

Commercial Law

Finders and Gifts	2
Bailment.....	7
Agency.....	19
Guarantees.....	31
<i>Bills of Exchange Act 1909 (Cth)</i>	35
<i>Cheques Act 1986 (Cth)</i>	42
<i>The Personal Property Securities Act 2009</i>	47
<i>Sale of Goods Act 1923 (NSW)</i>	54
ACL Guarantees.....	70
Section 18 Problem Question	77
Conduct.....	77
'In trade and Commerce'	79
Misleading and Deceptive Conduct	84
Disclaimer Clauses	87
Ancillary Liability	89
Reliance and Damages	89
Apportioning Liability.....	93
Unfair Contract Terms	95
Case List	97
Vendor-Purchaser	97
Provision of Finance.....	99
Public representations	100
Landlord Tenant	102

Finders and Gifts

- Ownership and possession
 - A person has possession of an object at law if he or she has control of it and intends to retain the control (*Penfold Wines v Elliot*)
 - Possession confers a right to retain control of an object against any other person except the person who has rights of ownership in the object (*Armory v Delamirie*)
 - Thus, possession is good against the world except for the true owner.
- Finders
 - Abandonment
 - First, there must be abandonment before the finder or occupier can claim ownership of the chattel. There must be 'evidence which establishes an express intention to abandon or from which such an intention might be inferred' (per Samuels JA in *Moorhouse v Angus and Robertson (No 1) Pty Ltd*)
 - In that case, the elapsing of 7 years before the plaintiff demanded the return of the property (manuscript) was insufficient grounds to infer the plaintiff had intended to abandoned ALL rights in it
 - Intention to abandon:
 - Enables the finder/occupier to have a superior possessory title against all but the true owner of the chattel (*Armory v Delamirie; Munday v ACT*)
 - If no intention to abandon:
 - The finder takes into possession a chattel which has not been abandoned, he/she commits no wrong but simply becomes a gratuitous bailee (*Parker v British Airways Board; Kowal v Ellis*) unless the finder had an intention to permanently deprive (*Hibert v McKiernan*)
 - As a result, finder is under a duty to (*Isaac v Clark*):
 - take reasonable steps to locate the true owner
 - take reasonable steps to inform the true owner of the fact that the chattel has been found and of its current location
 - exercise reasonable care for the safety of the chattel until it is returned to the true owner
 - return the chattel to the owner upon demand
 - Onus
 - Moreover, as a gratuitous bailee, [finder] bears the onus of proving he/she took reasonable care of the goods (per Diplock LJ in *Morris v CW Martin & Sons Ltd*)
 - Give to police
 - Can discharge this duty by handing chattel over to police (per Donaldson LJ in *Parker British Airways*)
 - Effect
 - Breach of gratuitous bailee duties
 - Unlawful taking by stealing/trespassing
 - Thief v Occupier
 - It was held in *Hibert v McKiernan* that, even if the owners of the chattel had abandoned it (which was not in that case), 'every householder or occupier of land means or intends to exclude thieves and wrongdoers from the property' to the effect that their 'felonious intent' deprives them of a good claim of right (per Lord Goddard CJ)
 - Thief v not-occupier
 - In *Costello v Chief Constable of Derbyshire Constabulary*, the thief of a car was held to have a possessory title good against the world except for the true owner.
 - As Lightman J explained, people obtaining property by 'theft or other unlawful means' are afforded 'the same legal protection' as people who gain the property without unlawful conduct. The mere fact that 'public policy' or 'natural moral disinclination' urges the thief to be deprived of a possessory title is insufficient.
 - Thus, in that case the thief was able to retake possession of his stolen car from the police.
 - Nevertheless, the thief may still be charged with larceny (*Hibert v McKiernan; Costello v Chief Constable*)
 - Title to sue
 - As finders have actual possession, they have the title to sue (*Armory v Delamirie*)
 - Is one of the parties the rightful owner?
 - The finder of abandoned good, if acting honestly, has a superior possessory title against all but the true owner of the chattel (*Armory v Delamirie; Munday v ACT; Gatward v Alley*)
 - Attached or inside land
 - Lawful owner wins
 - Where an object was found in or attached to land, the owner or lawful possessor of the land has a better title to the object than the finder (per Donaldson LJ in *Parker v British Airways Board; Waverley Borough Council v Fletcher; South Staffordshire Water Co. v. Sharman*)
 - Doesn't matter owner of land didn't know of its existence (*Elwes v Brigg Gas Co*)
 - Treasure troves- conflicting authority
 - However, 'treasure troves' belong to the Crown by virtue of the Crown's proprietary prerogative (*Attorney-General v Trustees of the British Museum; FCT v Official Liquidator of E O Farley Ltd*)
 - Treasure troves include
 - Silver or gold (*Attorney-General of the Duchy of Lancaster v GE Overton (Farms) Ltd*)

