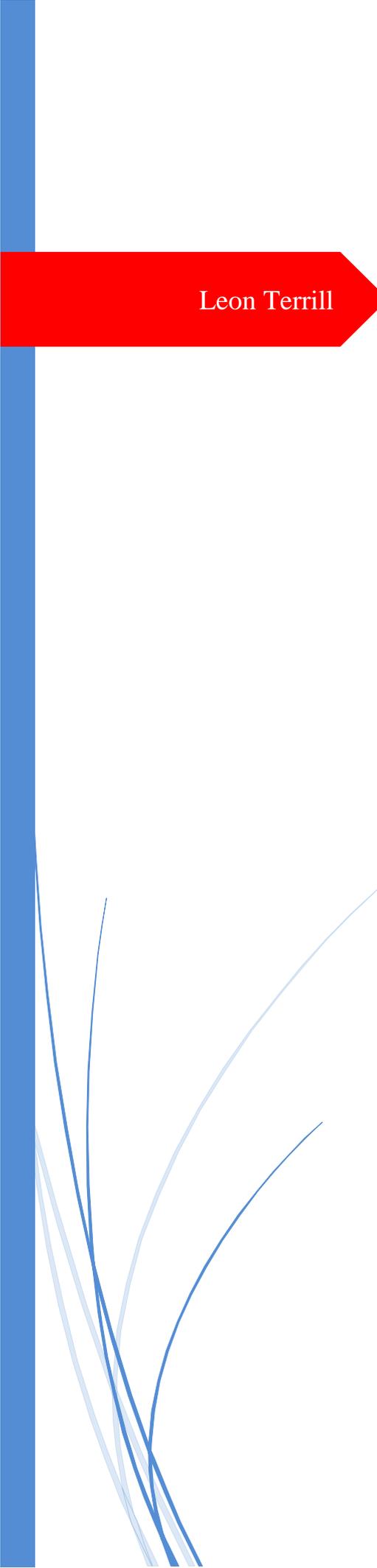




Leon Terrill

Principles of Private Law

LAWS1150



STUDENTVIP
UNSW

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Class Participation Notes

Fixtures

Summary

The main thing we look at in this class is the doctrine of fixtures: what it means, when it matters and its rules. We also look more briefly at the physical boundaries of land ownership, in terms of how far it extends upwards and downwards.

Discussion Qs

1. How high does ownership of land extend? How far beneath the ground?
2. What is a fixture?
3. What are some of the situations in which it matters whether or not something is a fixture?
4. What are the rules for determining whether something is a fixture?
5. Who owns a fixture that has been installed by a tenant? Can tenants remove a fixture that they have installed?
6. What happens when a person installs a fixture by accident on someone else's land?

Set readings

Property Casebook [1.70] – [1.98]

Traditional Classification and Terminology

Technical terminology from sense of historical continuity > analytical precision

The basic and traditional distinction in property is as follows:

- **Real Property:** Land. Divided into two sub-categories:
 - **Corporeal** hereditaments - rights of possession (**tangible** real property).
 - **Incorporeal** hereditaments - lesser rights to land (**intangible** real property, such as an easement of way which entitles holder only to right to walk across a certain piece of land owned by another. It is the right of one individual to use another's property and can be inherited.)
- **Personal Property:** **Chattels**. Divided further into:
 - Chattels **real** - a hybrid between personal and real property. For example, leaseholds (right in property, but not complete ownership).
 - Chattels **personal** - all other chattels. These can also be divided into:
 - Choses in Possession - tangible physical objects.
 - Choses in Action - Intangible things, such as patents, copyrights, deeds etc. Choses in action are really a 'right to sue' (on the basis of copyright etc)

The legal ramifications of the distinction between real and personal property are:

- **Real property:**
 - Can only enforce a contract of land if there is an agreement **in writing**.
 - **Specific performance is a remedy:** Land is recoverable in itself (and not merely damages) if a claim succeeds.
- **Personal property:**

- Can enforce in the absence of a written agreement (can be oral etc)
- No specific performance, **damages only**: The property itself is not recoverable, the party will be compensated with damages.
- The distinction concentrates not on **proprietary interests themselves** but on the **objects of those interests** – distinguish btwn land and goods bcos land is **immovable/permanent** that law recognises proprietary interests as diff to goods/patents

