

SAMPLE

LAWS2012\5008

Introduction to Property and Commercial Law

Scaffolds (SAMPLE)

TOPIC 3 - PERSONAL PROPERTY - INTRODUCTION TO CHOSSES IN ACTION

Definitions: A chose in action is a right to receive something. It is „the legal expression used to describe all personal rights of property which can only be claimed or enforced or enforced by action, and not by taking physical possession“: *Torkington v Magee (1902)*.

✓ *Loxton v Moir (1914)*: „The phrase “chose in action” is used in different senses, but its primary sense is that of a **right enforceable by an action**. It may also be **used to describe the right of an action itself, when considered as part of the property of the person entitled to sue.**“

- Only this case resolved that CIAs were, in fact, property. There is a view that it is a residual category of property – e.g. in *Maitland*, it was argued that CIAs were personal and not property rights – so still a live issue.

Legal choses in action

Bluebottle UK v Deputy Commissioner of Taxation (2007) 232 CLR 598: C and H had shares in Virgin Blue. On 11 November 2005, VB declared a final dividend. The record date (i.e. the date that it closed its share register to determine to whom the dividend is paid) was 28 November 2005. The payment date was 15 December 2005. On 12 December, the DCT tried to intervene and issue notices to VB to retain money owed in tax by C and H. On 13 December, C and H assigned their rights in the dividends to Bluebottle. Bluebottle gave directions to VB to pay Barfair. On 14 December, VB received copies of deeds of assignment and directions. The DCT issues and served assessment notices on C and H. VB received a DCT letter advising the payment amount required. The key questions:

✓ Was VB a person having the „receipt, control or disposal of money belonging to C and H“?

✓ What was the chose of action and when did it arise?

- HCA held: A matter of construction. Important to know that VB intended to declare a dividend and, therefore, the debt was incurred at the earlier date of 11 November as opposed to 15 December. What arose was a **debt** that arose at the **record date to those shareholders**. The case was simply an example of how the Courts construe a chose in action.

Examples of Legal Choses in Action: debt (a right to receive payment). A personal bank account is a chose in action. It is really the right to receive an amount of money equivalent to the credit standing in the account. The right to be paid is still valuable as a debt.

✓Or, a contractual right to something (e.g. right to building work).

Property rights that cannot be dealt with:

1. The bare right to litigate
2. Contractual prohibitions on assignments
3. Personal service contracts
4. Public pay

1. **Bare right to litigate:** The bare right to litigate cannot be assigned, but funding litigation is permitted, and assigning the **fruits of litigation** is permitted.

SUMMARY:

✓**Grey v IRC:** The disposition was within the meaning of s 23C(1)(c) – it was not transferring legal title. Writing was necessary (and evidenced by the deed).

✓**Vandervell v IRC:** The disposition was not within the meaning of s 23C(1)(c) – it was transferring full legal title.

This is the *Vandervell* exception.

✓**Parker and Parker v Ledsham [1988] WAR 32:** The beneficiary had given a direction to her trustee to pay income to third parties. But the beneficiary died before the direction was carried out. The trustee (appropriately) asked the Court for a direction as to whether it should perform what was directed.

✓**Held: On death, the authority of the direction was revoked.**

- If the money had been paid before death, then it would have been fine.
- In a situation where there is a **letter** (like **Howard Smith**), **this letter can be revoked until it is acted upon**. The letter will be revoked if the letter writer dies.
 - Thus, the trustee was told that they should not carry the direction out. There would be no disposition. (Note: assuming the **Vandervell** exception does not apply. That is, if there is a situation where full legal title would be received, then there is no writing requirement and, thus, the disposition can be said to occur immediately, the letter being irrevocable.)

- **BUT:** If the Trustee **does not know** that the beneficiary is dead (and has no reason to know), then arguably the authority of the direction would not be revoked.