- Goods that are not merely 'lost', but instead they have been hidden in the ground or in a building with the intention of being recovered and this will be presumed if the goods are found buried and lying all together in one place (*Attorney-General v Trustees of the British Museum*)
- Articles found on land
 - Where the object was unattached on land, the owner or lawful possessor only has a better title than the finder where he had exercised such 'manifest control over the land as to indicate an intention to control it and anything found on it' (per Donaldson LJ in *Parker v British Airways Board*; *Waverley Borough Council v Fletcher*; *South Staffordshire Water Co. v. Sharman*)
 - Proving intention
 - Regularly searching for lost property in the area (*Parker v British Airways Board*)
 - Accepting liability voluntarily or by law, such as the innkeeper and carrier's liability (at 1018)
 - A 'Lost and found' area
 - Signs stipulating the owner intends to keep all things within the property
 - Residential premises
 - If the chattel is found in residential premises, there is a rebuttable presumption that the requisite manifestation of intention to possess all chattels on the premises is fulfilled (*National Crime Authority v Flack*)
 - Disproving intention
 - Where the occupier was under no obligation to take such reasonable measures to ensure that the lost chattels are reacquired with the true owner, and no obligation to care for the chattels pending the discovery of the true owner, then the occupier evinced no manifest intention to control the lost good (*Tamworth Industries Ltd v A-G*; *Parker v British Airways Board*)
- Rights of agents/employees/servants
 - 'Unless otherwise agreed, any servant or agent who finds a chattel in the course of his employment or agency and not wholly incidentally or collaterally thereto and who takes it into his care and control does so on behalf of his employer or principal' (per Donaldson LJ in *Parker v British Airways Board*; *City of London Corp v Appleyard*)
 - However, where the employment is not the cause of the finding but merely incidental to it, employee is entitled to the goods (*Byrne v Hoare*)
- Between lessee/lessor (occupier vs owner)
 - If the chattel is in the land, it belongs to the lessor (*Elwes v Brigg Gas Co*). Otherwise, lessee is the rightful owner because he/she is the occupier.
- Liability
 - Negligence of agents
 - The finder is liable for the negligence of his or her servants or agents in carrying out any instructions within their authority in relation to the goods (*Newman v Bourne & Hollingsworth*)
 - Delivered to wrong person
 - The finder is liable for conversion if the goods are delivered to the wrong person (*Isaac v Clark*)
- Gifts
 - A gift is effective when the donor intended to make a gift and the donee received the thing given and kept it, knowing that he got it (*Dewar v Dewar*)
 - Elements
 - If no co-ownership is envisaged, the elements of a gift are (per Mayo J in *Knapp v Knapp*; *Handshin v Hackett*):
 - 1) Intention by donor to give absolute right to exclusive enjoyment
 - 2) There is delivery of the chattel
 - 3) The donee accepts the gift in a timeframe that meets the donor's intentions
 - 4) To be a gift there must be an absence of valuable consideration so it's not a sale or barter.
 - Delivery effected by:
 - The transfer of possession (per Lawrence J in *Stoneham v Stoneham*; *Irons v Smallpiece*)
 - Actual transfer of possession
 - Here, there is an actual transfer of possession through:
 - the deliverer (X) handing property to the donee OR
 - the donee simply taking it from where it resides with the permission of the deliverer (*Cochrane v Moore*)
 - [Donee] has effective occupation or control
 - Constructive transfer of possession
 - Big chattel/too many
 - Here, there is a constructive transfer of possession because the nature/bulk of the goods renders manual delivery impossible or impractical, therefore some act symbolising delivery is sufficient (*Rawlinson v Mort*; *Nolan v Nolan*)
 - In *Rawlinson v Mort*, a gift was effected when the donor put his hand on a church organ in the presence of the donee and expressed gestures and words of gift.
 - Good is small enough to be delivered
 - However, where actual delivery is possible, merely showing the donee the chattels and then stating words of gift is insufficient (*Re Cole*)
 - Common custody/possession

