

FIXTURES

Fixture or Chattel?

Key Principle: what is annexed to the land becomes part of the land.
Chattels, by virtue of their annexation, may become fixtures.

1. Degree of Annexation - attached or not?

Belgrave: where an article 'is no further attached...then by its own weight' it is generally regarded as a chattel.

- Even low/slight degree of annexation = presumption fixture.
- Burden on person alleging not a fixture where annex (AusProvinc)

2. Objective Intention – examine to rebut presumption.

- Chattel must be fixed 'with the intention that it shall remain in position permanently' or for a substantial period (Holland)
- Object & purpose either confirms or rebuts the presumption.
- Must consider all of the circumstances (Leigh) – case by case.

Factors

- Degree of annexation – extent of physical attachment.
- Ease of removal - will it cause damage to remove it?
- Purpose of attaching/not attaching chattel
- Nature of the interest held by the attachers
- Subjective intention: this won't trump other factors (Elitestone)
- Common practice & usages: what's usually sold with property
- Nature of the chattel and its relationship to the realty

3. **Conclusion** - where the factors are evenly balanced, resolve with regard to onus of proof.

Leigh: tapestries, held chattels despite being nailed to wall, hung to enjoy not to become part of house, life tenant, could be removed w/out damage

Belgrave: air-con, held fixtures, not nailed because of noise and vibration.

Hobson: engine belongs to King on Hobson's land. Was a fixture despite contract between K+H, private agreement.

Elitestone: bungalows own weight – held fixture – reasonable bystander would assume permanent.

LOST & FOUND

Does a finder have a right to the property?

1. **Start:** 'The finder has good title to it against the world, except someone with a better right to possession' (Parker; Armory).

2. Has the finder fulfilled the 2 acts for possession?

The finder gaining rights is subject to the finder asserting possession (Armory). 2 elements of possession:

- a) Physical act of taking it into your care/custody/control
- b) With the intention to possess – in Parker the airline employee stated that he wanted it back.

3. Must be assessed if anyone had a superior right

On Land:

- Public space, quasi-public or private space? Parker identified this spectrum.
- Private area, then the manifest intention is implied through possession and by virtue of the occupants exclusion of other people (Flack).

Flack: private house, \$ in cupboard. Landowner won

- Quasi-public: must be manifest intention to control lost articles by the occupant

Parker: BA did not manifest an intent to control the exec. lounge. Controlled who entered, but no regular sweep.

- Public: diffc to manifest necessary intention, likely finder win

In Land:

Landowner has superior rights

Elwes: Buried in soil, attached to building

Waverly – brooch found in the ground, held property of the council even if on top of the ground because they manifested an intention to take control

4. Employment

Employer will have superior right than employee when the finding occurred by reason of employ (**Byrne v Hoare**).

Bryne: Policeman found ingot on way to duties, not during. course of employ even during working hours. That the item wouldn't have been discovered 'but for' employ is not sufficient, only succeed if finding is within actual perform. of duties.

Willey: (W) discovered coins concealed on board ship. Customs took authority of the coins. W claimed the coins as finder.. P found the coins, but he never had possession of them. Possession was taken by his employers

5. Possession By Law

Costello: Police took lawful possession of a vehicle under statute from C which they believed they have been stolen. The period they were entitled to retain possession expired. C then had better right.

6. Conclude – who has best right to the property/chattel.

Note: Abandonment: not many cases, judicial support for the proposition that relinquishment of possession + clear/unequivocal intent (can be 'inferred or established' Sims v SPM) to renounce ownership, is effective in divesting int: Moorhouse

Moffatt: more than a faulty memory required- vendor forgot to take biscuit tin of money, successful in an action.

Moorhouse: provided Angus&Rob with four manuscripts. Term of contract that A&R would only have exclusive right in some countries

– contract undermined assertion that M had abandoned. Onus on person asserting abandonment.

LAND - TORRENS BASED

Registered Interests

- Fee simple
- Registered lease
- Registered mortgage
- Easement

Unregistered Interest

Specifically Enforceable Contract (consider Estoppel after)

A SEC may create an unregistered interest (*Lysaght v Edwards, Bunny*)

- Purchaser's interest under a contract of sale: *Bunny*
- Mortgagees/lessees interest under an agreement to create a mortgage/lease: *Walsh*

3 Requirements:

1. Valid Contract

- Offer, acceptance, consideration (gift/volunteer don't have this)
- Intention to create legal relations (*Ogilvie, Inwards*)
 - Familiar relationship: informal proprietary reliance often arise in families
 - Intention to create legal obligations or only informal family arrangement?

2. Writing? Or saved by part performance?

- S 54A CA requires a contract to be written & signed by the vendor for an action to be brought relating to an interest in land
- S 54A(2): preserves the law relating to part perform.

