

# Introduction to Property and Commercial Law

## Topic 1 (A) The Concept and Function of 'Property' and (B) Real Property - Introduction to Real Property (Chapters 1 – 7)

*This topic considers the meaning and role of the concept of "property" in our legal system and wider society. It then looks at the foundational elements of land ownership, including: the doctrine of tenure and estates; the institution of native title; the legal boundaries of land (focussing primarily on the doctrine of fixtures); the distinction between, and historical origin of, legal and equitable interests; and an overview of the variety of interests that can exist in land*

### Distinction Between Law and Equity

#### Introduction to General Property Concepts: Chapter 1

**Property Rights** – are rights to things.

1. Need to identify **the kinds of rights** which are regarded as property rights
2. Then identify the **kinds of things** which can be subject to those rights (Chapter 3)

**Definition of Property;** When lawyers talk about property, they are usually **referring to the rights which people have to things**, rather than the things themselves.

- Whether a particular rights counts as property depends on why it matters e.g. whether it is transferable or not or whether the right can be **enforced** – in this context a property right is on that can be enforced against other members of the public and not just specific persons.
  - o This also produces a much narrower definition
- E.g. mortgages - challenges the unidimensional interpretation of property. Mortgages create a stake for a third party.
  - o Then we give people easements e.g. rights to run sewerage through your property
  - o Air BnB – you can then lease out your property
  - o You might have animals on your property – and then give people the right to come in and hunt them – once again another dimension added to 'ownership' these are categorised as 'property rights' as well.
  - o The idea of an interest is - that someone has a bundle of rights in your property.

#### Conclusion;

- **Property is a RIGHT not a thing**
- Because it is a right, **property is a relationship between people**
- **Property law is about human beings.**

#### Assignable Rights

- At its widest, property means any right that can be transferred from one person to another
- E.g. property of the deceased transferred by the executor
  - o Or a right to appeal from a judgement against the bankrupt in a court of law – property right for the purposes of bankruptcy law.

- These wide definitions of property are those based on the assignability of rights, when defined in this way **property includes everything** that might be **regarded as wealth** or which an accountant might list as an asset on a **balance sheet**.
  - **Excluded are personal rights** – i.e. those which can only be used by the person who holds them e.g. academic qualifications or the right to vote etc.
  - **Thus for most purposes the definition of property is based on the enforceability of rights and not the assignability**

### Rights in Rem

- For most purpose, the distinction between personal and property rights is based on enforceability. It corresponds to the distinction between
  - *Rights **in personam** and rights **in Rem***
  - **In personam** – are those because they are enforced against particular persons without the regard to the things they might have
    - **Do not depend on the existence of a particular thing** – but rather correspond to some person’s obligation to fulfil the right e.g. the loan of \$20 – you have a right work \$20 (this may be reduced practically, when the individual is bankrupt)
    - **Personal Rights** – are less respected.
    - **Property Rights** – are more respected.
  - **In Rem** – rights people have concerning things, without regard to the people against whom those rights might be enforced.
    - **Property law is more concerned with rights in rem**
    - Example: Difference between borrowing a book and borrowing a 20 dollar note. You do not have an enforceable right against the particular note you lent out as it transfer possession to a shopkeeper etc. but for the book your rights follow possession.
    - **Rights in Rem depend upon the continued existence of the thing to which the right relates** e.g. If the book is destroyed the property right is gone *in rem* – though this may give rise to a right in *personam* against the destroyer or an insurance company.
- **The Role of Equity in Bridging the Divide**
  - Role of interaction between contract law – In personam representation to move an In rem Right
  - Equity regards as what ought to be done
  - Equity recognise obligations and property where common law refuses to do so e.g. Estoppel

### The Essential Characteristics of Property Rights

#### 1) **Enforceability**

- a. **Note;** All legal rights whether personal or property have correlating obligations
- b. Property rights are also enforceable against people **but they have no specific person responsible for their fulfilment** – consist of a ‘large class of fundamentally yet separate rights’ ...corresponding to a ‘large and indefinite class of people’ <sup>1</sup>
  - i. In other words, your property rights may be viewed as a large collection of rights against every member of society, each of whom is under an obligation to not interfere with your rights to the book

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<sup>1</sup> *Fundamental Legal Conceptions as Applied to Judicial Reasoning (1917) Yale Law Journal at 718. P6 Text.*

- ii. The issue with this view is that it devalues the 'role of **things**' that are subject to rights – nor does it accord with the way property rights function in society.

## 2) The existence of 'Some Thing'

- a. The right to be free from bodily interference is not a property right because the **body is not a 'thing'**
- b. Property rights must relate to **things which are separate and apart from ourselves**
  - i. *James Penner*: **thing** is an art term here which restricts the application of property to those items in the world which are **contingently related to us** – this consistency will change given the surrounding circumstances, including our personal, cultural or technological circumstances<sup>2</sup>
- c. Things which are **intrinsically connected to us** e.g. bodies and reputations – cannot be subject to property rights.
- d. Unless the **intrinsic connection is severed** – then they cannot be subject to property rights. Must be severed and reduced to a contingent connection

## 3) Other – not all property rights have these traits while many personal rights do – so they are not useful as defining characteristics of property rights.