Edward Chen

- If the chattels are in common custody between the donee and donor, or the donee had possession before accepting the gift (*Winter v Winter*), an expression of donative intention will establish delivery (*Horsley v Phillips Fine Art Auctioneers*)
 - In that case, the delivery of furniture in common custody (but the donee did not own the furniture) only required an unequivocal statement they'd give the property to the donee (the mother). Acceptance was shown by a 'champagne celebration'
- Declaration of trust
 - Embodied in a deed
- Donee wanted to repay
- The donee's intention to regard the gift as something else, such as a loan, is immaterial because a valid gift only is concerned with the intention of the donor (*Dewar v Dewar*)

<ul style="list-style-type: none">• <i>Armory v Delamirie</i> (1722) 93 ER 664: ~CHIMNEY SWEEPER'S CASE~ -Armory found a jewelled ring while cleaning a chimney. He took it to Delamirie, a jeweller, for appraisal (valuation). Delamirie's apprentice took the stones from their sockets, and Delamirie offered to give the ring back to Armory for a very low price (3 pence). Armory sued in trover for money damages for the value of the jewels. -Held the finder has superior title to everyone except the rightful owner. -Delamirie was liable for his apprentice's actions
<ul style="list-style-type: none">• <i>Bridges v Hawkesworth</i> (1851) 21 LJ QB 75: ~ROLL OF BANKNOTES~ -Customer of a shop found a roll of banknotes on the shop floor -Held the customer was entitled to the banknotes as the shopkeeper didn't display an intention to control everything on the premises.
<ul style="list-style-type: none">• <i>Byrne v Hoare</i> [1965] Qd R 135: ~POLICEMAN SUPERVISING CINEMA FOUND INGOT OF GOLD~ -Plaintiff policeman was performing special duty at a drive-in cinema. While walking towards the area where he was to supervise traffic leaving the drive-in, he found a small ingot of gold. He claimed the ingot as against the Crown. -Held he found the ingot in the same position as any casual passer-by and that the performance of his duties was not the real or effective cause of the finding. -Thus, he was entitled to ingot.
<ul style="list-style-type: none">• <i>Costello v Chief Constable of Derbyshire Constabulary</i> [2001] 3 All ER 150: ~THIEF OF CAR~ -Police lawfully seized a stolen car from Costello (Costello stole it). Costello was the registered owner of the car. When no proceedings were brought against Costello, and the statutory purposes of the seizure expired, Costello demanded that his car be returned. The police refused to do so, contending that the car was stolen and Costello knew about it. However, the true owner of the car was unknown. -Held the car must be returned to Costello. The 'same legal protection whether or not it had been obtained lawfully' must be applied. -The only exception is if the chattel is unlawful, such as a gun or drugs.
<ul style="list-style-type: none">• <i>Dewar v Dewar</i> [1975] 2 All ER 728: ~MUM GIVING MONEY, GOOD SON INSISTS ON A LOAN~ -Plaintiff and defendant were brothers. The defendant wanted to buy a house so his mum lent him 500 pounds towards the purchase price intending it to be a gift. Although he took it, the defendant always regarded as a loan, intending to pay his mum back for her generosity. When the mother died, her estate passed to the plaintiff and defendant in equal shares. The plaintiff claims that the 500 pounds was a loan, not a gift, so that the plaintiff was entitled to a share in the property. - Held a gift is effective when the donor intended to make a gift and the donee received the thing given and kept it, knowing that he got it. -It was immaterial that the defendant insisted it be a loan unless the mother agreed that it should be a loan.
<ul style="list-style-type: none">• <i>Elwes v Brigg Gas Co</i> (1886) 33 Ch D 562: ~PREHISTORIC BOAT~ -Elwes leased land to Brigg for 99 years. While excavating foundations for a gasholder, Brigg found a prehistoric boat 6 feet below the surface. -Held the owner of the land had a better claim as it was found IN the land.
<ul style="list-style-type: none">• <i>Hannah v Peel</i> [1945] 1 KB 509: ~SOLDIER FINDS BROOCH IN HOUSE~ -Peel was the owner of a house that he had never occupied. The house was requisitioned during the war. The plaintiff soldier stationed at the house, Hannah, found a brooch (pin) in a crevice on a windowsill. The soldier gave the brooch to the police who subsequently gave it to the owner of the house who sold it. There was no evidence that the owner had any knowledge of the existence of the brooch before the soldier found it. -Held the soldier had a better claim to the brooch by virtue of his possession than anyone except the true owner, who could not be found.
<ul style="list-style-type: none">• <i>Knapp v Knapp</i> [1944] SASR 25: ~CAR FOR BIRTHDAY~ -The husband owned a motor car. He said to his wife that he'd give it to her as a birthday present. The husband was the registered owner of the car and was given petrol allowance by the State. The wife had custody of the car and used the husband's petrol allowance. Things went sour and eventually the husband wanted the car back. -Held, applying <i>Handshin v Hackett</i>, that the four elements of gifts if no <u>co-ownership</u> is envisaged are: 1) Intention by donor to give absolute right to exclusive enjoyment 2) The donee accepts the gift through overt conduct 3) The donee accepts the gift in a timeframe that meets the donor's intentions (delivery) 4) To be a gift there must be an absence of valuable consideration so it's not a sale or barter.

