

## TOPIC I. REAL PROPERTY

### *General Concepts*

#### Definitions of Property Rights

- **Assignable Rights:** at its widest, property means any right that can be transferred from one person to another
- **Rights in Rem:** rights concerning particular things, enforceable against anyone and depend upon continued existence of things
  - Contrast with **rights in personam** which are enforced against particular persons
- Consist of a large class of fundamentally similar yet separate rights, which correspond to the obligations of a very large and indefinite class of people
- Characteristics: **alienable** (i.e. disposable); **excludability**; **value**
- **Real Property:** usually rights to land (excluding a lease)
- **Ownership:** includes right to possess indefinitely; has reversionary right; can destroy thing owned
- **Possession:** without ownership is a temporary right

#### *King v David Allen & Sons Billposting*

- Contracted for affixing of posters and advertisements to a wall; subsequently made an agreement for a lease; the contract was merely a personal obligation in the sense of a licence to use land rather than a proprietary interest in the land
- Must look to the document itself: the description of the contracting document was that of a licence; only personal rights were ever contemplated by the parties

#### *Yanner v Eaton*

- Aboriginal caught crocodiles without a licence or permit under relevant Queensland Act
- Property refers to a legal relationship with a thing: it is a bundle of rights but not a monolithic notion of standard content and invariable intensity
- Must identify what rights the term 'property' in the act actually creates
- Held was not 'full beneficial, or absolute, ownership' because difficulty in identifying exactly what fauna was the Crown's; 'full beneficial ownership' of wild animals impossible; there were not responsibility rights attached to ownership rights
  - Rather was a fiction expressive in legal shorthand for the State to preserve and regulate fauna

#### *Fixtures*

- Goods that have become part of the land and thus lost their individual identity
- **Presumption:**
  - If merely resting on land, continue to be goods
  - If any degree of attachment, presumption that chattel is a fixture (*Belgrave Nominees*)
  - Party asserting otherwise bears the onus of proof.
- **degree of annexation:**
- **object of annexation**
  - Was the chattel joined to the land for its better use as a chattel or for the improvement of the land
  - Objective intention from observable circumstances (*Reid v Smith*)
- If a **security right** (i.e. if attached to land but not by owner of chattel), owner can come in and sever and remove the chattels which have become fixtures (*Kay's Leasing Corp v CSR Provident Fund Nominees*).

- In this case merely had an option as there was nothing binding

### ***Robinson v Graves***

- Defendant orally commissioned an artist (plaintiff) to paint a portrait but subsequently repudiated the contract prior to completion.
- Held: was a contract for work and labour and not for the sale of goods as the substance of the contract was that skill and labour should be exercised upon the production of the portrait, and that it was only ancillary to that contract that there would pass from the artist to his customer some materials
- Must look at the substance of the contract
  - If the substance was the production of something to be sold, then that is sale of goods
  - If the substance was that skill and labour have to be exercised for the production of the article, and it is only ancillary to that that there will pass from the artist to his client or customer some materials in addition to the skill involved in the production of the portrait, then the substance is the skill and experience of the artist in producing the picture

### ***McEntire v Crossley***

- Owners and lessors of a gas engine agreed to let to the lessee; upon payment in full the engine became the property of the lessee but until then remains sole and absolute property of lessors. In case of failure to pay instalment, the lessors could elect either to recover the full remaining balance due, or instead resume possession and sell it
- Held property never passed to the lessee but remained in the lessors and thus the transaction was not within the Bills of Sales Act (our SGA)
- Agreement must be regarded as a whole – its substance must be looked at
- The parties cannot, by insertion of any mere words, defeat the effect of the transaction as appearing from the whole of the agreement into which they have entered
  - Must look at substantial effect of agreement as a whole
- Expressed intention that property shall not pass until instalments paid
  - Agreement to sell depends upon the intention of the parties whether the property does or not pass
  - Everything seems to point to the property remaining in the vendor

### **Unascertained and Future Goods**

- Property cannot pass in a thing unless it is clear what that thing is
- Under rule 5, the property in unascertained goods may be transferred when the goods are unconditionally appropriated to the contract with assent
- Property in unascertained goods may pass by the intention of the parties as expressed in the general rule in s 22, subject to contrary intention s 23 r 5
  - Inquiry is as to whether the goods have been ascertained prior to unconditional appropriation
- Ascertainment
  - By exhaustion
  - By segregation and constructive delivery

### ***Carlos Federspiel & Co SA v Charles Twigg & Co Ltd***

- Contract for sale of unascertained goods by description, for the sale of future goods probably still to be manufactures. Afterwards certain goods (bicycles) were manufactures, and the sellers at one time apparently expected to use them in fulfilment of the contract. Question was whether there had been appropriation of those goods by the sellers with the assent of the buyers
- Both parties must agree as to the specific chattels in which property is to pass, and nothing remains to be done in order to pass it

