TUTORIAL 2: PERSONAL PROPERTY/ CHATTELS

LEGAL AND EQUITABLE INTERESTS IN CHATTELS

Equity will only intervene when damages are insufficient. Specific performance will not usually be granted for the sale of chattels- damages are usually sufficient for goods or securities obtainable on the market [Dougan v Ley].

- Specific performance may be available when the chattels are of "unusual beauty, rarity or distinction; or not easily obtained [in the market]" [Dougan v Ley]. Note: proof that a similar chattel was available in the market will not necessarily preclude the order of specific performance [Dougan v Ley]
- It may be available if the chattel is easily replaceable, but has a valuable privilege (i.e. a licence) attached to it [Dougan v Ley]
- Could also make an argument if the price of the good is not commensurate with its value.

**Dougan v Ley**

Contract for the sale of a taxi and a taxi license. 10% deposit paid, but the contract was not performed. The purchaser sought specific performance, but in the meantime bought another taxi.

It was held (Dixon J's judgment) that

- Damages are usually sufficient for goods or securities obtainable on the market
- However if they are articles of unusual beauty, rarity or distinction then can specific performance will be ordered
- Moreover, the economic importance of the taxi was considered:
  - Here, there were only a limited number of vehicles that could be registered and licensed as taxis, and the proceeds from the licence are not necessarily commensurate with the value of the licence itself
  - It was not relevant that the purchaser had acquired another taxi- he is entitled to build up a business with multiple taxis.
- The court could not supervise the enforcement of specific performance in this case, it was merely passed to the Commissioner to decide.

THE NATURE OF OWNERSHIP (/abandonment)

A contract can modify and determine when goods have been abandoned [Re Jigrose]- so need to examine the terms of the contract.

But generally, at common law, title remains with the original possessor until there is an intention to abandon it; if an item is merely lost, the intention to possess may be retained [Re Jigrose]. So the distinction is between losing and abandoning.

If the item is abandoned, there must then be an act of appropriation for title to pass [re Jigrose; in that case, it was locking the paddock \(\rightarrow\) this appropriated the hay].

Statute can grant exclusive rights to abandoned goods- but only once they are abandoned. It cannot prevent the owner of the goods from giving them to whomever they please until the time the goods have been physically abandoned [Munday].

The law concerning abandoned Aboriginal relics has been specifically modified by Statute [Stockland v Carriage]. National Parks and Wildlife Act 1967 s 33D(2) states that an owner of land with relics on it does not have possession simply because it is on his or her land. S 83 states that all relics are owned by the Crown. S 85A gives the director general discretion to transfer the relics back to the Aboriginal owners, or to other persons for safekeeping.

**Re Jigrose 1994**

Contract for the sale of a farm. The contract stipulated what would happen with the goods on the farm: that any property items not emoved before possession was delivered would be deemed to be abandoned. The vendor left $20,000 of hay on the land, and then later sought to claim that back.

- (per Kiefel J): a good is abandoned when there is no intention to retain possession and therefore no further interest in ownership. This must be distinguished from loss.
- In order for the purchaser to get rights to the hay [i.e. look at it from that perspective- did the purchaser acquire rights to the hay, because the vendor is the original owner so abandonment needs to be made out]- in order for the purchaser to get rights to the hay, there needed to be abandonment and then appropriation by the purchaser. Here, there was an abandonment under the terms of the contract- contract can stipulate this. And by locking the paddock containing the hay, the purchaser evidenced an intention to have exclusive control over the land and thus had appropriated the hay.

**Munday 1998**

The ACT gov purported to give a recycling group exclusive rights to salvage of tip materials. Munday was a tip rat.

- It was held that the owners of the goods had rights over them until the goods were actually abandoned; as such, Munday could approach people before they abandoned their goods and ask for a gift.
- All Act could do was grant rights to the goods once they were abandoned on their land- then could grant exclusive rights.
- You need the physical act of abandoning something as well as the intention to abandon it; intention not enough

**Stockland (Constructors) v Carriage 2002**

Aboriginal relics found on a freehold estate (no native title). Carriage is the Aboriginal land council. They put a caveat over the land.

