

FIXTURE OR CHATTEL?

1. Degree of annexation

- If attached to land (by any means other than own weight), then prima facie presumed to be a fixture. Presumption is rebuttable, burden of proof on person who asserts it is not a fixture. (*Holland v Hodgson*) Even **slight** fixing to the land is sufficient to raise the presumption that the chattel is a fixture (aircon attached by pipes and screws in *Belgrave*).

- If not attached other than its own weight, presumed not to be a fixture, burden of proof falls on person arguing it is part of land

2. Object or purpose of annexation by affixer

What was the affixer's objective intention?

- To improve the land? (*Reid v Smith* – house rests on piers to avoid termites) (*Belgrave* - aircon)

- Not to improve the land? (*Leigh v Taylor* - only reason for fixing the tapestries was to enjoy them as tapestries, not to make them part of the house or improve the house) (*Coroneo* - seats in theatre not bolted to improve land but for safety and convenience to sit on)

Also consider: a) permanent/temporary attachment, b) ease of removal/potential damage, c) purpose it was fixed i.e.

display/decoration, d) subjective intention (any contract about ownership)

Does x have a right to the property? (finders)

Right through possession? Possession gives rights against the world except someone with a prior claim or better title (*Armory*)

1. Finder has obligation to take reasonable measures to find true owner (*Parker v British Airways*)

Does anyone else have a better claim?

- Occupiers? – Better title where they have manifested an intention to exercise control over the building and the chattels in it (*Parker v BA*) [Effort to search for lost items? Restrict access?] - Note home is private and exercise control over everything (*National Crime v Flack*)

- Employers? – must have been acting in the scope of their employment

Byrne v Hoare – need causal connection to finding and duties

Willey v Synan - sailor wouldn't have been on ship, acting in employment in finding

- Prior owner – will win unless abandoned

Moorhouse – seven years with no enquiries not abandonment

Specific performance

P's unreg interest in the land is created when the contract is "specifically enforceable" (*Walsh v Lonsdale* - lease).

1) the contract is valid (offer, acceptance, consideration, terms are certain, intention to create legal relations, no illegality)

2) in writing s54A(1) (or saved by doctrine of part-perf s54A(2) CA, *Maddison, Steadman*)

3) other requirements for SP met (a) prove that damages are an inadequate remedy for a unique piece of property, b) P must have performed or is ready and willing to perform obligations under the contract, c) any conditions must be satisfied, e.g. subject to planning approval etc., d) no equitable bar to the awarding of SP, no unconscionability, no delay, e) vendor has title of property

If there is a SEC, court will find a Constructive trust

Bahr v Nicolay – option to buy back after two years – knew about the contract and would be unjust for them to refuse to honour it – note it was specific and written

Ogilvie – partner lived with and cared for O on understanding she'd get a life estate, not SE contract trust created. Mrs Ryan's possession as showing part-perf not sufficient bc not exclusive, she did not live there alone. (common intention (but in doubt bc relationship love?) + detrimental reliance + Mrs Ryan won bc O's conscience bound bc of promise).

Efstathiou – wife paid half the deposit – resulting trust

Tanwar – Bunny may be in doubt for LAND NOT LEASES. In *OBITER*, HC doubted the Constructive Trust analogy but agreed P gains an equitable interest if can establish part-performance.

Registered v Unregistered Priority Rule:

Registered interest prevails. ____ is RP of fee simple and has immediate indefeasible title enshrined in s42, 43, 45(2), Frazer, Walker, unless URI holder can make out exception to indefeasibility.

Frazer v Walker: authority for immediate indefeasibility & fraud is exception to I but not if RI party (i.e. Walker) was innocent of fraud - no exception to indefeasibility for forged documents under Torrens

Part performance – s54A(2)

Maddison (stricter test) acts relied upon, as part-perf must be unequivocally referable to agreement in question e.g. giving and taking of possession (satisfied in *Regent v Miller*) *Steadman* (narrower test) acts that will constitute part perf if on the balance of probabilities they indicate a contract of the kind existed e.g. payment of money under contract (*Efstathiou*)

**In Aus, the strict test prevails but the court may also adopt the relaxed test

Estoppel

Inwards – Father owned land, let son build on it. Died and willed to defacto wife. Wife went to eject son. Three elements: 1. Expectation of interest in land, 2. Created or encouraged by the owner and, 3. Expenditure of money on the land by the person with the expectation

Owner's conscience is bound bc they have created this expectation that the person can stay on property if they do certain things. The son satisfied these three elements.