Land or Realty

- Origins of dichotomy btwn real/personal property lie in **remedies available at CL** for recovery of tangible objects
 - If person dispossessed of object could recover the object (the *res*) as of right it was classified as real property → distinguishing characteristic of RP was quality of being **specifically recoverable in a 'real' action**
 - Objects not recoverable were regarded as personal property – eg. had 'personal action' for dmgs against wrongdoer, but no order requiring delivery of actual object

Boundaries of Land

Airspace

- *Baron Bernstein of Leigh v Skyviews & General Ltd* [1978]
 - Griffiths J
 - 'balance the rights of an owner to enjoy the use of his land against the rights of the general public to take advantage of all that science now offers in the use of air space...restricting rights of an owner in the air space above his land to such height as is **necessary for the ordinary use and enjoyment of his land** and the structures upon it'
 - Thus, scenic flights operating some 100s of feet ↑ P's land did not constitute a trespass
- *LJP Investments v Howard Chia Investments* (1989)
 - P obtained injunction requiring D to remove scaffolding which was erected 4.5m above ground level and protruded 1.5m into air space above P's property
 - Whether 'one person should be permitted to use land of another person for considerable personal gain for himself, simply bcos his use of the land causes no significant dmg' → NO
- *Bendal v Mirvac Projects* (1991)
 - Held construction facilities and objects encroaching upon air space above adjacent land constituted trespass if they were of a nature and at a height which would interfere with any **ordinary uses** of land which occupier may see fit to undertake.

Below the surface

- Same concept applies
- *Bulli Coal Mining Co v Osborne* [1899]
 - Person who mined coal beneath land of another person held liable in trespass

Council Codes

[omitted for sample purposes]

Chattels or Personality

[omitted for sample purposes]

Boundaries btwn Diff Types of Property

Courts have to decide what type of property the subject matter of the dispute is – chattel or land? Ownership?

The boundary btwn land and chattels: Fixtures

A fixture is a thing once a chattel which has become in law land through having been fixed to the land: *APA v Coroneo* per Jordan CJ

What are some of the circumstances when it can matter?

- The doctrine of fixtures provides that chattels may **change character from personal to real property** if it is **annexed** (attached) to land
 - A chattel (personal property), which is affixed to land may become part of the land (real property)
 - Can transfer ownership in the particular objects
 - Ownership of land v ownership of chattels, are the whiteboards part of the land
 - Significant over where **dispute in ownership**
 - Can arise btwn
 - Landlords/tenants + mortgagees/owners + devisee/personal rep of deceased
 - Important for tax/stamp duty law – where Q of who is owner important
- A mortgage is an interest in land
 - If you don't repay the loan, they can take possession of your land, ahead of other creditors

Belgrave Nominees Pty Ltd v Barlin-Scott Airconditioning (Aust) Pty Ltd (1984)

RATIO:

In determining whether an object has become a fixture, one employs a two-step process - examining **degree of annexation** and **intention** of the person who affixed the chattel.

- Degree of annexation:
 - if the object is **attached** to the land by more than its own weight, then it raises the presumption that it is a **fixture**. If it is not, then it raises the presumption it is a **chattel**.
- Intention:
 - after the presumption has been raised, the **party seeking** to **refute** it has the **onus of proving** that the **intention** (of the party which affixed/didn't affix the object) was that the **object be a fixture/chattel despite being unattached/attached** respectively.

In determining the intention of the parties, the court considers: *Reid v Shaw* (1906)

- (a) the **nature** of the chattel;
- (b) the **relation and situation of the two parties**;
 - Land owner or doing it for landowner?
- (c) the **mode of annexation** (how well attached was it); and
- (d) the **purpose** for which the chattel was fixed.

FACTS:

- Ps, owners of a building, entered into contract with builder (Guide) for renovation of adjoining buildings. Builder subcontracted D for supply and installation of air-conditioning systems. D installed 2 AC plants on roofs of Ps buildings. Platform installed on each roof to hold a chiller, which stood on own weight on platform. Chiller connected to water reticulation system of its building, connected to electrical supply cables

(form structure of building) were connected to electrical junction box fitted to chiller. Cooler unit attached only by water/electricity, electricity attached to unit not yet attached.

