prima facie indication that property has not passed; usually the appropriating act is the last act performed by the seller

- 5(2) – seller deemed to have unconditionally appropriated goods to the contract once seller delivers the goods to buyer, or to a carrier or bailee for the purpose of transmission to the buyer and does not reserve the right of disposal

### 1.2.2. Transfer of possession by bailment

- Is there a bailment?
  - **'Bailment'** – the voluntary receiving into possession the goods of another (*Pioneer Container*)
  - **Categories** of bailments (*Coggs v Bernard*), but not closed – safekeeping; lending to a friend for use; goods left with a bailee to be used by him for hire; goods delivered as security; goods delivered to be carried, or something is to be done about them for reward; goods delivered to somebody, who is to carry them or do something about them without any reward
  - **Key features**
    - **Type of property** – chattel
    - **Receipt of possession** – delivery, voluntary receiving of possession (with knowledge of goods or consent of bailee). Undertaking to take possession without actual possession is insufficient (*Hobbs; Pioneer Container*)
    - **Redeliver or dealing in a stipulated way** – also includes where there is clear physical hereditament e.g. grapes and wine (*Pangallo*)
    - **Distinct from sale** – bailment involves the redelivery of the specific chattel in the original or altered form to the bailor. (*Chapman Bros*)
- Is there a **sub-bailment** (*Pioneer Container*)?
  - Requires – (i) **authority** of bailor, (ii) **sufficient notice** to sub-bailee that a person other than the sub-bailor is interested in the goods
  - Sub-bailee owes the bailor the same standard of care as it owes the sub-bailor – bailor is bound by the terms of the sub-bailment
- **Duty of care** and liability of the bailee?
  - Extent of duty – duty to exercise care that is **reasonable in the circumstance** (*Hobbs; Pitt Son & Badgery*).
    - Regard must be had to the difficulty and expense of the possible precaution (Pitt Son)
  - Burden of proof – onus on bailee (*Hobbs*)

**1.3. Choses in Action** → all personal rights of property which can only be claimed or enforced by action, and not by taking physical possession (*Torkington v Magee*)

1) Is it a chose in action?

- Characteristics – enforceable, incorporeal (not reducible to physical possession), 'bare right'
- Examples
  - Legal – debts, shares, copyright, contractual rights, right of action in tort
    - Debts – obligation on the debtor to make a payment – right on the part of creditor to sue for payment. Bank deposits – banks are debtors and account holders are creditors
    - A creditor can use their chose (right to payment) to give security to another bank, or the same bank.
  - Equitable – interests under a trust, interest under unadministered estate, equity of redemption, partnership interest
- Consider – single or bundle of rights? Does it confer an interest in property? Is it assignable?

2) Is the chose **assignable**? – can assign the benefit, not the burden (*Linden Gardens*). Some property are incapable of being assigned:

- Inherent incapability
  - Public pay
  - **Bare right to litigate** (but with exceptions)
    - Bare right or ‘fruits’ of litigation (assignable) (*Glegg v Bromley*)
    - Existing or future chose? – future property cannot be assigned (*Glegg*)
    - Existing + bare right → is there a **genuine commercial interest**? *Trendtex* - look to the totality of the transaction
      - Is there a property right/interest which the chose is ancillary to?
      - Does the assignee have a genuine commercial interest in taking and enforcing it for his own benefit?
  - **Personal service contract** – *Nokes* – contracts of employment are only with the original employer, requires a new contract
    - But right of confidentiality could be assigned, separately from the direct contract of service
- Capable, but
  - **Materiality of identity** – a right will not be personal if it makes no difference to the obligee to whom they have to discharge the obligation (*Pacific Brands*)
  - **Contractual prohibition** (*Linden Gardens*)
    - Does clause prohibit assignment of benefit?
    - Does clause prohibit assignment of causes of action for breach subsisting at date of assignment?
    - Is such a prohibition void on ground of policy?
    - Even if assignment is validly prohibited, is it effective to vest cause of action in assignee?
- Restitutionary claims are assignable – (*Equuscorp Pty Ltd v Haxton*)

### 3) Equitable choses in action

- Interests under **trusts** – exists when the owner of a legal/equitable interest in property is bound by obligation, recognised and enforced by equity, to hold that interest for the benefit of others or for some object or purpose permitted by law. Distinct from charge, bailments, agencies and contracts
  - **Intention to create a trust** → whether in substance a sufficient intention to create a trust has been manifested (*Re Kayford*)
    - Determined objectively by the **language** + materiality of **surrounding conditions**
    - *Re Kayford* – separate bank accounts are an indication of intent to set up a trust, but inconclusive
    - Subjective intention irrelevant to existence or terms of trust – but relevant when transaction is open to challenge or some application for modification e.g. mistake/misrep/non est factum.. (*Byrnes v Kendle*)
  - **Nature of interest** → a proprietary interest in the trust property which will be enforceable in equity against any subsequent holder other than a bona fide purchaser of legal title for value without notice
    - Not necessarily a right against the trustee
    - Trustee can pass legal title to a 3<sup>rd</sup> party buyer for value without notice
- Interests in unadministered deceased estates
  - *Livingson* right
    - Entire ownership of property (legal and equitable) in and unadministered estate of a deceased person is in the administrator