- It was held that the relics were personal property (and so the caveat was invalid because you need to have an interest in the land, not just personal property), and in any event were the property of the Crown by operation of the National Parks and Wildlife Act- that act could come in and specify this.
- Because Carriage had no property rights, the caveat had to be removed.

Note definition: National Parks and Wildlife Act 1974 (NSW) s5: "Aboriginal object" means any deposit, object or material evidence (not being a handicraft made for sale) relating to the Aboriginal habitation of the area that comprises New South Wales, being habitation before or concurrent with (or both) the occupation of that area by persons of non-Aboriginal extraction, and includes Aboriginal remains.

THE NATURE OF POSSESSION (and custody)
There are two elements necessary for possession: control and intention to control. Both are questions of fact. Legislation can alter the normal common law rules that apply to determine whether someone has control and possession—so always look at any applicable statute [FCT v ANZ 1979].

(i) Physical control of a thing

- The ability to physically produce an item is usually sufficient for there to be control of that item [FCT v ANZ]
- Note that you have to look at any relevant statute: can come in over the top of contract in some ways [FCT v ANZ]
- Where goods are attached to or under the land (buried), the occupier of land on which those goods are found has possession, notwithstanding that there is no knowledge of those goods or that they are found in a public access area [Ranger v Griffin; Waverley Borough Council v Fletcher]
- Where there is public access to the land, things found on (not attached to/buried in) the land are not generally controlled by the possessor of the land [Bridges v Hawkesworth]
- Also consider:
  - The nature of the chattel (eg locking the car, fencing an area of land to contain the chattel)
  - The technology available [The Tubantia; diving and salvaging the wreck gave them sufficient control]
  - The location of the object [The Tubantia; location can limit the maximum amount of possession you can have over a chattel]
  - Social elements [consider pets—allowed to run free but still you have ownership over them]
  - Purpose of control [Riley v Pentilla, where the fence around a tennis court was not enough to demonstrate exclusive possession, because the fence was for the purpose of keeping the ball in, not keeping others out]
  - Anticipation of control is not enough [Young v Hitchens]

(ii) Intention to possess

- The way in which an item is physically controlled can evidence intention
- Generally, intention to control a property extends to the intention to controlling things inside that property [Ranger v Griffin; Flack v National Crime Authority], regardless of knowledge of the thing’s existence [Flack v National Crime Authority]
- Where there is public access to a space (a ‘public access area’), the possessor of the land generally does not intend to control goods in that public space and thus finders can take possession [Parker v British Airways (airport lounge); Bridges v Hawkesworth (public area in a shop)]
  - The exception is if the owner of the public access area places conditions on entry [Parker v British Airways, where if there had been a sign stipulating that items found remain property of the owner then outcome would have been different, would have evinced an intention to control the goods in the space.]
  - And, as noted above, if the item is attached to land or buried then the owner has a better claim [Waverley Borough Council v Fletcher]
- Physically holding, occupying or controlling items in a way that falls short of possession will be considered held in custody even where there may be other legal or contractual obligations which would prohibit the production of those items [FCT v ANZ—note Mason J in dissent though]
- When an employee takes possession of something on behalf of their employer, that possession is treated as the employer’s possession despite the fact that the employee may have custody [Ranger v Griffin; presumably has to be in the course of the employee’s duties?]

**FINDERS**

A finder will acquire rights to possession except against the true owner—unless there can be shown a clear intention to exercise control over the space where the item was found (so note that there will not be this intention in a public access area (unless the chattel is attached to or buried in the land), unless there are conditions of entry or something obviously evincing such an intention Parker v British Airways).

A finder will not have superior rights to possession where there was an intention to exercise control over land on which the item was found, even if the occupier was unaware of the existence of that item [NCA v Flack]- an intention to control the land includes an intention to exercise control over the things on that land as well.

Even if the owner grants authority to dig, this does not remove intention to exercise control over all things buried in the land [South Staffordshire].