- a. *Alienability* – they can be sold or given away to others
  - i. While most rights are alienable, many are not. Most non-assignable rights are rights in personam but also some in rem.
  - ii. In other words – there is some property that cannot be sold or given away e.g. a non-assignable residential lease.
  - iii. All property rights can be described as **alienable** – if the term is understood to be **disposable** rather than **transferable**
- b. *Excludability*
  - i. The holder of a property right is able to exclude others from making use of the thing which is subject to that right
  - ii. Most property rights include this trait e.g. own or rent a home, book.
  - iii. However there are property rights which do not allow exclusion e.g. **a right of way** is a property right to cross another person's land – but the holder of this right is not permitted to exclude others from the land subject to it.
  - iv. Some personal rights can also have this trait
- c. *Value*
  - i. It is shared by some property rights but not all – not a **necessary characteristic of property** e.g. some only have sentimental value etc.
  - ii. On the other hand there are many personal rights that have market value e.g. contractual rights

## Taxonomy of Property

### 1. Land and Goods

Generally speaking – land is both permanent and stationary. It remains relatively constant while the people who use it come and go. Most other things are transitory e.g. .animals die, clothes

**Goods** – can be moved from one place to another – thus can be subject to laws of different jurisdictions.

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<sup>2</sup> *Bundle of Rights Picture of Property 1996 UCLA Law Review 711 at 807*

## 2. Real and Personal

The distinction between land/goods and movable/immoveable are based on the nature of the 'thing' – the distinction between 'real/personal' is based on **the nature of the right**.

- It is derived from the forms of legal action used in 13<sup>th</sup>/14<sup>th</sup> century England
- **real property** = holder of the right could bring a 'real action' to recover the land from someone who was wrongly in possession of it
  - o **Real property rights** – are rights to land while most personal property rights are not.
- **Personal Property** – there was no real action available to recover the thing itself – rather the right was for one of compensation for loss caused by the interference with their right.

## 3. Legal and Equitable

**These are also based on the nature** of the right – and were created by legal conditions that have ceased to exist.

- From a separation of the common law courts in England and the court of chancery (equitable) court – this was later merged by the 1973 Judicature act.
- **Still relevant** – because even though the courts have ceased to exist – many property rights have both a legal or equitable counterpart.
  - o **This is determined by considering the right and whether it would have been recognised in a court of common law or only in a court of equity**

## 4. Tangible and Intangible

- **Also known as corporeal or incorporeal** – all property rights are intangible in the sense that they are rights enforceable against other persons regardless of the nature of the thing to which those rights relate.
- **Tangible Rights** – include the right to possession of some thing
- **Intangible Rights - do not include** the right to possession
- **Possession** – is a legal concept – a thing cannot be possessed unless it is something that can be controlled physically.
  - o **Therefore** – property rights to things which cannot be possessed e.g. a share in a company – are necessarily intangible, however the converse is not true.

## 5. Property Creating Events

Another way to organise property rights is according to the events that create them. Four categories<sup>3</sup>;

1. Wrongs – property rights can also be created by wrongdoings e.g. employer may have a property right to a bribe received by an employee
2. Consent – most property rights are created by consent e.g. Sale of goods, will, or mortgages.
3. Unjust enrichment – such as the right to recover land or goods transferred by mistake.
4. Others

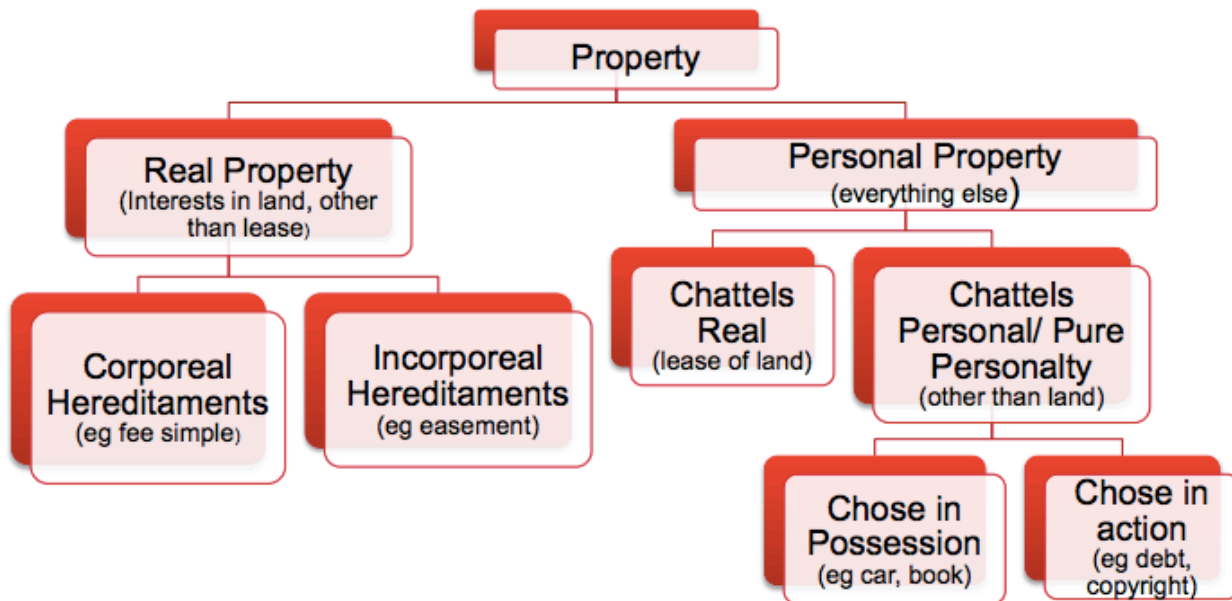
**Taxonomy** – of property rights is useful because it brings together and invites comparisons between different rights. Also allows comparisons to be drawn between property and personal rights –

