

**IPCL**  
**LAWS2012**  
**TOPIC NOTES**

# TOPIC 1 – (A) The Concept & Function of ‘Property’ and (B) Introduction to Real Property

## INTRODUCTION TO GENERAL PROPERTY CONCEPTS

### Introduction to what is property

Property rights are **rights to things**, not necessarily to the things themselves. Understanding property involved two key questions:

1. **What kind of rights does the law consider property rights?**
2. **What things can be subject to property rights?**

### Definitions of Property

The term “**property**” has different meanings in different contexts:

- **Popular/layperson usage:** Refers to physical objects (e.g. land, belongings)
- **Legal usage:** Refers to **rights** people have over thing rather than the things themselves

There are **two** main types of **legal rights**:

1. **Personal rights (rights in personam):** Enforceable **against specific persons** (e.g. contracts)
2. **Property rights (rights in rem):** Enforceable **against the world** (e.g. ownership of land)

### Key considerations

- If a right is **assignable (transferable)**, it may be classified as property, but this is a broad definition
- If a right is **enforceable against the world (in rem)**, it is more narrowly defined as property

### Assignable Rights (Broad Definition of Property)

At its broadest, property includes any **right that can be transferred** (e.g. inheritance, bankruptcy).

### Examples:

- When someone dies, their **estate** (including land, shares, debts) is transferred to an executor.
- In bankruptcy, the **property of the bankrupt** is transferred to a trustee for distribution to creditors  
(*Bankruptcy Act 1966 (Cth) s 58*)

### Limits on assignability

- Some rights cannot be transferred and are **personal rights**, e.g.:
  - o **Voting rights** (cannot be sold or transferred)
  - o **University degrees/professional licences** (cannot be given away) (*Caratun v Caratun (1992) (Ont CA)*)
- If property were always defined by assignability it would overlap with contract and tort law, making property law too broad.

### Rights in Rem v Rights in Personam (Narrow Definition of Property Law)

The most common legal definition of property is based on **enforceability**, distinguishing:

- **Rights in personam** (against a specific person)
- **Rights in rem** (enforceable against the world)

### Example: Money vs borrowed property

- If A **lends \$20** to B:
  - o B has **personal obligation** to repay A (corresponds to A's personal right to be paid \$20, but not expected to be paid the exact same \$20 note back)
  - o A has a **right in personam** (can enforce the debt against B, but not anyone else, regardless of what has become of the \$20 or who it has been given to)
- If A **lends a book** to B
  - o A still **owns** the book
  - o A has right in rem enforceable against B because B still has A's book

- If B gives the book to C, A can enforce their **right in rem** against C
- **Key differences**
  - **Rights in Rem:** Follows the object (e.g. ownership of land, a car)
  - **Rights in Personam:** Follows the person and is enforceable against a specific individual (e.g. contracts, debts)
    - The value of a right in personam depends on whether the obligated person can fulfil it
    - Example:
      - A lends B \$20 → A has a personal right to be repaid
      - If B is financially stable, A's right is effectively worth \$20
      - However if B is in severe debt and unable to pay, A's right remains, but its **practical value is significantly reduced**
  - **If a thing is destroyed:**
    - **Right in rem is lost** (e.g. if A's book is destroyed, A's property right disappears)
    - **Right in personam may still exist** (e.g. A may have a claim for damages against the person who destroyed the book)

### Essential Characteristics of Property Rights

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Two essential characteristics of property rights:

1. **Property rights always relate to a particular thing**
2. **Property rights are enforceable against a wide range of persons (not just specific individuals)**

### Enforceability

- All legal rights have corresponding obligations (e.g. if A owes B \$20, A has an obligation to pay B).
- **Personal rights (in personam):** Enforceable against a **specific person** (e.g. a debtor in a loan)
- **Property rights (in rem):** Enforceable against **everyone in society** (e.g. the right to exclude others from one's land)

### Hohfeld's Analysis of Property Rights

- Hohfeld (in *Fundamental Legal Conceptions as Applied to Judicial Reasoning*) argued that property rights consist of a **large set of similar personal rights** against everyone in society.
- Example:
  - If X contracts with Y to keep off Z's land, X has a **personal right** against Y.
  - However, Z has a **property right** enforceable against **everyone**, including Y.
- **Criticism** of Hohfeld's view
  - It downplays the **importance of the object** of the property rights
  - Property rights do not exist as separate legal relationships with each individual in society – they exist as general obligations **not to interfere**.

### The Existence of a 'Thing'

Property rights must relate to a **tangible or intangible 'thing'**

### Contrast with personal rights:

- The law protects **personal integrity** (e.g. freedom from assault, reputation in defamation), but these are **not property rights** because our **bodies and reputations are not 'things'**
- Example: Cutting off a lock of hair or removing a kidney **can** turn them into 'things' that could be subject to property rights.

### Other Non-Essential Characteristics

1. **Alienability (Transferability)**
  - Property rights are **generally alienable (can be sold or given away)**
  - **Exceptions:** Some rights in rem (e.g. non-assignable leases) are **not** transferable but are still property rights
  - Alienability should be understood as **disposability** (ability to sever the connection to the object), rather than strict **transferability**
2. **Excludability (Right to Exclude Others)**

- a. That person affixes his or her mark to the deed,
- b. The affixing of the mark is attested by a person who is not a party or signatory (except by way of attestation) to the deed, and
- c. The person attesting the affixing of the mark certifies in his or her attestation–
  - i. That, before the mark was affixed, he or she explained the nature and effect of the deed to the person making the mark, and
  - ii. That he or she believed, at the time the mark was affixed, that the person making the mark understood the explanation

2. Indenting shall not be necessary in any case
3. Every instrument expressed to be an indenture or a deed, or to be sealed, which is signed and attested in accordance with this section, shall be deemed to be sealed
4. Every deed executed and attested in accordance with this section may be proved in the same manner as a deed not required by law to be attested might have been proved heretofore.
5. Nothing in this section contained shall affect–
  - a. The execution of deeds by corporations, or
  - b. The provisions of **s 184F(4)**, or
  - c. Any deed executed prior to the commencement of this Act

#### **54A Contracts for sale etc of land to be in writing**

1. No action or proceedings may be brought upon any contract for the sale or other disposition of land or any interest in land, unless the agreement upon which such action or proceedings is brought, or some memorandum or note thereof, is in writing, and signed by the party to be charged or by some other person thereunto lawfully authorised by the party to be charged.
2. This section applies to contracts whether made before or after the commencement of the **Conveyancing (Amendment) Act 1930** and does not affect the law relating to part performance, or sales by the court.
3. This section applies and shall be deemed to have applied from the commencement of the **Conveyancing (Amendment) Act 1930** to land under the provisions of the **Real Property Act 1900**.
4. A contract referred to in subsection (1) is not invalidated or rendered unenforceable only because it has been created in electronic form and electronically signed or attested.

