

LAW5006

PRINCIPLES OF PROPERTY LAW

EXAM CASE SUMMARIES

TRIMESTER ONE 2018

Topic 1: Introduction to Property

Characteristics of Property

| <i>Milirrpur v Nabalco Pty Ltd (1971) FLR</i> | |
|---|--|
| Facts | -Aboriginal groups based at Yirrkala brought an action against Nabalco Mining Group to assert their continuing ownership of their traditional lands -They challenged the validity of mining leases granted over their land by the Commonwealth government |
| Issue | Was the native title recognised as in Australian law? |
| Held | -Native titles do not form part of the law of any part of Australia |
| Rationale | Blackburn J: -The doctrine of communal native title does not have a place in Australian law -Acknowledged that the aboriginal clans had their own recognised system of law, and that this system provided for a relationship between the clans and the land -However, this relationship was not acknowledged as a proprietary one |
| Key Legal Principle | -Recognised that the Aboriginal clans had a recognisable system of law, and that system of law involved a relationship between the clans and the land |

How Does A Proprietary Right Differ From A Contractual Right?

| <i>King v David Allen & Sons Billposting Ltd (1916) AC</i> | |
|--|--|
| Facts | -King had a property on which he intended to construct a theatre -King had an agreement with Allen allowing him to put posters on the wall -King then leased the property to another company -After completion, Allen attempted to put up posters but was stopped by the third party (King protested this) -Allen claimed damages for the breach of the agreement against King |
| Issue | Could the license be considered a proprietary right? |
| Held | -The license did not qualify as a proprietary right |
| Rationale | Lord Buckmaster: -The licensor is in breach of his obligation to the licensee -The agreement did not create an interest in land but merely created a personal obligation on the part of the licensor to allow the licensees the use of the wall for advertisements -They are therefore in breach of contract |
| Key Legal Principle | -A contractual license cannot be converted into a proprietary interest, without which you cannot enforce your right against a third party -The license did not qualify as a proprietary right as it delivers insufficient control over the land |

Can New Kinds of Property Be Created?

Restrictive Covenants

| <i>Tulk v Moxhay (1848) ER</i> | |
|--------------------------------|---|
| Facts | -Tulk sold land and a garden, subject to a covenant to keep the Garden Square uncovered with buildings, so it could remain a pleasure ground -The land was sold several times, and then eventually to the Moxhay -Moxhay, aware of the covenant at the time of the purchase, refused to abide by it |
| Issue | Was the new owner bound by the covenant? |
| Held | The owner was bound by the covenant |
| Rationale | -If the agreement had been a contract it would have been unenforceable -A covenant is enforceable at equity and privity of estate is not required for the burden of a covenant to run -The purchaser knew of the covenant -This may have affected the price and purchase but it was part of the sale |

Topic 2: Classification of Property

General Principles of a Possessory Title: The Doctrine of Relativity Titles

| <i>Asher v Whitlock (1865) QB</i> | |
|-----------------------------------|---|
| Facts | -Williamson took possession of two pieces of land (not documentary title holder) -Williamson died, and left the land to his widow for life then, to his daughter -In 1861 the widow married Whitlock and in 1963 the daughter died -In 1863 the widow died and the plaintiff (the daughter's heir) brought an action against Whitlock for ejection |
| Issue | Who owned the land? |
| Held | Asher, the plaintiff owned the land |
| Rationale | -Asher had the best title -The only way Whitlock could have succeeded is if adverse possession was made out |
| Key Legal Principle | -There is no reason why the rights acquired from mere possession cannot be passed on via a will |

| <i>Perry v Clissold [1907] AC</i> | |
|-----------------------------------|---|
| Facts | -Clissold took possession of land in 1881 without title and fenced it -Clissold had possession and conducted his business without any sign of a better title -Perry compulsorily acquired the land to build a school |
| Issue | Did Clissold have a right to compensation as an adverse possessor? |
| Held | Clissold acquired title through adverse possession |
| Rationale | -An adverse possessor has a good title against the entire world but the rightful owner -If the rightful owner does not come forward and assert his title within the period prescribed his right is forever extinguished, and the possessory owner acquires an absolute title |
| Key Legal Principle | -Jus tertii defence does not apply to land |