- Builder failed to make payments to D and went into liquidation. Ps entered into contract with new builder. D agreed to complete installation, but removed AC plants. Ps sought injunction compelling D to deliver 2 AC or alternatively dms for detention, conversion and trespass
 - Had not been paid for goods they delivered.
 - New builder given job of finishing job. BSA said haven't been paid, so taking them back.
 - BSA – chattel
 - Belgrave – fixture
 - Whether they had the legal right to take it

HELD:

- To determine whether what is annexed = land must depend on circumstances of each case
- **General rule of CL that property in materials/fittings, once annexed to a building, become part of the freehold**
 - **BoP on other party to disprove**
 - Whether annexation of plants sufficient to constitute the plants fixtures must be determined by the **circumstances in which the same were positioned on the platform, and more particularly, the intention as evidenced by the degree of annexation and the purpose of the annexation.**
 - 'it is a Q of which must depend on the circumstances of each case, and mainly on two circumstances indicating intention, the degree of annexation and the object of annexation'
 - Blackburn J in *Holland v Hodgson* (1827)
 - 'mainly on two circumstances as indicating the intention, viz, the degree of annexation and the object of the annexation. When the article in question is no further attached to the land then by its own weight it is generally to be considered mere chattel'
- If there is intention to make articles part of land, **they become part of land**
 - Compare
 - Builder's yard, temporarily leaving stones stacked for convenience = chattel
 - Anchor of large ship
 - Articles attached by their own weight not considered as part of land → onus of showing they ceased to be chattels
- *Australian Provincial Assurance Co Ltd v Coroneo* (1938)
- **Depends upon if fixed to land, and for what purpose**
 - if chattel is actually fixed to land to any extent, by any means other than its own weight, then prima facie it is a fixture, and BoP is upon anyone who asserts that it is: *Holland*
 - The test of whether a chattel which has been to **some extent fixed to land is whether it has been fixed with the intent** it shall remain in position **perma** or whether it shall remain in position for **temporary** purpose
 - **Did the affixer intend to attach it perma, semi-perma or temp**
 - **CJ Jordan**
 - 'whether it has been fixed with the intention that it shall remain in position perma or for an indefinite or substantial period...or temporary'
 - If perma = fixture, whether it has been **fixed for better enjoyment of land or building, or fixed merely to steady** the thing itself, for better use of enjoyment
 - **Peter Butt**
 - **If intention was better use or enjoyment of land, in sense of furthering the use to which the land is put, then the item is likely to be a fixture**
 - **But if the intention was the better use or enjoyment of the item itself (as distinct from the land) then the item is likely to be a chattel**

- **Did the affixer intend for the object to become an accessory to the land; or to affix it for the benefit of the object**
 - Intention must be gathered from the purpose for which and the time during which user in the fixed position is contemplated: *Hobson v Gorringe* [1897]
 - If it has been securely fixed, so cannot be detached without substantial injury to thing itself, or to which it is attached – this supplies ‘strong but necessarily conclusive evidence that a permanent fixing was intended’
 - If fixing is ‘very slight’ support ‘inference that it was not intended to be permanent’
- Apply the **above^ intention test**
 - **That is the ultimate Q – that the intention is to form part of the land**
- Facts which suggest plants were intended to be affixed permanently
 - Nature of air conditioning plants
 - D supplied positioned and connected
 - Ps are registered proprietors of freeholds
 - Chillers positioned on platforms + connected up by pipes to water pumps which in turn connected to reticulation system of building
 - Plants when fitted formed an **essential part of the buildings necessary** for their use and occupancy as modern office premises
- Counsel for D submitted D’s intention ought not be inferred without regard to sub-contract as only partly performed → because some repairs could not be carried out *in situ* necessary to remove plant for that purpose
- **Distinguishing feature was contractual relationship between P and D** – absence of relationship between parties in present action.
 - Blackburn J’s statement in *Appleby v Myers* (1867) has no application to circumstances where no contractual relationship between person fitting chattel and owner of freehold/possessor.
 - Made clear in *Hobson v Gorringe*
 - Gas engine which had been affixed by bolts/screws to mortgagor’s land under hire-purchase agreement made by him with hirer. Mortgagor made default under his HPA and mortgagee entered in possession. Hirer sought to restrain from selling machine, claiming ownership, while mortgagee said fixture
- D **submits insufficient annexation of chillers** to cause fixtures
 - **Connected** to water pipes, 4 bolts so there **was a connection**.
 - Nevertheless, **even slight** fixing to land is **sufficient to raise presumption** that chattel is a fixture
- ‘AC plants were **intended to be fitted permanently** to each building and therefore the same were fixtures at time of removal by D’