SUMMARY:

1. **Disposition v Authorisation** – if a letter is simply an authorisation, and not a disposition, s 23C(1)(c) does not apply (*Howard Smith*).
2. **Transferring full legal title** of the equitable interest is **not a disposition** within the meaning of s 23C(1)(c) (*Vandervell v IRC*).
3. An **authorisation** i.e. direction to trustee is a **revocable mandate** until it is acted upon (*Parker*).
4. An **oral direction** to transfer shares is a **disposition** within the meaning of s 23C(1)(c) and **requires writing** (*Grey*) – note: query whether later evidence in writing will suffice. In *Grey*, the subsequent deed drawn up was sufficient.

2. Sub-Trusts – Not Examinable

ISPT Nominees Pty Ltd v Commissioner of State Revenue (2003) 53 ATR 527 (esp. 572–584)

(i) For Value

3. Contracts for Value to Assign

- ✓ **Recall:** equity in legal property
 - If there is an enforceable contract to assign a legal interest, and where the formalities fail, you may have a vendor-purchaser ***constructive trust***. Note: the contract must be enforceable (s 54A – i.e. if it is a contract for land, it must be in writing.)
 - How does this work when the contract is for an **equitable interest**?

✓Section 23C(2): This section does not affect the creation or operation of resulting, implied, or constructive trusts.

- **For example:** Q agrees to transfer his equitable interest to P (which is held on trust by R). P pays Q valuable consideration but fails to meet the s 23C(1)(c) requirements (as this is clearly a disposition of a subsisting equitable interest). However, since valuable consideration has been paid, R holds the interest on **constructive trust** for P: R/Q □ consideration is paid □ R[c.t.]/P. Thus, s 23C(2) applies: this **does not need to be in writing**.

Problem-solving steps (SAMPLE)

Problem-solving steps (very good for exams!!!!)

OUTLINES of PQ-solving steps

TOPIC1 REAL PROPERTY

✓ **What kind of Nature of interests & types of property is dealt with?**

- Legal property: assignable in both law and equity
- Equitable property: assignable in equity

✓ **Old system title**

- Is there a deed pursuant to **Conveyancing Act s 23B(1)**?
- Does the agreement create an immediate interest in the land, so that no further action of creation is contemplated?
- Applying **ss 23C and 54A**.
-

✓ **Torrens title land**

- Has the dealing been registered?
 - ✧ Was the proprietary guilty of fraud?
- Does the agreement create an immediate interest in the land, so that no further action of creation is contemplated?
- Applying **ss 23C and 54A**.

✓ **Fixtures**

- Contract
- Initial presumption – degree/mode of annexation
- Purpose/object of annexation
- Tenants

TOPIC 2 PERSONAL PROPERTY: CHOSSES IN POSSESSION

✓ **Abandonment of choses in possession**

- Was the chose in possession abandoned?

- The party claiming ownership can only acquire said ownership if appropriation took place.

✓ **Does the party have possession?**

- 6 categories of possession – levels of possession

✓ **Was the party engaged in dealings?**

- Delivery
- Transfer of ownership
 - Transfer of ownership by losing and finding
 - *abandoned or lost?*
 - *Issue 1. e potential claimants? better right to the claim?*
 - *Issue 2. Where was the chose in possession found?*
 - Transfer of ownership by gift inter vivos
 - Transfer of ownership by gift on account of death
 - Transfer of ownership by sale
 - *Is the contract a contract for the sale of goods per s 6(1) of the Sale of Goods Act (SoGA)?*
 - *If there is a contract, then when does ownership pass under the rules contained under the Sale of Goods Act?*
 - Transfer of ownership by way of security (Topic 5B)
 - parties to the relationship?
 - a security interest exist?
 - enforceable against the GRANTOR?
 - enforceable against 3RD PARTIES?
 - Transfer of possession by bailment
 - Is there a bailment relationship?
 - Duty of bailee (*Hobbs v Petersham*):
 - A concurrent (sub-)bailment relationship

TOPIC 3. PERSONAL PROPERTY - CHOSSES IN ACTION

✓ **Can the choses in action be dealt with?**

- Bare rights to litigate
- Contractual prohibition assignment
- Personal service contracts
- Public pay