-Held in this case, the husband succeeded. The car was still registered as his so he did not have an intention to give exclusive right to his wife. The wife also does not seem to have been allowed to use the car in the timeframe intended by the husband so there was no delivery to her.

• *Munday v ACT* (1998) 99 LGERA 312:

~RUBBISH DUMP SCAVENGING~

-Munday scavenges at the Tip, which is a fenced off Commonwealth area used for waste disposal. The Tip is open to members of the public at specified hours to allow them to dump wastes. For a number of years, a company called Revolve Ltd has been permitted to operate at the Tip to collect and sell recyclable goods. Its employees are allowed to scavenge the Tip for materials. If no one collects the materials at the Tip, they eventually become bulldozed into the ground and covered in soil. In 1994, the government introduced a fee for members of the public accessing the Tip face (to dump materials) and had signs stating only Revolve members could scavenge at the Tip face. Munday refused to accept these terms. The government formally awarded the contractually exclusive right to Revolve for scavenging rights at the Tip face. Munday argued that the materials on the Tip Face are abandoned, probably even by members of the Revolve if they are unable to sell them.

-Held the Territory is entitled to assert control over the abandoned goods in the Tip so that they may exclude other lawful entrants the right to scavenge.

-Held the Territory, however, only can assert this control once possession is abandoned. Thus, there is nothing stopping Munday from convincing the people dumping rubbish to give him the goods, because that would occur before abandonment.

-The occupier of the land has good title against trespassers but not against persons lawfully on the land.

-Until materials are abandoned there, Revolve has no right thereto superior to anybody else.

-Held abandoned goods that are not in the lawful possession of others cannot be stolen.

-Believes law and equity has fused in 172-173

• *National Crime Authority v Flack* (1999) 86 FCR 16:

~MUM WITH DRUG DEALER KID FINDS SUITCASE OF CASH~

-The National Crime Authority executed a search warrant on Flack's property under the suspicion of Flack's son dealing in drug sales. The police found a locked briefcase with \$433,000 in cash. Flack claimed he had never seen that suitcase or money. The police never charged her son, so Flack demanded the money be returned to him.

-Held money was to be returned to Flack.

-Held in residential premises, there is a rebuttable presumption that the requisite manifestation of intention to possess all chattels on the premises is fulfilled.