Leigh v Taylor [1902] outlines important principle

- ‘regard to all the circumstances of the particular case – to the taste and fashion of the day as well as to the position in regard to the freehold of the person who is supposed to have made that which was once a mere chattel part of the realty. The mode of annexation is only one of the circumstances of the case, and not always the most important’

[Tapestries](#)

Leigh v Taylor [1902]

- Facts:
 - Ms Taylor, a tenant for life affixed expensive tapestries to the wall. Tapestries tacked onto canvas, which was stretched over and nailed to strips of wood which were nailed to walls. After her death, the remainderman claimed the tapestries were a fixture, as they were **‘affixed’** to the wall with wood, nails and screws.

- Held:
 - The tapestries were fixed for the **purpose of ornament** in the only way possible for their use and enjoyment. They could also be removed **fairly easily**, without causing damage to the house. Thus, they did not become a fixture the property of the remainderman, but were removable by the executor of the tenant for life.
 - Lord Lindley observed life **tenant** likely **not** have **intended** to **annex** tapestries for benefit of **remainderman**.
- This case highlights the underlying rationale for the doctrine of fixtures: originally, it was to prevent people from removing chattels from freehold that would physically destroy part of the freehold. These days, it is possible to remove chattels without destroying the actual realty. Thus, it makes it difficult to determine cases that are at the margins of the rule.

Compared to *Re Whaley* [1908] where tapestries were considered fixtures, bcos attached by an owner, reasonable to expect owner to intend they contribute to improvement of land + enhance the Elizabethan character of the room.

In *Norton v Dashwood* [1896] tapestries held to be fixtures as not removed without dmging brickwork, leaving room 'maimed and disfigured'

In *Famous Makers Confectionary v Sengos* (1993) held large freestanding AC which sat on a roof was connected by ducting was a fixture. A similar result was reached in relation to insulation consisting of panels of aluminium foil resting on girders which supported the roof of the building

Contractual term

Hobson v Gorringe [1897]

[omitted for sample purposes]

May v Ceedive Pty Ltd (2006)

- A lived on land owned by R. at time he took up residence, signed contract for sale which specified subject matter of contract was house, not land on which it was situated. Also agreed that lease land to A in return for payment of ground rent.
- Working miners build own house son land, retaining ownership

FACTS:

- A practice had developed in mining areas, that lessees would build and inhabit houses on land. The houses would become their own property, while the land remained the property of the original owner. In this case, May acquired a mining house, and formed an arrangement with Ceedive to pay a weekly rent for the land. Ceedive increased the rent, and May refused to pay.
 - Ppl who **built houses**, were treated as **owners of house**, **not land**. The local custom, have to pay rent for use of land.
 - App May had bought land in 1969 from Mrs B
 - Q is who owned the house?
- Ceedive had only bought land in 2000
- Mining company had owed it for very long time.

HELD:

- Santow JA:
 - Start with **onus of proof** → if attached beyond its own weight

- **Mainly objective intention**, the 'original affixer's actual (subjective) intention may have 'limited bearing' as least as it **indicates the period of time** the item is intended to remain in position, **function**.
- The house was a **fixture** on the land as per the **objective standard** of the law, notwithstanding subjective intentions of the parties to the contrary.
- Upon looking at 'all the surrounding circumstances', the **presumption** that the house is a fixture has **not been rebutted** → **circumstances clearly indicate** house is **affixed to land**
- The agreement evincing an intention for the house to remain a chattel was **between the parties**, and **not** the **builder** who affixed the house. The intention which matters is not the parties', but the one who originally affixed the house.
 - Relevant intention is those who built it
- The fact that the house would **have to be demolished** to be removed strongly indicates that it is a fixture (chattels are **movable!**)
 - **Shifting them would involve their demolition. Degree of annexation very high.**
- 'one important factor pointing strongly in favour of the house being a fixture is the fact that all the evidence points to the house being affixed with the **intent** that it remain in **position permanently or for an indefinite or substantial period.**' In this case from at **least since 1910**. No predecessor to Mr May purported to sever or remove it, nor has Mr May.
 - **Entire** contract, **based** on **understanding** that it was a chattel, that he was buying a **house**, his as an object. That was the understanding of May and woman he bought it from. BUT...
 - This is not relevant, bcos **current intention is not relevant**
 - We are **interested in the intention of the affixer** → **not other ppl who buy/sell later** on
 - **'subjective belief that he was purchasing the house... would not alter the position at law'**

