

## Chapter 2:

### The Nature of Land: (Bradbrook Ch 16)

#### 1. THE MEANING OF LAND IN WRITTEN LAW

##### **INTERPRETATION ACT 1984 (WA) - SECT 5**

**"Land"** includes buildings and other structures, land covered with water, and any estate, interest, easement, servitude or right in or over land;

##### **ACTS INTERPRETATION ACT 1901 (Cth) - SECT 2B**

**"land "** includes messuages, tenements and hereditaments, corporeal and incorporeal, of any tenure or description, whatever may be the estate or interest in them

n/b: Both acts define the word land at state and Cth level, not just limited to soil includes buildings and interests in land etc.

What rights can someone exercise over? Above and below.... Airspace and soil. Can the airspace above be sold and someone else own the building below? Yes.

#### 2. THE PHYSICAL LIMITS TO LAND

##### (a) **Airspace**

- (i) Can airspace be regarded in its own right as "land" which can be dealt with separate from the soil? YES
  - *Strata Titles Act 1985 (WA)* –
  - *Bursill Enterprises Pty Ltd v Berger Bros Trading Co Pty Ltd* (1971) 124 CLR 73, 91 – [16.120] 12 feet of airspace above the land can be sold to someone else. Here it was the grant of an easement (crossing of land) of carriageway was granted. "the right to pull down such buildings and to rebuild others at a height of not less than 12 feet from the ground...and for any such purposes to use and to build upon the walls to the extent aforesaid".
  - *Glenthams Pty Ltd v City of Perth* [1986] WAR 205 / *Resumed Properties Department v Sydney* (1937) – land maybe defined by horizontal as well as vertical boundaries and that an estate in fee simple may exist in respect of land so defined where it is held by a private person.
- (ii) Does the owner of the land surface have property rights in the airspace above the land to support an action in tort for trespass or nuisance? YES (qualified)

How far above the land do you own?

- *Cuius est solum est usque ad coelum et ad inferos* "To whom belongs the soil, his it is, even to heaven and to the middle of the earth." Do not take this literally it's the starting point – better test in LJP investment
- This allows for a wide application; *Kelsen v Imperial Tobacco Co [1957]* P wanted an injunction based on trespass to stop the D erecting a sign above P's shop. Held P as a tenant had the right to use the airspace and that the sign was trespass. This case was based on UK legislation (Civil Aviation Act) but similar legislation occurs in Australia, it is a good authority for a wider application of the maxim. Was recently applied in *Break Fast Investments Pty Ltd v PCH Melbourne* (2007).
- On the other hand.....the following case limits the scope of the doctrine:
  - *Lord Bernstein v Skyview & General Ltd [1978]* 1 QB 479

*"The problem is to balance the rights of an owner to enjoy the use of his land against the rights of the general public to take advantage of all that science now offers in the use of airspace...to such a height as is necessary for the ordinary*

*use and enjoyment of his land and the structures upon it and declaring that above that height he has no greater rights in the air space than any other member of the public” (Griffith J)*

Facts: aerial photographs were taken of P’s land with the intention of selling them. P tried to sue under trespass on the basis that he had unrestricted ownership of the airspace -he failed. Landowners claim cannot extend to an unlimited height (see quote).

- **LJP Investments Pty Ltd v Howard Chia Investments Pty Ltd (1989) 24 NSWLR 490**

*Commercial dev of land, contacted P neighbour and said do you mind if my scaffolding encroaching on your land? P said yes as long as you pay \$. Were unable to agree on a fixed sum, D gave up and erected the scaffolding anyway, P sued in trespass. D said the scaffolding is not affecting the use and enjoyment of your land, rely on Bernstein case = no reason for trespass. Held: Bazaar if you can someone else’s land for profit as long as you were not interfering with their use.*

*“ The relevant test is not whether the incursion **actually interferes** with the occupier’s actual use of the land at the time, but rather whether it is of a nature and at a height which **may interfere** with the ordinary use of the land which the occupier **may see fit to undertake**.” (Hodgson J)* focus not on what the present use is but what would be a reasonable land use that might be interfered with by D’s activity. This is the BETTER test to the original common law starting point.

NOTE:

- **Anchor Brewhouse Dev Ltd v Berkley House (Docklands Dev) Ltd (1987)** – where the boom of a crane oversailed the P’s land – D admitted it happened often but said it was nuisance and not trespass – no damage was caused. Held: Yes Trespass, if an adjoining owner places a structure on his (the adjoining land owners land) that overhangs his neighbours land, he thereby takes into his possession air space to which his neighbour is entitled. This is trespass. The critical question is: whether the invasion of airspace interfered with the ordinary use and enjoyment of land.
- Ordinary use and enjoyment test vs type of intrusion test
- 1 - **Permanent intrusion** into airspace = trespass, it is always a trespass case eg a building coming onto your land. Might be in airspace only and that still counts eg gutters.
- 2 - **Transient intrusion** into airspace = a temporary intrusion = always trespass eg **Davies v Bennison (1927)** 22 TasLR 52 at 56 (*D got fed up with the neighbours cat he fired a gun at the cat, held the bullet travelling in the airspace was trespass*)
- 3 - Where intrusion into airspace is at a **great height**, the law is less clear eg **Schleter v Brazakka Pty Ltd (2002)** 12 NTLR 73, 83 (*aircraft flying over an outback property that was using it for pastoral land 600 feet, did this flight interfere to constitute a trespass? It was a pastoral lease, not exclusive land but the right to sue the land for cattle or livestock, HELD: flying of the aircraft at 600 feet was not a trespass because it did not interfere with the pastoral use of the land, property rights only extend to the height of ordinary pastoral uses*)– the higher you go the less clear how relevant the use of that airspace is to the ordinary use of the land.

Now its regulated by statute: