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Topic 1A. Concept and Function of Property

I. Property - Definition

- 1) **Property is assignable**
 - a) Property refers to any right that can be transferred from one person to another.
 - b) Different from a personal right (e.g. the right to vote).
- 2) **Property is a right *in rem***
 - a) Property concerns rights people have to certain things, and exists subject to the continued existence of the object.
 - b) It differs from a right *in personam* which is enforced against particular persons.
- 3) **Characteristics of property rights**
 - a) Enforceability:
 - i) Property rights are enforceable against a large class of indefinite people, while a right *in personam* is a unique right enforceable against a definite person(s) (***Fundamental Legal Conceptions as Applied to Judicial Reasoning (1917), W. Hohfeld***)
 - b) Existence of a 'thing':
 - i) Property rights exist subject to a thing that is separate and apart from ourselves.

II. Ascertaining property rights

- 1) **General principle**
 - a) Property 'generally implies the right to use or enjoy, the right to exclude others and the right to alienate' (***Milirrpum v Nabalco Pty Ltd (1971)***).
- 2) **Is the 'thing' able to be subject to a property right**
 - a) Property refers to a legal relationship with a thing, and the degree of power that may be permissibly exercised over the thing.
 - b) ***Yanner v Eaton (1999)***
 - i) The Act in question did not extinguish native title rights as the Court held that there could not be absolute ownership over wild animals.
 - c) ***ICM Agriculture Pty Ltd v Commonwealth (2009)***
 - i) The assertion of control over a waterway was not a specific property right, only the control of its supply as a public resource.
- 3) **Numerus Clausus principle**
 - a) There are a limited number of recognized property rights. The law limits the creation of new property rights outside of the recognized forms.
 - b) ***King v David Allen & Sons Billposting Ltd [1916]***
 - i) A contractual licence to advertise was a right *in personam* and could not create proprietary rights such that they could be enforceable against a person other than the defined person.
- 4) **Recognition of native title rights**
 - a) General principle is that the common law will recognise native title if it is consistent with the common law. The Crown does not have sovereign title over the land and did not acquire absolute beneficial ownership of it. (***Mabo (No 2)***).
 - b) If the traditional customs and laws are practiced and observed by the indigenous group, there will be a basis for native title (***Mabo (No 2)***)
 - c) The legislature must express a clear and plain intention to extinguish native title, and absent this, native title will remain effective. (***Mabo (No 2)***)

III. Possession and ownership

- 1) **General principle**
 - a) Ownership is a right to possess a thing indefinitely, while possession without ownership is a temporary right.
- 2) **Bundle of rights (Honore, Oxford, 1961)**
 - a) Duty to prevent harm: The owner of a thing has a duty not to harm others with the thing and not to harm the thing itself.
 - i) The person that has power to control its use bears the responsibility for its **misuse**.
 - ii) There is a burden of responsibility for care conferred by the right of property in regards to the ownership of animals (***Backhouse v Judd [1925]***)
 - b) Liability to execution
 - i) Generally accepted limit that rights may be forfeit to acquisition by the government for the greater good, or in circumstances where the owner's debts need to be repaid.

Topic 1B. Real property

I. Legal and Equitable Interests in Land

1. If in dispute about multiple interests first state general principle:

- a. The doctrine of estates recognises that multiple persons may have an interest in land simultaneously dividing the interests based on **present right to possession** and **future rights to possession**: *Western Australia v Ward (2000)*.

2. Identify the interest - The *Numerus Clausus* principle recognises a ‘closed list’ of property rights and will not allow the creation of new property rights by agreement: *King v David Allen & Sons, Billposting*

- a. **Ownership of an estate in fee simple** (strongest interest at common law and statute):

- i. In possession
- ii. In reversion – owner’s interest in the land after lease period
- iii. Conditional - upon certain conditions (e.g. conditions for the use of land)
- iv. Determinable - fee simple ends at a certain time
- v. In remainder - whatever is left after the life estate is provided – during the life of the donee, he/she has an estate in possession. The grantor, on the other hand, has fee simple in remainder (which can pass under his/her will).

