Real Property (LPAB 05) – 2024

Notes and cases

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Week 1: Defining Property

(Chapt 1)

Land law is the body of legal rules that confer rights over what the *Macquarie Dictionary* refers to as "the solid substance of the earth's surface";[1] or what lawyers term "real", or "immovable", property. These rules mark out the boundaries between owners and their neighbours; between occupiers, strangers, and the state; and between the private and public spheres. They also delineate the temporal limits of entitlement between past, present and future. Land law governs the most intimate, important and valuable spaces – homes, workplaces, sites of leisure, even the environment. In doing so, it inevitably structures the relationships people have both with those who are closest to them, and those others who are not. And because it is impossible to do anything without being situated somewhere, land law is ubiquitous and inescapable By regulating and safeguarding space, land law plays a central and indispensable role in the sustenance of life itself. Rights over land are therefore among the most fundamental of all legal rights, underpinning individual flourishing, the stability of relationships, and broader social cohesion.

The common law drew a firm distinction between property rights and other forms of rights. It laid down the distinction between rights over things and rights against persons, or in the language of Roman law which has influenced the common law, rights ²in rem² in contrast to rights ²in personam². It drew a further distinction between "real property" and "personal property", one of the chief features of the common law. A fundamental principle developed centuries ago was that success in any of the actions for land resulted in the plaintiff recovering the "res", that is, the thing that formed the very subject matter of the dispute. Such an action received the name "real action" ("actio realis") – as opposed to "personal action" ("actio personalis"), in which the gist of the judgment was an order, directed to the person of the defendant, to pay money. Generally speaking, the only property that came within the scope of the real actions was property in land. And so property recoverable by the real actions came to be called "real" property. It was only in respect of this type of property that in rem rights applied. Other forms of wealth were protected by personal actions. The distinction between real and personal property is, therefore, broadly equivalent to the distinction between immovables and movables, or between land and chattels.[228]

Today, it is possible for types of property other than land – such as tangible personal property or chattels, and intangible personal property such as shares, copyright, patents, and choses in action (which include rights to sue) – also to be specifically recovered or protected, so that all property rights can be seen as rights in rem.

What is property?

Real Property (William Blackstone 1777)

- Realty, interests in land – land is three-dimensional space located by reference to a point on the earth's surface and fixtures – in the past only land was recoverable
- Real Property is also split into two categories – corporeal and incorporeal hereditaments (a right capable of being devised to an heir)

Personal Property

- Chattels real – leasehold and other interests in land that are less than freehold – distinction drawn because of an institutional definition of rights – only freeholds were enforceable by real actions for recovery
- Chose in possession – a movable corporeal thing – eg goods

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	abandoned the property, along with his family, and the wife was permitted to continue living there rent free as part of the separation agreement. The bank sought possession of the property, which the wife resisted.	The House of Lords held the wife had no overriding interest, and so the bank could take possession of the property. The House of Lords held that the **necessary interest had to be proprietary**. They held that the separation agreement permitting the wife to remain in the house was a mere license**, and licenses are a personal, non-proprietary right**. As the wife did not have a proprietary interest in the house, she had no interest which could amount to an overriding interest. She could not, therefore, resist possession.
Milirrpum v Nabalco Pty Ltd. (1971) 17 FLR 141 (Gove land rights case) Early native title (rejection of)	The Yolngu people, the traditional owners of Arnhem Land had petitioned the Australian House of Representatives in August 1963 after the government had sold part of the Arnhem Land to a bauxite mining company, Nabalco without consultation. They obtained writs in the Supreme Court of the Northern Territory against the Nabalco. The plaintiffs claimed they enjoyed sovereignty over their land, and sought the freedom to occupy their lands. The applicants asserted before the Court that since time immemorial, they held a "communal native title" that had not been validly extinguished, or acquired under the Lands Acquisition Act 1955 (Cth), and should be recognised as an enforceable proprietary right.	Justice Blackburn found that the Yolngu people could not prevent mining on their lands. He held that native title was not part of the law of Australia, and even had it existed, any native title rights had been extinguished. Further, even if extinguishment had not occurred, the plaintiffs were not able to prove native title.
Yanner v Eaton (1999) 201 CLR 351	The appellant was an indigenous hunter who killed two animals in a creek for his own consumption. He was later charged with taking 'fauna' from the area without a license, contrary to statute. This statute made all 'fauna' 'property' of the Crown. Unlike the previous statute, there was no exception for native hunting rights.	Issue: was the meaning of 'property' under the statute. What the statute meant by 'property' was determinative of whether the appellant's native hunting rights had been extinguished by the statute. **The High Court held in favour of the appellant.** The court explained that the term 'property' does not necessarily mean full, beneficial or legal ownership. Rather, property is a 'legal relationship' with an object which grants a person a right to exercise power over the object in some respect. As such, **property is a variable concept which can have different degrees of intensity.**

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Week 2: Concepts of land

What is Land?

- Land is a three-dimensional space referable to a point on the earth's surface
- Land can exist above the surface and below the surface

Trespass

- Airspace
- Below ground

Boundaries

Natural rights

Encroachment

Fixtures and chattels

Case	Facts	Ruling

TRESPASS TO LAND

Trespass

- Trespass to land is **intentional** (or negligent) **direct physical contact** by the defendant with the **land** [exclusively] **possessed** by the plaintiff (*Public Transport Commission of NSW v Perry (1977) 137 CLR 107)*
    - This may include the defendant directly causing some object to contact the land

- Actionable per se – no need to prove damages
- Implied licence to enter - *Halliday v Nevill (1984) 155 CLR 1*, *TCN Channel Nine v Anning (2002) 54 NSWLR 333*
- Lawful right to enter - *Plenty v Dillon (1991) 171 CLR 635, Kuru v NSW (2008) 246 ALR 260* – license revoked
- Exemplary and aggravated damages: *TCN Channel Nine Pty Ltd v Ilvariy Pty Ltd [2008] NSWCA 9*
- Easements? See *s88K Conveyancing Act 1919*, which empowers the Supreme Court to impose an easement over a parcel of land provided the easement is reasonably necessary for the effective use or development of another parcel of land that will gain the benefit.
    - The Court must determine that:
        - use of the land in accordance with the easement will not be inconsistent with the public interest,
        - the owner of the land to be burdened by the easement can be adequately compensated for any detriment caused by imposition of the easement, and

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