✓ **Is there an equitable chose in action?**

- Trust
- Is it a debt rather than a trust?
- Agents as trustees
- Trusts of the benefit of the contract
- Trusts of voluntary covenants
- Trusts as equitable charges
- Succession – Livingston rights
- Vendor-purchaser constructive trust

TOPIC 4. ASSIGNMENT AND DISPOSITION OF INTERESTS

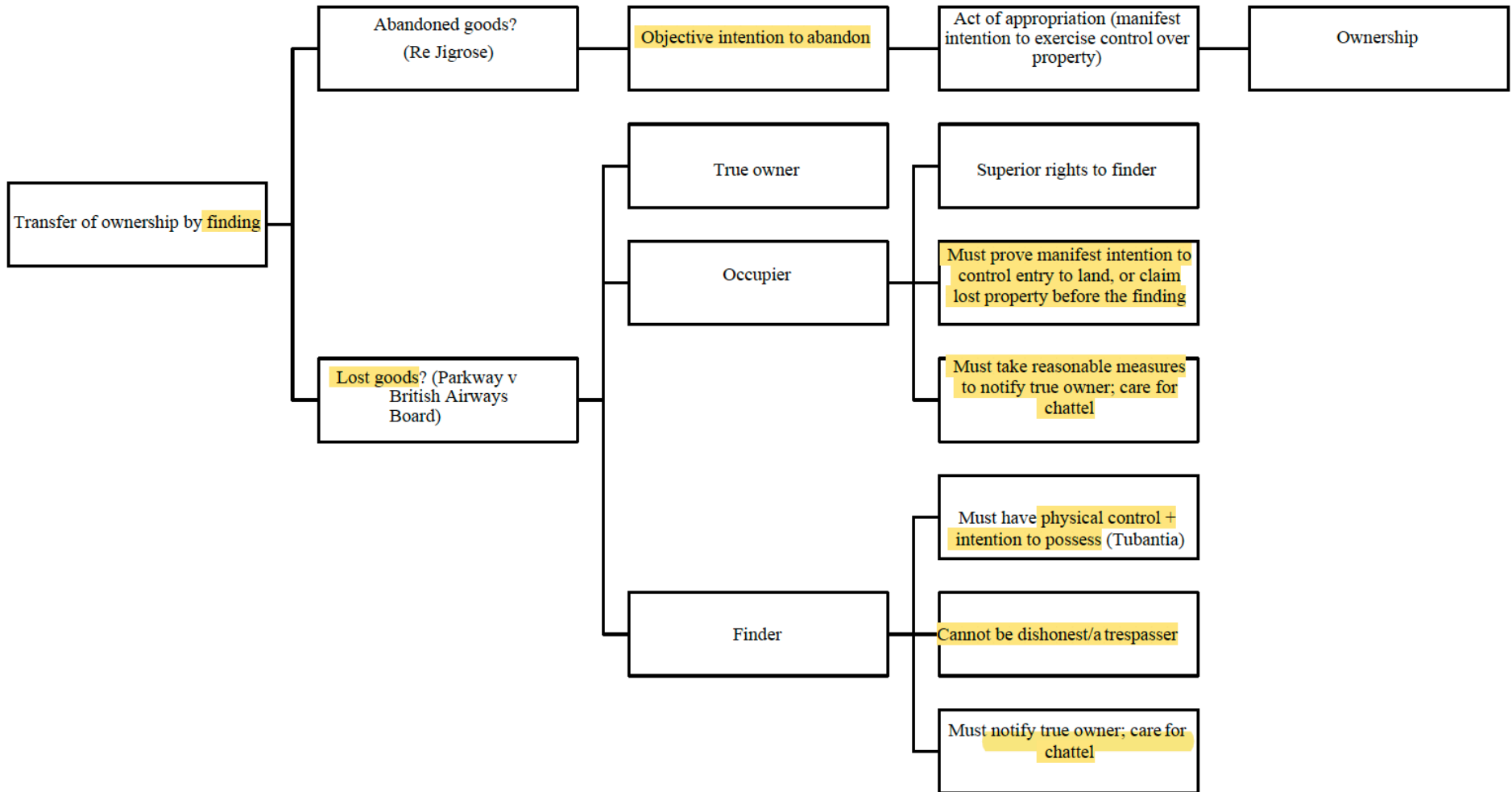
- ✓ **What type of property are we dealing with?**
- ✓ **Is the property a present property right or future property?**
- ✓ **The assignment of the interest in present property?**
 - Assignment of LEGAL property interests at LAW
 - Assignment of LEGAL property in EQUITY
 - Voluntary assignment:
 - Assignment for value:
 - Assignment of EQUITABLE property
 - Declaration of trusts
 - Agreements to declare a trust
 - Self-declaration of trust
 - Assignment of existing equitable interest
 - The assignment of FUTURE property in EQUITY

