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b) *support the plenary power of the Crown (when the Crown has exercised its sovereign power to appropriate to itself ownership of parcels of land within the Crown's territory).*

- Unless the sovereign power is exercised in one or other of those ways, there is no reason why land within the Crown's territory should not continue to be subject to native title. It is only the fallacy of equating sovereignty and beneficial ownership of land that gives rise to the notion that native title is extinguished by the acquisition of sovereignty.'

Facts:

- Meriam people occupied the Murray Islands (Mer, Dauar & Waier) long before European contact
- 1879: Islands annexed to Colony of Queensland
- 1982: plaintiffs sought declaration that Meriam people held native title over Islands
- 1985: Queensland enacts the Queensland Coast Islands Declaratory Act 1985

Issue: following their annexation in 1879 the Murray Islands were vested in the Crown in right of Queensland freed from all other rights, interests and claims.

Held: Mabo (No 1): HCA held that if native title existed at the time of the enactment of the Racial Discrimination Act 1975 (Cth), the Qld Act was invalid to the extent that it purported to extinguish that native title.

Issue: Mabo (No 2): did native title exist at time of enactment of the RDA?

Why recognise Native Title?

To refuse to recognise native title 'would destroy the equality of all Australian citizens before the law. The common law of this country would perpetuate injustice if it were to continue to embrace the enlarged notion of terra nullius and to persist in characterizing the indigenous inhabitants of the Australian colonies as people too low in the scale of social organization to be acknowledged as possessing rights and interests in land.' (58) Helps equalise rights of inhabitants of settled and conquered colonies (57)

Attributes of Native Title

- Native title more diverse and far reaching than proprietary under anglo system
    - Weakness in Australian law = vulnerability of Native Title for an interest by the Crown
- *"Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs."* (58)
    - This means the nature of native title can differ between the customs/laws of different Indigenous groups. Gives effect to the disparate cultures. Native title therefore gives right to traditional uses of land (eg hunting, gathering, ceremonies, etc), not allowing for full economic exploitation of the land
- Can't be transferred (59), but can be surrendered to the Crown (60)
- May be "proprietary or personal and usufructuary in nature and … possessed by a community, a group or an individual". (61)
    - This means that things that don't usually look proprietary in the common law can nevertheless be covered in native title rights.

Held: shares were distinctly chose in action – they were goods required for purposes of business, used for those purposes.

- Turns on construction of Bankruptcy Act 1883 s 44(2) (per Cotton LJ at 273)
    - Relevant property includes *"all goods, being at the commencement of the bankruptcy, in the possession, order or disposition of the bankrupt, in his trade or business, by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof: Provided that things in action, other than debts due or growing to the bankrupt in the course of his trade or business, shall not be deemed goods".*
- Fy LJ (dissenting, but upheld on appeal)
    - *'The first question is whether, according to the ordinary legal meaning of the words "things in action", which I take to be technical words, they include such shares as those in controversy. This leads to the consideration of some elementary points in English law. According to my view of the law, all personal things are either in possession or in action. The law knows no tertium quid between the two.'* (285)

Your Response Ltd v Datateam Business Media Ltd (2015)

Recent appellate confirmation of Colonial Bank v Whinney – court reluctant to move away from traditional constructions of property, despite need for law to be abreast of technological developments.

Issue: can possession (under a possessory lien [see Topic 5B]) be taken of an electronic database?

- per Moore-Bick LJ ' *…that decision makes it very difficult to accept that the common law recognises the existence of intangible property other than choses in action (apart from patents, which are subject to statutory classification),…'*
- per Davis LJ '…appeal to modernism has its attractions…the court should resist those attractions…The law of unintended consequences is no part of the law of England and Wales. But it is worth paying attention to it, in an appropriate case, all the same…'
- in Aus, protected under Equity but not property
- focused on chattels personal – choses in possession and choses in action ***Colonial Bank v Whinney***
- personal property under PPSA = quite different categories
- intangible = only not financial / intermediated
- NOTE: Aus is using intangible under a narrow sense
    - If were looking to change ***Whinney*** dichotomy – broad, this is significant confusion in Australia. Thought needs to be given t it.

Identifying legal interests in choses in possession

Ownership and Possession

Ownership: For choses in possession, there is no doctrine of tenure or estates (like there is in real property). 'Ownership' in this sense refers to an abstract relationship between a person and a thing - a residual 'bundle of rights' in an asset - must have at least a present right to future possession (Re

- Property passes at such a time as the parties intended it to be transferred (s 22(1)).
- 'Intention' = consider terms of contract, conduct of parties and circumstances of the case (s 22(2)).