Determining whether a chattel has become a fixture

| <i>Leigh v Taylor [1902] AC</i> | |
|---------------------------------|--|
| Facts | -The tenant attached valuable tapestries to the wall of the drawing room of a house -The tapestries were attached to canvas by tacks, and then the canvas was nailed to wooden supports, which were nailed to the wall |
| Issue | Were the tapestries fixtures? |
| Held | The tapestries were not fixtures |
| Rationale | Lord MacNaghten: -The question always is has the thing in question become part of the freehold? -To determine the question all the circumstances on the particular case must be considered and the mode of annexation is only one of the circumstances of the case -Affixing the tapestries by nails to the wall was the only method by which the tapestries could be effectively displayed as chattels -There was no intention to benefit the real estate by attaching the tapestries |
| Key Legal Principle | -Seminal case on the object of annexation test |

Revocation of Licences

| <i>Cowell v Rosehill Racecourse Co Ltd (1937) CLR</i> | |
|---|---|
| Facts | -Cowell had bought a ticket to enter Rosehill Racecourse was ejected for misbehaviour -Cowell sued for damages for assault on the ground that as a licensee he had a right or permission to be on the premises |
| Issue | -What type of licence did Cowell have? |
| Held | The licence was merely a permission to enter |
| Rationale | -As the licence was a mere permission to enter, the contract gave Cowell a right to remain as long as he behaved -When he misbehaved and refused to leave, his licence was revoked and he became a trespasser |
| Key Legal Principle | -Suggested that licences are capable of revocation at law |

| <i>Heidke v Sydney City Council (1952) SR</i> | |
|---|--|
| Facts | -Plaintiff paid the council for the hire of four ovals -Before the carnival, the council purported to revoke the licence -The plaintiff sought an injunction preventing revocation |
| Issue | -Could an injunction be granted? |
| Held | The injunction was granted and the carnival went ahead |
| Rationale | Hardie JA: -The following must be considered: 1) Was attempted revocation of the licence in breach of a contract? 2) Are damages an adequate remedy? 3) Are there any bars in equity? |
| Key Legal Principle | -An injunction may be granted to stop an incorrect revocation where there is an express or implied promise that the licensor will not revoke it NOTE: Specific performance would also be available -Even if it is too late to restrain revocation, the remedies of the parties may turn on whether equity would have granted an injunction |

Enforceability of Licences

| <i>King v David Allen Billposting Ltd [1916] AC</i> | |
|---|--|
| Facts | See above |
| Issue | Was the contractual licence enforceable against a new owner? |
| Held | The contractual licence was not enforceable |
| Rationale | The new owner was not privy to the original contract |
| Key Legal Principle | Contractual licences are not enforceable against new owners |

| <i>Georgeski v Owners Corporation SP 49833 [2004] NSWSC</i> | |
|---|--|
| Facts | -The Crown granted the plaintiff a licence giving the licensee permission to remove a jetty and a slipway -The licensee sought an injunction/declaration to prevent two neighbours from using the jetty |
| Issue | -Did the plaintiff have a right of exclusive possession? |
| Held | The plaintiff had no right to exclusive possession – it was only a contractual licence |
| Rationale | Barrett J: -This was purely a contractual right to remove the fixtures and therefore there was no right of exclusive possession |
| Key Legal Principle | -A licence will not be enforceable as a right in rem |

Topic 5: Leasehold Covenants

Lease Covenants

| <i>Hawkesbury Nominees Pty Ltd v Battik Pty Ltd [2000] FCA</i> | |
|---|--|
| Facts | -Hawkesbury Nominees were owners of a lease over a building in Canberra -There was a restaurant in the basement and this was sublet to Williams and Brayshaw -The sublease was then assigned to Battik -Battik claimed that there was a breach of the covenant for quiet enjoyment due to the ineffective ventilation system and claimed damages and termination of the lease -Hawkesbury Nominees asserted that the exhaust system and fans were Battik's fixtures and they had no responsibility |
| Issue | -Was there a breach of the covenant for quiet enjoyment? |
| Held | There was substantial interference and a breach to the covenant |
| Rationale | -This was a question of fact and the test had to be applied: -There is a breach of the covenant for quiet enjoyment where the ordinary and lawful enjoyment of the premises are 'substantially interfered' with by the acts of the lessor |
| Key Legal Principle | -Outlined the test for the covenant of quiet enjoyment -The Court also outlined that the covenant for quiet enjoyment is independent of the covenant to pay rent |