TOPIC 5A. PRIORITY REGIMES

- ✓ **Conflicting interests from the sale of goods?**
- ✓ **General conflicting interests**

Topic 2: Personal Property - Choses in Possession

- Note: ownership = bundle of rights:
 - Ownership confers on the owner the competence to enjoy, use, possess, dispose of and alienate the object, as well as the capacity to ward off any encroachment on the object (exclude others)



Transfer of ownership by finding

1. What is the property?
 - Goods/chattel
2. What are you trying to do with it?
 - Transfer ownership
3. What is the governing regime?
 - Common law

1. Have the goods been abandoned?	
<ul style="list-style-type: none"> • There must be an objective intention to abandon on the part of the original owner: Re Jigrose <ul style="list-style-type: none"> - Throwing away something = objective intention to abandon - If no clear act, look at terms of K to ascertain intention • Then the new person must perform an act of appropriation (taking the property to oneself as one's property): Re Jigrose <ul style="list-style-type: none"> - Act manifests intention to exercise control over the property (i.e. an intention to exclude others) • THEN ownership of the goods will have transferred to the new person 	<p><u>Cases</u></p> <ul style="list-style-type: none"> • Re Jigrose: <ul style="list-style-type: none"> - Intention to abandon = the clause in the contract saying that property not moved would be deemed to be abandoned considered equivalent to representation by vendor that it had no further interest in chattels - Act of appropriation = purchaser putting padlock on gate, clearly precluding vendor from coming back onto property
2. OR are the goods lost?	
<ul style="list-style-type: none"> • If the goods were instead lost, ownership to a new person is transferred differently (Parkway v British Airways Board): <ul style="list-style-type: none"> → <u>If the new person is an occupier:</u> <ol style="list-style-type: none"> a) Have superior rights to finder over chattels in or attached to land, whether or not they are aware of presence b) Must prove manifest <u>intention to control entry to land</u>, or claim lost property before the finding 	<p><u>Cases</u></p> <ul style="list-style-type: none"> • The Tubantia: <ul style="list-style-type: none"> - Questions to ask re physical control: <ol style="list-style-type: none"> 1. What kind of use and control is the thing practically capable of? 2. Has physical control been applied to the thing as a whole or in part?

- ♦ Bank vault – manifest intention to exercise a very high degree of control. Park – public has access; no manifest intention to exercise such control
 - ♦ In Parkway, on facts, British Airways didn't fulfil this criterion - no indication they had intended to exercise control over the lounge in that way
- c) Must take reasonable measures to ensure lost chattels are found; to notify true owner; care for chattel

→ If a finder:

- a) Acquires rights to keep against all [b/c you get legal possession] but true owner [if goods have not been abandoned] or person who asserts prior right [i.e. occupier]
- b) Must have physical control + intention to possess (The Tubantia)
- c) Can't have been dishonest/a trespasser
- d) Must notify true owner; care for chattel

→ NB: rules qualified if you're finding in your capacity as a servant or agent:

- Finding in the course of your employment or agency = you find on behalf of employer or principal

3. Sufficient occupation to prevent others from taking?

- In this case, the Court found that:

1. There was the use and occupation of which the subject matter was capable. There was power to exclude strangers from interfering if the Ps did not use unlawful force. The Ps did with the wreck what the purchaser would prudently have done.
2. Unwieldy as the wreck was, they were dealing with it as a whole.
3. On the facts there was sufficient control (even though divers could clearly not bring up whole wreck).