Rule 1: Specific goods in deliverable state

- Where: An unconditional contract, for the sale of specific goods ('goods identified and agreed upon at the time a contract of sale is made' - s 5), in a deliverable state (buyer would be bound to take delivery). Deliverable means it is perfect - e.g. nice and assembled.
- Then: Property passes when the contract is made. It is immaterial whether the time of payment/delivery/both is postponed.

Rule 2: Specific goods in as yet undeliverable state

- Where: Contract, for the sale of specific goods ('goods identified and agreed upon at the time a contract of sale is made' - s 5), BUT seller is bound to do something to the goods for purpose of putting them in deliverable state (eg buy a dress but it needs to be altered).
- Then: Property does not pass until the goods are altered and the buyer has notice thereof.

Rule 3: Specific goods BUT bound to weigh, measure or test

- Where: Contract for sale of specific goods ('goods identified and agreed upon at the time a contract of sale is made' - s 5), in a deliverable state (buyer would be bound to take delivery), BUT the seller is bound to weigh, measure, test or do some other act for the purpose of ascertaining price.
- Then: Property does not pass until act is done AND buyer has notice thereof.

Unascertained?

- see Re ***Goldcorp Exchange Pty Ltd*** (text: p 296) Privy council said 2 types
    - Generic
        - Goods where seller can decide source of the goods, *"terms which preserve sellers freedom to decide for himself how and on what source will obtain goods on contractual subscription"*
            - Ie sheep: ill sell you 50, can source them from wherever. Only obligation is the sheep.
            - If specific, must be that one white sheep in paddock A: agreed on it.
            - Generic, not identified or agreed upon
    - Generic from a particular source (ex bulk; quasi-specific)

Future by description (SGA s 5)

- Where the goods are generic, generic from a particular source (ex bulk; quasi-specific). Also includes future by description (s 5) *"Future goods" means goods to be manufactured or acquired by the seller after the making of the contract of sale.*
    - Property in unascertained goods cannot pass until they are ascertained unless the goods fall within the s 25A exception
        - Contract is for a sale of specified quantity of unascertained goods, of which some or all form part of a single bulk quantity of goods, AND (1)(a) bulk is

-

Fitzroy v Cave [1905]
Note: Right to sue to be paid a debt and a right to sue for liquidated damages for breach of contract sit outside the prohibition on assigning bare rights to litigate

- Discussed re unliquidated damages" for breach of contract
    - If claim is for liquidated damages, treated as able to be assigned. Treated like debts
    - Previously, even when passed right for payment and there was a right to sue for payment of debt, could still assign that

*****Glegg v Bromley [1912]***
Assigning the fruits of litigation is not assigning a bare right to litigate. Distinction between assigning bare right to litigate and assigning whatever fruits may come out of the litigation. CL did not prevent assigning those fruits.

Facts: Mrs Glegg sued someone for slander/defamation (right to litigate). At the same time, owed 7K to her husband and other creditors. To clear those debts she assigned to her husband all she was going to get by virtue of slander claim.

Held: an effective assignment

- Under pinned by Maintenance and Champerty. Not assigning course of action, but what came out of
- "It is not an existing chose in action, but future property identified by reference to an existing chose in action."
- Future property doesn't yet exist, or exists and you don't yet own it. Cant assign it but can contract to assign it.
- Assigning whatever damages might receive for slander, not the claim itself.
- Matters for whether maintenance and champerty are applicable:
    - *"I know of no rule which prevents the assignment of the fruits of an action. Such an assignment does not give the assignee any right to interfere in the proceedings in the action. … There is in my opinion nothing resembling maintenance or champerty in the deed of assignment."*
        - Husband not given right to control action. Doesn't have a right to control, doesn't involve M or C.

*****Trendtex Trading Corp v Credit Suisse [1982]***
Exception: Assignee has a genuine commercial interest in the litigation.). *E.g. Assignee who is a creditor of the assignor, so has a genuine pre-existing financial interest in maintaining the plaintiff's solvency*

- *Because the basis of the prohibition on bare right to litigate was the tort of maintenance, could assign a cause of action, even a bare right, if assigning to someone with a legitimate interest in pursuing it. Then their right to litigate wouldn't involve M or C*

NB: Talking about signing right to litigate, but if instead were assigning an entire business, and part of business involved right to litigate a part of that business, then could work without ***Trendtex*** exception – this would be an ***Ellis v Torrington*** exception

