

Statutes

- *Real Property Act 1900 (NSW)* ±
- *Sales of Goods Act 1923 (NSW)* ±
- *Conveyancing Act 1919 (NSW)* ±
- *Personal Property Securities Act 2009 (Cth)* ±
- *Corporations Act 2001 (Cth)* ±

Topic 1 – Land (Real Property)

Proprietary or Personal Interest

- Property is a right which people have to things, rather than the things themselves
 - The meaning of “property” within a statutory scheme depends on **how that word was used in the statute**. [*Yanner v Eaton*]
 - ‘In the *Fauna Act*, property does not refer to a thing; it is a description of a legal relationship with a thing. It refers to a degree of power that is recognised in law as power permissibly exercised over a thing...’ → at common law, there is no ‘absolute’ property in wild animals [which was a crocodile in *Yanner v Eaton*]
 - In the *Fauna Act*, ‘property’ was used to support the system of regulation to provide a basis for the Crown to assert rights to unlawfully taken fauna, or to impose a royalty.
 - *Fauna Act* gives Crown regulatory rights; and it’s those specific rights which form property of Crown. Property rights here do not mean ownership but the aggregate of legal relationship between the Crown and the fauna.
- **Proprietary right**
 - Fee simple (exclusive possession of land “forever”)
 - Life estate (exclusive possession of land for duration of measuring life)
 - Lease (exclusive possession of land for certain term)
 - Easement (right, accommodating dominant land to use, or restrain use of, servient land in a manner not inconsistent with servient owner’s continuing ownership)
 - Profit a prendre (right to enter servient land and remove the soil or its natural produce)
 - Chattel ownership (exclusive possession “forever”)
 - Bailment of chattel (delivery of exclusive possession with an obligation to redeliver)
- **Personal/contractual right**
 - License (contractual/personal right to use the land for a specific activity) – e.g., *King v David Allen* [right to post advertising on the theatre]

Difference between contractual and property rights

	Property	Contractual
Enforceability	Can be enforced against third parties under the obligation not to interfere with your property rights. Thus, a right <i>in rem</i> .	Can only be enforced against parties to the contract (due to privity doctrine) Thus, a right <i>in personam</i> .
Potential Content	Limited set of rights; given their content by the law	Content governed by the terms of the agreement. An infinite possible array of contractual rights – parties determine what they’re agreeing to.

- Personal rights (or contractual rights) – only sound in damages (see *King v David Allen & Sons* for an award of damages for breach of contract)
- Property rights – when effected, give the owner an actual possession over the land/object

Native Title

- The right of native title for Indigenous people – to use the land for traditional customary practices – are recognised by common law – but are vulnerable to Crown extinguishment (*Mabo, (No 2)*)
- Native title is recognised where (*Mabo*):

- 1) What are the kinds of physical control and use of which the things in question were practically capable?
 - Moveable objects vs bulky objects
- 2) Could physical control be applied to the res (thing) as a whole?
 - e.g., full control was not needed in certain circumstances to effect possession; where the chattel was a sunken ship beneath the ocean, it was held that control is adequate if another prospective finder cannot achieve the same degree of physical control without the use of force (*The Tubantia*)
- 3) Was there a complete taking?
- 4) Had the plaintiffs occupation sufficient for practical purposes to exclude strangers from interfering with the property?
- 5) Was there the animus possidendi accompanying the acts in question? → indicated by factors 1)-4)
- 6) Whether the knowledge of intention of any other person was material to their effect, and if so, what that person did know and intend.

The nature of possession

- Three types of possession – each are distinct in conception and separable in practice:
 - a. Physical control, detention or de facto possession. This, as an actual relation between a person and a thing, is a matter of fact. Nevertheless, questions which the Courts must decide as matter of law arise as to proof of the facts.
 - b. Legal possession, the state of being a possessor in the eyes of the law → can co-exist with physical control, but can exist without physical control (or detention)
 - c. [Constructive possession] – Right to possess or to have legal possession. This includes the right to physical possession.
 - It can exist apart from both physical and legal possession – e.g., a person who has been wrongfully dispossessed (e.g., through robbery) still remains the rightful possessor – and has a right to reclaim actual control
 - This right is not exclusive like possession → A (rightful possessor) may have a right to possess a thing against B (the thief) and everyone else; while B (thief) has a right to possess it as against everyone except for A (rightful possessor)
 - Right to possess (without possession) is called CONSTRUCTIVE POSSESSION → a person entitled to possession is given the same remedies as if he had been in actual possession