• Fed Commissioner of Taxation v ANZ: control in a statutory context

- Bank had key to safety deposit box
- The ability to physically produce an item will be sufficient for there to be control and possession of that item and this will not be affected by contractual obligations which may prohibit the production of the relevant item

Tutorial Q&A (SAMPLE)

Tutorial 2 Q&A

The Green Bicycles

- (a) **Characterisation:** Is this a contract for the sale of goods or a contract for labour? There was an agreement to supply 10 bicycles, painted green, constructed by W to C's design. In *Robinson v Graves*, it was held that the mere fact that you use skill to implement the design is not enough, in itself, to make it a contract for labour. More information is needed about the design – namely, as to how detailed or demanding the design was. If it was a straightforward design, and in the absence of contrary facts, it is likely to be a contract for the sale of goods.
- (b) **If it is a sale of goods:** Is this a contract for sale? Are the bikes „goods“?
- ☐ Under s 5(1) of the *Sale of Goods Act*, bikes are clearly „goods“.
 - ☐ Similarly, this fulfils the requirements of s 6(1) as a contract of sale where R agrees to transfer the property to C for valuable consideration.
 - ☐ The facts here, however, suggest an „agreement to buy“, a binding agreement (*Helby v Matthews*), and there is a price – that is, it is a sale, not a gift.
- (c) **Has property passed?** Under s 22 of the legislation, property passes when the parties intended the property to pass. But s 22 only applies to specific or ascertained goods. Specific goods are defined in s 5 as „goods identified at the time of the contract“. Ascertained is not defined in the *SOGA*, but it is generally understood to mean goods identified after the the time of the contract (*Goldcorp*). At the time of the contract, there were no bikes. They cannot, therefore, be specific goods. They must be ascertained, that is, come into existence after the date of the contract.
- ☐ To gauge the intentions of the parties, under s 22(2), you have to look at the terms of the contract (which are not available here), the

conduct of the parties, and the circumstances of the case. The conduct is minimal – but payment on delivery was specified. Thus, this clearly indicates that property was intended to pass at payment on delivery. However, there is little other than this to determine the intention of the parties.

- (d) **Section 23:** If intention cannot be determined by s 22, look to the s 23 Rules, which apply to specific or unascertained or future goods. Future goods are manufactured after the making of the contract of sale, such as the green bikes. Thus, the relevant rule is Rule 5. The additional criterion is that the goods are in a „deliverable state“, that is, goods that are in such a condition that the buyer would be forced to accept them. Furthermore, it must be unconditionally appropriated to the contract either by the seller with the consent of the buyer or by the buyer with the consent of the seller. Following the principles set out in *Carlos Federspiel* the bikes were by a specific design; they were placed in a loading dock; and an email was sent to inform the buyer that they were ready – though, no reply was received. It is the buyer who needs to consent in this circumstance: but this consent can be delivered in advance (*Carlos Federspiel*). Perhaps giving the design over qualifies as consent – but if it is not, then there was no response to the email and, as such, the buyer had not accepted the consent. On that basis, property may not pass.

The Black Bicycles

- (a) **Characterisation:** Is this a contract for sale or labour? Here, the goods are selected from a catalogue; no special labour being required. Clearly, therefore, this is a contract for the sale of goods.
- (b) **Since they were identified in the catalogue, but not physically, specifically identified,** they are not specific but unascertained goods. Thus, as stated

above, the same principles apply to the green bikes – intention cannot be established under s 22.