| <i>Aussie Traveller Pty Ltd v Marklea Lty Ltd [1998] Qd R</i> | |
|--|--|
| Facts | -Aussie traveller leased part of a building in a commercial building -The tenant next door (Top Flight) made timber staircases -The two premises were separated by partitions but they did not reach the roof -Top Flight's activities interfered with Aussie Traveller's lease |
| Issue | -Was the disturbance suffered by Aussie Traveller a breach of the lessor's obligation not to derogate from the grant and a breach of the covenant for the quiet enjoyment? |
| Held | -There was breach of both the covenant of quiet enjoyment and non-derogation |
| Rationale | -If the grant is made for a particular purpose, the lessor is under an <i>obligation not to use the land retained by him in such a way as to render the land granted 'unfit or materially less fit' for the particular purpose for which the grant was made (must be substantial)</i> |
| Key Legal Principle | -Outlines the test to ascertain whether there has been a breach of the covenant not to derogate from the grant -There does not need to be practical frustration of the purpose of a lease to establish a breach of the covenant not to derogate from the grant -For the landlord to be liable, the landlord must have the right to stop the interference by the other tenant, and must have failed to do so after being notified |

| <i>Norden v Blueport Enterprises Ltd [1996] NZLR</i> | |
|---|---|
| Facts | -Panda leased the third floor of Norden's building for a fixed term -The lease specified that it was only to be used as 'general office accommodation' -A brothel moved into the fourth floor by an assignment of a lease -Complaints were made in April 1990 and Panda moved out in May 1990 |
| Issue | Was there a breach of either the covenant for quiet enjoyment or the covenant for non-derogation from the grant? |
| Held | Both covenants were breached and the plaintiff was allowed to cancel the lease |
| Rationale | -It is the landlord's actions in countenancing a use wholly inconsistent with the respectable business being run by Panda that constitutes its breach of the covenant of quiet enjoyment -There was substantial interruption which prevented the lessee using the premises for the purpose leased -Norden either knew or shut their eyes deliberately to the activity being undertaken, and refused to take any steps to stop it, despite the representations made by Panda |

Topic 6: Adverse Possession

What Constitutes Adverse Possession?

| <i>Whittlesea City Council v Abbatangelo [2009] VSCA</i> | |
|--|---|
| Facts | <ul style="list-style-type: none"> -The Whittlesea City Council obtained the land for the construction of a shire hall -The shire hall was never built -In 1959, Mrs Abbatangelo and her husband purchased the property abutting the western, northern and eastern boundaries of the disputed land -Mrs A treated the land as her own and in 2004 wrote to the council to advise them of her adverse possession claim of the disputed land -The Council disputed the claim and entered the land erecting a fence on the eastern boundary -Mrs A relied on numerous acts of adverse possession: <ol style="list-style-type: none"> 1. The installation of a gate so that the land could only be access through the surrounding Abbatangelo land 2. The maintenance of fences on the boundary of the disputed land 3. The use of land of grazing, shade, shelter, general maintenance as well as sporting, social and recreational activities |
| Issue | -Who had the title to the land? |
| Held | Mrs Abbatangelo had the right to the title of the land via her adverse possession |
| Rationale | <ul style="list-style-type: none"> -The Court set out a number of principles necessary to establish adverse possession: <ol style="list-style-type: none"> 1. The owner of land with the paper title is deemed to be in possession of the land 2. An alleged possessor must show both factual possession and the requisite intention to possess 3. The possessor must show that it has dealt with the land as an occupying owner 4. It must be clear that the intention to possess is to the exclusion of all others 5. There does not need to be a conscious intention to exclude the true owner, but rather an intention to exercise exclusive control of the land 6. Possession of the land cannot be with the consent of the true owner 7. Whether the title owner realises that dispossession has occurred is irrelevant 8. Acts of possession with respect to only part of the land claimed may constitute acts of possession with respect to all the land claimed -Whilst some of the factors evidencing intention may have been insufficient if viewed on their own, when viewed in context of each other, they were more than sufficient to demonstrate the necessary intention |
| Key Legal Principle | <ul style="list-style-type: none"> -Demonstrates that each case will be decided on its facts and circumstances -The Courts will look at the combined conduct and acts of the alleged possessor to establish whether the necessary principles can be established |