^ No.3 do not have to expend money, only that you suffer **detriment** if they ignored their promise (*Crabb*)

Giumelli v Giumelli: HC, if you establish estoppel over real estate, may not get any legal interest in the property at all, might just get personal remedy like compensation.

Strategically choose pp.

Breskvar v Wall: Barwick CJ: The torrens system is not a system of registration by title but a system of title BY registration. The title it certifies is not historical or derivative. It is the title which registration itself has vested in the proprietor. A registration that results from a void instrument is effective according to the terms of the registration. It matters not what the cause or reason for which the instrument is void. = endorsement of II

Gibbs v Messer: Title by someone who doesn't exist (fictional character) does not matter except for this one case. Where you have an instrument that is void bc it is executed by a forger using a fictitious name, Court rules in favour of person deprived of fee simple.

NSW Parliament has tried to insert into the definition of "fraud" in section 3 of RPA, an explicit statement that fraud involves actions of fictitious people. Thus try to fit it under fraud exception, otherwise immediate indefeasibility applies.

EXCEPTION: Short-term leases

Useful for tenants, s42(1)(d) – leases of less than three years at time lease created (including any options to renew DO THE MATH) = statutory exception to RP's indefeasibility, enforceable against RP even though not recorded on register

EXCEPTION: Fraud (s42 RPA)

- Must be brought home to the RP or their agent (Assets Co).
- In *Frazer v Walker*, the RP (Walker) was innocent of the fraud, thus fraud could not be proven to make out exception. In *Breskvar v Wall*, RP (Wall) was complicit in the fraud, thus Breskvars would be able to restore title.
- Just because you are co-owner, does not mean fraud can be brought home to you (Cassegrain)
- Fraud is not notice = knowledge of unregistered interest shall not on itself be imputed as fraud (Section 43 RPA)
- 'PDMT' (Butler v Fairclough) - 'Something more than mere disregard of rights of which the person sought to be affected had notice. It imports something in the nature of PDMT.' (Wicks v Bennett)
- Fraud timing: must be fraud (PDMT) committed in the act of acquiring registered title. Pre-registration or during (Bahr v Nicolay – 3/5 majority judgment, Mason & Dawson dissent)

Loke Yew: **PDMT at time of registration**

i. Did Rubber Co commit Torrens fraud?

Section 43: the fact that the Rubber Co knew Loke Yew had an interest could not on itself constitute fraud. Notice is not fraud.

ii. Did Rubber Co commit acts of PDMT?

Yes, more than mere disregard of Loke Yew's interests. The PDMT stemmed from the inducement that was made to Yisop to sell the land. Rubber Co did not intend to honour that inducement, thus was PDMT, sufficient to constitute Torrens fraud.

RP is fraud by wilful blindness

Assets v Co: Lindley LJ on wilful blindness

Failure to discover the fraud of another because he didn't make inquiries =/ fraud (Assets Co)

BUT if his suspicions had been aroused, and he abstained from making further enquires for fear of learning the truth, then fraud may be properly ascribed to him.' (Assets Co) = PDMT

Efstriou v Glantschig NZ: Facts: MrG was the RP but he and MrsG both paid for the house. They divorced. Mr. G instructed a property agent to sell the house to E. Mrs. G argued on fraud. The sale was completed in great speed (3 days), the house was sold far below market price, Efstriou never inspected house. Efstriou had suspicion of a fraud but did not enquire = wilful blindness = fraud.

Notice / acknowledgement / negligence =/ fraud

Wicks v Bennett (1921) - Facts: W had an URI in the land. B (RP) sold the land to D. D had spoken to W and knew that W had an interest in the land. But mere knowledge (notice) of an URI does not equal fraud (s43 RPA).

RM Hosking v Barnes (1971) - Facts: The RP had a lease with B for 2 years with an option to renew. Before end of the lease, the land was sold to H, who acknowledged in contract the existence of the lease to B and B would remain in possession. B paid rent to H. When B sought to renew the lease, H refused. Mere acknowledgment of the URI =/ fraud - Notice after registration is irrelevant.

Grgic v ANZ Banking Company (1994) NSW – FRAUD ON RG. Bank clerk didn't know Mr G and attested the signature of an imposter at the request of the son = not personal dishonesty

EXCEPTION: Actions in Personam

Registered title will not deny a person with URI the right to bring action against RP in personam. Bahr v Nicolay: Lost on fraud (PDMT not at time of reg.) AIP- had a trust arising by virtue of the acknowledgement by Thompson's. Could bring action for breach of trust

Thompson's. Could bring action for breach of trust

Gosper: Lost on fraud argument. AIP- breach of contract bc Insurance Co produced CT (in order to lodge the second mortgage) w/o Mrs Gosper's consent.

