

TOPIC ONE:

(A) THE CONCEPT AND FUNCTION OF PROPERTY

(B) REAL PROPERTY – INTRODUCTION TO REAL PROPERTY

Introduction to general property and concepts

What is property?

- Property rights are rights to things
- When lawyers talk about property, they are usually referring to the rights which people have to things, rather than the things themselves
- Legal rights are divided into personal rights and property rights
 - Whether a particular right counts as property depends on why it matters
 - The distinction between personal rights and property rights is based on their enforceability
 - *Rights in personam* - rights enforced against particular persons, without much regard to the things they might have – does not require the existence of a particular thing
 - *Rights in rem* – rights people have concerning particular things, without much regard to the people against whom those rights might be enforced – property law is primarily about rights in rem
 - A right in rem depends on the continued existence of the thing to which the right relates
- Property means any right that can be transferred from one person to another
 - Definitions of property are those based on the assignability of rights – when defined in this way, property includes everything that might be regarded as wealth or which an accountant might list on a balance sheet
 - Excluded, are personal rights
 - BUT if we base the definition of property based on assignability, the scope will be too wide therefore, the definition of property is based on the enforceability of rights and not their assignability

Characteristics of property rights

- The key differences between property rights and personal rights are two fold
 - Property rights are always in relation to a particular thing
 - Property rights are enforceable against a wide range of people (not just against specific persons)
- The rights associated with property are:
 - To use and enjoy
 - Efficient allocation of resources (measured by a willingness to pay) will maximise the total wealth of society
 - Exclude
 - The right to use and exclude provide incentive to put resources to their most productive use
 - Alienate and transfer
 - The right to alienate allows resources to move to more highly values uses through mutually beneficial exchange

The variable meaning of “property”

[CASE] *Yanner v Eaton* (1999)

- Facts:
 - Yanner was an Aboriginal man of the Gunnamulla clan and was charged with the taking of a crocodile without a license, this was believed to be contrary to the Queensland Fauna Conservation Act (1974)
 - A magistrate found that the man’s clan had a connection with the land from which the crocodiles were taken which had existed before the common law of the colony of Queensland had come into being and which continued thereafter. He also held that it was a traditional custom of the clan to hunt juvenile crocodiles for food
 - The charge was dismissed on the basis that s211 of the Native Title Act applied
 - Eaton applied for a review of this decision arguing that any native title right or interest to hunt crocodiles, which the man may have enjoyed, was extinguished prior to the commencement of the Native Title Act by enactment of s7(1) of the *Fauna Conservation Act*
- Held:
 - “Property” is a term that can be, and is, applied to many different kinds of relationships with a subject matter
 - It is not “a monolithic notion of standard content and invariable intensity”
 - What interest in fauna was vested in the Crown when the Fauna Act provided that some Fauna was “the property of the Crown and under the control of the Fauna Authority”?
 - The High Court held that property does not mean ownership, it means a lesser bundle of rights which does not extinguish Native Title
 - When the Fauna Act mentioned that there is property in the Crown, it is vesting rights expressly given by the act, not the property itself, this is not considered to be absolute ownership
 - Yanner was held to be not guilty of infringing the Act because he was exercising Native Title rights

Contractual vs Proprietary Rights

[CASE] *King v David Allen and Sons Billposting* (1916)

- Facts:
 - King owned land and agreed with Billposting that it would have the sole right for 4 years to affix advertising on the walls of a theatre which was to be built on the land
 - Subsequently, King leased the land to a third party (the lessee) which built the theatre
 - The lease did not refer to the agreement between King and Billposting
 - The Lessee refused to allow Billposting to affix advertising on the wall of the theatre, as contemplated by Billposting’s agreement with the King
 - The Billposting company sued King for breach of contract
 - King unsuccessfully argued that the agreement with Billposting created an interest in land that was enforceable against the Lessee and therefore that King was not in breach of the agreement
 - King’s defence was that the lessee had improperly prevented the posting of advertising material on the wall of the theatre and in doing so, this prevention is improper because the agreement created a proprietary right between “us” and third parties

Definition of land

The Doctrine of Fixtures

- A fixture is a chose in possession (chattel) that has been attached to or is resting on land in such a way that it has lost its legal identity as a separate object and has become a part of the land
- There are two factors which are used to determine whether goods have become fixtures:
 - The degree of annexation (extent of attachment to the land)
 - The object of annexation (apparent purpose of attachment)
 - *Palumberi v Palumberi*
- The Doctrine of Fixtures is relevant in issues in the context of:
 - The sale of land:
 - If an item has become a fixture, it will pass with the sale unless the contract excludes it, if something is not a fixture it is not going to pass unless it is expressly included
 - Chattels – the vendor keeps them unless included in the sale
 - Mortgage of land:
 - Granting the bank a mortgage of the land and its fixtures; chose in possession not covered
 - Lease:
 - E.g. I lease you land and as a tenant you install something, if it becomes a fixture, I then become entitled to the land and the fixtures but tenants have a right to remove the fixtures at the end of the lease, if not removed they are part of the land
 - if I leave a will, I leave real property to x and property to y whether this item is a fixture or chattel is an important consideration
 - Parties to a contract can agree whether an item is a fixture or chattel
 - Life tenant v remainderman
 - Succession
 - If a third party is involved, they wouldn't be bound by whether the item is a fixture or chattel