Custody

The meaning of “custody” – compared to possession

- Sometimes, custody is equated to possession
 - Custody is sometimes considered equal to physical possession – but it is actually less than physical possession – it is only a fleeting holding
 - Custody is also sometimes equated to legal possession – but it is certainly less than legal possession (which requires physical control at the exclusion of others, and intention to control)
- But at general law, custody has a different meaning to possession → custody is considered less than possession:
 - E.g., an employee that holds/uses objects of the employer will only have custody
 - E.g., a shopper that picks up an object in a store and puts it down again only had custody – a fleeting holding
 - E.g., a guest who picks up a fork to eat at owner’s house only has custody
- “Custody” is sometimes used in statute – must keep in mind the definition of custody (e.g., *FCT v ANZ Banking Group*)
 - In this case, the Bank had the required ‘custody’ under the Statute “custody” referred to the Bank’s ability to open the locker without the customer’s assistance – and the Bank could physically open the locker since it had both keys – hence had custody

- Under the new contract, the assignee is now a party, alongside the other contracting party. The assignee now has the obligation to perform the contract for the other party, and the assignor is discharged from that obligation, as they are no longer a party to the contract with the other party

[B] **BENEFIT of a Contract**

- Prima facie, the **benefit** of a contract is assignable because they are choses in action with proprietary character, unless some reason precludes their assignment [*Pacific Brands Sports v Underworks*, at [43]]
- **Reasons precluding assignment:**
 - **Statutory prohibition** on assignment of certain types of rights [*Owners of Strata Plan 5290 v CG*]
 - **Contractual prohibition** on assignment of contractual rights [*Linden Gardens*; *Bluebottle*]
 - **Personal service contracts** – benefits under a personal service contract cannot be assigned

Step 2: If the **benefit** of a contract is being assigned, is there a **reason precluding its assignment**?

[1] **Statutory prohibition on assignment**

- Parliament, through a statute, can prohibit a certain type of right being assigned and vice versa; make assignable rights which are otherwise non-assignable [*Owners of Strata Plan 5290 v CG*]
- Whether a statute has prohibited the assignment of a certain right, or permitted a non-assignable right to be assigned depends on statutory construction [*Owners of Strata Plan 5290 v CG*]

Issue A: Was the statute **clear** enough to alter the assignability of a certain right?

- **Example of unclear statute:**
 - In *Owners of Strata Plan 5290 v CG* → there was a contractual prohibition on assignment of the building contract, and its rights (i.e., benefits) → the building company went into liquidation and the liquidator sought to assign (by selling) the benefit of the right to be paid under the building contract → the liquidator tried to overcome the contractual prohibition, by relying on the **Corporations Act**, which provided that a liquidator could sell the company's property, including things in action → but the Court held that the Act was not clear enough to change the inability to assign the contractual benefit under a contract

Contractual prohibition on Assignment

[2] **Contractual prohibition on assignment**

- **General rule:**
 - Contractual prohibitions on the assignment of contractual rights, which would otherwise be assignable, are effective and enforceable, and a purported assignment of contractual rights in breach of a contractual prohibition is **void** and ineffective to transfer those contractual rights at law and at equity [*Linden Gardens*, 107-108; *Bluebottle UK*; *Nokes v Doncaster [1940] 3 All ER 549*, 561]
- **Exceptions:**
 - 1) The contractual prohibition is not enforceable if the **provision is illegal** pursuant to statute or on public policy grounds → in which case it will **be severable** from the contract and will **not preclude assignment** of contractual rights.
 - 2) **Statute** may make an otherwise non-assignable right (e.g., due to a contractual prohibition), assignable, if it is sufficiently clear (*Owners of Strata Plan 5290 v CGS*) → see above at [1]
 - **KEY EXAMPLE: DEBTS** → The principle in *Linden Gardens* [that assignment can be prohibited under a contractual term] does not apply to debt, due to **s 81(2), Personal Property Securities Act** → which provides that a prohibition on the assignment of a debt is unenforceable against a third party [an assignee] → if there is an assignment to a third party, that third party [assignee] can enforce the debt [s 81(2)(b)]
 - The prohibition on assignability is however enforceable against the assignor [party that made the assignment] [s 81(2)(a)] → the non-assigning party can sue the assignor for damages for breach of contract – if it has suffered losses from the assignment.