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<sup>3</sup> Peter Birks "Equity in the Modern Law: An exercise in Taxonomy" 1996 at 8.

- Focussing on the events which create legal rights is particularly helpful because they are the most important legal issues affecting our lives e.g. we want to know if the purchase of our new home is complete.

## Taxonomy of Property Interests



### Rights Usually Associated with 'Property'

- Right to...
  - o **Use and enjoy** – it's a consequence of a property right but not the definition e.g. going to the beach doesn't mean you own it.
  - o **Exclude** – though this is a strong justification for private property, but there's lot of types of property which are commonly owned e.g. the Commons – which created the 'working poor' in the 17<sup>th</sup> Century. Interestingly, these were the source of labour in the industrial revolution – and also for the population of Australia.
  - o **Alienate/transfer** – uranium in your backyard, doesn't mean you can transfer it.
- **Economic justification for property**
  - o Efficient allocation of resources (measured by willingness to pay) and so maximise total wealth of society
  - o Right to use and exclude provide incentive to put resources to their most productive use
  - o Right to alienate allows resources to move to more highly values uses through mutually beneficial exchange.
- But context is everything.

### Introduction to Ownership

**Ownership is not the same as property – distinguish ownership from possession.**

attached to the LAND but they were attached to the BROTHER. So he had to pay the rent until they got married.

- Explanation of a personal right
- **Mere Equities** – sits in the middle between personal and property equity *Latec*
  - Hotel Terrigal etc. You started out with a big bundle of property rights in the estate, but you're left to one.
  - Weak card – they don't usually survive property disputes.

#### 4 examples of Equitable Interests

1. **Rule in Lysaght v Edwards: A (vendor) exchanges contracts with B (purchasers) – rule that applies to K for property when you have a specifically performable contract. (RULE in L v E: Contract of sale – 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 - 1/ The vendor has a right to the purchase money, a charge on the estate for the security of that money and a right to retain possession in until said monies are paid. )**
2.
  - a. **Specific Performance – remedy granted in equity to force the other side to complete. You only get it where – 1. Damages are inadequate 2. The K was for valuable consideration.**
  - b. For example, A gets a better offer from C – who knows about B's offer – and completes the sale to C before B knows.
  - c. Common Law approach – breach and reliance damages – no property held by B.
  - d. Equity approaches it through – breach and specific performance.
    - i. **Property Rights?** In Common Law B is not the owner as the K has not been completed so the property cannot be returned.
    - ii. **In equity the rule in Lysaght and Edwards says that B gets an equitable interests from the exchange and that it is a form of constructive trust which CAN BE enforced against C**
      1. So C has to transfer the property to B and then can litigate against A for reliance damages etc. WHEN he knows about B...
      2. Normally applies to land, rarely with personalty.
  - e. So the rule is;( Comment - The interest of a purchaser under a contract of sale is asserted to arise when the contract becomes specifically enforceable.) WHEN you exchange contracts on a K which is specifically performable the purchaser is treated as the fee simple
    - i. **Fee Simple; a permanent and absolute tenure in land with freedom to dispose of it at will, especially in full fee simple absolute in possession a freehold tenure, which is the main type of land ownership.**
3. **Express trusts** – Primogeniture:
  - a. **Feoffee** – Landowner transfers it to "B" the 'feoffee to use' i.e. they have the legal ownership but with the condition that they use it for the benefit of the family. They were using these to get around by tax.
  - b. **Statute of uses in 1535** – this collapsed the use, the legal ownership went to the cestui que use – "beneficiaries" –
  - c. **Then - "Double Uses" in the 1700s**
  - d. **Now** – Landowner "A" gives it to the feoffee "trustee"/"B", in TRUST for the beneficiary "C"
    - i. This is **Unique to Equity – no such thing as a common law trust**
4. **The Rule in Walsh and Lonsdale – Comment - Equitable Leases**

- i. Arises where – agreement to lease in writing which does not abide by formal requirements i.e. nota deed
- ii. Equitable lease – where the court would grant specific performance, should be respected as if it were a legal lease
- iii. Lessee – acquires an equitable interest in the property and accordingly the lessor acquires some protections in return for that interest.