**FCT v ANZ 1979**

Documents put in double locked safety deposit box. While the bank had a duplicate of the depositor’s key, the contract said that the bank couldn’t use it. The depositor was being investigated for tax fraud, the FCT issued notices to produce the documents. Statute would require the production of the documents if the bank had custody of them [Income Tax Assessment Act s 264 required furnishing of documents ‘in custody or under control’ of a person]

Did the bank have custody of the documents for the purposes of the Act in question?

- Per Gibbs ACJ:
  - He first eldh that ‘custody’ was referring to physical possession, not legal ownership—there is a distinction between the two.
  - ANZ did have custody; possession does not concern the legal relationship between two parties, but instead the ability to produce the documents—need to look at whether there was a physical possession, not what the contract says.
- Note that this is not the common law definition of possession—it is the definition from the Act—so need to look at nature of legislation in these circumstances.

*Ranger v Griffin*
Banknotes found by employee of a contractor, on the land of a person who had not put the banknotes there. The court inferred that the money had been buried there by someone who had been running an illegal betting operation.

Competing claims to the notes: relative of the actual owner of the notes, employer of the person who found the notes, the employee who actually found the notes, the previous owner of the house, and the current owner f the house.

- It was held that the current owner of the house got title to the notes, not the employer- that is, the land rights overrode the finding rights.

**Waverley Borough Council v Fletcher**

A medieval broach was found by a metal detector in a public park. Did the finder or the council have the better title?

- Generally, when something is buried in the soil, it is taken to have become part fo the land (and hence belongs to the owner of the land)
- Also, is a treasure has been hidden, with an intention of returning to get it, but the owner forgets about it (or dies or whatever), then it belongs to the Crown (the law of treasure troves)
- Here, because the broad was part of the soil, the question was: who had rights over the soil? Here, it was the council, since the right to use the park did not include a right to dig, so the council had the better possessory title over the broach.
- So distinguish this with *Parker*— generally, when something is found on (but not attached to/buried under) land that is accessed by the public are

**Bridges v Hawkesworth**

A roll of bank notes found in a public area of a shop; it was held that the finder had better possessory title than the shopkeeper- the shopkeeper did not have sufficient control of the space.

**The Tubantia 1924**

A dutch steamer (with gold in it) sank in 1916, X found it, put bouys around it, cut a hole in the hull and was

Did X have possessory title?

- When taking into account the state of technology at the time, access for 8 minutes a day was enough for possession. That is, while X did not have absolute possession, they had maximum possession given the state of technology at the time, and this was sufficient for possessory title.
- Also consider the location of the thing when considering what degree of control is sufficient to evidence possession.

**Young v Hitchens 1884**

Young was in the process of enclosing herring in a very large fishing net. Hitchens sailed his small boat inside the net and netted some of the herring.

Did Y have possession of the fish?

- Y did not yet have possession of the fish because Y did not have control over the fish- it was possible for the herring to escape (unlikely, but possible).

**National Crime Authority v Flack**

It was suspected that Mrs Flack’s son was a drug dealer; police obtained a search warrant and found a large sum of money in son’s bedroom. Mrs F claimed that it was just a lost suitcase containing a large sum of money.

- It was held that the intention to possess a private residence includes an intention to possess the things inside of it, even without knowledge of those things. Thus, Mrs F had better title than the police.
- Note that legislation has since allowed police to acquire all goods suspected to be the proceeds of crime

**Parker v British Airways**

Jewellery found in the executive lounge of the airport. Executive lounge only accessible to first class passengers.

- It was held that there was public access (notwithstanding that there was a lower level of public access- only first class passengers)—that there was some public access was enough to deny that British Airways implied control over everything in the area.
- But note: need to look at the particular thing in question--- obviously the possession of the lounge evidenced an intention to control the furniture in the executive lounge.
- And this does not preclude BA of evidencing an intention to control such items as lost jewellery, eg by placing signs indicating that passengers return found items to the help desk, oregularly checking the lounge for such items.

**Hibbert v McKiernan**

All lost balls in a golf club belong to the golf club- even though the public access the golf course.