- **Cohen v Cohen** [transaction 1] → wife gave husband 9,000 German marks to buy goods to import to UK (as a means of getting the money to the wife in UK)
 - No intention to create a trust
 - The husband's obligation was to give her an equivalent value from any of his own sources of money – he could buy whatever goods to import, he could do whatever he wanted with the goods he imported, could sell them at whatever price, could use proceeds for whatever he wanted → so long as he accounted to her by paying the equivalent value of the 9,000 German marks
- The agent's ONLY duty to the principal is to account?
 - Although a mere existence in the agent of a duty to account is not itself decisive in negating a trust, if the agent's only duty to the principal is to account – then that is an indication against a trust (Meagher JA at 398, **Walker v Corboy**)
 - **YES**: e.g., the contract or statute may contemplate that the agent's only duty is to pay the principal the amount due in a specified time → that is a duty only to account – so indicates against a trust (Meagher JA at 398, **Walker v Corboy**)
- Single transaction (vs Multiple transactions) [**Walker v Corboy** per Meagher JA at 396-7,]
 - Complex and multiple transactions → is a strong factor against the imputation of intention to create a trust – particularly due to the practical complications that may arise

Problem solving steps – Agency or Trust?

Issue 1: Has the **three certainties** for creating a trust been satisfied?

- [see [above](#)]
- In agency- principal situations, where **agents hold proceeds of sale for the principal**:
 - Certainty of objects – is likely satisfied – the parties are the agent and the principal – even if there were more than one principal, it would just be any seller who the agent has acted for (which is not difficult to ascertain)
 - Certainty of subject-matter – is likely satisfied – the subject matter of the trust would just be the proceeds of sale which the agent holds for the principal (and it would be easy to ascertain which proceeds belongs to which principal – if there were more than one principal – unlike in **Associated Alloys**, where the seller of steel could not determine which of the buyer's proceeds of sale of manufactured goods came from the steel they sold)
 - Query whether proceeds of sale are really certain → tutorial question: proceeds could equal revenue – 10% (usual cost deduction), OR revenue – extraordinary costs for that period
 - Certainty of intention – is likely **at issue** – intention to create a trust is most important in determining whether the agent is merely a debtor of the principal, or a trustee for the principal (Meagher JA at 395, **Walker v Corboy**)

Issue 1-A: Is there **certainty of intention** to create a trust?

- **Has there been 'express intention' by the parties?**
 - If the parties have expressly stated that the relationship is (or is not) to operate as a trust, then that will be determinative of intention (Meagher JA at 395, **Walker v Corboy**)
- **If NO 'expressed intention' – can intention be imputed?**
 - If there is no express intention, then it is necessary to determine whether intention should be imputed based on all the circumstances of the case (Meagher JA at 395-6, **Walker v Corboy**), including the nature of the transaction, particular provisions of the agreement, and the circumstances attending the parties' relationship (Meagher JA at 397, **Walker v Corboy**).
- **Key factors for determining a trust:**
 - 1) Requirement that money should be kept in a separate account from the agent's general account
 - While the absence of an obligation to pay money into a separate 'trust account' does not prevent the existence of a trust (Megarry V-C in **Re Kayford**; **Re Farepak Food & Gifts**) – it is a factor tending against a trust (Meagher JA at 398, **Walker v Corboy**) – particularly where money is actually mixed (**Re Farepak Food & Gifts**)

- However, the change in equitable interest is not a result of ___ [e.g., the issuance of unit trusts]– it is brought about by the operation of the vendor-purchaser constructive trust doctrine and the payment of full consideration (*Oughtred*, Lord Cohen; *Halloran*, [81])
- E.g., in *Halloran* – the consideration was the issuance of units in a unit trust – but the change in the equitable interest did not occur as a consequence of the actual issuance
- E.g., in *Oughtred* – the consideration was provided via a document [after an oral contract had been formed] – the change in equitable interest did not occur as a consequence of the document [no stamp duty was payable] → the value (equitable interest) moved by the operation of the constructive trust doctrines, and independently of the document
- **SUMMARY:** The change in ownership of equitable property resulted from the oral transaction (under the operation of the constructive trust doctrines), and any subsequent written document does not bring about any change in ownership of the equitable property – it functions merely as evidence of the oral transaction

Choses in Possession

Legal Interest

Issue 1: What is the assignor's property interest?