**b. Walsh v Lonsdale**

- i. This is to do with informality.
  - 1. A lease for a mill for 7 years and agreement to create a deed by no deed created. Agreement was for rent payable quarterly with an entitlement of the landlord to request a year in advance.
  - 2. Tenant entered into possession and paid rent for 18 months.
  - 3. Landlord levied distress; tenant refused and sought an injunction.
  - 4. The agreement was in writing so satisfies s54C and s23c but NOT s23B.
  - 5. CL says no to the lease but Equity says MAYBE
    - a. “We acted like it was a lease, we both paid consideration, we had a signed agreement, but no legal lease”
- ii. Held: **Equity looks on as done that which ought to be done.** You hold as if land had been granted...there was consideration provided and it was in writing – then they will order that the lease be completed.
  - 1. **As long as there is consideration given and it is capable of specific performance** – with something in written form. Then they will order that it be completed.
  - 2. An agreement for a lease, binding at equity under this rule will not come into existence unless it constitutes a binding contract under normal common law principles
    - a. i.e. **final agreement on essential terms** – the property to be leased, rent payable, names of parties, commencement date and maximum duration of the term
    - b. Court must **also be satisfied that the K is intended to be final** –if the courts belief that the parties intend to reopen negotiations on any terms prior to signing a formal lease **the document will not be enforceable in equity as an agreement for a lease**
      - i. E.g. if it says **subject to contract** – unenforceable.
  - 3. Additionally the rule will not apply unless the terms are embodied in a signed memorandum or note in writing **unless there is part performance see below – s54A Conveyancing act also**

**5. Doctrine of Part Performance – worst case scenario**

- a. **No writing at all** – there is a reluctance even from the court of Equity.
  - You **must show there was an agreement** – where there were acts done by the parties to the agreement and they were relying on the agreement.
  - These acts done must be done by the party to the contract seeking to rely on the doctrine, or his or her authorised agent; **McBride v Sandland 1918**
  - **Second** it must be shown that the acts done by the plaintiff **were permitted, but not necessarily required**, to be done by the terms of the oral agreements; **Regent v Millet**

- Thus demonstrating a **change in possession can be modified by Contract**
- Title remains with the original owner of the property until there is shown an intention to abandon it, it then becomes public right and is liable to be appropriated by the next occupier – their abandonment perfects the ownership. Whatever view is taken as to where title lies in the interim, the bales of hay have in this case been appropriated by the purchasers.

### The nature of possession

**Possession** – a definite legal relation to something capable of having an owner. Possession is a root of title in itself. Furthermore, the separate right to possession is a property right in that the law deems it worthy of protection. It may also provide evidence of ownership or if possession lasts long enough it can become ownership.

**Definition;** the concept of possession has evaded comprehensive definition. *At is simplest 'possession connotes power over the article possessed'*<sup>7</sup>.

- Connotes a relationship between a person and some material objection – it is a relationship **subsisting in fact**
- Possession is very **case-specific, or instance-specific**
- **The English and Australian law** of ownership and possession – is not a system of identifying absolute entitlement but rather a priority of entitlement<sup>8</sup>

### **2 Elements of Legal possession;** the *Tubantia* (physical control; animus)

- **Animus possidendi** – the **intention** to control the chose
- **Physical control** over the chose

- Significance, beyond being a legal interest?
  - Evidence of title
  - Confers possessory title, good against all except owner

### Possession can be actual or constructive

**Actual possession** – where the person has physical possession of goods as well as then intention to control or exercise power over the goods

**Constructive** – where the person, having the **requisite intention**, has taken symbolic delivery, as opposed to physical possession e.g. a key to a car

**The law recognises several degrees of possession:**<sup>9</sup>

<sup>7</sup> Knapp v Knapp [1944]

<sup>8</sup> Pollock v Wright, *An Essay on Possession in the Common Law* 1888

<sup>9</sup> Ibid.



- **Custody**
- **De Facto Possession**
  - Broader than custody – also known as detention
  - May be termed effective occupation or control
    - Occupation without adverse interest etc. will often amount to possession
- **Lawful Possession**
  - Intention to possess and physically in possession (thus meeting the legal tests) but not entitled to possession e.g. a thief.
  - **Possession in law is most commonly** associated with possession in fact – it exists for the benefit of possessors in fact and in good faith
  - The state of being a possessor in the eyes of the law
- **Right to call for immediate possession**
  - E.g. under a bailment, where possession is with another party
- **Constructive possession**
  - Where the physical possession is with someone else but you have the right to possess
- **Legal possession**
  - Intention and physical possession

#### *The Tubantia [1924]*

**Facts:** SS Tubantia was an ocean liner that sank in 1916, along with a large amount of gold coins. In 1924, the wreck was located and recovery was initiated. Sippe, a wreckage salvor, had marked the wreck with buoys, obtained limited access (25 days out of the year), and sent in divers – but the divers could only stay down there briefly, and had not yet retrieved anything of real value. There were intermittent trips down to the ship.