- b. **Servitude:**

- i. Easements, right of way – non possessory right to use and/or enter onto the real property of another without possessing it – but must be from one piece of land in favour of another piece of land

- c. **Leases**; exclusive possession needed – distinguish from *licence* (in personam) – consider language of arrangement – in *King v David Allen* – rent at 121 per annum “so long as this **license remains in force**”

- d. **Mortgages or other security interests**

3. Is the nature of the interest legal?

- a. **Ownership interest?**

- i. Old system - determined by conveyance of a valid deeds *23B Conveyancing Act 1919 (NSW)*; first registered takes priority: *s 184G(1)*
- ii. Torrens system: title by registration *s 41 Real Property Act 1900 (NSW)*

- b. **Mortgage** - creation of security interest over a loan

- i. Old system - conveyance of a valid deed to the property *s 23B CA*
 1. The mortgagor has an equity in redemption *Figgins (1999)*
- ii. Torrens mortgage - Title by registration, though no legal transfer in ownership of the land: *s 41 RPA*
 1. No transfer of the land mortgaged or charged *s 57(1) RPA*: Mortgagor has a statutory **charge**: *s 58 RPA*

- c. **Lease**

- i. Old system - conveyance of a valid deed: *s 23B CA*
- ii. Torrens system - title by registration: *s 41 RPA*
- iii. Legal lease - *s 23D(2) CA* - Nothing in 23B or 23C shall affect the creation by **parol** of a lease if:
 1. Lease is less than a period of 3 years
 2. Lease is at market price
 3. Lease grants immediate rights to possession.

4. If there is no legal interest, there *may* be an equitable interest (subject to satisfaction of formality requirements)

- a. **Express trust?**

- i. General principle: The trustee is the legal owner of the land but is bound to hold the land for the benefit of the *cestui que trust* (absolute owner) (*DKLR Holdings Co (No 2) v Commissioner of Stamp Duties [1980]*)
- ii. May be constituted without a particular form but the “intention of the settlor to create a trust must be explicit” (*Bloch v Bloch (1981)*)
- iii. An express declaration of trust of land is not enforceable unless it is evidenced in writing and signed by the party able to declare the trust: *S 23C CA*

- b. **Constructive trust?**

- i. A constructive trust may be formed absent writing and signature requirements if it would otherwise be fraud for the legal owner to assert a beneficial interest (*Allen v Snyder [1977]*)
- ii. When there is a written and signed contract (satisfying *s 54A CA*), which there can be specific performance, equity assumes there is a **constructive trust**.
 1. A valid contract for sale creates, in equity, a constructive trust, where the vendor becomes a

Topic 2 - Choses in Possession

I. Choses in Possession

1. What is the item of personal property? - *Colonial Bank v Whinney (1885)*; *Your Response Ltd v Datateam Business (2015)*
 - a. Chose in possession (chattel)
 - i. Choses in possession have, as their *object*, some “thing” in the material world
 - ii. Choses in possession are *in rem*, meaning that the right is enforceable against the world at large.
 - iii. Subject to possessory rights - can be capable of physical possession - *Your Response*
 1. **Tangible:** Can be subject to a common law “artificer’s lien” (a right to retain possession over some thing as security)
 2. **C.f. intangible:** Electronic data, for example is not capable of physical possession, and as such the refusal to release cannot be done by asserting a possessory lien.
 - b. Chose in action
 - i. Does not relate to some object in the ‘real world’ - they are a legal construct that confers a right of proceeding in a Court of law to reclaim possession.
 - ii. Rights *in personam* - enforceable against a defined person but not against the whole world.
 1. E.g. A creditor cannot insist on the payment of a debtor’s debt against anyone else but the debtor.
 - c. Intangible assets that are *not* choses in action?
 - i. *Colonial Bank v Whinney (1885)* suggests that “all personal things are either in possession or in action. The law knows no *tertium quid* between the two”
 - ii. Third category is not established in Australia, however consider proposal of the *Law Commission for England and Wales* of the third category:
 1. Composed of data in an electronic medium
 2. Exists independently of persons and independently of the legal system
 3. Rivalrous (that is, if one person is using it, another cannot).
2. What is the relevant legal interest in the chose in possession?
 - a. Ownership:
 - i. Maximal interest in a chattel, ability to exclude others from interference.
 - ii. Prima facie, means the entire dominion over the object owned (*Union Trustee Co of Australia 1915*)
 - iii. The general right of ownership involves “exclusive enjoyment to destroy, to alienate, or to alter, and, of course the right to maintain, and to resume and recover possession from other persons (*Knapp v Knapp*)”
 - b. Possession:
 - i. There are **two elements necessary for legal possession**: *JA Pye (Oxford) Ltd v Graham [2003]*
 1. a sufficient degree of physical custody and control (‘factual possession’);
 2. an intention to exercise such custody and control on one’s own behalf and for one’s own benefit (‘intention to possess’).
 - ii. **What constitutes a sufficient degree of control?**
 1. It is the control ‘of that character of which the thing is capable’ (*Lord Advocate v Young [1887]*)
 2. In *The Tubantia [1924]* the attachment of buoys and moorings on the hull of a wrecked ship was sufficient to establishing “effective control” and to “prevent any useful work by new-comers”. That is “without violence”, no new-comers could had have exercised the kind of control P had.
 3. Character of the thing: In *The Tubantia*, the difficulty of asserting possession over a sunken vessel was considered in the degree of control necessary to establish possession.
 - c. If possession, what is the effect of possession?
 - i. **Relative title**
 1. “Possession is good title against all the world except the person who can shew a good title” - *Asher v Whitlock (1865)*
 2. A person possessed of goods has good title against any stranger with no title themselves, and the stranger cannot defend themselves by shewing there was a title in some third person, for against a wrongdoer possession is title - *Jeffries v The Great Western Railway (1865)*
 3. There is no concept of “absolute title” at common law. The question of relative title assesses the relative strengths of the titles proved by the rival claimants and the rival claimants only - *Ocean Estates Ltd v Pinder [1969]*
3. Transfer of ownership/possession?