- The assignor's property interest is:
 - Legal ownership?
 - Legal mortgage? – mortgages over chattels work like Old System mortgages
- [explain why this arises – see [Types of interest](#) – Topic 5]

Issue 2: What does the transaction do?

- The assignor is seeking to:
 - **[A]** Assign the interest to the assignee [*assignment*]
 - *Assignment* – go to [Issue 3 \(Legal assignment\)](#) + [Issue 4 \(Equitable assignment – if legal assignment fails\)](#)
 - **[B]** Declare a trust over the interest in favour of the assignee [*declaration of trust*]
 - *Declaration of trust* = creation of a new equitable interest – go to [Issue 5](#)
 - **[C]** Assign future property that will be produced from the present property [*assignment of future property*]
 - *Future property* – see below [[Future property](#)]
- **Distinguishing between Assignment vs Declaration of Trust**
 - Words of transfer: “I give to” or “I am giving to”
 - In *Jones v Lock* → father said ‘I give this to my son’ and ‘there’s his present; that’s for him’
 - Words of trust: “I hold for” or “I am holding for”
- **Failed assignments (dispositions/transfers) WILL NOT be construed as a declaration of trust:**
 - If a transfer (assignment) has been attempted, it either succeeds or it fails (or if it just fails at law, may be able to apply a *Corin v Patton* analysis for an equitable assignment).
 - While equity will give effect to a purported assignment, it will not treat a failed assignment at law as a valid assignment by calling it a trust that was never intended [*Milroy v Lord*, Turner LJ at 274-75; *Jones v Lock*]
 - There are three ways to effectively create a gift – if a gift is intended to be effected in one mode, the Court will not give effect to it by applying another mode [*Milroy v Lord*]:
 - Outright transfer of legal title to the property to the recipient – disposition/assignment [invalid transfer will not be construed as a declaration of trust]
 - The transfer of legal title to the property of a trustee to hold on trust for the recipient – disposition/assignment
 - Self-declaration of trust (instead of transferring legal title) – not a disposition [creation of new rights in equity]

- Since this is an agreement to assign legal title for value, rather than a gift, whether ___ [assignee] received rights in the shares in Equity depends on whether a vendor-purchaser constructive trust has been created over the shares such that ___ [assignor] now holds the shares on trust for ___ [assignee] (*Chang*).

[A] Two Requirements:

- An agreement to assign a legal interest for value will give rise to a vendor-purchaser constructive trust and thus be effective to grant an interest in equity (*Chang v Registrar of Title; Lysaght v Edwards; Walsh v Lonsdale*):
 - (1) Where an enforceable contract to grant or transfer exists; supported by valuable consideration; and
 - (2) Where equity would decree specific performance of the contract
- (1) Is there an enforceable contract?
 - For shares, a contract that supported by valuable consideration would be enforceable even if it were only oral
- (2) Is the contract one for which equity will decree specific performance?
 - Equity will decree specific performance for property that is unique, rare, special or difficult to acquire in the open market (e.g., rare vases, shares in private companies) → but not for property that is general and available in the open market
 - shares in small (or private) companies – e.g., “Pty Ltd” = a small company → but not shares in a large public company, since they are freely available on the market
 - For example: *Oughtred* concerned an agreement to assign an equitable interest in shares in small private company, and not legal title, but it was held that such shares would be property which equity would decree specific performance.

[B] Effect:

- [If contract is specifically enforceable]
 - If both requirements are satisfied, equity will regard legal title as having passed → the legal interest contracted to be granted/transferred is regarded in Equity as having been granted/transferred, even though legal formalities not satisfied.
 - This does not mean that legal title has actually passed. The legal owner (seller) is considered in Equity as a bare trustee who holds the legal interest on constructive trust for the purchaser (vendor-purchaser constructive trust) [*Chang v Registrar of Title*]
 - A court of equity can then order the completion of the transfer and the conveyance of legal title
- [If contract is not specifically enforceable]
 - Since the contract for sale is not specifically enforceable, it not effective to create a vendor-purchaser constructive trust over the legal title to the chose (*Chang*).
 - Mason J in *Chang* stated that the availability of specific performance is essential to the existence of a constructive trust arising from a contract of sale, which has also been held in the context of agreements to assign future property (*Holroyd*, Lord Westbury, 211)
 - However, the extent to which such constructive trust depends on specific performance has been doubted in *Tailby*, where Lord Macnaghten held that the existence of the constructive trust arising from an agreement to assign future property depends on the maxim that ‘equity regards as done that which ought to be done’ and not specific performance (affirmed in *Chan v Cresdon*).
 - Whilst *Tailby* may be distinguished from *Chang* in that *Tailby* did not concern assignments of legal property, there is a strong case for recognising a constructive trust based on the maxim that ‘equity regards as done that which ought to be done’ because here, full consideration has been paid and there is nothing left to do except for ___ [assignor] to transfer legal title.