Importance of 'surrounding circumstances'

- *Aus Provincial Co v Coroneo* (1938) a theatre, subject to mortgage, contained rows of seats which were bolted to floor and fastened together. Held they remained chattels bcos seats were **regularly moved around**: best seats went to back for pic shows and to front for concerts.
- *Vaudeville Electric Cinema v Muriset* [1923] premises were used exclusively as cinema, cinema chairs bolted in place by owner held to be fixtures as object of annexation was to provide **perma benefit for building**
- *Eon Metals NL v Commissioner of State Txanation (WA)* (1991)
 - Concerned mining plant/equipment which, without being moved from the mine where it was installed, was sold to the A
 - Q of whether agreement for sale of plant/equipment should be charged with stamp duty at rate applicable to personalty. In deciding that some of equipment remained chattel, Ipp J took account the 'limited life of the mine, the transportable character of the equipment concerned, the common practice to transfer equipment of that kind, the economic incentive to remove it, the relevantly slight degree of attachment to the ground, and the facility with which detachment could occur'
- *National Australia Bank Ltd v Claker* (2000) court held that items of irrigation equipment were chattels. The electric pumps/sprinkler heads **rested on their own weight** for operational purposes, and the valves attached to hoses could be easily removed
- Compared to *Litz v NAB* [1986] where items of irrigation equipment were held to be fixtures, no dmg would be caused to either the land or the chattel upon removal in this instance. Also intention of parties was equipment would be readily movable around property whenever needed, thus indicating no intention to annex.
- *Chelsea Yacht and Boat Co v Pope* [2000] **houseboat** moored to a pontoon in a river and used as rental accom, held not to be fixture, even **tho electricity, gas, other services connected to it**. **No sufficient degree of annexation**, as houseboat could be **easily moved** without injury to it, or to the land; **nor** did parties demonstrate any **intention** to attach the chattel perma to the land

- *Rudd v Cinderella Rockerfellas Ltd* [2003] but if moored more securely and on a more permanent basis, a boat (used as a nightclub) may become part of land

Summary and Conclusion

- Have to look at all the surrounding circumstances
- All cases consistent with onus of proof, starting point
- Shift away from looking at how attached it is, more towards looking at what is the reason for its attachment. Shift in emphasis in the cases.
- Use precedent carefully

Tenant's Fixtures

In certain circumstances, affixed chattels can be removed by the affixer, despite the fact they are fixtures. The most common example are tenant's fixtures.

The owner owns the fixture, but the tenant often/may have right to remove it.

There has been a change of legal ownership.

- Reflects CL economic considerations
- CL permits tenant to remove any ornamental, trade, domestic fixture affixed by tenant during term of lease eg. wooden panelling, ornamental chimneypieces and fireplaces held to be removable tenant's fixtures: *Spyer v Phillipson* [1931]

Right to remove

- While lease is in force and fixture attached to land, lessor (landlord) is said to be owner of fixture subject to tenant's right of removal
 - Can remove at will, before expiry/termination
- Can remove any time up to expiry of lease, unless:
 - 1. Lease prohibits this right
 - 2. Right does not usually apply where lease forfeited or surrendered
- If after expiration a tenant remains in possession by virtue of a new tenancy, the tenant is still entitled to remove fixtures
 - After tenancy ends, do tenants have right to remove fixtures they have installed?
 - Depends on tenancy.
- 'Colour of right' principle in *Concepts Property v McKay* [1984] allows a tenant who claimed he had a fixed-term lease under an equitable assignment a reasonable time to remove fixtures after expiration of the periodic tenancy which was found to exist between the landlord/tenant.