When answering a fixtures problem question

Refer to:

- Initial presumption [then refer to the purpose and object of annexation]:
 - If something is resting by its own weight it is presumed to be a chattel, the burden is on the person that is asserting it is a fixture to prove that it is a fixture
 - If something is attached to the land, it is presumed to be a fixture, the burden is on the person that think that it is a chattel to prove that it is a chattel
 - *Belgrave Nominees Pty Ltd v Barlin Scott Airconditioning*
 - In this case, the air conditioning unit was connected by water pipes to the building and the court said even though the connection was slight, it was enough to say that it was a fixture
 - Whether the intention of the party fixing the chattel was to make it a permanent accession to the freehold [intended to become a part of the land itself or not] is to be inferred from matters and circumstances, including the following:
 - The nature of the chattel
 - The relation and situation of the party making the annexation vis a vis the owner of the freehold or the person in possession
 - Mode of annexation
 - The purpose of annexation

[CASE] *Re Cancer Care Institute of Australia* (2013)

- Facts:
 - This case was about linear accelerators used in the radiotherapeutic treatment of people with cancer
 - The linear accelerators were owned by Varion who sold the equipment to CCIA (so now the linear accelerators are owned by CCIA but a personal property security interest was granted by CCIA because they could not afford to pay for it (this resulted in the security interest))
 - CCIA installed the accelerators in a suite of a medical centre owned by Cortez
 - CCIA occupied the suite as a tenant at will, they had a lease that could be terminated at any time
 - Cortez granted two mortgages to two financial institutions
- Issue: Have the linear accelerators become fixtures or not?
 - In theory, the litigation is between Cortez (the owner of the land) and CCIA, the owner of the equipment, but ultimately, the equipment will go to Varion, if it is a chattel and if it is a fixture, it will go to the mortgagees
- Held:
 - The accelerators are bolted to a frame which is cemented to the floor of the suite
 - They can be detached from the frame easily
 - Were the two linear accelerators, worth 9 million, used for radio therapy in the treatment of cancer, fixtures or chattels?
 - Because the linear accelerators could be detached and placed elsewhere, they were considered to be separate items, the legal status of the frame's fixture did not mean that the linear accelerators were fixtures
 - If it was one item, then it is considered to be a composite item – one item made up of separate discrete parts
 - The linear accelerators had separate and independent viability, even if we regarded it all as one item, it was one item with separate parts – the frame was a fixture, not the linear accelerator itself
 - The court concluded that the linear accelerator had not become a fixture
 - Cortez argued that he had designed the premises so the linear accelerators could be installed and used there and that it had become a fixture because it enhanced the enjoyment of the building
 - The court rejected this argument, because it is the objective intention of the person that brings the chattel onto the land that determines whether the item has become a fixture or not
 - Therefore, the intention of the CCIA should be considered – this is determined objectively, what would the reasonable bystander have assumed the intention of CCIA to be?
 - The actual intention of CCIA is important because it helps determine what the reasonable person would have intended – refer to paragraph 26
 - Substantial damages not caused because they were regularly removed, they were easy to unclamp
 - Therefore, the intention of CCIA was unlikely for them to be considered as fixtures
 - CCIA intended to retain ownership
- A tangential point:
 - Cortez argued that the equipment had become a fixture because it contributed to the overall architectural design of the building

- their argument derives from *Gregory* (1866) – marble fixtures were resting by their own weight (chattel) but the intention of installing them was to give a certain design and aesthetic, so its not enjoyed as separate object but for the enjoyment of the overall manor house
- Did not apply in this case

The special rights of tenants – when there is a dispute regarding a fixture between a landlord and tenant

- A tenant installed an item – they could have the objective intention for the item to not be considered as a fixture, it could be for the improvement of the land but that does not mean that it has become a fixture because the tenant still has the right to remove it at the end of the lease if two conditions are met:
 - Installed for trade, domestic or ornamental purposes
 - Not have been firmly attached that removal would destroy the essential character or value of the item, or cause substantial damage to the realty
 - If damage is caused to the item or land, it is considered as the landlord's fixture and cannot be removed by the tenant