- Need this exception when it's a bare right on its own. Genuine commercial interest before the assignment

- Key to understand = beneficiaries interest under trust is a collection of different rights. Some operate in rem, against 3rd parties, but not all
    - Also has other rights under rights, in personum. Enforceable against trustee but not third parties
    - Best way to understand is not looking at interest as a whole but individual rights under trust
    - Interest as a whole is proprietary in some but not all/others

Trust beneficiary chose in action includes right to assign their interest. Those are assignable, like a debt. Illustrated in:

*****Byrnes v Kendle [2011]***
2 key rights that beneficiary can have over trust assets: right to have returned and force trustee to act properly

Facts: Husband declared held half share on trust for his wife. Later separated. Husband leased property to son and didn't collect rent. Wife sold her interest by trust to son by different marriage. Then sued husband for breach of trust and was successful

1) If trustee wrongfully disposes of assets from trust and gives to third party, first right beneficiaries have is to get those assets returned to trustee from those who were wrongfully disposed

- Negative: prevents third praties from benefitting from trust if not entitled
- Affects third parties (not all)
- Proprietary right, but negative right

2) emphasises importance of not forgetting that trust beneficiaries has a personal right to force trustee to act properly

- ie because youre trustee, required to collect rent, for beneficiaries (and wifes son now beneficiaries)
- because hadn't collect, had to pay compensation when didn't do that'
- ➢ beneficiaries may be able to assert rights to specific trust assets in the hands of trustee
- More positive right, can say to trustee "that is my asset" it belongs to me in equity
- "may" because depends on terms of trust. Depends if gives rights to trust

*****Baker v Archer-Shee (1927)***
This is the case generally cited for the proposition that the beneficiary under a trust has an equitable right to the trust property

Issue: Only if she had a proprietary interest would it be taxable under the relevant legislation.

Held: Majority had the view that it was a proprietary interest, and therefore the daughter had to pay income tax.

- Did Lady Archer-Shee have an immediate property right to the interest, or simply a personal right to be paid the equivalent of that income?

Held: AS liable to pay income tax because liable to income from assets. It was her property

- Didn't matter whether it was received in US or not

trust, so because it was not in writing it failed at step 2. This case is a direction to trustees but is slightly different.

- *When legal title is given as gift by beneficiary to another, legal title and beneficial interest under the trust merge and so there has not been a disposition of an equitable interest per s23C(1)(c)*

Facts: Tony Vandervell was very wealthy. V wanted to make a gift to royal college of surgeons to endow a chair of pharmacology. Most tax efficient way, he was advised, was to – rather than pay to college, go through complicated arrangement:

- Shares in T's company held by bank, in trust, with V as beneficiary.
- V orally directs transfer of legal title to royal college of surgeons. Dividends to go to college = most tax efficient donation
- However, royal college are meant to take shares as full owner – collect dividend and keep.
- V's equitable interest: isn't he disposing of it? Not giving it to another beneficiary, but is disposing

Held: V's actions did not amount to disposition of subsisting equitable interests for purposes of 23c(1)(c). if did apply, V would always be beneficiary even when royal college collected dividends applied etc etc

Q is it necessary for V to put in writing to be sure he is giving away his interests? House of lords said no

- Counter intuitive, surely any other way of looking at interest, V has done so. Disposed.
- Justification for why 23c1c doesn't apply? Why not?
    - Analysis in case isn't strong, closest to reason we can find is remember where requirements came from
    - Point of statute is to protect trustees. This allows trustees to be sure of who beneficiaries are
    - If didn't, trustee would have no way of knowing to who should pay trust funds.
    - Point of writing requirements is to protect trustees. Doesn't matter when surgeons college is taking legal title for its own benefit. Rationale for writing requirement **doesn't pertain to this situation**
- Another way to look at case:
    - <u>Nolan:</u> (in paper) surgeons were authorised. Bank authorised by terms of trust
        - Ie trustee holds $ in CBD for beneficiary, there are tenants, $ takes to pay rent
        - When trustee takes money out of trustee to pay expense, don't think of beneficiary, think of trustee applying trustee in accordance with trust
        - V changed terms of trust so bank was authorised
        - Was instead an overreaching of interests.