#### **Formalities for the transfer of land**

##### **Legal interests**

- **Common law tradition:** Since the 19<sup>th</sup> century, land transactions required **deeds** to transfer (conveyance) freehold estates
- Statutory provisions:
  - o **New South Wales:** *Conveyancing Act 1919* (ss 23B(1), 23D)
  - o **Victoria:** *Property Law Act 1958* (s 52(1))
  - o **South Australia:** *Law of Property Act 1936* (s 28(1))
  - o **Western Australia:** *Property Law Act 1969* (s 33(1))
  - o **Tasmania:** *Conveyancing and Law of Property Act 1884* (s 60(1))

#### **Manton v Parabolic Pty Ltd (1985) (NSWSC)**

- Young J examined the evolution of land conveyancing rituals, emphasising that legal systems require clear, solemn acts to signify binding agreements
- **Key historical developments:**
  - o **Ancient rituals:** Early land transactions required symbolic actions (e.g. livery of seisin, where landowners transferred possession by physically handing over a clump of soil).
  - o **Introduction of deeds:** By the 17<sup>th</sup> century, written documents (deeds) replaced these symbolic actions as the primary method of land transfer
  - o **Torrens system reform:** The introduction of registration-based systems (e.g. Torrens title) meant that registration, rather than execution of a deed, became the key to passing legal title.

#### **The function of formalities in land transactions**

- **Formal requirements ensure**
  - o Evidence of the transaction → reducing fraud

- D's actions (**anchoring near the wreck, entangling lines, sending divers, and attempting to remove Ps' equipment**) were found to be **unjustified interference** with the P's possessory rights
- The Court **rejected the defence** that the Ds had a right to 'cooperate' with the Ps
  - o *"The Ds interfered intentionally and without justification imperilling the ultimate success of the Ps' salvage operations."*
- **Trespass and wrongful interference were established**

#### Reasoning on possession

- The Court relied on Pollock & Wright's analysis of possession:
  - o **Control must be assessed based on what is practicable for the object in question**
  - o **Possession does not require absolute exclusivity**, but rather the ability to exclude others for practical purposes
  - o **A person acts as a possessor when they treat the thing as their own**, subject to its natural limitations
    - *"Omnia ut dominium gessisse" (to have acted in all respects as the owner) is a good working synonym for 'in possession esse' (to be in possession)"*
  - o Ps' actions were **equivalent to those of an owner**, reinforcing their possessory claim

#### **CONCLUSION & ORDERS**

- Ps were declared to have possessory rights over the *Tubantia* and her cargo
- The Ds were found liable for trespass and wrongful interference
- The court issued an injunction preventing further interference by the Ds
- Damages were referred to the Registrar for assessment
- *"Salvage by means of bold and costly work is of great public importance, and I do not feel bound to reach a conclusion that would discourage such efforts."*

#### **Federal Commissioner of Taxation v Australia and New Zealand Banking Group Ltd (1979) 143 CLR 499**

**FACTS:** ATO issued notices under s 264(1) of the *Income Tax Assessment Act 1936* (Cth), requiring ANZ to produce documents relating to taxation affairs of certain depositors. The relevant docs were stored in safe deposit lockers at the bank's premises, with access controlled by a dual-key system – one key was retained by the deposit, while ANZ held a duplicate for safekeeping. ANZ argued it did not have 'custody or control' of the documents inside the deposit boxes, as required by s 264(1), and therefore could not be compelled to produce them. Commissioner of Taxation argued ANZ had the ability to access and produce the docs, thereby satisfying the statutory requirement.

**ISSUE:** Whether ANZ had 'custody or control' over the docs inside the deposit lockers and was therefore obliged to comply with the notice.

#### **HELD (Gibbs ACJ, Majority Opinion)**

##### Distinction between possession, custody and control

- The court distinguished between possession, and the broader concepts of custody and control which appeal in s 246(1)
- **Possession requires both physical control and an intention to exclude others**, whereas **custody and control can exist even where possession is contractually limited**
- ANZ **retained physical control** of the lockers because it **held a duplicate key** that enabled it to access the boxes.
- Therefore, even if ANZ had contractually agreed not to open the lockers, that agreement **did not negate the fact that it had the ability to access them**
  - o *"The Bank is physically able to abstract from the locker, and produce to the authorised officer, anything moveable that the locker contains." (at 519)*
- Even if a box inside the locker were padlocked, **ANZ could still produce the box itself**, thus satisfying the statutory obligation
  - o *"If the documents are kept inside a box inside the locker, and the box is secured with a padlock, the Bank would have no power to force it open but could produce the documents by producing the box containing them." (at 519)*

##### Rejection of ANZ's argument: lack of control

- ANZ argued that the **contract with the depositor prevented it from accessing the documents** except in specific circumstances
- It also argued that it **had relinquished all power over the documents**, and therefore did **not have custody or control** under s 264(1)

- The Court rejected ANZ's argument, holding that the **mere existence of a contractual obligation does not negate actual control**
- **Contractual duties do not override statutory obligations**, especially where **Parliament's clear intention is to require disclosure of relevant documents for taxation purposes**
  - o *"The Bank has actual custody or physical control of the contents of the locker, even if it has bound itself by contract to refrain from exercising the power which it has in fact."* (at 521)
- The Court found ANZ could **not contract out of its statutory obligations and its duty to the ATO overrode its contractual duty to its customers**
  - o *"Any contractual duty owed by the Bank to the depositor is subject to, and overridden by, this statutory duty."* (at 522)
- ANZ's control over the documents was not negated by its agreement with depositors because the law prioritises practical ability over contractual restrictions

#### **Broader Implications of the Decision**

1. **A person can have "custody" or "control" of documents even without legal possession.**
  - o The Bank **was not the legal owner of the documents**, but because it had the **ability to access them**, it had **control** under s 264(1).
2. **A contractual obligation cannot override statutory duties.**
  - o The Court held that **contractual duties not to access documents do not constitute a valid defence against a statutory obligation to produce them.**
3. **Multiple parties can have control over a document at the same time.**
  - o Both the **Bank (physical control)** and **depositors (legal control)** could have been served with a **s 264(1) notice**, since each had some form of control.
    - *"More than one person may have the control of a document within the meaning of the section."* (at 522)
4. **Practical ability to access documents is key in determining control.**
  - o If a party has the **ability to produce documents**, they are deemed to have **control** under the law.

#### **CONCLUSION**

- The High Court held that the Bank had **custody or control of the documents** and was therefore **obliged to comply with the ATO's notice under s 264(1)**.
- The Court **dismissed the Bank's argument** that contractual limitations prevented it from accessing the documents.
- This case **established an important precedent** that **statutory obligations to disclose documents override private contractual arrangements**.

#### **Ownership**

##### **Definition of ownership**

- Ownership is one of the two key interests a person can have in personal property, alongside possession
- It is a **comprehensive real right** that grants the owner the **widest degree of control and dominion** over an object
- As stated in the South African Law Commission's Report on the Giving of Security by Means of Movable Property (1991, para [2.2.1]):
  - o *"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."*

##### **Content of ownership**

Ownership consists of several rights, which can be broken down as follows (adapted from CG Van der Merwe (1993)):

1. **The right to use the thing** (ius utendi)
2. **The right to enjoy its fruits** (ius fruendi) – such as profits or natural produce from the object
3. **The right to consume, alter, or destroy the thing** (ius abutendi) – e.g. using up raw materials
4. **The right to possess the thing** (ius possidendi)
5. **The right to dispose of the thing** (ius disponendi) – including sale, transfer or gifting
6. **The right to reclaim or protect the thing** (ius negandi) – such as preventing wrongful interference or reclaiming property from a wrongfule possessor

- Examples:
  - o **Debts** – obligations to pay money: *King v Brown* (1912) at 25
  - o **Negotiable instruments** – bills, cheques, promissory notes: *Colonial Bank v Whinney* (1886)
  - o **Insurance policies**: *Re Moore; Ex parte Ibbetson* (1878)
  - o **Shares in issued capital**: *Archibald Howie Pty Ltd v Commissioner of Stamp Duties (NSW)* (1948) at 156-157
  - o **Guarantees**: *Loxton v Moir* (1914); *PT Ltd v Maradona Pty Ltd* (1992) at 660

## Assignability

### **Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd (2006)**

**FACTS:** A group of tobacco retailers (including Fostif) sought to recover alleged overpaid licence fees from tobacco wholesalers, following a HCA decision in *Ha v NSW* (1997). The claims were brought via representative proceedings funded and controlled by a litigation funder (Firmstones), who paid legal costs and stood to take a portion of any recovery. Campbells Case (a wholesaler) objected to the proceedings, arguing they were abusive and contrary to public policy on the grounds of maintenance and champerty.