Agricultural Tenancies

- At CL, tenant's rights did not extend to agricultural fixtures.
- Legislation modifies this rule, can allow in specified circumstances. Generally subject to statutory right of the landlord to purchase the fixtures for a reasonable price
 - *Agricultural Tenancies Act* (NSW) s10

Residential Tenancies

- Residential tenancies legislation – in general prevent tenants affixing or removing fixtures to residential premises without landlord's consent

- *Residential Tenancies Act 2010 s66*
 - (1) Starting point is tenant cannot install fixture without permission
 - (2) landlord cannot reasonably withhold
- S67 – at end of agreement, at your own cost, you can remove fixture to its former state

Accidental fixtures - Chattels annexed without permission

- General rule is that in absence of agreement, a **person who annexes a chattel** to the owner's land **has no right to recover it**
 - Where you **accidentally build** on someone else's land
- *Chateau v Chateau* [1978] where the owner of one vineyard planted vines on a neighbouring vineyard without either party's knowledge. The vines, winery and equipment were held to be a fixture on the neighbouring property.
- *Brand v Chris Building Society* [1957] the defendant **mistakenly** built a house on the plaintiff's land. The plaintiff sought a restraining order to demolish the house, but the defendant claimed that the plaintiff knew about the mistake at the **beginning of construction**, but took no steps to stop it, and undertook to give the plaintiff the choice to either (a) have the property removed, or (b) keep it for 2145p.
 - Pointed to wrong lot. Found out building on property, when substantial completion – could builder retrieve, restore land to prev state, or to accept minimal payment for building.
 - **Court held: It is now the owner's house. Chris Building Society had right to remove chattels, loose items, but not the fixture.**
 - **The fixture was the house**
 - Hudson J entered judgment for the plaintiff, holding that in the absence of something in the nature of fraud of the plaintiff's part, there was no equitable principle upon which the defendant could rely to defeat his claim.
 - Hudson J **rejected submission by P** on basis of unjust enrichment bcos counsel could not identify authorities that would establish such a principle. **But tide is turning**

Can there be exceptions?

Unjust enrichment

If owner saw that house was being built on his land, and he let it continue UE applies possibly (any sort of involvement). But in **Brand he had no knowledge. No wrongdoing on his part.**

Property Law Act 1974 (Qld) s196

- Where you build on another's land on genuine but mistaken belief, you can apply to court for relief, and the **court has discretion.**
 - Change in **boundary, compensation**? If they did it on purpose, x3 value of land

Cases of Unjust Enrichment in Action

- *Pavey & Matthews v Paul* (1986)
 - Deane J offered definition of unjust enrichment where work is performed on property
 - Calculated @ 'fair value of the benefit provided' (remuneration calculated at reasonable rate for work)
 - Deane J added that payment of the full value of the work performed would be unreasonable where 'unsolicited but subsequently accepted work is done in improving property in circumstances where remuneration for the unsolicited work calculated at what was a reasonable rate would far exceed the enhanced value of the property'

- *Napean District Tennis Association v Penrith City Council* (1988) Hodgson J, relying on *Pavey* awarded P compensation for expenditure in re-surfacing tennis courts bcos council acquiesced in it by contributing to the expense of constructing a levee bank to protect the courts
- *Angelopoulos v Sabatino* (1995)
 - Court held D unjustly enriched by P's improvements to the property and was therefore required to reimburse the P for this cost
- *Sunstar Fruit v Cosmo* [1995]
 - Purchaser under contract of sale went into possession prior to completion. Despite provision in contract that purchaser would not add to property without vendor's consent, P made various improvements. After vendor rescinded contract, P sought restitution for improvements
 - Held that P was not entitled to restitution bcos enrichment was not 'unjust' on account of the breach of agreement, and there was no inducement by the vendor.