-The rights of the police to hold onto the money ceased as soon as it served no purpose as evidence in the charge against Flack's son.

• *Parker v British Airways Board* [1982] QB 1004:

~BRACELET IN EXECUTIVE LOUNGE~

-Parker, an outgoing passenger, found a gold bracelet in the Executive Lounge of British Airways. He handed it to a British Airways official with a note that it should be forwarded to him if the owner could not be discovered. Instead of doing so, British Airways asserted that, because the bracelet was lost on its premises, it had the superior right to the bracelet, no owner having been found. The Airways sold the bracelet for 850 pounds and retained the proceeds.

-Held Parker has superior title to the bracelet than BAB. By finding the bracelet, he acquired rights of possessions better than all except the true owner of the bracelet because the Airway lacked the manifestation of intention necessary to have a better right than the finder. By handing it to the authorities, he acted honestly and discharged his obligations as a finder.

-The evidence showed there was no obvious manifestation of intention by the Airway to assert such control over the Lounge and the things in it. That is, it was not clear that the Airways already owned the bracelet before Parker found it. This was shown by not regularly searching the Lounge for lost property.

-Held if Parker had been a trespasser, than his title is inferior to the occupier's title.

• *Ranger v Giffen* (1968) 87 WN (Pt 1) (NSW) 531:

~UNDER THE HOUSE~

- A tin of money was found under a house

-Held the owner of the house has a better title than the finder.

• *Re Cole* [1964] 1 Ch 175:

~HUSBAND SAYS 'IT'S ALL YOURS' TO WIFE ABOUT FURNITURE~

- Husband bought a large home in London and furnished it. He took his wife to see it and said 'it's all yours'. The husband was declared bankrupt several years later and the matrimonial home was claimed by the trustee in bankruptcy.

-Held gift is ineffective by simply showing the donee the chattels and then stating words of gift. There must be the delivery of the gift.

• *South Staffordshire Water Co v Sharman* [1896] 2 QB 44:

~GOLD RINGS FOUND IN POOL~

- Sharman, when cleaning out a pool of water on the plaintiff's land under the plaintiff's direction, found two gold rings. Sharman refused to give the rings to the owner and instead gave it to the police but could not find the real owner.

-Held the plaintiffs were entitled to the rings because the possessor of land generally has a better title for goods found on the land than the finder.

• *Tamworth Industries Ltd v A-G* [1993] 3 NZLR 616:

~CARDBOARD BOX OF CASH UNDER WOODEN FLOORS OF DERELICT BUILDING~

-Police executed a search warrant on Gisborne Refrigerating Co Ltd's land (which was leased to Tamworth) and found, concealed beneath the floorboards of a derelict building, a cardboard box containing approximately \$50,000 in cash. On the same land, beneath another derelict building, a box of cannabis was found. Tamworth owned the adjoining farm. Tamworth had leased both those buildings in the past as tenant but the lease expired a few weeks before the raid. It was established that the money did not belong to him, and the true owner was never found. Entry into the derelict buildings was easy and a number of persons had freely accessed it.

-Held in favour of police.

-Held once the police no longer had a purpose to keep the money, it belonged to the occupier of the premises which was Tamworth. However, there

was no manifestation of intention on Tamworth's part to show that he would try to acquaint the true owner with the chattel and care for it meanwhile. As shown by the building's condition and neglect, evidence showed the Tamworth evinced no intention to assert control over the goods that may be within or on the buildings.

-The money being hidden, not abandoned, does not affect its status as abandoned.

- *Waverley Borough Council v Fletcher* [1996] QB 334:

~METAL DETECTOR~

-The Council owned a park which had several covenants, one being that the park can only be used for recreational purposes such as ball games etc.

The Council declared a policy that no metal detectors were allowed in the park but the notices of this policy were torn down so not to be able to be seen. Fletcher, a lawful entrant onto the park, was unaware of the Council's policy and used his metal detector to find a medieval gold brooch under the soil.

-Held the metal detecting and digging were acts of trespass so Council had a better right to the brooch.

-Also, as it was found in the land, the occupier naturally has a better title than the finder.