Injunctions for Encroachments

| <i>Break Fast Investments Pty Ltd v PCH Melbourne Pty Ltd [2007] VSCA</i> | |
|---|--|
| Facts | <ul style="list-style-type: none"> -In 2001 Break Fast attached metal cladding to sections of its building which protruded 3-6cm into PCH's airspace when refurbishing its 12 storey office building -After becoming aware that the cladding projected into its airspace, PCH applied for a mandatory injunction requiring Break Fast to remove the cladding -This would cost approximately \$300,000 -The injunction was initially granted and Break Fast appealed against the judge's refusal to award damages in lieu of the injunction |
| Issue | Was the decision to reject an award of damages, and instead order an injunction appropriate? |
| Held | A mandatory injunction was issued appropriately |
| Rationale | <ul style="list-style-type: none"> -In most cases a land owner would be entitled to an injunction to restrain a trespass -In exceptional cases of demonstrated disproportionate hardship, constituting oppression of the trespasser, equitable damages are available as a remedy -There is not evidence of disproportionate hardship here |

Topic 7: Land Transfers and Formalities

Requirements to Pass Land in Equity

| <i>Australia and New Zealand Banking Group v Widin (1990) ALR</i> | |
|--|---|
| Facts | -Considered whether an instrument of mortgage fulfilled the writing requirement to create an interest of land for the mortgagee -The bank documents that Widin executed did not include a description of the land (date and particulars) used as security for the mortgage -ANZ argued as an alternative that there was an oral agreement and part performance giving rise to a mortgage |
| Issue | -Was there a valid equitable mortgage i.e. was there a note or memorandum in writing satisfying the requirements of section 126? |
| Held | -Writing requirements were not met -However there were sufficient acts of part performance to validate the mortgage, so that it was enforceable against the trustee |
| Rationale | Hill J: -The details had to be included in whatever was signed by the person to be charged -The document must describe the subject matter of the transaction in specific detail -One would think that this has the address and the names of the parties -If the note is signed by the party to be charged, and expressly referred to another document, the two documents may be read together -The bank manager's diary note which contained the particulars of the property could not be put together with the mortgage documents signed There was an oral agreement with part performance evidenced by the endorsing and affecting bills of exchange, obtaining an indemnity and the mortgage form signed to secure the indemnity |
| Key Legal Principle | -If the section 126 requirements fail, the contract will be unenforceable -However, if there is sufficient part performance, equity will prevail and order specific performance |

| <i>Regent v Millett (1976) CLR</i> | |
|---|---|
| Facts | -Millett took possession prior to paying the full price and having the title transferred -Although the agreement was oral, Millett started paying the mortgage, making repairs etc. -Millett defaulted on payments and Regent refused to transfer the property -The Millett's sued the Regents seeking specific performance of the oral agreement |
| Issue | Was the agreement enforceable for part performance? |
| Held | The agreement was enforceable for part performance |
| Rationale | Gibbs CJ: -It was sufficient if the acts were unequivocally referable to some contract of the general nature of the alleged one -The acts did not have to be required by the contract – it is enough that they were carried out under it -Millett not only relied on possession of the land, but also repairs, renovations and mortgage repayments -The High Court found that the giving and taking of possession by itself was sufficient part performance of the contract and it is therefore unnecessary to consider whether the other acts relied upon would also, either alone or together, amount to part performance |
| Key Legal Principle | -Possession of land will generally be sufficient part performance of an oral agreement between the parties in relation to that land (<i>par excellence</i> –the best sort of act of part performance) |

| <i>Mason v Clarke [1955] AC</i> | |
|---------------------------------|---|
| Facts | -An oral agreement to allow hunting rights to a lessor and Mason -The lessee (Clarke) tried to prevent Mason from exercising these rights on the claim that there was no written agreement |
| Issue | Was the oral agreement enforceable? |
| Held | The agreement was enforceable |
| Rationale | -Although there was no sufficient memorandum for the oral agreement, the acts done by Mason (preparing and actually hunting rabbits) constituted acts of part performance |
| Key Legal Principle | -Outlines what acts are considered sufficient acts of part performance -A strict approach to the test of part performance is applied in Australia |

