

## A. MID-SEM EXAM SCAFFOLDS

The following content relates to the mid-semester exam (Topics 1-2).

### 1. FIXTURES & TRANSFERRING INTERESTS IN LAND

#### 1.1 FIXTURES

1. First preliminary consideration: is the item one or more items? I.e. can it be separated like the CCIA machines?
  - a. Were the two items installed separately or together? Is it normal practice to move one and leave the other? *Are they independently viable?* (CCIA)
    - i. If the chattel is 'composite', and each component is independently viable, it may be possible that part of the chattel is a fixture, while the other part remains a chattel (*Eon Metals NL v Commissioner of State Taxation*; *Macrocom Pty Ltd v City West Centre Pty Ltd*)
2. Second preliminary question: is the issue of whether or not the items are fixtures dealt with in any lease/tenancy agreement?
3. Address presumption: is the thing kept in place by its own weight, or attached to the land (*Coroneo*; *Holland v Hodgson*)?
  - a. Something which cannot be removed from the land without causing permanent injury to the land or goods will most likely be a fixture (e.g. paint) (CCIA)
  - b. 'Even slight fixing to the land is sufficient to raise the presumption that a chattel is a fixture' (*Belgrave Nominees*)
  - c. If the chattel is fixed to the land by means other than its own weight, the prima facie it is a fixture. If it is kept in place only by its own weight, then it is prima facie not a fixture (*Coroneo*)
4. What is the degree of affixation? Is it practical to remove the item from the land?
  - a. The greater the degree of annexation, the more likely the item is a fixture (CCIA)
  - b. Item will be fixture where it cannot be removed without injury to the land or goods (CCIA)
5. Consider objective purpose of annexation (determinative test):
  - a. Was the item joined to the land for its better use as a chattel or for the improvement of the land?
    - i. Air conditioning units obviously for improvement of land (*Belgrave*)
    - ii. Art may remain a chattel where affixed in a way intended for ease of removal (*Leigh v Taylor*)
    - iii. Was the item affixed to the land for only temporary purposes? (*Pukuweka Sawmills Ltd v Winger*)
      1. Alternatively, was it resting by its own weight, but for a permanent function? (*Monti v Barnes*)
      2. Note that issues of permanency are persuasive but not conclusive (*Coroneo*)
    - iv. A painting affixed to accentuate the architectural features of the room may be a fixture (*Re Whaley*); a painting affixed merely to display its beauty may not be a fixture (*Berkley v Poulett*)
    - v. An intention to permanently improve the land is easier to impute to an owner than a lessee, as a lessee is unlikely to intend to make a present of the item to the landlord (CCIA; Butt's Land Law)
    - vi. Was the item affixed merely to *steady* it? If so, may not necessarily be a fixture (*AG v RT Company*; *NH Dunn Pty Ltd v LM Ericsson Pty Ltd*)

- vii. Machinery affixed to concrete base held to be a fixture where installed to promote the use of the land to make bricks (*Commissioner of Stamps (WA) v L Whiteman*)
  - viii. Affixture by concreting does not necessarily make the item a fixture where it may be removed relatively easily and without excessive damage to the land (*Anthony v Cth*)
6. Is the item a tenant's fixture?
- a. Must have been installed for trade, domestic or ornamental purposes (*Reid v Smith*); and
  - b. Must not have been so firmly attached that removal would destroy its essential character or value, or cause substantial damage to the realty (where removal would cause such damage, the fixture is a 'landlord's fixture')
    - i. Tenant generally able to remove fixture where it would not cause irreparable damage to the land (*Spyer v Phillipson*)
    - ii. Where removable, objective purpose of annexation is main consideration:
      - 1. Repairs and structural additions considered permanent improvements
      - 2. Expensive items are assumed not to be intended as valuable gifts to others (*Registrar of Titles v Spencer*)
  - c. Tenant's fixtures may be removed by the tenant at the conclusion of the lease or during a reasonable time thereafter (*Lees v Leech; McMahon v Ebbage*)
  - d. The owner of a chattel leased under a hire-to-purchase contract may remove it from leased land upon default, notwithstanding the fact that it may be a fixture (*Kay's Leasing Corp*).