Part perform: contracts may be specifically enforceable where saved by the doctrine of part performance. Must be sufficient acts of part performance. 2 UK tests:

Madison v Alderson (strict) test:

The acts relied upon as part-performance must be unequivocally, and in their own nature, referable to some such agreement as that alleged

- Paying purchase price to vendor not enough (enough for Steadman)
- Exclusive possession is fine
- **Ogilvie v Ryan:** R housekeeper and then de facto spouse, looking after him many years. Promisor left house to son in will, even after promised to R after he died. Son evicted R + she sought SP. Lost under Madison, would've won under Steadman – said acts relied on couldn't satisfy this test as there were other explanations for her doing what she did - could be voluntary acts of love and affection

Steadman v Steadman (flexible) test:

Acts will constitute part performance if on the balance of probabilities they indicate that a contract of the kind existed - mention if it makes a difference.

3. Other SP requirements

'There appears to be nothing that would prevent the contract from being SEC. It is generally assumed that damages are not an adequate remedy in relation to interest in land. The party seeking specific performance (X) is ready, willing and able to perform. Furthermore, there is no condition precedent and no equitable bars to specific performance (elaborate). Thus, X has SEC.

In Tanwar, the HC in obiter comments threw into doubt the Bunny analysis of the interest a purchaser receives when they have a SEC. In particular, the HC dislikes the analogy of constructive trust. They did recognize that the purchaser receives an equitable interest, but seems to prefer to talk about it as some sort of equitable lien. Accordingly, we will continue to apply Bunny until the HC next decides.

MORTGAGES

Torrens mortgages is a charge over the land (s57(1))

Characterise the interests

Legal mortgage: requires registration. An approved mortgage form executed correctly, the certificate of title and it needs to be registered.

S 56C RPA can affect whether mortgage is actually registered - mortgagee must confirm the identity of the mortgagor else the Registrar can refuse to register the mortgage.

If not legal: equitable/unregistered

- Unregistered mortgage by deposit of certificate of title to the mortgagee (i.e. *J&H*)
- Unregistered interest based on a specifically enforceable contract to mortgagor

Default by mortgagor (instalment or principal) = mortgagee remedies

1. Due in debt on covenant for repayment (personal action, not proprietary)
2. Possession to manage the property (subject to onerous duties)
3. Appoint a receiver
4. Foreclosure - court order, vests full ownership in the mortgagor - costly and lengthy
5. Power of sale

Exercising the power of sale

Source of power of sale? Express in covenant or implied (s 109(1)(a)CA).

Formalities (necessary to be validly exercised)

- I. Default by the mortgagor (s 57 RPA)
- II. Mortgagee must be given notice in the prescribed form on mortgagor and other parties - writing (s 57(2) and give specified period of rectification - statutory minimum is 1 month (s57(4))
- III. Default deemed not to have occurred if rectified (s 57(4) RPA)

Good faith- duty owed by mortgagee in exercising power of sale

Power of sale may be defective if mortgagee fails to observe common law/equitable duties. When exercising PoS, mortgagee owes a duty to other interested parties, not only acting in their own interest. But, the mortgagee is not a trustee for the mortgagor and is entitled to execute PoS and realise their security (*Salmon, Cuckmere*).

Duty owed? 2 views. UK (*Cuckmere*) espouses reasonable care/negligence test. AU (*Southern Goldfields*) good faith standard (lesser). Must ascertain whether the mortgagee took reasonable precautions to obtain a proper price. Focus is on the process and whether the mortgagee tested the market (*Southern Goldfields*). Mortgagee bona fide efforts.

Were reasonable measures taken?

- **Time of sale:** mortgagee's choice when to sell, they don't have to consider when is a good time or rural property needs (*Southern Goldfields*). **Exception:** if time chosen won't adequately test the market and will exclude some classes of purchasers (*Bangadilly* - 23rd December, *Southern Goldfields* - mortgagee advertised and properly tested the market at auction, didn't breach its duty selling at auction for \$360K when pre action value \$700K)
- They have no obligation to accept an earlier offer (*Westpac*)
- **Advertising:** must be sufficient to adequately test the market. If the market price is achieved doesn't matter if inadequate (*Vasilou*). Needs to be sufficient in description (e.g. Inc. development option, failure to do so may exclude a class of purchasers (*Cuckmere*). In *Pendlebury*: mortgagee gave the barest publicity to the auction sale and a paucity of detail in the description of the farm and reserve price as disclosed at auction and sold at a price slightly exceeding the reserve and about 75% below value. Consider where advertised and for how long (today - online). *Bangadilly*: rural property and insufficient to advertised once in a city paper, insufficient lead time.
 - Was the mistake so substantial it did not attract the right type of people?
- **Reserve price:** reserve price is secret, shouldn't be too low. Valuation needed for private sale unless well advertised. *Southern Goldfields*: reserve price \$360K before auction market value was around \$700K. Argument - mortgagee recklessly sacrificed integrity of mortgagor. Held: reasonable precautions taken, good advert, auctioneer apt, didn't think reserve price was an issue. *Bangadilly*: reserve price well below what other corps agreed to pay - contributed to breach.
- **Arms length sale (Relationship):** mortgagee cannot sell to themselves or their agents, even where best price secured (*Farrar*).
Farrar: purchaser was a company the mortgagee was shareholder of. Ok as mortgagee became a shareholder after sale and market value. Illustrates that where a close relationship exists, the onus is on the person in the relationship to show the sale was proper.
Bangadilly: Mortgagee and the purchaser were both family companies, directors and shareholders were the same - separate legal entities but run by the same people. Low reserve price, bid only just above reserve price = breach.