What Property Rights Arise in Equity under a Contract of Sale of Land?

| <i>Lysaght v Edwards (1876) Ch D</i> | |
|--------------------------------------|--|
| Facts | -Edwards agreed to sell a Farm to Lysaght (deposit was duly paid) -Edwards died before settlement, leaving his real estate to his wife, including the power given to the trustee to postpone any sale |
| Issue | Does the property form part of his estate (and should be transferred to his wife) or to the purchaser? |
| Held | -The land was to be transferred to the purchaser |
| Rationale | Sir George Jessel MR: <i>‘The moment you have a valid contract, the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser’</i> -The position of vendor under a valid contract of sale is between a trustee for the purchaser, and a mortgagor in relation to the land -The Vendor, while still the registered proprietor, has a separate equitable lien over the property in relation to the purchase price |
| Key Legal Principle | -Outlines the doctrine of conversion -The classic position from Lysaght is that the purchaser obtains an equitable interest -Recent cases have been moving away from the notion that until legal title is complete, the vendor is a trustee for the purchaser in equity (see Tanwar) |

| <i>Tanwar Enterprises Pty Ltd v Cauchi (2003) CLR</i> | |
|---|---|
| Facts | -The contract of sale specified that the date for completion was an essential term -When the purchasers failed to settle on the due date, the vendors purported to terminate the contract one day later -The plaintiff sought an order for specific performance for the contract and an order for relief against forfeiture based on their equitable interest in the land |
| Issue | -Was it unfair for the vendor to terminate the contract of sale/was there protection in equity? |
| Held | -Tanwar had no claim as they committed a serious breach |
| Rationale | -The court declined to follow the rule in Lysaght v Edwards instead consideration the relationship between the parties a contractual relationship -A vendor under an uncompleted contract is not a trustee of the plaintiff -The interest of the plaintiff is commensurate with the availability of specific performance -Specific performance is not available at the time the contract is entered into -A plaintiff in serious breach cannot insist on specific performance but does have a lien to recover part payments |
| Key Legal Principle/Legal Development | -Strongly suggests that the doctrine of conversion in Lysaght is no longer fully supported -The relationship between the purchaser/vendor is contractual |

| <i>Sunshine Retail Investments Pty Ltd v Wulff 1999 VSC</i> | |
|---|---|
| Facts | -Wulff claimed rights by long use through common property of an apartment block -In the 1970's, work was done (a rockery and garden bed) to discourage vehicle access however pedestrian access was still available and possible -These rights were exercised frequently (up to 50 times a day) |
| Issue | -Was there an applicable easement for rights of way by long use? |
| Held | -There was no easement (failed on elements 4 and 5) |
| Rationale | -Five tests were applied by the court for an easement by 'lost modern grant' 1. Doing of an act by a person upon the land of another 2. Absence of a right to do that act by the person doing it 3. Knowledge of the person affected by the act 4. Power of the person affected to prevent it (by their own act or court action) -In this case, rights were created at the time when the servient tenement was occupied by tenants, when the fee simple owner was neither in possession or occupation of the property (also applicable for point 5) -Thus the servient tenement had no power or obligation to prevent use (also applicable for point 5) 5. Abstinence by that person from interfering with the act for so long that they should no longer be able to interfere with the act (see above points) |
| Key Legal Principle | -Outlines the five criteria to establish uninterrupted and continuous use as of right |