**Issue:** What is required for a salvor to have sufficient possession of a sunken shipwreck? Had the salvor met this requirement?

**Held:** The Court decided in favour of Sippe, the salvor.

- “What are the kinds of physical control and use of which the things in question were practically capable? Could physical control be applied to the res as a whole? Was there a complete taking? Had the plaintiff’s occupation sufficient for practical purposes to exclude strangers from interfering with the property? ... There was **animus possidendi in the plaintiffs**. There was the use and occupation of which the subject matter was capable. There was power to exclude strangers from interfering if the plaintiffs did not use unlawful force. The plaintiffs did with the wreck what a purchaser would prudently have done.”

#### *Federal Commissioner of Taxation v ANZ (1979)*

**Facts:** Taxpayer had safety deposit box with bank, two keys to the deposit box. Taxpayer had one, bank had the other. Taxpayer was concerned that they may lose the key, so agreed that a third key would be put in plastic envelope by way of safe keeping. Tax office issued order to bank to produce the safety deposit box, which were said to be in custody of the bank in accordance with s264(1) of the Income Tax Assessment Act 1936 (Cth). The Bank denied having custody to the property.

**Held:** Bank had sufficient control of the safety deposit box.

**Held** (per Gibbs ACJ) at [6]: “the Bank has the **custody, or physical control**, of the documents in the lockers. The documents are in its power in fact; it holds the keys that enable it to open the locker, take out the box and

### Deanes Judgement; TWOFOLD TEST – Must apply

**That test is a twofold one.** 1. It is whether the donor has **done all that is necessary** to place the vesting of the legal title within the control of the donee and 2. Put **beyond the recall or intervention of the donor**.

Once that stage is reached and the gift is complete and effective in equity, the equitable interest in the land vests in the donee and, that being so, the donor is bound in conscience to hold the property as trustee for the donee pending the vesting of the legal title. – Deane J

### Costin v Costin 1997

Example of a case that applies the twofold test from Deane's judgement in **Corin v Patton**. Similar facts to the above case, had the joint tenancy of land been severed? What happened here, is that the donor was going to sever the joint tenancy and give it to recipient A, but he brought it back and assigned it to recipient B. Recipient B had the legal title, but the question was whether something had happened in the earlier one? Clearly no **legal title** for A – but is there an **equitable title**?

**Held:** No, because it can't have been beyond the point of recall i.e. the second step in Deane's test.

Note; it is very important for you to understand that equity has no power at all to ignore legal or statutory requirements. Equity cannot ignore the legal requirements for transfer. **We don't say legal title does not move, we say that the gift is incomplete in equity.**

- **Equity is saying; legal title ought to have moved, it is not saying that it HAS moved.** What that means is we get a trust, the phrase constructive trust is not very helpful – it describes this situation when equity recognises that legal title is still there but should have gone over there so operates as if it were over there and then you get a constructive trust.
- Equity operates underneath the legal requirements.

**Secondly;** the above 2 cases are 'land cases' but such a rule is applicable to 'shares' cases also, and other choses in action – under *S 12 Conveyancing Act* – it doesn't say 'from whom' the notice to the debtor must come. Jamie does not think it is possible to have a *Corin v Patton* analysis for the transfer of chattel.

### Norman v FCT (1963)

The reason this is here, is because it decides the question of how you assign a 'part legal chose'. 150 years ago the law did not recognise the legal assigning of choses, but you could assign choses in action in equity. After the judicature acts, there became a legal way of assigning a legal interest in a choses in action. But prior to this there was an equitable method of assignment i.e. just stating 'I assign this chose to you' was sufficient.

### **What this case is important for**

**Norman provides, that if you are assigning a part legal chose, there are no formalities you just need to declare your intention.** (you can't assign a part chose at law, so there are no requirements you can legally meet, i.e. s 12 does not allow it) So in equity it is much easier to assign a part legal chose in equity, than it is to assign a full legal chose in equity.

later. But neither of these parties told the trustees about this...sometime later, brown contracted to sell his whole interest in the trust fund to Hall...the dearle and sherring assignments were by way of security however the sale to Hall was an outright assignment.

Hall’s soliticors contracted the trustees and asked if there were any other interests existing in the trust fund. Hall bought the interest and gave notice of the sale to the trustees.

The trustees on notice of this began paying the interest to Hall, Dearle and Sherring then gave notice to the trustees ...the problem here is that D and S – have had a valid assignment of an equitable interst. Notice to the trustee is not required for this – so why isn’t this prior interest taking prioirity over the later interest?