**ISSUE:** Did the litigation funding arrangements involving the assignment of choses in action contravene the doctrines of maintenance and champerty, rendering the proceedings contrary to public policy or invalid?

**HELD: No.** The litigation funding agreements did not offend public policy. The assignment of choses in action is not invalid solely because it involves funding or control of litigation. Historical doctrines of maintenance and champerty no longer prohibit such arrangements.

#### **REASONING (Gummow, Hayne & Crennan JJ):**

##### **Historical foundations of maintenance and champerty**

- Maintenance and champerty trace back to the Statute of Westminster 1275. Champerty was a type of maintenance involving reward, traditionally precluding assignment of choses in action. *Coke's report in Lampet's Case* reflected the policy fear that assignment to strangers would cause “the multiplying of contentions and suits, of great oppression of the people... and the subversion of the due and equal execution of justice” ([70])
- By the 19<sup>th</sup> century, the doctrine was framed around improper stirring of litigation. Lord Abinger CB described maintenance as involving one who, “for the purpose of stirring up litigation and strife, encourages others... to make defences which they have no right to make” ([69]). But he also recognises that assisting the oppressed with litigation could be justifiable, rejecting a blanket prohibition.

##### **Equity rejected the common law rigidity**

- Equity refused to apply the strict common law rule, with Buller J in *Master v Miller* noting that courts of equity “from the earliest times thought the doctrine... too absurd for them to adopt” ([72]). Equity allowed assignments of choses in action and s 25 of the *Judicature Act* gave statutory effect to such assignments.

##### **The improper purpose exception**

- An assignment made “with the improper purpose of stirring up litigation” could still raise champerty concerns ([73]). If the assignee’s only interest arose from the assignment and they actively participated in the litigation, the arrangement may be improper – unless they had an independent legal interest in the property ([73]).

##### **Bare right to litigate vs property**

- The common law distinguished between assignment of property and a “bare right to litigate” ([74]). However, courts admitted the distinction was difficult to define and not strongly rooted in coherent policy. Knight Bruce LJ condemned champertous dealings as “merchandizing in quarrels, of huckstering in litigious discord” ([74]).

##### **Practical erosion of the doctrine**

- Despite judicial condemnation, similar practices emerged in insolvency, where trustees could assign actions to third parties. Subrogation in insurance law also permitted recovery by non-parties ([75]).

##### **Privy Council approach in India**

- In *Ram Coomar Coondoo*, the Privy Council upheld litigation funding agreements in India, stating it was not per se against public policy to “supply funds to carry on a suit in consideration of having a share of the property, if recovered” ([76]). Such agreements could “be in furtherance of right and justice... to resist oppression” but must be “carefully watched” to avoid unconscionability or gambling in litigation ([76]).

##### **Modern rejection of rigid rules**

Parliament **could have adopted trust account requirements**, as it had for solicitors and other professions, but it didn't. The omission was seen as **deliberate** and weighed against the implication of a trust ([398]).

- **(4) Courts avoid imposing trusts in commercial settings**

There is a **reluctance to extend trust law into commercial transactions**. The “intricacies and doctrines connected with trusts” (per Bramwell LJ) are often unsuitable for fluid commercial dealings ([398]–[399]).

- **(5) Only a duty to account exists**

A duty to account **does not itself create a trust**. The mere obligation to pay what is due after taking an account is consistent with a **debtor–creditor relationship**, not a fiduciary one ([399]).

- **Stephens Travel case distinguished:** In that case, a trust was initially created, and the question was whether it had been revoked. In contrast, **here the issue was whether a trust was ever created**, and non-segregation of funds at the outset could be fatal ([398]).

**PRINCIPLE:** Where **no express trust** exists, courts will only infer a trust over sale proceeds where the **circumstances show a clear intention** to create one. In commercial agency arrangements, especially where **funds are not segregated, statute does not require a trust, and industry practice allows mixing**, a trust **will not be imputed**.

#### **Cohen v Cohen (1929) (HCA)**

**FACTS:** P & D were married in 1918. P was a widow who had returned from Germany; D was a jeweller based in London. Over time, P entrusted D with multiple financial matters, including collecting funds, selling her furniture, receiving insurance payments, and handling money-related claims. P attempted to recover various sums received or retained by him and sued in the HCA on six separate causes of action totalling £1,200, including:

1. £462 – German funds collected by D from Halle on P's behalf
2. £80 – insurance proceeds relating to P's jewellery
3. £123 – proceeds from sale of her furniture
4. £60 – money she paid on D's behalf
5. £275 – dress allowance (alleged agreement before marriage)
6. £200 – promissory notes issued by D

The limitation period and **whether D held certain monies on trust or as a debtor** were central issues, as well as whether an IOU constituted acknowledgement for limitation purposes.

**ISSUE:** Was the dress allowance a legally enforceable agreement? Was D under a **fiduciary obligation (trust) or debt obligation in receiving and holding the various sums?** Was the action statute-barred under the *Statute of Limitations 1623* (21 Jac I c 16)? Did the IOU constitute a sufficient acknowledgement to take claims outside the limitation period?

**HELD:**

- **Dress allowance:** Not enforceable – no intention to create legal relations
- **Furniture sale & insurance proceeds:** D held these on trust and was liable to account specifically; not statute-barred
- **German marks:** Treated as a debt – not held on trust; claim barred unless saved by acknowledgement
- **Promissory notes & debt paid by wife:** P entitled to recover
- **Acknowledgement (IOU):** Sufficient to revive barred claims

**REASONING (Dixon J)**

*Intention to Create Legal Relations – Dress Allowance*

- The alleged agreement was “not intended to affect or give rise to legal relations or be attended with legal consequences” (at 94), applying *Balfour v Balfour (1919)* and *Frank Co v JR Crompton & Bros (1925)*
- Partied merely “discussed and concurred in a proposal for the regular allowance to the wife of a sum... appropriate to their circumstances at the time of marriage... [thus] this cause of action fails” (at 96).

**Trust vs Debt and Limitation**

- For claims regarding **furniture proceeds** (£123) and **insurance money** (£80), Dixon J held these **were not debts but fiduciary receipts** held “as and for the beneficial property of another” and to be “accounted for specifically” (at 101).
- D could not “reasonably conceive himself as receiving money as his, incurring a mere debt” (at 102)

## TOPIC 4 – Assignment and Disposition of Interests

### ASSIGNMENT OF LEGAL INTERESTS

#### Legal Assignment of Real Property and Choses in Possession

Legal assignments of legal property (both real and personal) must comply with strict formal requirements, particularly where real property is concerned. These requirements differ depending on whether the property is **real** (land) or **personal** (chattels), and whether the land is held under **Old Systems** or **Torrens title**.