[C] When does the vendor-purchaser constructive trust arise? – Has there been full payment yet?

- Contract to assign legal property – IMMEDIATE PAYMENT

the original owner has avoided the seller's title, and acted in good faith and without notice of the seller's defective title.

Step 1: Does the seller of goods have a voidable title?

- Here, the seller has a voidable title which is subject to rescission by the original owner, because the contract for sale between the seller and original owner was induced by:
 - Misrepresentation – the original owner has a right to rescind for misrepresentation, including fraudulent misrepresentation at common law, and innocent and negligent misrepresentation at Equity (which applies to contracts for the sale of goods: **s 4(2A), SOGA**)
 - Undue influence
 - Fraud
 - Unconscionability
 - Breach of fiduciary duty

Step 2: [If there is a voidable title] – Has the original owner rescinded the contract **before** the fraudulent person sells to a bona fide purchaser?

- Where the seller has a voidable title and the original owner has a right to rescind, **s 26(2), SOGA** provides an exception to the *nemo dat* rule to enable the purchaser to acquire good title to the goods if they purchased the goods before the original owner has rescinded and avoided the seller's title, and acted in good faith and without notice of the seller's defective title.
- To avoid the seller's defective title, the original owner must:
 - If notice or communication with the seller (other party) is **possible** →
 - The original owner must communicate and give notice of the rescission to the other party (the seller). The contract otherwise remains on foot unless that communication is made (**Caldwell**, at 549)
 - E.g., for cases of innocent misrepresentation, it would be possible to communicate the rescission to the other party, because the other party would not deliberately avoid communication (because that would indicate against innocence) and it will be very rare for communication to not be possible (**Caldwell**, at 551-52)
 - If notice or communication with the seller (other party) is **not possible** →
 - The original owner must "take all possible steps to regain the goods even though he cannot find the rogue nor communicate with him." (**Caldwell**, at 551)
 - E.g., for cases of fraudulent misrepresentation, the rogue would likely not stay around to receive any communication.
 - **Caldwell** → it was sufficient to avoid the seller's title as the original owner had immediately, upon discovering the fraud, notified the police and the Automobile Association about the fraud and asked them to alert their patrols to look for the car.
- **Has the original owner taken sufficient steps to rescind the contract and avoid the seller's defective title?**
 - The original owner has a right to rescind, and to rescind the contract, they must give notice and communicate the rescission to the owner (**Caldwell**, at 549)
 - Here, the original owner has not communicated the rescission. Since it was not possible to communicate with the seller (other party), it is sufficient to avoid the title if the owner took "all possible steps to regain the goods even though he cannot find the rogue nor communicate with him." (**Caldwell**, at 551)
 - The owner has/has not taken sufficient steps before the subsequent purchaser purchased the goods – because:
 - [Explain conduct performed – e.g., advising police, searching for the goods etc.]

Step 3: Was the purchaser a bona fide purchaser – acted in good faith, and without notice of the seller's defective title?

- [Explain on the facts]