SAMPLE

Concise (Exam take-in) Notes

SAMPLE

Agency

Problem Q

- _____ may have a claim against _____ for conversion, as _____ is _____'s agent and has done the act of _____.
- Whether _____ will be held liable turns on what kind of authority _____ had.
 - In the context of creating/affecting legal relations, the principal will only be bound by acts of the agent which are within the agent's authority
- The critical issue is whether the agent had the principal's **authority** for the particular, identified act.
 - Actual authority will mean that principal can be sued for breach of duty, and they have no claim against the agent bcoz they authorised them
 - Ostensible authority will mean that the contract remains so the principal is bound, but the principal can sue the agent for breach of agency
 - No authority at all means the principal is not liable and there is no contract.
 - Agent may be liable to the third party for breach of warranty of authority, an action brought by _____ against _____ for purporting to act as an agent, when they did not have the authority which by their actions, they warrant they possess
- **ACTUAL EXPRESS AUTHORITY**
 - There was no actual express authority as _____ acting outside the scope of authority for contract
- **ACTUAL IMPLIED AUTHORITY**
 - _____ was incidental to acts expressly authorised.
 - _____ was not a usual authority that they would have.
 - _____ was not usual business practice.
 - Industry practice
 - When selling art for consignment, is it reasonable for selling as per agent. Gets commission. Unlikely that there is a custom, without permission, without further
 - EVERYONE DOES IT
 - _____ course of conduct
 - Dealings btwn parties
 - BRETT always does it, and she has acquiesced → not on the facts.
 - Never previously consented.
 - NEED FACTS SUCH AS if she knows that her friend another artist this happens. Don't have the facts that reveal this
- _____ has not ratified the acts.
- **OSTENSIBLE AUTHORITY**
 - **Refer to below**

WAYS IN WHICH AUTHORITY MAY BE GRANTED / AGENCY CREATED

1. Actual authority
 - a. Express – P may expressly grant to A authority to do particular act
 - b. Implied – The relationship btwn P and A may be such that P impliedly authorises A: actual authority is **implied**
 - c. Ratification – actual authority after the event
2. Ostensible authority
3. By operation of law
 - a. By operation of statute
 - b. By operation of CL

Go through the 3 authorities

Actual Express Authority

- Starting point under CL no formal requirements
- AA requires **consent of both parties - the principal + agent** (express or implied)
 - In contention, normally, it is the principal – as agent will go out and do things
- May be **conferred in writing** or **by words**
- May be in **form of written or oral contract**
 - Or a power of attorney or a scribble on a piece of paper
 - Director may be authorised to act in certain matters on behalf of a company by its articles – can comprise simple oral instruction

Actual Implied Authority

- Where consents are inferred from the relationship or conduct of parties – not express words
- **Incidental authority**
 - Bcos act performed by agent is necessarily/normally incidental to the acts expressly authorised
 - It comes with the task
 - *Mullens v Miller* (1882)
 - Where an agent was authorised to lease a property, there would be implied authority to describe the property to prospective lessees
 - *Fairmede v Von Pein* [2004]
 - Held an agent authorised to sell property did not have implied authority to make representations as to how vendors would respond to requests for extensions of time under the contract
- **Usual authority**
 - Bcos act is one which agent of the type concerned would **usually have authority** to do
 - Usual - Employee position whereas customary → someone in position such as stockbroker
 - **Managing director's** usual authority would include:
 - Employing others to provide services to the company
 - Guaranteeing loans made to the subsidiary of the company
 - Agreeing to indemnify other guarantors
 - Borrowing money and giving security over the company's property
 - Authorising agents to enter into contracts on behalf of company: *Crabtree*
 - **Ordinary director** does not have implied authority to bind the company
 - **Real estate agent** has implied authority to find a purchaser, but not to bind the vendor to terms with the purchaser
 - **A solicitor** has no implied authority to make a contract on behalf of a client: *Nowrani v Brown* [1989]
 - No authority to receive on behalf of a client a revocation of an offer, and revocation will be ineffective if so given
 - Whether A has 'usual authority' depends upon **nature of relationship**
- **Customary authority**
 - Act is in accordance with **reasonable** business practice applicable to particular transaction
 - Eg. rules of a market (stock exchange are expressly incorporated into contract made by agent with 3rd party)
 - It must be shown that 'usage or customer is notorious, certain and reasonable'

- Ie. Necessary to identify evidence of usage within the particular market which shows person who holds such a position customarily holds such authority

- **By Conduct/Circumstances authority**

- Implied from conduct/circumstances
- Important where parties have history of dealings btwn them
- Eg. if board of directors allows one of its directors to enter into contracts of a particular type over a period without seeking sanction of the board – may result in finding of actual implied authority to enter into similar contract in future: *Hely-Hutchinson*
 - CoA held that AA was to be implied from circumstances that board of directors by its conduct had acquiesced to Richards contracting without necessity of sanction by the board
 - *Bank of NZ v Fiberni* (1992)
 - Turns on what directors have acquiesced in, what they have been permitting to happen without demur, what position is as they have allowed it to be
 - Inference cannot be drawn from conduct of which they were wholly unaware and had no reason to suspect/anticipate

Inconsistency

Any authority implied from an AA must not be inconsistent with the substantial character of the agency.