#### Real Property

##### Old System Title

- Transfer of land or interests under **Old System title** requires a **deed of conveyance** (i.e., a written instrument under seal).
- The deed must be **delivered** to the assignee for the legal interest to pass.
- **Statutory authority:**
  - o *Conveyancing Act 1919 (NSW) s 23B(1)*;
  - o *Property Law Act 1936 (SA) s 28(1)*;
  - o *Property Law Act 1958 (Vic) s 52(1)*;
  - o Other similar provisions exist across the states.
- **Formal words of assurance** were once required, but now *any words indicating an intention to convey land* suffice (*Conveyancing Act 1919 (NSW) s 46*).
- A **voluntary deed** (i.e., without consideration) still transfers the legal estate, but **does not confer protection** under the **bona fide purchaser for value** doctrine when determining priorities.

##### Torrens Title

- Legal title passes **only upon registration** of an approved instrument of transfer in the Torrens register.
- Mere execution of a transfer is insufficient — **registration is essential** to acquire a legal estate.
- The legal status of **registered volunteers** (i.e., those without consideration) depends on interpretation of the specific Torrens statute.

#### Personal Property (Choses in Possession)

The legal rules are **less stringent** than for real property. Chattels can be transferred in the following ways:

1. **Gift with delivery**
  - o Oral gift is valid if **accompanied by delivery** (actual or constructive) of the chattel.
2. **Deed (No Delivery Required)**
  - o Legal title passes without delivery if the transfer is made **by deed**, whether for consideration or as a gift.
3. **Sale**
  - o Sale of chattels transfers legal ownership, assuming delivery or constructive delivery occurs.

#### Legal (Statutory) Assignment of Choses in Action

##### Conveyancing Act 1919 (NSW)

###### 12 Assignments of Debts and Choses in Action

This section allows:

- An **absolute assignment** (i.e. a full and unconditional transfer – *not a charge or security*) of a **debt** or **other legal chose in action**:
  - o Must be **in writing**, and
  - o Must be **signed by the assignor** (the person transferring the right),
  - o And **must not merely be a charge**.

###### Requirements for the assignment to be effective in law:

To be *legally effective* (i.e. to transfer the legal right, remedies, and power to discharge the debt), the following conditions must be met:

### Norman v FCT (1963) 109 CLR 9

**FACTS:** The taxpayer (Norman) attempted to assign to his wife:

- The **interest on a loan** he made to a partnership (repayable at will), and
- **Dividends from shares** he was to receive in the future as a beneficiary under two estates.

The Commissioner of Taxation claimed the assignments were **ineffective**, such that the income remained Norman's and was **taxable in his hands**.

**ISSUE:** Were Norman's assignments valid in equity, such that his wife acquired a **present equitable interest** in the future income (interest and dividends), making the income hers (not his) for tax purposes?

**HELD:** The assignments were **ineffective**:

- The **interest on the loan** was assignable at law but the assignment did not comply with statutory formalities.
- The **dividends from the estates** were **future property** or **mere expectancies** and thus not **presently assignable** by way of gift.

Equity would not perfect these **voluntary** and **incomplete** assignments.

**REASONING** (Windeyer J, approved by Dixon CJ)

**Future Property Cannot Be Assigned by Gift**

- Equity **does not recognise a present gift of future property**, as one cannot gift what they do not yet own.
- Equity distinguishes between:
  - o A **promise to assign** future property (unenforceable if voluntary),
  - o And a **binding agreement** to assign for value — enforceable once property comes into existence (via *Holroyd v Marshall* principle).
- "Things not yet in existence could only be the subject of agreement, not of present disposition" (at [24]).

**Assignment of Choses in Action**

- A **legal chose in action** is assignable at law only if the **statutory requirements** (e.g. notice under **s 12 CA 1919**) are met.
- If not, an **equitable assignment** is possible **only if the donor does all that is necessary on their part to complete the gift**.
- "Equity does not perfect an imperfect gift... unless the donor has done all that must be done to transfer the property" (at [28]–[29]).

**Assignment of Part of a Debt**

- Part of a debt is **not assignable at law** under the statutory method (due to indivisibility of debts at common law).
- However, **equity permits voluntary equitable assignment of part of a debt, even without consideration**, where:
  - o There is a clear **intention to assign**, and
  - o A sufficient **act of assignment**.
- "To say, 'you can give away the whole, but not the part,' would seem to contradict common sense" (at [34]).

**Consideration and Equitable Assignment**

- For **future property or expectancies**, **consideration is required** to bind conscience (i.e. equity aids **contracts**, not **gifts**).
- But where the property is **presently existing**, and the donor **does all that is required**, a **voluntary assignment may be effective** in equity.
- "Equity enforces the assignment... by refusing to allow [the donor] to act in a way inconsistent with what he has done" (at [33]).

**PRINCIPLES**

- **Future property** cannot be gifted voluntarily — only **contractually assigned for value**.
- **Equity will not perfect an imperfect voluntary gift** of a legal chose unless all has been done by the donor.
- **Assignment of part of a debt is not permitted at law**, but **may be recognised in equity**, even as a gift, provided the donor's **intention is clear** and they have **done all on their part**.
- The existence of a **deed** helps show intention, but it **does not substitute for consideration** where that is required.

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EXAM SCAFFOLDS**

## FIXTURES SCAFFOLD

### 1. Identify relevant object

The central issue is whether the [object] installed by [insert party] on the premises located at [insert location] is a fixture (part of the land) or merely a chattel (personal property). Fixtures are items of personal property (chattels) that have become so affixed to land or buildings that they are legally regarded as part of the land. This process is known as accession, and once it occurs, the chattel loses its independent legal identity and becomes part of the realty.

The distinction is critical because it determines ownership; if an item is a fixture, it becomes part of the land and is owned by the landowner or mortgagee; if it remains a chattel, it stays with the person who brought it onto the land.

This is determined by applying the **two-limbed common law test**: (1) the degree of annexation, and (2) the object of annexation (*Cancer Care*; *Holland v Hodgson* (1872); *APA v Coroneo* (1938); *Palumberi v Palumberi* (1986) per *Kearney J*).

### 2. The Two-Limb Test

#### 2.1 Degree of Annexation (How is it attached?)

The first consideration is the manner and extent to which the [insert item] is affixed to the land. The principles in *Cancer Care* and *Coroneo* make clear that if the item is attached such that removal would cause damage to either the land or the item itself, it is presumed to be a fixture. On the other hand, if it is merely resting by its own weight, it is presumed to be a chattel. However, this presumption may be rebutted depending on the purpose of annexation.

In the present case...