### 1.2 NATIVE TITLE

1. The acquisition of sovereignty by the Crown (conferring radical title) does not create absolute beneficial title of the land alone sufficient to extinguish native title. Native title will subsist unless it is legally inconsistent with the Crown's grant of an interest in the land (either by legislation, through the tenurial powers of the crown, or by the exercise of plenary power (*Mabo (No 2)*)).
2. Have the laws and customs regarding traditional use of the land been maintained? (*Mabo (No 2)*)
3. If they have been maintained, have they since been extinguished?
  - a. Extinguishment may occur through legislation, through the tenurial powers of the Crown, and through the exercise of plenary power (*Mabo per Brennan J*)
  - b. Right must be *inconsistent* with native title rights (*WA v Brown*)
    - i. Inconsistency is question of law, not fact (*Brown*)
    - ii. Fee simple, lease will extinguish native title (as they confer a right to exclusive possession) (*Brown*)
    - iii. The grant of rights to use land for specific purposes (e.g. pastoral, mining) will not necessarily extinguish native title rights where there is no right to exclusive possession (*Wik; Ward*)
    - iv. Native title will only be extinguished *to the extent* of inconsistency (*Brown*)

### 1.3 TRANSFERRING LEGAL INTERESTS

Both substantive and formal requirements must be met in order to transfer a legal interest in land.

Firstly, identify the interest in property seeking to be transferred in order to determine whether substantive requirements have been met:

- Fee simple, mortgage, lease can all be legal *or* equitable

- a. Freehold estates:
    - i. Legal fee simple: exclusive possession for unlimited duration
    - ii. Legal life estate: exclusive possession for period of life of the holder
  - b. Leasehold estates: exclusive possession for fixed term of certain duration
  - c. Easements: a right for a dominant landowner to use/restrain use of servient (nearby/adjacent) land in a manner not inconsistent with the servient owner's continuing ownership (e.g. right to use shared driveway)
  - d. Profit a prendre: right to enter servient land and remove natural produce (e.g. natural vegetation, wild animals)
- Express and constructive trusts can *only* be equitable
  - **Look out for contractual interests:** if the interest in the land cannot fit into any of the above categories, and further cannot be characterised as an easement, then it is likely a contractual interest in the land only, not a property interest (contractual licence). Property interests will prevail over contractual interests – contractual rights are only enforceable *in personam*, meaning the promisee's only course of action is a claim for damages against the promisor (*King v David Allen and Sons*).

Then ask: have formalities been met to grant interest?

### 1. Old System land:

- a. Requires deed to pass interest (CA s 23B(1))
  - i. Requirements of a deed:
    - 1. Must be written (paper, parchment or vellum)
    - 2. Signed, sealed, and attested by one witness not a party to the transaction (CA s 38(1))
    - 3. Deemed to be sealed if expressed to be an indenture or a deed or to be sealed and if signed and attested (CA s 38(2))
    - 4. Indenting not necessary (CA s 38(2))
    - 5. Deeds may be electronic (CA s 38A))
- b. Exception: deed requirement does not apply to lease or tenancy not required by law to be made in writing (s 23B(2)(d))
  - i. Lease which can be created without writing must have following characteristics (s 23D(2)):
    - 1. Created by parol (oral)
    - 2. Term (incl. option to renew) does not exceed 3 years
    - 3. At the best (i.e. market) rent
    - 4. Taking effect in possession (i.e. immediate right to possession)
- c. Result: if either (a) deed requirements are met; or (b) exception to deed requirements are met, then legal interest in the property (fee simple/mortgage/lease) is transferred
- d. Old System Mortgage:
  - i. Old System mortgage involves the transfer of legal title to the mortgagee; title is to be transferred back once debt is paid (mortgagor retains an equity of redemption) (*Figgins; Coroneo*)
  - ii. There cannot be more than one legal mortgage in land, but equity of redemption can be mortgaged