### *Lysaght v Edwards*

→ See previous stuff

### *Dealings with Equitable Interests*

- General rule: all that is required for assignment of equitable property is “a clear expression of an intention to make an immediate disposition” (*Norman v Federal Commissioner of Taxation*)
  - Distinguishable from a revocable mandate which may be recalled before being acted upon (*William Brandt's Sons v Dunlop Rubber*)
- Exception is statutory provisions:
  - S 23C CA: applies to equitable interests in all types of property – real and personal
  - S 12 CA which applies to both equitable and legal choses in action
- Direct assignments of equitable interests need to be in writing and signed by the assignor (s 23C(1)(c))
- Agreements to assign for value equitable interests in:
  - real property are captured in s 54A CA
  - personal property captured in s 23C(1)(c)
    - if it agreement outright disposes of assignor's existing equitable interest
    - but not if the agreement is viewed as making the assignor a constructive trustee of that equitable interest for the assignee
      - i.e. assignor retains existing equitable interests and creates a new equitable interest in the assignee which is exempted under s 23C(2)
- Declarations of trust
  - Real property (land) must be in writing under s 23C(1)(a): void if not
    - If only s 23C(1)(b) then non-compliance means unenforceable and a memorandum proving declaration will render declaration enforceable
  - Personal property must be in writing under s 23C(1)(a) if seen as effecting a 'disposition' of a 'subsisting' equitable interest
    - If whole equitable interest then likely must be in writing
    - If assignor has new obligations with active duties then still has equitable interest so likely not needed to be in writing
- Directions to trustee to transfer equitable interest
  - Does the direction itself pass the assignor's equitable interest to the assignee? Would need to be in writing
  - Does the direction simply make the assignor a subtrustee of the equitable interest for the assignee and therefore effectively 'create' an equitable interest in the assignee? Would not need to be in writing
- Disclaimers of equitable interests
  - I.e. repudiate interest
  - Disposition is statutory defined in NSW to include 'disclaimer' so likely relevant in construing s 23C(1)(c).
  - If not, *Paradise Motor* says disclaimer is not the same as disposition
- Releases of equitable interests
  - When the holder of absolute equitable interest releases the trustee from their obligations to deal with the trust property for the benefit of the assignor (i.e. leaves the trustee free to deal with property as their own)
  - Needs to be in writing as it is highly likely it is a disposition (*Crichton v Crichton; Vandervell*)
- Nomination of beneficiary upon assignor's death in property that would otherwise pass to assignor's estate

- Only property capable of possession but includes documents of title to those chattels so can just pledge the documents of title to the chose in action
- Not an ownership interest, described as a special property interest
  - Special property of the pledgee and the general property which remains in the pledgor

***Palgo Holdings Pty Ltd v Gowans (2005) 221 CLR 249 (esp at [1]-[33])***

- Common law: mortgage, charge (fixed/floating), pledge
- Pledge is a bailment of personal property as a security for some debt or engagement
- Mortgage is where the whole legal title passes conditionally to the mortgagee
- Lien is a right of detaining the res until the money owing is paid: a lien disappears if possession is lost, and there is no right of sale
  - Personal right

***Statute: eg Torrens title mortgage Real Property Act 1900 (NSW), ss 56, 57***

***Security within the PPSA***

- See table on page 575 and relevant sections at 611 in Forge
- Security interest s 12(1):
  - Interest in personal property
    - Excludes property other than land (s 10) and fixtures (s 8(1)(j)) but includes a licence
    - Financial property includes
      - Chattel paper
      - Currency
      - Document of title
      - Investment instrument
      - Negotiable instrument
    - Inclusion of ‘flawed asset arrangement’ is contentious as traditionally a contractual form – query extent to which PPSA may apply to non-traditional personal property rights
  - Transaction
    - Consensual
    - Implies existence of a valid agreement: ***Ellingsen v Hallmark Ford Sales***
  - Securing payment or performance of an obligation
    - In substance
    - Deemed
      - Interest of a transferee under a transfer of an account or chattel paper
      - The interest of a consignor who delivers goods to a consignee under a commercial consignment
      - The interest of a lessor or bailor of goods under a PPS lease
    - PPS Lease
      - (includes bailments for value)
      - At a particular duration (see lecture notes)
      - And with regular engagement by the lessor or bailor in the business of leasing or bailing goods (considered by NZCA ***Rabobank Newzealand v McAnulty***)
        - Series of transactions, however can be the start of the series
        - Must be intending to profit from the bailment
  - Exclusions under s 8 and 12
    - Interests arising by operation of law
- Cf whether need to know PMSI’s
  - Seems to be about priority so beyond scope?