- **If bolted, plumbed, wired attached in some way:**
  - o ... the [item] is [insert way of annexation]. This supports a finding that it is physically annexed in a substantial and potentially permanent manner.
  - o *Kaye J* in *Belgrave* held that even slight attachment is enough to raise this presumption, where air-con units resting on their own weight were still found to be fixtures because they were bolted into pipes. [Insert similar or contrasting facts]
- **If resting on own weight – but check for connections or supports:**
  - o ... the [item] simply rests on its own weight without further attachment, and is therefore presumed to be a chattel (*Holland v Hodgson*), but this presumption can be rebutted.
  - o In *Cancer Care*, linear accelerators rested on steel base frames that were bolted into the floor. However, the court found they were not fixtures because the base frames were installed separately ([11]), had independent viability ([12]), and the machines could be removed without damage ([13]).
  - o **[Insert comparison, e.g. "Similarly, the [item] rests in a purpose-built cavity but is otherwise removable without damage to the premises."]**
- **Other relevant cases:**
  - o *Anthony v Cth* (1975): Steel telephone poles concreted into the ground were held to be chattels, as their removal would not damage the land
  - o *AG v RT Company (No 2)*: Printing presses bolted into the floor were held to be chattels, as bolting was only to stabilise them, not to permanently improve the land.
- **If object includes multiple components:**
  - o The court may also assess whether the item is part of a **composite system**. In *Cancer Care* ([11]-[13]), the steel base frames and accelerators were assessed separately due to their independence.
  - o Where the components are functionally integrated, courts may consider the whole system together.
  - o **[Insert details about the components, e.g. "The [item] includes a pump and filtration system, which are necessary for its operation and are functionally integrated, supporting the view that it is a single object."]**

**Preliminary conclusion:** Based on the degree of annexation, the [item] is [likely/unlikely] to be a fixture, though this must be confirmed by considering the purpose of annexation

- However, Higgins J in *Cooney* held that payment alone or preparatory work/expenses are not enough and are “merely preparatory and ancillary to performance”. Possession and lease specific conduct **is**.
- **2.4.4.2 Statute as an instrument of fraud**
  - Even if formalities are not satisfied, equity will not allow **s 23C or s 54A** to be used to commit fraud (*Maddison v Alderson; Theodore v Mistford; Ciaglia*).
    - If Y attempts to deny X’s claim by pointing to formal invalidity, yet induced or benefited from the agreement, equity may step in to enforce it as a constructive trust.

#### ***2.4.5 Specific performance must be available***

An equitable leasehold interest only arises where the agreement is one which equity would specifically enforce. If the contract is sufficiently certain, fair, and not subject to discretionary bars, equity regards as done that which ought to be done (*Walsh v Lonsdale*).

#### ***2.4.6 Effect of equitable lease***

If X has an equitable lease:

- It binds all except bona fide purchasers for value without notice
- May lodge a caveat, seek injunctions, or claim specific performance
- It does not confer legal priority unless protected by caveat or registration (if possible)

The equitable lease arises due to enforceability, not because a vendor becomes a trustee per se (*Golden Mile at [104]*).

#### ***2.4.7 Conclusion***

If X has:

- A binding agreement to lease, and
- Either complies with formality requirements, or
- Falls within part performance or fraud prevention

Then X “holds under an agreement for a lease... under the same terms in equity as if the lease had been granted.”

*Walsh v Lonsdale* at 14

### **2.5 Mortgage Interest**

If X has given or received a mortgage over Old System land, it must be assessed whether the mortgage has created a legal or equitable proprietary interest. It was held in *Figgins* (at [21]) that under Old System, a mortgage operates as a conveyance of title, and the mortgagor retains only the equity of redemption.

#### ***2.5.1 Legal Mortgage (Common law mortgage)***

Under Old system title, a legal mortgage involves a transfer of legal title to the mortgagee (lender) as security for a loan.

To create a legal mortgage, formalities under **s 23B(1)** must be satisfied:

- Must be made by deed
- Deed must comply with **s 38**:
  - Written on paper (or electronic: **s 38A**)
  - Signed, sealed (deemed if attested) and witnesses by 1 non-party witness
  - Delivered (delivery = intention to be bound)

If these are met, a legal mortgage exists, and the mortgagee takes possession and legal title (*Figgins [24]; Coroneo*).

#### ***2.5.2 Equity of redemption***

Even where legal title is transferred to the mortgagee, the mortgagor retains an equitable interest in the land – known as the equity of redemption; the mortgage is a security only, and equity prevents the mortgagee from treating the land as theirs outright (*Figgins [21]*).

This gives X the right to recover the land once the debt is repaid and the mortgage is discharged.

### **3.1.2 Indefeasibility upon registration (s 42)**

Once registered, X gains indefeasible title (**s 42**), meaning their interest is protected from unregistered and prior equitable interests.

X's interest is paramount under **s 42(1)** except for limited exceptions:

- Pre existing registered interest on a prior folio (**s 42(1)(a)**)
- Short-term tenancy with notice (**s 42(1)(d)**)
- Easements/profits à prendre if omitted but subsisting (**s 42(1)(a1), (b)**)
- Wrong description of parcels/boundaries unless X is a bona fide purchaser (**s 42(1)(c)**)

This protection applies even if their title was acquired via a void or forged instrument (*Frazer v Walker; Breskvar v Wall*), unless an exception applies, fraud, in personam claims, statutory exceptions.

### **3.1.3 Protection from notice (s 43)**

Section 43 RPA protects bona fide purchaser from being affected by notice of an unregistered interest or trust, unless fraud is proven.

Did X purchase or receive transfer in good faith and for value?

- If yes, they are not affected by any unregistered equitable interests, even with actual notice (unless fraudulent conduct)
- Mere knowledge of a trust/unregistered interest is not fraud: **s 43(1)**

In *Breskvar v Wall*, the later purchaser (Alban Pty Ltd) with no knowledge of fraud defeated prior equitable interest due to priority.

In *Frazer*, there was no obligation to inquire into validity of prior dealings unless bad faith or fraud involved.

### **3.1.4 Does an exception apply?**

Indefeasibility under **s 42** and **43** is not absolute. Key exceptions include:

- **3.1.4.1 Fraud by the registered proprietor**
  - o Under **s 42** and **43**, fraud defeats indefeasibility – but fraud must be actual, dishonest conduct by the registered proprietor themselves
    - In *Frazer*, the PC upheld immediate indefeasibility, confirming that where an instrument is forged or void (as in the forged mortgage), registration confers title on the transferee, unless they were complicit in fraud.
      - Walker acquired title via a forged mortgage (Mrs Frazer forged her husband's signature) and a fraudulent sale, yet he was not personally fraudulent
      - HELD: Walker's title was indefeasible – the Torrens system protects those who innocently acquire registered title, even from a void instrument
    - In *Breskvar*, the HCA held that Wall's registration was tainted by fraud, and so his title was defeasible. However, when Alban subsequently purchased the land in good faith and for value, it acquired an indefeasible title upon registration (**s 43**).
      - "The Torrens system is a system of title by registration, not a system of registration of title" – Barwick CJ at 385
      - The Breskvars still held an equitable interest, but this was postponed due to their own conduct (handing over blank transfer and title deed), which contributed to the fraud
      - Even an earlier equitable interests can be defeated where the holder's conduct encourages the fraud or misleads third parties
    - Legal principles:
      - Fraud = dishonest intent; not mere notice or carelessness
      - If X was complicit in dishonesty/fraud, they lose indefeasibility

Breskvars lost priority because they executed a blank transfer and gave up their duplicate certificate of title, contributing to the fraud (encouraging false assumption)

If fraud by the registered lessee is proven, their interest may be set aside. But if X is innocent, the lease remains valid and enforceable.

#### ***3.3.4 Registration as cure to forgery***

As established, even if the instrument is void (e.g. due to forgery), registration cures the defect, giving rise to legal title (*Frazer; Breskvar*; ss 42, 43 RPA)

#### ***3.3.5 Priority over competing interests***

Are there any unregistered or competing interests?