**Popov v Hayashi**

Shows the importance of cultural ideas in influencing when possession is deemed to have been taken. A baseball was hit into a crowd, hit A’s hands, rolled away and was picked up by B. Held it was A’s- this was US case, probably would be decided differently in Aus. (that was what Glister said, but what actually happened was A caught ball, was overwhelmed by illegal rioters, dropped ball and B picked it up- held that when gone part of the way towards possession but interrupted by illegal acts, have a pre-possessory right to the ball which is property right, but here since B was not a wrongdoer they both had rights and the ball was sold and proceeds bvided equally between A and B].
COMMINGLING

A) MIXTURE

Three scenarios:

• When mixed with the consent of both parties: become tenants-in-common (is this the right terminology - tenancy??) in the proportion which they have severally contributed

• When mixed by accident (consent of neither party), and so mixed as to be indistinguishable, the owners become tenants in common of the whole, in the proportions which they have severally contributed [Spence v Union Marine (1868) per Bovill CJ]

• When mixed without the consent of one party; while A would cite the academically pure argument that if you wrongfully commingle your property, you lose it, the better view is that of Windeyer J in Hunter Confectioners: each party has an interest in common in the proportion to their respective shares, but where there is doubt as to quantification this should be resolved in favour of the non-consenting party (they also have the right to claim damages) [Hunter Confectioners per Windeyer J- justification is that we are dealing with property, not criminal law- we don’t fine people for doing things wrongly, wrongful mixture, but we do resolve against the wrongful party in the event of doubt; Gibson and Stiassy v Stock].

Spence v Union Marine Insurance Co 1868

Spence was a merchant who shipped cotton to the US. He owned and insured 52 bars of cotton on boat carrying 2500 bars to the US. The boat crashed, 2200 bars could be recovered but identifying marks were washed off- so couldn’t tell who owned many of them. Union Marine Insurance Co argued that the bars should eb sold off and the proceeds divided according to how much each owner had on the boat. But Spence had only a small amount an the price for cotton at that time was low, so he would have got a small amount. Instead, he argued that none of the bars of cotton were his, and sought insurance on the basis of total loss. Held:

• When goods of different owners become, by accident, so mixed together as to be indistinguishable, the owners so mixed become tenants-in-common of the whole in proportions which they have severally contributed.

• Therefore, since Spence retained some proprietary interest in the mixed bars, S did not suffer a total loss and so could not claim insurance on that basis.

Spence v Union Marine confirmed in NSW is Hill v Reglon re scaffolding poles and re bars of chocolate in Hunter Wholesale Confectioners.

B) SPECIFICATION

Specification is the process of transforming property so that it cannot be reduced back to its original form (classic eg is using flour to make bread). Specification is a question of fact: it is not simply whether it is possible to reduce the product back to its original form, but whether it is economically and socially appropriate to do so [Associated Alloys].

I.e. when ‘the original goods lose their character and what emerges is a wholly new product’ [Borden (UK) v Scottish Timber Products]

Associated Alloys v Metropolitan Engineering [1996]

In this case, steel was transformed into pressure valves; at what point did AA cease to own the steel? So in this case, there was what is called a ‘Rompalpa clause’, which are often used by suppliers of raw materials to reserve legal ownership of those materials after they have been delivered to manufacturers- in this case, it reserved title over the goods until payment of the full price. Thus ME did not own the steel it had used to create the valves, but merely possessed it as bailee. Thus, if this was merely a modified form of AA’s steel, then they would have title over the valves, but if specification had occurred then these would be new items and ME would have title over then (and AA would not be able to claim them as their own and be left merely as an unsecured creditor- since ME had become insolvent)

• It was held that it is not merely a question of whether it is physically possible to reduce the valves back their original form (i.e. melting them back into steel, as would be possible here)- but whether it is economically and socially appropriate to do so; and here, it was held that it was not.
C) ACCESSORIES/ ACCESSION

[This is like fixtures for chattels—though note that unlike fixtures, cannot accede and then be removed, once it is affixed cannot then be unaffixed]

Accession is established when an accessory is attached to the principal object.

Which of the tests for accession is to be applied appears to be informed by the state of mind of the owner of the minor chattel [McKeown]:

- If the owner of the minor chattel is a commercial operator who should have had notice that someone else had an interest in the major chattel, then they must show that removal would not occasion a ‘destruction of utility’ (harder to meet than injurious removal)
  - Consider how business is normally conducted in regards to whether he should reasonably have believed that he owned the principal [McKeown].
- If the owner of the minor chattel is an innocent third party who mistakenly believes that they own the major chattel, then the injurious removal or loss of identity tests will be applied.