Topic 3 - Choses in Action

I. Is the property a 'chose in action'?

1. [GENERAL PRINCIPLE] A 'chose in action' describes all personal rights of property which can only be claimed or enforced by [legal] action, and not by taking physical possession (unlike CiP).” – *Torkington v Magee* [1902]
2. **Main characteristics of a chose in action:**
 - a. Enforceability *Tolson*
 - i. Must be capable of being enforced by the rightsholder against the duty holder.
 - b. Incorporeal and intangible *Tolson*
 - i. It is not physical.
 - c. Bare right *AVGH v German Property*
 - i. There is only a bare right, there is no occupation or enjoyment.
3. **Is it a legal chose in action?**
 - a. Debts *King*: 'an obligation to pay money to the creditor'
 - i. No proprietary interest in money held in a bank account is also considered a debt, where the bank owes a debt to the depositor (*Foley v Hill; Libyan Arab Foreign Bank*).
 - b. Shares in the issued capital of a company *Archibald*
 - c. Contractual rights including royalties *Linden Garden*
 - d. Copyright
 - e. A policy of insurance *Moore*
 - f. A benefit a creditor enjoys under a guarantee given by a guarantor *Loxton*
 - g. Negotiable instruments (bill of exchange, promissory notes, cheques) *Whinney*
4. **Is it an equitable chose in action?**
 - a. Share interest in a partnership *Everett*
 - i. No title to specific property, but a right to proportion of the surplus after realisation of assets and payment of debts/liabilities – proportionate interest in assets: *Canny Gabriel (1974); Rojoda (2020)*
 - b. Interest of a beneficiary under a trust *Norman*
 - c. Interest in a legacy *Perpetual*
 - d. A reversionary interest under a will *Tritton*
 - i. Beneficiaries interest under an unadministered estate (*Livingston Rights*)

II. Can the chose in action be assigned?

1. **Is it public pay?**
 - a. Is A a holder of public office and entitled to be paid for work in public office?
 - b. If so, A cannot assign that right *Mulvenna v Admiralty (1926)*
 - i. The reasoning is one of public policy, that being it would affect the dignity of the public office and discharge of duties.
 - c. However, what is the purpose of the right?
 - i. In *Arbuthnot v Norton (1846)*, a judge's right for his estate to be paid 6 months of his salary after he died was assignable, as it was not a payment of salary (no issue of public policy) – look at the purpose of the right.
2. **Is it a 'bare right to litigate' (BRL)?**
 - a. [DEFINITION] - A right to sue that is not **ancillary/incidental** to some other assignable property right; i.e. accompanying the transfer of a chose in possession *Ellis v Torrington (1920)*.
 - b. Prima facie, you cannot assign a bare right to litigate for tort, breach of equitable obligations and rights to sue for unliquidated damages for breach of contract to another party. *Ellis*
 - c. [EXAMPLES OF BRL] - Right to sue for torts, unliquidated damages for breach of K, but NOT debts or liq. Damages.
 - i. [NOT BRL] A **debt is assignable**, even if it has already fallen due – *Fitzroy v Cave [1905]*