If X's lease is registered:

- It prevails over earlier unregistered or equitable interests (s 42)
- Only subject to:
  - o Prior registered interests
  - o Statutory exceptions (e.g. short leases under s 42(d))
  - o Fraud

If competing equitable interest claims exist, consider notice, priority rules, and conduct (see *Breskvar* priority reasoning)

#### ***3.3.6 Conclusion***

If X's lease is:

- Properly executed
- Registered on the folio of the Register, and
- Not affected by fraud,

Then X holds a legal leasehold interest in Torrens title land with indefeasible title, subject only to the exceptions in s 42 and s 43 RPA.

If not registered, move to parol lease (3.4), or equitable lease (3.5)

### ***3.4 Leasehold – Legal Interest via parol lease***

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A leasehold interest in Torrens title may still arise orally without a deed or registration, provided it satisfies the statutory exception in s 23D(2) of the *Conveyancing Act*. It must still satisfy the common law requirements of a lease, granting exclusive possession for a defined period of time (*Street v Mountford*). Here, X ...

#### ***3.4.1 Statutory exception: s 23D(2) Conveyancing Act***

Even if there is no writing, deed or registration, a legal lease may still arise orally under s 23D(2) if the lease:

- Is at best rent reasonably obtainable (i.e. market rent) s 23D(2)(i)
- Takes effect in possession immediately (i.e. not future lease) s 23D(2)(ii)
- Has a term not exceeding 3 years, including any renewal or extension rights s 23D(2)(iii)

#### ***3.4.2 Consequences of a valid parol lease***

If s 23D(2) conditions are met:

- A legal leasehold interest exists at general law
- But it does not gain protection of indefeasibility under the Torrens system (s 41 RPA)
- X may still have priority if in possession and protected by s 42(1)(d)

So...

- Is X in possession (s 42(1)(d) RPA)?
- Are s 23D(2) CA requirements satisfied?
- Did the registered proprietor have notice of the tenancy?

If yes → the lease binds the registered proprietor

## TRANSFER OF OWNERSHIP BY GIFT (INTER VIVOS)

To determine whether X became the owner of the [chattel] via an inter vivos gift, consider whether the gift was perfected under one of the recognised legal methods. The burden of proof lies on the donee to establish all elements (*Nolan* at [129]).

### 1. Identify which of the 3 recognised methods applies

There are three valid legal methods to transfer ownership of a gift inter vivos (*Nolan* at [122])

#### 1.1 By Deed

Requires execution of a formal instrument (e.g. s 23B *Conveyancing Act* for land)

No deed executed in [insert facts] → No gift by deed

#### 1.2 Declaration of trust

Donor declares themselves as trustee for the benefit of the donee.

- Required clear intent to create a trust and hold the item beneficially for the donee (*DKLR*; *Ciaglia*)

[Insert facts] do/do not indicate intention to create a trust → no valid trust created

#### 1.3 By delivery (most common for personal property)

Delivery completes the gift and transfers ownership

#### Must prove (*Nolan* at [131])

- Intention by donor to make gift
- Intention by donee to accept
- Actual or constructive delivery

### 2. Was there delivery?

#### 2.1 Intention by the donor to make a gift

Requires clear and **unequivocal intention** to make a present gift (*Nolan* at [140]):

- “There must be a present and unequivocal intention to make a gift of the chattel, and the gift must take immediate effect.”
- Were they joking etc? drunk?

Evidence of intention can include oral statements or consistent (surrounding) conduct (*Nolan* at [139]–[142]).

**Application:** If [insert facts] include donor statements (e.g. “This is yours now”), family acknowledgement, or documentation, this may evidence donative intention.

#### 2.2 Intention by the donee to accept the gift

Can be inferred from conduct or belief that they were the new owner (*Nolan* at [131], [142]).

**Application:** [Insert facts] show [X] accepted the gift by [e.g. using/acknowledging the item as their own].

#### 2.3 Delivery (Actual or Constructive)

This requirement is the most contentious issue. Delivery must either be actual or constructive. Actual delivery requires physically handing the chattel to the donee, which ... plainly did/did not occur here, as ...

- **Actual delivery:** Manual handover of the chattel (*Re Everett*; *Olsson v Dyson*).
- **Constructive delivery:** Occurs when manual delivery is impractical or unnecessary (*Nolan* at [460]–[461]):
  - o Delivery of means of access (symbolic) (e.g. keys)
  - o Change in character of possession (e.g. bailee becomes owner)
  - o Donee already had control requiring donor to “retake” item to effect delivery (*Nolan* at [501])

## TRANSFER OF OWNERSHIP BY DONATIO MORTIS CAUSA (DMC)

To determine whether [X] became the owner of [chattel/shares] via a *donatio mortis causa* (DMC), the claimant must establish three essential elements. The onus is on the donee to prove them (*Public Trustee v Bussell* (1993) 30 NSWLR 111 at 122 per Cohen J).

### 1. Was the gift made in contemplation of death?

Must be made by the donor **in contemplation (but not necessarily in expectation)** of their death (*Public Trustee v Bussell* at 122; *Re Craven's Estate* [1937]).

The gift must be made because the donor believes their death is impending, e.g. due to terminal illness, imminent surgery, or danger.

**Application:** [Insert facts showing donor believed death was near, e.g. terminal illness, recent diagnosis, surgery].

### 2. Was there delivery of the subject matter or essential indicia of title?

**Manual delivery** of the chattel itself or constructive delivery of the **means of access to the property** or its **indicia of title** is required.

Delivery **need not be sufficient to perfect an inter vivos gift** under *Nolan v Nolan* — the threshold is lower (*Bussell* at 122–123).

Examples:

- Share certificates handed over → sufficient indicia of title (*Bussell; Re Wasserberg* [1915])
- Deeds, keys, or title documents → may suffice depending on context (*Sen v Headley* [1991]).

**Application:** [Insert whether donor physically handed over the item or its documentary equivalent (e.g. certificate, keys)].

### 3. Was the gift conditional on the donor's death and revocable until death?

The gift must be **intended to take effect only upon the donor's death**, and be **revocable at any time prior to death** (*Bussell* at 122; *Birch v Treasury Solicitor* [1951]; *Sen v Headley* [1991]).

If the donor survives or revokes the gift, it is void.

Words such as "you may as well take these now" may be ambiguous; the **surrounding circumstances and donor's condition** will assist in characterising the gift as a DMC or not (*Bussell* at 122–123).

**Application:** [Insert facts showing gift was conditional on death and not completed inter vivos, e.g. death occurred shortly after delivery, donor had not executed formal transfer].

### 4. Conclusion

If all three elements are satisfied:

- Gift made in contemplation of death
- Delivery of chattel or essential indicia of title
- Gift conditional on death and revocable until then

→ Then a valid *donatio mortis causa* has occurred and [X] obtains ownership of [chattel].

If **any element is missing** → No valid DMC → Title remains with deceased estate and passes under the will/intestacy.

- A prohibition on assigning the *contract* (or performance) is not the same as a prohibition on assigning *fruits* (money received).
- *Bluebottle UK Ltd v Deputy Commissioner of Taxation* (2007) 232 CLR 598:
  - o **Held:** A prohibition on assignment of contract rights does not prevent assignment of proceeds once received (i.e. the fruits). This does not affect the other party as no rights are enforced against them.