- **Retention of title / hire purchase** – grantor takes possession, but secured party retains ownership of goods to secure payment → consider if title has passed from the secured party to the grantor under the **Sale of Goods Act**
 - Title passed to grantor = secured party has no property interest = no security interest
 - Title has not passed to grantor = secured party has a property interest (ownership)
- **Trust**
 - A valid trust requires certainty of intention, subject matter, object + trust property reached trustee
- **Step (2): Is the interest excluded by s 8?** [DO NOT APPLY IF NOT RELEVANT]
 - **S 8** excludes ___ [state the interest] from being a security interest within the **PPSA**:
 - Liens, charges, and other interests in personal property that arises by operation of law (**s 8(1)(c)**)
 - E.g., vendor's unpaid lien – arises by operation of law – excluded by **s 8**
 - E.g., charge as security – if entered into on agreement by the parties – then not excluded
 - interests in fixtures (**s 8(1)(j)**)
 - Under the **PPSA**, fixtures are personal property, because it is excluded from the definition of 'land' in **s 10**, but an interest in fixtures is not a security interest (**s 8(1)(j)**)
 - [see topic 1 – for fixture or chattel]
- **Step (3): Does the interest secure payment or performance of an obligation?**
 - [assess on the facts]
 - **Trusts**: [POSSIBLY – not listed in **s 12(2)**] → the beneficial interest under a trust may amount to a security interest if it is securing payment of a debt or performance of an obligation
 - In **Associated Alloys**, Kirby J (dissent) held that the trust had operated as security and should be regarded as a charge for the purposes of registration under the **Corporation Act** – Majority held that a trust is a trust (not security interest) – but **PPSA** rejects this
 - BUT, if the trust arises and replaces the debt – it is not a security interest under **PPSA** (**North Shore City Council v Stiassny**, obiter – New Zealand Court of Appeal)
 - If the trust arises such that the creditor now has a beneficial right under a trust [with the borrower becoming trustee with simply an obligation to account to the creditor/beneficiary for moneys held or received on behalf of the beneficiary] → that trust is replacing the debt (chooses in action) – **North Shore City Council v Stiassny** case says this is not captured as a security interest for the purpose of the **PPSA**.
 - **Bailment** – factors indicating that a bailment secures payment/performance [**Arcabi**, [20]]:
 - (a) the bailment provides that ownership of the goods will vest in the bailee on expiry of the bailment agreement
 - (b) bailee has an obligation to purchase the goods or an option to purchase the goods or extend the term of the arrangement at a “bargain” price such that it would be reasonable to expect the bailee to exercise the option
 - (c) the term of the arrangement is for a major part of the economic life of the goods; and
 - Not satisfied if the goods had an indefinite economic life, and the bailment arrangement (e.g., for storage of the goods) was not for such a long time (**Arcabi**, [22])
 - (d) the minimum payments under the bailment amount to substantially all the capital cost of the goods.
 - E.g., in **Arcabi** – the small, nominal payment for the bailment was \$240 (for storage of the goods) – did not equate to the capital cost of the Goods.
 - **Consignment** – factors indicating that a consignment does not secure payment/performance [**Arcabi**, [47]-[49]]:
 - The consignment arrangement gave mutual advantage to the consignor and consignee (**Arcabi**; **Re Stephanian's**) → indicating that the arrangement was not predominantly for security:

Tutorial 1 – Real Property – Land + Fixtures

Question 1

Magda held the legal fee simple in one of the very few remaining parcels of Old System title land in inner Sydney. She ran the business of a seafood restaurant on the land. Magda purchased a large fish tank to keep live lobsters in prior to being cooked and served to customers of the restaurant. Magda renovated the restaurant to create a cavity in the wall of the dining room. The dimensions of the cavity are only slightly larger than the fish tank, which rests in the cavity by its own weight. The pump and filtration system of the fish tank are connected to the restaurant's electrical power supply.

Subsequently Magda borrowed money from Atlantis Bank and granted Atlantis a first mortgage over the land in the form of a deed. One year later, Magda defaulted on the mortgage and Atlantis commenced to exercise its power of sale. There is a dispute between Magda and Atlantis as to whether the fish tank will be included in the mortgagee's sale.

What is the nature of Atlantis' interest in the land? Advise Atlantis as to whether it can include the fish tank in its sale of the land.

Nature of Atlantis' interest in the land

- Old system land = needs a deed to create an interest in land (**s 23B(1)** – in writing, signed by parties, sealed, delivered and attested – **s 38, Conveyancing Act** = requirements of a deed)
- So, Atlantis has a legal interest in the land – as mortgagee under a legal mortgage
- Magda has an equitable interest in the land – as mortgagor under a legal mortgage
 - There can only be one legal interest in the land at one time, but Equity will recognise equitable interests
 - As the mortgagor, Magda has an equitable interest – i.e., a equity of redemption
- If deed was defective – but there was writing which captures their interest to create a mortgage
 - Magda retains a legal interest in the land
 - Atlantis has an equitable interest in land
 - This is if it satisfied **s 54A** or **s 23C**

Is the fish tank a fixture?