*The rule in d and H – in this situation the first to give notice to the trustee wins- when you have a competing assignments of interest in personal property – although they are all valid – the point of prioiryt will be determined by who gives notice to the trustee first.*

*Another example of where first in time is ousted.*

### SUMMARY OF COMMON LAW PRIORITIES

VERSUS	Subsequent Legal (second interest created)	Subsequent Equitable (second interest created)
<b>Prior Legal</b> (first interest created)	<b>Nemo Dat</b> <b>First in time</b>	<b>Legal, unless</b> <b>contributed to creation</b> <b>of Equitable Interest</b>
<b>Prior Equitable</b> (first interest created)	<b>Bona fide purchaser for</b> <b>value without notice</b>	<b>First in time, subject to</b> <b>the merits</b>

## Topic 5B: Commercial Dealings as Security Interests over Property

### Traditional Forms of Security;

#### Common Law - Mortgage, Charge and Pledge, Lien

**Statute-** Torrens title mortgage cf. *Real Property Act 1900 (NSW)* – ss 56 and ss57

#### Legal Mortgage –

1. Transfer of legal title from the mortgagor in exchange for an equity of redemption – also referred to as a chattel mortgage
2. Application: Common law legal mortgage applies to legal property i.e. you can't have a legal mortgage over equitable property – but you can have an equitable mortgage over such property
3. In a security agreement, the effect of the arrangement is that the transfer is not disposal of the property, but a means of ensuring that the mortgagor will perform their obligations
4. Attempts to prevent the mortgagor from redeeming their property will be void:
  - o E.g. clogs on the equity of redemption; the imposition of a penalty.

#### Equitable Mortgages

1. Arise because either:
  - a. The parties failed to comply with the requisite formalities
  - b. The property in question is equitable
2. Will apply to mortgages arising from:
  - a. A deposit of title deeds or share certificates
  - b. A mortgage of future property
  - c. A mortgage of equitable property e.g. partnership property or a beneficiary interest under a trust

Mortgagor is the **borrower** who takes loan from the lender and pledges his property as a security for repayment. Mortgagee is the lender who gives the loan to the mortgagor and receives the security interest in the property from the latter.

#### Equitable Charge

1. Unlike a mortgage, there is no transfer of title but an appropriation of property for the satisfaction of an obligation
2. The Chargee will be entitled to realise the property (i.e. sell it to recover what is owed)
3. The charge is extinguished once the chargor has satisfied the relevant obligation
4. **Two types:**
  - a. **Fixed:** Attaches to property (which it is stipulated to apply to) from the moment of creation. Giving rise to a proprietary interest.
  - b. **Floating:** The assets subject to the charge are not appropriated as security for the debt until the occurrence of a certain event.
    - i. **Illingsworth v Houldsworth 1904** – It is ambulatory and shifting in nature, hovering over and so to speak – floating with the property which it is intended to affect until some event occurs or some act is done which causes it to settle and fasten on the subject of the charge within its reach and grasp.
    - ii. **Re Yorkshire Woolcombers Association Ltd;** 3 characteristics identified by Romer LJ
      1. If it is a charge on a **class of assets** of a company **present and future**
      2. If that class is one which in the **ordinary course of the business** of the company would be changing from time to time; and
      3. If you find that by the charge it is contemplated that, until some future step is taken by or on behalf of those interested in the charge, the company may carry on its