#### ***5.3.3 Determine whether the contract involves personal services***

- Personal service contracts are generally unassignable without consent because they depend on the identity of the performing party.
- *Notes v Doncaster Amalgamated Collieries Ltd* [1940] AC 1014:
  - o **Held:** Contracts of personal service cannot be transferred without consent. The right to choose whom to serve is fundamental (Viscount Simon LC at 1022; Lord Atkin at 1026).

**Practical rule:** Where the identity of the party is central to the contract (employment, skill-based roles), assignment is typically void without express agreement.

- *Pacific Brands Sport & Leisure Pty Ltd v Underworks Pty Ltd* (2006) FCR 1:
  - o Assignment of trademark sub-licence was ineffective. Identity of the parties was important to the original deal.

#### ***5.3.4 Consider whether the obligation is severable and assignable (e.g. negative obligations)***

- *Mid-City Skin Cancer & Laser Centre Pty Ltd v Zahedi-Anarak* [2006] NSWSC 1341:
  - o **Held:** Although an employment contract generally cannot be assigned, individual obligations that are negative in nature (e.g. not misusing confidential info) can be assigned if they do not depend on the identity of the promisee (Campbell J at [179]).

#### ***5.3.5 Consider effect of statute***

- Statutory frameworks may override or affect contractual prohibitions:
  - o *Owners of Strata Plan 5290 v CGS & Co Pty Ltd* [2011] NSWSC 1001:
    - A liquidator's statutory power to sell a company's property (including choses) did not override a prohibition on assignment.
    - **Held:** Statute must expressly override the prohibition; general power to sell does not suffice.
- *PPSA s 81(2):*
  - o A contractual prohibition is enforceable *between assignor and debtor*, but not against the assignee. The debtor can sue the assignor for breach.

#### ***5.3.6 Determine the legal consequence of the breach***

- Construction question: Does breach render the assignment void, or merely give rise to damages?
- *Linden Gardens* (above): Express no-assignment clause = void assignment.
- Sometimes courts may treat breach as breach of warranty, not condition precedent to validity, allowing for damages instead.

#### ***5.3.7 Exceptions: When assignment is permitted despite identity concerns***

- *Tolhurst v Associated Portland Cement Manufacturers* [1903] AC 414:
  - o Supply of goods contract: identity of the company was not central; assignment permitted.
- *Notes v Doncaster* [1940] AC:
  - o **Exception to exception:** A change in management or ownership of the same company does not destroy identity for assignment purposes (Lord Atkin at 1030).

## EQUITABLE ASSIGNMENTS OF LEGAL INTERESTS

Use this scaffold only if there HAS NOT BEEN a valid assignment of interests under **s 12 Conveyancing Act**

Where the assignment fails to meet the formal requirements for legal assignment (e.g. no notice given), equity may still recognise an assignment if one of the following applies:

### 1. Specifically enforceable agreement to assign

#### 1.1 Was there a present attempt to assign a chose in action?

- Equity will only assist where there has been a **clear and present intention to assign**, not a mere promise to do so in the future.
- This requires a **sufficiently clear expression of intention to assign** the property.
  - o *Norman v FCT (1963) 109 CLR 9* at 33 per Windeyer J: "The intention to assign must be clearly expressed."

#### 1.2 Was the assignment supported by valuable consideration?

- Equity distinguishes between **voluntary assignments** (which require strict completion) and **assignments for value**, which equity may enforce more readily.
- Consideration must be **valuable**, though **nominal consideration suffices**.
  - o *Tailby v Official Receiver (1888) 13 App Cas 523 at 546*: "Even a peppercorn will do."
  - o *Holroyd v Marshall (1862) 10 HLC 191*: An agreement to assign future property for value is enforceable in equity.

#### 1.3 Was the only defect the failure to comply with legal formalities (e.g. s 12)?

- Equity will not intervene if there are other vitiating factors (e.g. uncertainty, illegality, want of capacity).
- But if the assignment failed solely due to a **technicality** (e.g. notice not given under s 12), equity may intervene.
  - o *Equity treats as done that which ought to be done (Holroyd; Tailby)*.

#### 1.4 Legal effect

- The assignee obtains an **equitable interest** in the chose in action.
- The assignor may be compelled to cooperate with enforcement (e.g. by joining as co-plaintiff in a claim).
- The equitable interest is enforceable **against all parties except a bona fide purchaser for value without notice**.

### 2. Voluntary assignment in equity (gift) – *Corin v Patton* framework

The general rule is that **equity will not perfect an imperfect gift**:

- *Milroy v Lord (1862) 45 ER 1185 at 274*: "The settlor must have done everything... necessary to transfer the property."

And, **equity does not assist a volunteer**: the donee cannot compel the transfer if the gift is still incomplete.

- **BUT**: Equity is also not overly rigid – *T Choithram International SA v Pagarani [2001] 1 WLR 1 at 11*: "Equity will not strive officiously to defeat a gift."  
→ If the gift is practically complete and the only step is minor or capable of being done by the donee, equity may intervene.

However...

Where the assignment is **voluntary** (i.e. not supported by consideration), equity will only recognise the gift if it is **complete in equity**. This is assessed by the **twofold test** in *Corin v Patton (1990) 169 CLR 540* (per Griffith J), which refines the older rule from *Milroy v Lord*.

#### 2.1 Has the assignor done all that is necessary to place the vesting of legal title within the control of the donee?

- The assignor must take all **necessary steps that only they can do** to enable legal transfer.

## CONTRACTS TO ASSIGN LEGAL PROPERTY

If X seeks to assert an equitable interest in land or another legal asset on the basis of a contract to assign, the issue is whether equity will recognise the contract as creating a presently enforceable interest.

### 1. Is the asset capable of legal assignment, and is there a binding contract to assign it?

- At common law, legal title to land (or other legal property) passes only through formal conveyance. A contract to assign does not itself transfer legal title.
- However, equity may recognise a **binding contract to assign legal property** (e.g. land or shares) as creating an **equitable interest** in the purchaser/assignee.

If a **binding and enforceable contract** exists for the assignment of land or legal property, equity may recognise the assignee as having an equitable proprietary interest.

### 2. Does the contract comply with formalities under statute (e.g. s 54A Conveyancing Act 1919 (NSW))?

**s 54A(1)** requires that **contracts for the sale or other disposition of land or an interest in land** must:

- Be **in writing** (or evidenced by a written memorandum),
- Be **signed by the party to be charged** or their authorised agent.

If the contract does not comply with **s 54A**, no equitable interest arises — unless an equitable exception like part performance applies (see Topic 1).

### 3. If formalities are met, does equity treat the purchaser as acquiring a present equitable interest?

Yes, if:

- The contract is **valid and specifically enforceable**, and
- The subject matter is legal property (e.g. land, legal chose in action, shares).

*Lysaght v Edwards (1876) 2 Ch D 499:*

- “The moment you have a valid contract for sale, the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser.”

This creates a **vendor-purchaser constructive trust**:

- Vendor retains **legal title**, holds it **on trust** for the purchaser.
- Purchaser acquires the **equitable estate**, subject to payment of price.

### 4. Identify what equitable interest arises (vendor-purchaser constructive trust)

- Upon valid execution of a contract to assign land or other legal property, equity regards the vendor as holding the property on a **constructive trust** for the purchaser.
- However, this trust is not always full and unconditional:
  - If price not paid yet → purchaser may only be **beneficiary sub modo** (*Chang v Registrar of Titles*).
  - If contract is **not specifically enforceable** (e.g. uncertain, informal, or unenforceable in equity) → no equitable interest arises.