*****Parker and Parker v Ledsham***

Similar to Howard-Smith. Direction to trustee to transfer legal title will normally be seen as revokable mandate.

absolute, unqualified, unanswerable defence, and an unanswerable plea to the jurisdiction of this Court." – Sir WM James LJ

- Where beneficiaries entrust to trustee who turns out to be a rogue, stands to reason that you may lose it. Beneficiaries here bore the loss. Beneficiaries were less meritious than bonafide mortgagees so awarded them priority.
- This is in accordance with the "ordinary feelings of the justice of mankind"

3 elements:

1) is subsequent legal holder bona fide? Requires examination of overall circumstances in which legal title was acquired. Whether unconsciousable conniving behavior on facts
2) whether purchaser for value. Doesn't apply to volunteers. Must be established that estate holder has been given some kind of consideration, money, or promise to marry!
3) has subsequent legal holder taken title without notice of existence of prior legal interest. Notice in this context includes active constructed computed notice.

> doctrine of notice binds title holder to any equity they should have known about as a result of all inspections. Timing very important. Must be established that legal holder had notice of equity prior to legal title. (important)

Prior equitable interest v later legal interest

NOTICE

Conveyancing Act 1919 (NSW) s 164 Restriction on constructive notice

(1) A purchaser shall not be prejudicially affected by notice of any instrument, fact, or thing, unless: -

ACTIVE CONSTRUCTIVE: *(a) it is within the purchaser's own knowledge, or would have come to the purchaser's knowledge, if such searches as to instruments registered or deposited under any Act of Parliament, inquiries, and inspections had been made as ought reasonably to have been made by the purchaser, or*

- (what would have been discovered if requisite inquiries had been made)

INPUTED: *(b) in the same transaction with respect to which a question of notice to the purchaser arises, it has come to the knowledge of the purchaser's counsel as such, or of the purchaser's solicitor or other agent as such, or would have to come to the knowledge of the purchaser's solicitor or other agent as such, if such searches, inquiries, and inspections had been made as ought reasonably to have been made by the solicitor or other agent.*

- Imputed notice can only happen if agent had actual or constructive notice of prior interest in same transaction. Where lawyer had received information in usual course of business in same transaction that has been authorised by clients however hadn't brought to principals attention, would then have imputed notice affixed to us)

(3) A purchaser shall not by reason of anything in this section be affected by notice in any case where the purchaser would not have been so affected if this section had not been enacted. …

- The statute is really limiting the doctrine of notice in accordance with section 164(1)(a)&(b) – active, constructive, or imputed notice. Statutory provisions don't alter notice, just restricts application of the statute. Case law is very relevant still, but statutory provisions ensure no new form of notice can be created except by statute.

creditors for selling or leasing to others. If creditors knew gallery dealt with works of others, wouldn't be within definition of consignment.
    - Artists very concerned about this, didn't see their ownership as security or their needing to take steps to protect their interests via financing statement.
    - Suggestions for reform, haven't yet been implemented
- Interest of lessor/bailor of goods under a PPS lease (see ***Arcabi***; ***Forge***)
    - transaction we focus on is lessor or bailor of goods under PPS lease 'PPS Leases'

Interests are included 'whether or not the transaction concerned, in substance, secures payment or performance'

- may be that they do secure payment, so in substance and falls within s12(1), BUT if they do not secure payment of performance are still caught. A 'deemed' security interest.
- Ie categories of security interests are not mutually exclusive
    - Interest can be in substance AND deemed security interest
    - We usually see interest with and deemed without, not accurate. Not mutually exclusive characteristics.

Controversial: interest of a lessor or bailor of goods under a PPS lease

SECT 13: Meaning of PPS lease

(1) A PPS lease means a lease or bailment of goods:

(a) for a term of more than 2 years ; or

(c) for a term of up to 2 years that is automatically renewable, or that is renewable at the option of one of the parties, for one or more terms if the total of all the terms might exceed 2 years; or

(d) for a term of up to 2 years, or a lease for an indefinite term, in a case in which the lessee or bailee, with the consent of the lessor or bailor, retains uninterrupted (or substantially uninterrupted) possession of the leased or bailed property for a period of more than 2 years after the day the lessee or bailee first acquired possession of the property (but not until the lessee's or bailee's possession extends for more than 2 years).

(2) However, a PPS lease does not include:

(a) a lease by a lessor who is not regularly engaged in the business of leasing goods; or

(b) a bailment by a bailor who is not regularly engaged in the business of bailing goods; or

(c) a lease of consumer property as part of a lease of land where the use of the property is incidental to the use and enjoyment of the land; or

(d) a lease or bailment of personal property prescribed by the regulations for the purposes of this definition, regardless of the length of the term of the lease or bailment.

Bailments for value only

(3) This section only applies to a bailment for which the bailee provides value.

- PPS lease defined in s 13 [read whole provision]