There are three tests for accession [Thomas v Robinson applied in McKeown]:

- Test of injurious removal: if the accessory cannot be removed without seriously damaging or destroying the principal, the accession has occurred [applied in McKeown] (less onerous on the owner of the minor chattel)
- Loss of identity test: if the accessory is so completely incorporated into the principal that it loses its identity, then it has acceded to the principal (eg a wooden plank in a ship)
- Destruction of utility test: if the removal of the accessory would not seriously damage or destroy the principal, but the usefulness of the principal would be severely compromised then accession has occurred (more onerous on the owner of the minor chattel)
  - Consider how readily identifiable the attached minor chattel is [Bergougnan]
  - It does not matter that the accessory is worth more than the principal if the former was gradually added, in small parts, to the latter [McKeown].
  - Contract can come in over the top of the law of accession [Akron Tyre].
  - If the owner of the minor chattel loses in accession, they may still have a claim in unjust enrichment [McKeown]

There seems to be a lot of discussion in McKeown about whether the owner of the accessory is an innocent third party; was it reasonable for them to believe that they owned the principal? This is relevant for whether the injurious removal test (used for innocent third parties) or the destruction of utility test (used for someone who did know or had constructive knowledge (i.e. should have known) that they did not own the principal- latter usually someone in commercial operation, look at how their business is operated etc). It is also relevant for whether the innocent third party can recover compensation for unjust enrichment, as occurred in McKeown.

Egs: thread woven into cloth. Painting on canvas, though it is not clear whether the painting accedes to the canvas or vice versa; probably depends on the quality of the painting. So note the distinction between accession and mixture- when two things are of equal status and are joined, it is impossible to say which is the principal and which is the accessory (eg two planks of wood joined together); is this a mixture then?

McKeown v Cavalier Yachts

A yacht worth 25K was built up from a 1.5K hull over time. M owned the hull, but CY had mistakenly thought it was theirs.

- It was held per Young J that the hull was the principal as each part of the yacht had been added gradually- as each piece was installed, it acceded to the hull and belonged to M; at no point did the hull accede to the small part being added on to it. [not such an obvious result- the expensive yacht acceded to the cheap hull]
- Also just consider that the hull is the essence of the yacht
- Therefore, the plaintiff was entitled to possession of the entire yacht (since the owner of the principal is entitled to own the improved thing)- but he had to pay the defendant on the basis of unjust enrichment caused by the mistaken improvements to the yacht- had to make fair and just payment for the improvements (because the improvements were done in mistaken belief of ownership of the principal I think)

Bergougnan v British Motors 1929 NSW

A hirer obtained a lorry under a hire purchase agreement. He fitted new tyres to the lorry. The lorry was later repossessed; did the hirer (i.e. the owner of th tyres before they were affixed to the vehicle) get them back?

The tyres were detachable only by special machinery, which the owner of the lorry (i.e. the owner of the principal) did not possess.
- Held that despite the difficulty of removal the tyres remained the property of the person who owned them before they were affixed to the lorry (i.e. difficulty of removal is no bar; and this is a just result here really, the lorry owner must expect the hirer to put tyres on the lorry so that it has some utility, cannot then just claim them as his own)
- See also Rendell, where an engine was installed in a truck, involved lots of connections to put it in but it could be taken out without damaging the truck or the engine- it might be afraid to do so, but if you can do it without damage then there is no accession

Lewis v Andrews and Rowley 1956

H mortgaged his truck to L. The truck was then in a state of disrepair. H tried to lease it to A&R. The lease agreement contained a clause that A&R (the plaintiff) would retain property in any spare parts nd accessories affixed to the truck. H defaulted under the mortgage and L repossessed the truck. Who owned the accessories?
- A&R owned the accessories, since this was specified under the contract and the doctrine of accession should only be applied when it must be- did not need to be here, could rely on the contract. See also:

Akron Tyre v Kittson