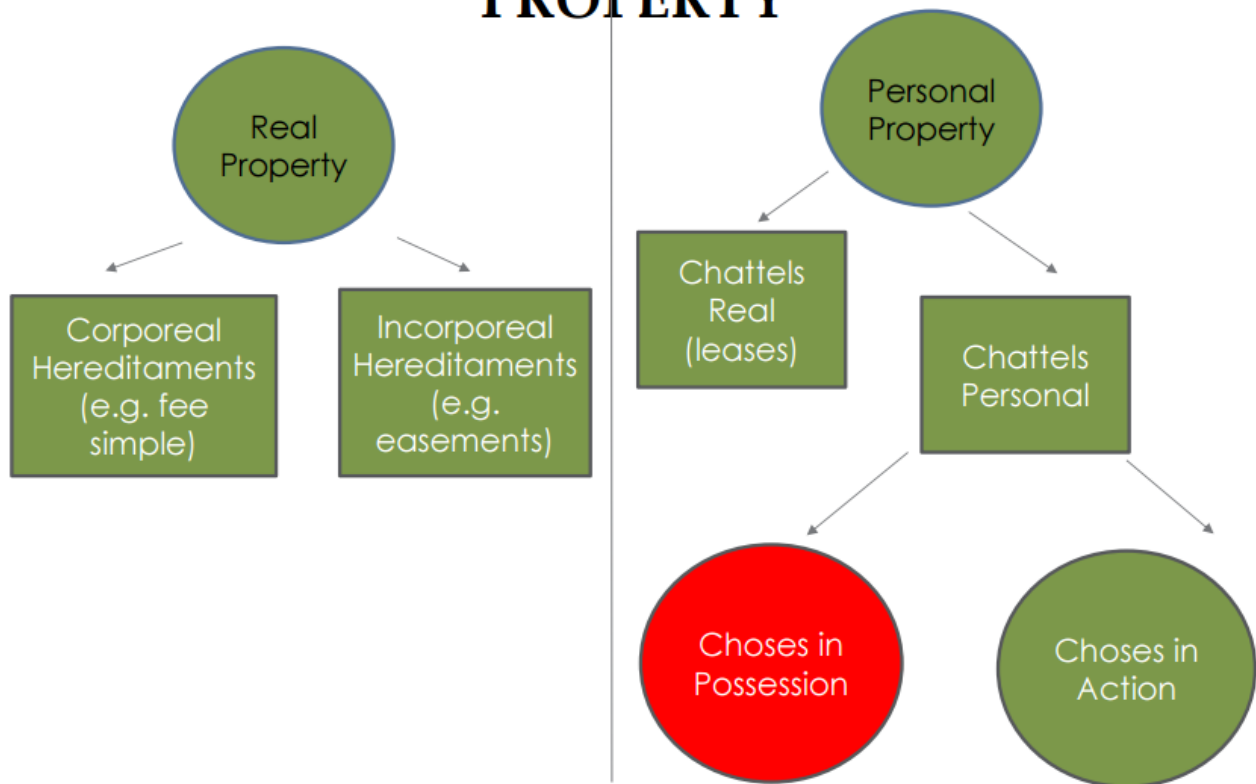
## Fixtures

**Fixture** - A fixture is a **chose in possession (chattel)** that has been attached or is resting on land in such a way that it has lost its legal identity as a separate object and **has become a part of the land**.

**Step 1 – Consider the Contract of Sale/Lease** – does it make any specification who is entitled to the item? *Note that this does not change the fundamental nature of the ‘thing’ i.e. whether it is a fixture or chattel*

- a) **Silent Contract – Step 2** – Determine whether the ‘thing’ is a
  - a. **Chattel** – in which case it remains a piece of **personal property** and the vendor (seller) or tenant (lessee) is entitled to retain ownership
    - i. **PRESUMPTIONS:** object resting on its own weight is presumed **chattel**
      1. These will affect the **burden of proof**
  - b. **Fixture (i.e. Real Property)** – in which case it passes to the purchaser upon SALE, or passes to the landlord upon conclusion of the LEASE
    - i. **PRESUMPTION:** object attached to land in some way – **presumed FIXTURE**
      1. Careful of assumptions: *Even slight fixing to the land is sufficient to raise the presumption that a chattel is a fixture*
        - a. *Belgrave Nominees v Barlin-Scott AC (4 bolts and nuts)*
- c. **TESTS:**
  - i. **Degree/Mode of Annexation** – how has the object been attached to the land; THEN look to -
  - ii. **Object/Purpose of Annexation** – what was the intention behind the chattel being fixed - *Belgrave Nominees*
    1. *whether the intention of the party fixing the chattel was to make it a permanent accession to the freehold is to be inferred from matters and circumstances including the following:*
      - a. The **nature of the chattel**
      - b. The **relation and situation** of the party making the annexation: vis a vis the owner of the freehold or the person in possession
      - c. The **mode** of annexation
      - d. The **purpose** for which the chattel was fixed This is the more dominant concern nowadays *Palumberi v Palumberi*
        - a. Was it fixed for better enjoyment **of the land or better use of the chattel?**
        - b. Is it an essential part of the buildings necessary for their use and occupancy?
        - c. **Contrast *NG Dunn v LM Ericsson***; with the Airconditioning case where the telephone system which was affixed to the office was held to be chattel.
          - a. **Consider Factors from DUNN**; e.g. contemplated duration of the annexation – ‘permanent, indefinite, or substantial period’ (in this case 10 years was ok) OR
          - b. **Temporary purpose?** **Objective Assessment** predominantly from *Dunn* – in this case it was to steady chattels and prevent damage or inconvenience from them moving whilst in use i.e. the purpose of annexation was to better enjoy the item as a chattel rather than to benefit the land.

## TAXONOMY OF PERSONAL PROPERTY



### 1. Possessing/Owning Chattels at Law

- a. **The first step is – IS IT PERSONAL PROPERTY.** i.e. not Real property
  - i. This includes *Choses in Possession* – i.e. *Tangible property* **Colonial Bank v Whinney**
  - ii. Other examples from the *Personal Property Securities Act*; *Goods, Financial property including – currency, document of title etc., Intermediated Security, Intangible Property*
- b. **Test for Ownership** – this is the most comprehensive ‘real right’ or interest that a person can have – confers upon the owner the competence to ‘use, enjoy, alienate, possess and dispose the object’
  - i. **No ownership where – i.e. property abandoned** where there is an intention to no longer retain ownership or possession of a good by giving up/divesting their rights to it.
    1. **No owner of abandoned property** until a *subsequent act of appropriation* – **Re Jigrose**
- c. **Tests for Possession: Two elements of possession – Animus Possidendi (intention to control) and Physical Control – Tubantia** –
  - i. Further there are **two types of possession**
    1. **Actual Possession** – Physical control and the intention to control/exercise power over the goods