- Start with presumption – goods merely resting in the land continues to be a chattel – here, the fish tank is resting by itself, so is a chattel, not a fixture
 - Degree of annexation: If there is any slight fixing to the land, the presumption of a fixture can arise (**Belgrave Nominees**)
 - Here, the fish tank is connected to the electric supply (the land itself) → this connection is enough to arise the presumption of the fixture
 - But, the pump and filtration may be different to the actual tank (e.g., **Cancer Care** – the wires of the machine base were connected to land, but was different to the base of the machine) → so not a fixture
 - Also, consider how the tank is connected to the land – e.g., **Belgrave Nominees** – the air conditioner was plugged into the walls – but if everything plugged into a wall was a fixture, then that is not really logical
- Burden of proof is on Atlantis to rebut presumption and prove that it is a fixture
 - Go to the inquiry about objective intention

Ben left all property to Alice (sole residuary beneficiary) – Alice has Livingston right → she has no rights in Ben's bank account

ISSUE: have the Livingston rights been assigned?

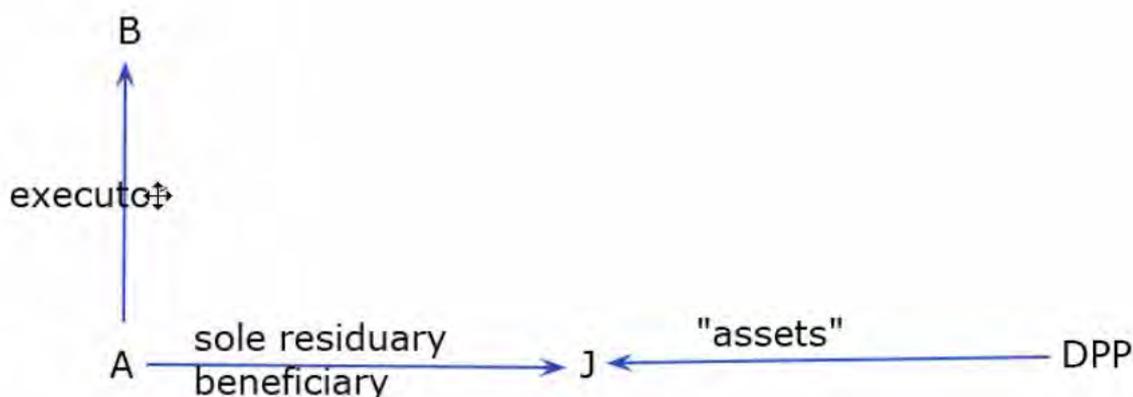
- **Leigh's Will Trusts** → signing of a bank account to someone else will
 - Husband left whole estate to wife, before it was administered, she bequeaths all the shares to the company to another person and any other interests she ever has [she has no other interests, so, it is interpreted as the Livingston right]
 - That was held enough to assign the Livingston right
- Here, Ben's estate mostly includes bank accounts – so bequeathing
 - All 'my bank accounts' – includes Ben's accounts AND her accounts → so unlikely to include her Livingston rights
 - This is different to **Leigh's Will Trusts** → where the wife's shares only included her husband's shares
- So, no Livingston rights assigned
 - So, Livingston rights does not go to Clancy, it goes to Doris (the residue beneficiary of Alice)
- If Alice had said 'all my bank accounts and all my rights in Ben's estate (or Livingston rights in Ben's estate)'

Question 4

4. Anthea, a well-known crime fiction writer, died suddenly in December 2020. She was extremely wealthy: her estate is likely to be worth \$20million. Boris, her brother and the executor of her estate seeks your advice.

Under Anthea's will, her son Jessie was appointed the sole residuary beneficiary. Jessie was convicted of a train robbery two weeks before Anthea's death. Anthea's will remains unadministered, but Boris has received a letter from the Director of Public Prosecutions (who has a statutory power to seize Jessie's assets) demanding full particulars of Jessie's assets under Anthea's will.

What interest or rights, if any, does Jessie have as a residuary beneficiary under his mother's will?



- Jessie has Livingston rights in his mother's estate
- ISSUE: are Jessie's rights 'assets'? – is the right caught under the DPP's statutory power to seize his assets?
 - As a question of statutory interpretation, does assets capture Livingston rights

Statutory interpretation cases:

- **Re Maye** – was the legislation on criminal proceeds inclusive of Livingston rights?
 - 'things in action' – was included in the definition of criminal proceeds –

Topic 1: Answering Problem Questions – IRAC Method

Question 2

Jill was the head security officer employed by Brady's, a department store.