EXCEPTION: Inconsistent legislation. Mostly allowing councils to put charges on the land (unpaid rates etc)

Pre 2009 – s 42(3) operates and act requires express override, Schedule 3 list of overriding statutes

Post-2009 (*Southern Drainage Board*) Later act acts as partial repeal of earlier act, consider 1) What's the extent of the interference? 2) What's the purpose of the later Act? If inconsistent, later act prevails to extent of inconsistency

EXCEPTION: Volunteers

VIC: a volunteer does not have immediate indefeasible title (*Rasmussen*)

NSW: a volunteer gets as good as a purchaser (*Bogdanovic*), affirmed in *Farah v Say-Dee* where HC said the RP prevails even if he/she is a volunteer. Exception is s118(1)(d)(ii): if RP is volunteer and the person transferring title committed fraud (*Cassegrain*)

EXCEPTION: Estates and interest recorded in a folio on the register

May not be on CT but fully described on the register so subject to it (*Merchandise Credits v Shell*)

Bursill – easement described as 'right of way' but reg showed it also included rights to building on top = subject

Windeyer J: 'A prudent conveyancer acting for the purchaser of the land upon seeing there is a right of way would go to search for the description.' Buyer should beware.

Unregistered v registered

STEP 1. Identify interests and order of creation of interests

STEP 2. Does s43A apply to protect URI2 against notice *before* registration? Yes if 3 req me → wins

1. Is there a registrable dealing?

Filled out approved form correctly and have cert of title. Not a registrable dealing if void for forgery (*Jonray*)

2. Are they dealing with the RP?

Mortgagee exercising power of sale gets it from the RP. *Wilkes v Spooner* applies – if there was a bona fide purchaser in the middle, doesn't matter that you know about a previously fraudulent transfer

3. Must have a legal estate – are they a BFPVN? (Taylor J view prevailed in *Meriton Apartments*)

i. Good faith/bona fide? – are they acting fraudulently themselves?

ii. Purchaser for value? Volunteers bound by prior equitable interest

iii. Without notice? (before sett)

S164(1)(a) CA - Actual notice? – not just rumour or suspicion (go to constructive)

S164(2)(a) CA - Constructive notice? Have they inspected the land? – bound by interest the inspection should have revealed (*Boland*) Imputed notice – agent has notice.

Taylor View *LAC (Finance)*: P2 will be guaranteed registration only if at settlement P2 is a BFPV without notice of P1.

Therefore if P2 receives notice only after settlement, P1's caveat will be ineffective to block registration of the transfer. If, however, **P2 knew about** P1 before settlement, then s 43A does not protect P2, and the caveat will be effective to block registration of the transfer and there will be a priority dispute between P1 and P2.

IF NOT SATISFIED, s43A did not protect any of these purchasers. Therefore go to Step 3.

STEP 3. Since s 43A did not confer priority on any party, apply the priority rule for unregistered interests 'the first in time prevails unless the equities are unequal' (*Heid v Reliance*).

1. Did the second interest holder know about the prior interest? (Must be actual knowledge – *Moffet v Dillon*)

If yes, URI 1 wins, if no go to 2.

2. Is there postponing conduct on the part of the first holder? – Act/omission by URI1 that led URI2 to mistakenly believe that URI1 had no interest in the land, thus creating URI2 later interest? (*Abigail, J&H*)

If no, URI 1 wins, if yes, go to 3.

POSTPONING CONDUCT:

1) Arming conduct

- *Abigail v Lapin* – Lapin gave transfer and CT as security for mortgage – mortgagee 'rogue' registered himself as the RP and executed mortgage = Lapin had armed rogue with means to give Abigail's interest. Thus Lapin's first in time priority is postponed

- *Breskvar* – gave CT and blank signed transfer to Petrie who registered nephew as RP then sold to Alban – they did lodge a caveat but they'd armed the rogues = postponed

- *Heid* – didn't follow usual conveyancing practice – used fake solicitor who represented both sides = postponed

- *Courtenay* – Ms Austin sold to the Courtenays who trusted her solicitor to register it all. Solicitor didn't register them and used them to sell to Denton who mortgaged to IAC – you can expect solicitors to act properly according to normal conveyancing practice = not postponed

2) 'Failure' to caveat in a timely fashion

- Failure to caveat is not in itself postponing conduct however in circumstances where there is no other way of protecting an interest it is highly likely that such failure will be postponing (*J&H*)

- *Butler v Fairclough* – Butler took 2 days between agreeing to the equitable mortgage and caveating (prevented F from registering)