S111A(4) MORTGAGE'S REMEDIES

Can use the duty imposed by CA s111A(1) as an alternative line of argument on whether it would be possible to set aside the title of the purchaser. This is distinct from the common law duty.

- Assuming X wants land back but if can't get it back, useful to discuss s 111A(4)
- Statutory duty to obtain market price/best possible price (s111A(1)) . (no case to interpret yet)

S 111A(1) CA imposes a statutory duty to take 'reasonable care' to obtain market value or the best price.

s 111A(4) - title cannot be challenged on the grounds of breach of this section, only damages available.

If not defective (then go through priority interest)

Mortgagee is entitled to cost of sale and debt owed. If defective, the mortgagor will have an unregistered interest. *Bofinger* illustrative of distribution of proceeds to mortgagees then mortgagor. Must pay amount owing into the court: *Allfox*.

If defective:

Note: Effect: if sale is set aside, sale is treated as sale of mortgage as opposed to sale of fee simple (*Latec*). Mortgagor will retain possession of fee simple and incoming purchaser will have bought mortgage off mortgagee, not the fee simple.

- **Pre-exchange:** Mortgagor can caveat, seek an injunction to restrain power of sale
 - Mortgagor = *Forsyth*; Mortgagee = specifically enforceable contract based on part performance?
- Contracts exchanged: pre-settlement: purchaser will have an interest under specifically enforceable contract for the sale of land

Mortgagors interest? Forsyth (Look at this in exam)

- RP asserting their legal fee simple. However, whilst still registered, the mortgagor sacrificed their indefeasibility by defaulting on registered mortgage which they bound themselves to.
- Mortgagor has an URI (suggests equity of redemption; intention to have the power of sale exercised properly). In *Forsyth* analysed based on mortgagor having an unregistered interest = URI of the mortgagor to have the point of sale exercised properly vs URI of purchaser based on specifically enforceable contract 1st in time rule. *Forsyth*: mortgagor intervened between exchange and settlement. Bank had been negotiating with 2 buyers and accidentally sold to lower bidder = breach.
- **Post-settlement, pre-registration:** s 43A applies because of settlement. So apply s 43A analysis (registrable dealing, dealing with the RP (needs to be dealing with the RP of the mortgage, the mortgagee), legal estate). If the purchaser is protected by s43A they win the priority dispute and can register their interest (becomes RP and mortgagor can only get damages). If s 43A won't apply to the purchaser, then apply normal priority rule for URI v URI - 1st in time unless equities are unequal.
- **Post-registration:** purchaser has an indefeasible title - need for exception. Mortgagor's interest = interest not to have the power of sale exercised defect. Fraud = most common (Fraud of RP = purchaser). Notice need be the RP knowing the sale was defective, insufficient that RP knows the property was worth more. Willful blindness? Likely fraud where there is collusion between the mortgagee and purchaser (*Latec*: the mortgagee fixed the auction so no bids reached the reserve and then the purchaser bought the property. In personam is unlikely - trust unlikely as there isn't a contract between the mortgagor and the purchaser and unlikely that the purchaser will undertake to respect mortgagors interests. Lose the priority dispute: RP has indefeasible title, mortgagor can take action for damages against person who exercised defective power of sale.

PRIORITY DISPUTES

URI v RP

X is the RP of _ and has immediate, indefeasible title (s 42(1) RPA, *Frazier*), subject to exceptions. Prima facie, it is enforceable against Y.

• Establish whether it is a lease or estoppel (see notes above)

NB: If it is a Bank:

Even though X's title is excepted to indefeasibility, her interest could still be passed onto the bank (*Breskvar*). Need to determine whether can find exception to bank's indefeasibility to get mortgage cancelled. (e.g. not fraud: only reckless in registering the loan, didn't have element of dishonesty and not involved in Y's scheme.). Therefore X would still have to pay out mortgage if got fee simple back.

Frazier: Ms F entered into a mortgage with the 2nd respondent by forging Mr F's signature. Ms F did not repay the debt and 2nd respondent sold the property to W. The 2nd respondent and W were not aware of the forged signature. W entitled to immediate indefeasibility.