During a walk through the store, Jill observed a sales assistant, Jack, acting in a manner which Jill considered suspicious. Jill formed the view that Jack was stealing his employer's stock. Later the same day, Jill telephoned Jack and asked him to attend her office on the pretext of informing him of new security arrangements. In the course of Jack's interview with Jill, which was conducted in the presence of the store manager, Jill accused Jack of stealing. Jack denied the accusation and gave an explanation of his conduct earlier in the day which satisfied the store manager that Jill's accusation had no reasonable basis. Jack, who was very distressed by the interview, left Jill's office and returned to his department.

Jack has suffered severe embarrassment because several of his fellow workers observed him being interviewed in Jill's office and also observed two police officers waiting outside Jill's office during the interview. The police officers had informed these fellow workers that police presence had been requested by Jill for the purpose of arresting a sales assistant who had been caught stealing. Jack was unaware of the presence of the police officers during the interview and did not see them at the end of the interview. No apology has been offered to Jack by Jill or Brady's and no attempt has been made by Jill or Brady's to inform Jack's fellow workers that he has been exonerated, although Jack has asked them to do so.

Advise Jack of his causes of action in tort and possible heads of recoverable damage against Jill and Brady's.

IRAC Steps:

- Step 1: What is the question asking you?
 - Question is asking you what causes of actions in tort is available to Jack, and the possible damages that can be recovered → two legal issues
- Step 2: Who are the parties?
 - Jack against Jill
 - Jack against Brady
 - Have one heading for each party group
- Step 3: What are the causes of action in Tort? (that Jack can bring against Jill, and then against Brady)
 - Have subheadings for each cause of action
- Step 4: What are the elements/requirements of each cause of action?
 - E.g. what are the elements required for battery
 - This is the "R" in IRAC (the rule)
- Step 5: Are the elements satisfied?
 - Application of the law → look to the facts
 - E.g. is direct interference established based on the facts
- Step 6: Are there any unclear issues?
 - The facts are in a grey area of a rule
 - This is identifying a more contingent issue based on the facts
- Step 7: What is the law relating to these issues?
- Step 8: Apply the law to the facts
- Step 9: Conclusion
 - Is it a battery or not a battery? Is it ambiguous? (state why → e.g. since facts are unclear)

BREACH OF DUTY AND STANDARD OF CARE (Week 9, week beginning 26 October)

Background reading: Reading for Topic 9 in the reading guide including relevant statutory provisions.

Question 1

Diane is a surgeon who is sued in the tort of negligence by her patient Cliff for not having warned him of the risk of a certain rare complication from surgery Cliff was considering having done to improve his facial appearance. Although Diane carried out the surgery with all due care and skill, the complication does in fact develop, resulting in a permanent disability to Cliff.

Diane tells you that she can bring evidence from other Australian doctors that the pre-operation advice she gave to Cliff (which did not include a warning of the risk) was the same advice that those other doctors would have given to him in the circumstances.

- a) Advise Diane on the relevance of that evidence in the negligence proceedings brought by Cliff and what other evidence might be relevant to a decision as to whether Diane was negligent in those circumstances.

- b) Would your answer differ if Diane was an engineer, the advice was about renovations to Cliff's house, and the risk involved was of very unlikely but potentially major structural damage to the foundations of his house occurring as a result of the renovations? The damage does in fact occur. Diane can bring evidence from other engineers in Australia that they would not have warned Cliff of the risk in those circumstances. However, enquiries you have made indicate that it is routine in New Zealand for warnings of such a risk to be given.

Part A: Doctor-Patient Relationship

Duty of Care:

- Diane, as a medical practitioner, owed a duty to exercise reasonable care and skill in the provision of professional advice and treatment to Cliff, her patient (*Rogers v Whitaker*)

Breach of Duty:

- Negligence is a breach of duty → which is a question of fact (*Swain v Waverly Municipal Council*) → about whether Diane failed to exercise the standard of care expected of her → by failing to disclose risk of complications of surgery leading to permanent disability to Cliff
- Standard of Care:
 - Since Diane is a professional (medical practitioner or surgeon), she is held to a higher standard of care (*Imbree v McNeilly*) → being that of the ordinary skilled person exercising the surgical profession (*Bolam; Rogers v Whitaker*)
- Did breach occur?
 - Since Diane is a professional defendant, we first turn to **s 50 of the CLA** in our analysis of breach (rather than s 5B) → according to *Sparks v Hobson* and *Dobler v Halverson*
 - **Relevance of evidence of Peer Professional Opinion?**
 - **S 50 of CLA** → a professional is not negligent if, at the time, they conformed to what was widely accepted in Australia by peer professional opinion as competent professional practice