Scope of Easements

| <i>Cargill v Gotts 1981 WLR</i> | |
|---------------------------------------|--|
| Facts | -Cargill owned a farm and drew water from a pool in a nearby river for his stock -Cargill took more water in the years later -Gotts became the owner of the land surrounding the river and took action to prevent Cargill from using it |
| Issue | -Did Cargill have this easement? |
| Held | -Cargill had the benefit of the easement to take water |
| Rationale | -Cargill was able to establish that he had an easement before 1965 -The exact frequency and rate of water usage was found to be not relevant -The court looked at whether taking the water was relevant to the ordinary and reasonable use of the farm at the time, and as it continued to be asserted -The farm had always been a farm and the water had always been used for these farming purposes |
| Key Legal Principle/Legal Development | -Supports a common sense approach as to the required frequency of use -Look to whether the easement was relevant to the ordinary and reasonable use of the land when the right was and continued to be asserted -Excessive use of an easement will render the dominant owner liable in nuisance |

| <i>Westfield Management Ltd v Perpetual Trustee Company Ltd 2007 CLR</i> | |
|--|--|
| Facts | -Westfield owns Skygarden (DT) that is accessed by a vehicular ramp -Perpetual owns the adjoining property where Glasshouse is located -Each building has partial frontage onto Pitt Street Mall -Skygarden had no vehicular access on one side so it was important to be able to access the property via a vehicular ramp -The easement was said to be created by instrument describing a right of way 6.6m wide and variable limited in the height |
| Issue | -What does the grant authorise? |
| Held | -The grant only authorised passing to and from |
| Rationale | -If parties has intended that the dominant tenement could travel across the easement, it should have been stated and the court should not have looked to extrinsic materials |
| Key Legal Principle | -The words of an easement should be strictly construed and will not allow a greater burden on the servient tenement to be imposed |

Topic 10: Restrictive Covenants

Characteristics of a Profit A Prendre

| <i>Mason v Clarke 1955 AC</i> | |
|-------------------------------|---|
| Facts | -Shepton Mallet Transport leased land to Clarke -In their agreement SMT reserved 'all game, rabbits, wild fowl and fish, with liberty for itself and all other persons authorised by it to preserve, shoot, hunt, course, kill and carry away the same' -SMT granted rabbiting rights over the land to Mason for 100 pounds in response to an infestation and with notice given to Clarke |
| Issue | -Did Mason have a profit a prendre to support the injunction and damages? |
| Held | Yes |
| Rationale | -The rabbit catcher could maintain an action in trespass against the farmer has he has entered into the profit a prendre that he had from SMT -Mason had an equitable profit a prendre |
| Key Legal Principle | -Application of profits |

Restrictive Covenants

Characteristics of a Restrictive Covenant

| <i>Tulk v Moxhay 1848 Ph</i> | |
|------------------------------|--|
| Facts | -Tulk sold land and a garden, subject to a covenant to keep the Garden Square uncovered with buildings, so it could remain a pleasure ground -The land was sold several times, and then eventually to the Moxhay -Moxhay, aware of the covenant at the time of the purchase, refused to abide by it |
| Issue | -Was there a restrictive covenant in place? |
| Held | -There was a restrictive covenant in place that ran with the land |
| Rationale | -Whether or not the covenant ran with the land, it was intended to bind subsequent owners and was enforceable in equity against Moxhay -Their Honours outlined four elements/characteristics where equity will enforce the covenant: 1. The restrictive covenant must clearly identify the land (Pollard) 2. The restrictive covenant is intended to run with the land (ss 78-9 PLA) 3. The restrictive covenant is 'negative' (does not require expenditure; compliance is possible by inaction – considered by looking at substance not form) 4. Successor takes with notice (s 88 TLA) |
| Key Legal Principle | -Outlined the characteristics of a restrictive covenant |

| <i>Pollard v Registrar of Titles 2013 VSC</i> | |
|---|---|
| Facts | -The restrictive covenant was made in 1911 stating that there was not to be more than one dwelling house on the land (only applied to one lot in a 23 lot subdivision) -Pollard applied for a declaration that the covenant was not valid under section 84(2) of the PLA |
| Issue | Was the restrictive covenant valid? |
| Held | -The covenant was not valid |
| Rationale | -The covenant did not identify the benefitted land -There was no annexation and it was not part of a building scheme Four elements of a restrictive covenant: 1. Must benefit the dominant tenement 2. Must run with the land 3. Must be negative 4. Must have notice |
| Key Legal Principle | -Addresses the first element of a restrictive covenant -Outlined the four characteristics of a restrictive covenant |