*Chang v Registrar of Titles (1976) 137 CLR 177:*

- "It is doubtful whether a vendor under a contract of sale can properly be described as a trustee... unless settlement has taken place and all that remains is the transfer of legal estate" (Jacobs J at 189–90).
- *Mason J* emphasised that whether a vendor is a trustee under a **statute** (e.g. for vesting orders) is a separate question from whether a vendor-purchaser trust arises under equity.

### 5. Is the contract specifically enforceable?

Equity only recognises the purchaser's equitable interest where the contract is of the kind that equity would enforce via **specific performance**.

- E.g. contracts for land or shares in public companies → generally enforceable.
- Contracts for personal services or involving discretion/uncertainty → not enforceable.

3. The second sale was a **delivery or disposition**;
4. The buyer **acted in good faith** and **without notice**.

**Application:**

1. Was there a prior sale, and did it transfer title?
2. Did the seller retain **continuous possession** of the goods or title documents?
  - Any evidence of **interruption or change of custody**?
3. Was the second transaction a **sale, pledge, or other disposition**?
4. Did [X] act **without knowledge** of the prior sale and **in good faith**?

**Conclusion:**

If all elements are met, [X] obtains **good title** under **s 28(1)**, despite the nemo dat rule.

## 6. EXCEPTION 5: Buyer in possession

Where a buyer obtains possession of goods with the seller's consent before title passes, they may nonetheless pass good title to a third party, if the third party purchases in good faith and without notice of the original seller's interest.

This statutory exception to the nemo dat rule is found in **s 28(2) of the Sale of Goods Act 1923 (NSW)**, and is aimed at protecting sub-buyers deceived by the appearance of ownership created through possession: *Gamer's Motor Centre (Newcastle) Pty Ltd v Natwest Wholesale Australia Pty Ltd* (1987) 163 CLR 236, 249 (Mason CJ). The provision gives legal effect to the second transaction "**as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner**".

The statutory conditions for the exception are:

### **6.1 The person must have "bought or agreed to buy" the goods.**

This broadens the scope of the exception beyond **s 28(1)**, and includes both completed sales and executory contracts. The buyer does not need to have legal title—mere agreement to purchase suffices (*Gamer's*, at 245–6 per Mason CJ). However, the original seller must have held good title at the time of the initial sale or agreement: *National Employers' Mutual General Insurance Association*.

### **6.2 The buyer must have obtained possession with the consent of the seller.**

Possession may be physical or constructive (i.e., where goods remain with the seller's bailee or agent), and must arise with the seller's voluntary consent. The delivery of signed documents or control mechanisms may evidence consent: in *Gamer's*, the dealer's delivery receipts constituted a voluntary transfer of constructive possession to Natwest (at 263 per Dawson J).

### **6.3 There must be a subsequent "delivery or transfer" under a disposition (e.g. sale, pledge, or other transfer).**

This disposition must be to a third party acting in good faith and without notice of the seller's interest. Importantly, "delivery" in **s 28(2)** is interpreted broadly to include **constructive delivery**—i.e., a change in the character of possession, such as where the buyer in possession becomes bailee for the third party without any physical transfer of goods (*Gamer's* at 245–6 per Mason CJ; Brennan J concurring). This recognises modern commercial practice and facilitates floorplan arrangements and secured lending.

### **6.4 The third party must receive the goods in good faith and without notice of the original seller's interest.**

If the sub-buyer knows of the original seller's title (e.g., under a retention of title clause), they cannot claim protection under **s 28(2)**. In *Gamer's*, Natwest had no notice of Gamer's interest and was therefore protected.

### **6.5 The effect of s 28(2)**

The effect is that, where all conditions are met, **the third party (C) acquires good title despite the buyer (B) not having title themselves**, due to the statutory fiction that the delivery was as if made by a mercantile agent. This is intended to protect innocent third parties from the risks of hidden ownership interests and promote confidence in commercial transactions involving apparent owners (*Gamer's* at 249 per Mason CJ).

**Policy rationale:** The provision reflects commercial realities by recognising that possession of goods is a strong indicium of ownership. It balances this by requiring the seller's consent and good faith on the part of the third party. It also promotes certainty in commerce and protects those who rely on ostensible authority, especially in contexts such as floorplan financing or goods held on bailment pending resale.

## PRIORITY REGIMES – see following for each scaffold

### 1. Identify Whether Priority Regime Applies

This general law priority regime applies where:

- The land is under **Old System Title** (OSTL); or
- The land is **Torrens Title** but the dispute concerns **unregistered interests** (e.g. equitable leases, unregistered mortgages) — see *Barry v Heider (1914) 19 CLR 197*.

Note: Registered Torrens interests are governed by the **Real Property Act 1900 (NSW)** and indefeasibility under ss 41–43A. This regime does **not apply** where one interest is a registered Torrens interest, which will be indefeasible.

### 2. Classify the Nature of the Competing Interests

The **hierarchy** of interests is critical to determining the applicable priority rule:

#### (a) Legal Interest

- Created by deed (**s 23B Conveyancing Act 1919 (NSW)**) or registration (e.g. **s 41 Real Property Act 1900 (NSW)**).
- Examples:
  - Registered legal title (Torrens or OSTL)
  - Legal lease under **s 23D(2) Conveyancing Act** (if by deed or <3 years with exclusive possession)

#### (b) Equitable Interest

- Arises where formalities are unmet or equitable principles intervene:
  - Specifically enforceable contracts: *Walsh v Lonsdale (1882) 21 Ch D 9; Lysaght v Edwards (1876) 2 Ch D 499*
  - Vendor's lien: unpaid vendor has equitable lien over the land
  - Mortagor's equity of redemption
  - Beneficial interest under a trust
  - Unregistered Torrens dealings: e.g. unregistered mortgage or lease

#### (c) Mere Equity

- A **claim to an equitable interest**, dependent on **equitable relief** to 'flower' into an enforceable right.
- Lower in priority than full equitable interests: *Double Bay Newspapers Pty Ltd v AW Holdings Pty Ltd (1996) 42 NSWLR 409 at 425 (Bryson J); Westpac Banking Corp v Ollis [2008] NSWSC 671 at [77] (Einstein J)*.
- Examples:
  - Right to set aside transaction for fraud: *Latec Investments Ltd v Hotel Terrigal Pty Ltd (1965) 113 CLR 265*
  - Right to rectify deed: *Smith v Jones [1954] 1 WLR 1089*

### 3. Apply the General Law Priority Rules (see following scaffolds)

Each pairing triggers different priority outcomes:

#### (a) Legal v Legal

- **First in time prevails.**
- Earlier valid legal interest takes priority over a later one.

#### (b) Legal v Equitable

- **Legal interest prevails** over earlier equitable interest **unless** the legal interest holder is **not a bona fide purchaser for value without notice**.
  - Notice may be actual, constructive, or imputed.
  - This doctrine underpins the *paramountcy of registered title* under Torrens.

#### (c) Equitable v Equitable

- **First in time prevails:** *Rice v Rice (1853) 2 Drew 73*.
- But a later equitable interest **may prevail** if:
  - They had **no notice** of the prior interest; **and**
  - They took **additional steps** to perfect their equity (e.g. lodging a caveat, taking possession, registration where possible): *Heid v Reliance Finance Corporation Pty Ltd (1983) 154 CLR 326*.

#### (d) Mere Equity v Equitable/Legal