- iii. **Purchaser as the equitable fee simple**; once the contracts have been exchanged, the purchaser is treated as a fee simple
  - 1. **The vendor holds the property in a constructive trust for the purchaser who holds the equitable fee simple (*Lysaght v Edwards*)**
- iv. If equity would decree specific performance of the contract; then – the interest contracted for is granted in equity and the vendor holds the property on constructive trust for the purchaser
- c. **If there is no writing at all; Part Performance**
  - i. You must show there was an agreement – where there were acts done by the parties to the agreement in reliance on the agreement
    - 1. These acts done must be done by the party to the contract seeking to rely on the contract OR his or her agent; (*McBride v Sandland 1918*)
    - 2. **Acts were permitted but not necessarily required** – you must show that the acts done by the plaintiff were permitted but not necessarily required to be done by the terms of the oral agreements; *Regent v Millet*: connecting the activity to the house e.g. cleaning the house, maintaining it, paying bills etc.
    - 3. **Acts done were ONLY done in performance of the contract** – i.e. no other reason *McBride*
      - a. But this does not mean that '**they must have been done under terms of the particular agreement alleged**' and by force of that agreement
  - ii. **Examples of Acts of Part-Performance in Case Law (SALE)**
    - 1. **The change of possession of lands has been described as the act of part-performance 'par excellence'**. It is clear that if a vendor permits a purchaser to take possession to which a contract of sale entitles him the giving and taking of that possession will amount to part performance notwithstanding that under the contract the purchaser was entitled rather than bound to take possession. *Regent v Millet*
    - 2. **Preparatory things that will not amount to part-performance**; 1. The taking of an inventory 2. The handing over of the lease 3. Incurring legal expenses 4. The payment of money. *Cooney*
      - a. Starke J: 'On the contrary, any acts preparatory to the completion not the formation of the contract do not alter the position of the parties in relation to the land.' *Cooney v Burns*
    - 3. **Equivocal acts are not part-performance i.e. those done for love and affection.** *Maddison v Alderson*
    - 4. **'Improvements made by a purchaser to a property after taking possession with the knowledge of the vendor are acts of part performance although they are not done in performance of the contract but rather in reliance on it'** *Ciaglia v Ciaglia*.
    - 5. **Oral Sale Case – *Regent v Millet***
      - a. '... when one of two contracting parties has been induced, or allowed by the other to alter his position on the faith of the contract, as for instance by taking possession of land, and expending money in building or other like acts, there it would be a fraud in the other party to set up the legal invalidity of the contract on the faith of which he induced, or allowed, the person contracting with him to act, and expend his money.'
      - b. **Note in *Regent v Millet* – the taking of possession, repairs and renovations, making of mortgage payments**

# Assignment and Disposition of Interests

Chose in possession? See topic 2;-

## Dealings in Legal Proprietary Interests;

- 1) Legal Assignment of Legal Interests
- 2) Equitable Assignment of Legal Interests
  - a. Via Contract (with consideration)
  - b. Via Gift (without consideration)
  - c. Partial Choses in Action

## Dealings in Equitable Proprietary Interests

- 1) Creation of a trust
  - a. Declaration of a trust
  - b. Agreements to declare a trust
- 2) Assignment of an equitable interest under a trust;
  - a. Directions to trustee
  - b. Sub-trusts
  - c. Contracts for value to assign
  - d. Release to trustee

## Dealings in Future Property

1. What right does the assignor have? Present v Future Property
2. If future property – how can the property be assigned?
  - a. Gratuitous assignment (ineffective) OR for value;
  - b. But **if for value and consideration is paid** – the future property is held on constructive trust – *Taliby v Official Receiver*

## Dealings in Legal Interests

### 1. LEGAL ASSIGNMENT OF LEGAL INTERESTS

#### a. REAL PROPERTY

##### i. Old System Land – (from topic 1)

1. By deed (s23B)
2. Short term lease exception (s23D)
3. Recall – that a deed can;
  - a. Transfer the legal fee simple;
  - b. Create a legal mortgage;
  - c. Create a legal lease (if not under the 23D exception)
  - d. Create a legal easement

##### ii. Torrens Title Land – (from topic 1)

1. **By Registration** – s41(Real Property Act) – i.e. you need registration to pass any estate or interest in any land. S42(1) – the registered interest is indefeasible except in the case of fraud

#### b. CHOSSES IN POSSESSION – TOPIC 2

- i. By Gift
- ii. By Losing and Finding;
- iii. By the Sale of Goods

#### c. LEGAL CHOSSES IN ACTION – including – debts, shares, contractual rights, actions in tort – these are assignable and the requirements are set out in s12 of the *Conveyancing Act; Requirements*;

- i. **Absolute Assignment** – can only assign the whole of a chose in action e.g. cannot assign half of a 20,000 debt.