- *Marriott v General Electric* (1935)
 - No IA when agent added term for equal representation on the board to the contracting parties when the substance of the agreement was that the principal was to acquire 51% of the issued share capital of the company
- *Smith v Peter and Diana Hubbard* [2006]
 - Held substantial character of the agency, namely to transact the sale through a particular entity was at variance with a direction to make a payment to an entity (name of which bore no relationship to vendor/nominated entity) and who in fact had no such relationship

Ostensible Authority

Rather, it is likely that ostensible authority will be made out.

The 3 elements are:

1. A representation to the third party that the agent has the principal's authority to do a certain act

- ___ represented to ___ by his words/conduct he had authority to do certain act.
- Look from the perspective of the 3rd party
 - From the perspective of the third party, Lucio was at the auction and was selling them. The facts suggest that Lucio has been armed with the ability to represent you
- Representation of OA often flows from the principal equipping an officer with a certain title, status and facilities
 - **Describing** the agent in a **particular way** (appointing and describing them as chief executive officer)
 - **Appointing** the agent to a particular position **known to the third party**
 - Repeatedly signing contracts – Principal cannot argue no authority bcos repeat conduct
- *Crabtree-Vickers* → Supplying person with a 'blank order form, thus **arming him with a** document which, when he signed it, would bear the hallmark of authenticity'
- *Egan v Ross* → Principal gave **signed memoranda in blank** → clothed with OA

- *Motor Finance v Brown* → Agent's possession of the car was a representation to any in the showrooms they had authority to sell it.
- *The Raffaella* → bank undertaking was not unusual - provided the bank had security form its customer – the undertaking was given at the bank's premises after discussions spread over 3 days
 - Was signed in presence of the 3rd party
 - Bank's stamp was affixed
- Extent of OA depends upon width of representation made
 - Eg. holding someone out to be your solicitor = no more than regular authority ordinarily to be implied of a solicitor
 - **Northside Developments** → Ps were **under no necessity of inquiring** whether the **person with whom they were dealing was properly appointed**. Act of engaging architects fell within **ordinary scope of authority** of managing director.
 - 3rd party is entitled to assume that the agent **had that authority**

2. Reliance upon that representation by the third party; and

[omitted for sample purposes]

3. Detriment suffered by the third party as a consequence of such reliance

[omitted for sample purposes]

IF ARGUING NO TO OSTENSIBLE AUTHORITY

- knowledge of limitation + faxing copies + putting themselves out there

Essington v Regency

- 1. Essington **knew** Drummond **had a limitation on his authority** (**not being able to release** agreement)
 - Fax of relevant agreement was a **representation by Drummond**, not the principal, could not be relied upon as a basis for assuming he had been given authority to release it
- 2. The Principal, Regency, had **not made a representation** by **silence** by **arming** Mr Drummond with the document + failing to prevent him from using it. Fact that document **was a fax significant factor** as to why argument failed
- Hodgson JA
 - On the effect of arming an agent with a **copy**
 - 'risk that a copy would be misused – lesser risk, **bcos possession + use of mere copies does not suggest authority in same way as originals.**
 - Copies **readily made**
 - Available to various ppl
 - Readily falsified
 - 'risk that an original will be misused so as to mislead third parties is a substantial risk' → is in many cases an unreasonable risk that could **give rise to a finding** that this misuse amounted to a representation permitted by the signer of the document

Crabtree-Vickers

- Although _____ put himself out and represented he himself had authority, this is not determinative. The **agent cannot give the representation that binds the company.**
- Hence the person making the representation **must have actual authority to make it.** Only relevant to the extent that they have been armed to do so by the principal.
 - Ultimate Q is what the principal conveyed?
 - Always look at the conduct of the principal or person with actually delegated authority