LAW316 Property Law- Semester 1, 2014

Lecture 1

Categories of Property

1. Real Property

Land
- Land is permanent and immovable
- Ownership of land can be split into multiple both physically and according to the doctrine of estates
- Land has been important for its use and for the status that it gave rather than a commodity to be traded to increase wealth.

2. Personal Property

- Personal property is moveable, tradeable and, with some exceptions valuable only in monetary terms.
- Goods can be transferred from hand to hand, and may deteriorate over time.
- Most forms of personal property have a limited life. Compared to land, interests in personal property usually exist for a shorter period of time and tend to change hands more frequently.
- Rules for transfer of personal property are aimed at increasing market efficiency.

The Limits of Land

CUJUS EST SOLUM EJUS EST USQUE AD COELUM ET AD INFEROS- (Land is owned from the heavens above to the centre of the earth)

Two ways in which something can be considered land:

- It can fall within the legal definition of land, or real property
- It can have acquired legal status as part of the land through the doctrine of fixtures (e.g. if you buy a cave, you own the area of land underneath that cave i.e. a portion of the subsurface (e.g. a geometric cube of airspace))

Physical Boundaries of Land

Rights above the surface
**Davies v Bennison (1927)**- Def. shot plaintiffs cat sitting on shed. Court held trespass to land. Transit of the bullet was still a trespass to land and actionable in trespass.

**Bernstein of Leigh (Baron) v Skyviews and General Ltd 1978**- Court dismissed Baron’s case. Court **held**: limit of a land owner’s airspace is “such height as is reasonably necessary for the ordinary use and enjoyment of his land the structures on it.”

**Woollerton v Costain 1970**- Crane Jib 15m above plaintiff’s land. Def tried to offer money to pl, but pl rejected. Court recognised it was a trespass, but court also said pl behaved unreasonably. Therefore, injunction was delayed until after building was completed.

**LJP Investments Pty Ltd v Howard Chia Investments (no 2) 1989**- Scaffolding was intruding the plaintiff’s airspace by 1.5m. Court granted injunction. **Held** that this intrusion was not actually interfering with the occupier’s use of the land. Hodgeson J said relevant test is whether the intrusion is of a **nature and at a height which may interfere with any ordinary uses of the land which the occupier may see fit to undertake.**

**LJP Investments Pty Ltd v Howard Chia Investments (no 3)**- Exemplary damages were awarded against a developer who simply ignored the rights of a joining airspace.

**Bendal v Mirvac Project 1991** and **Glenbrook Nominees v City of Perth 2009** both show that permanent intrusions into airspace are actionable.

**Section 88K Conveyancing Act, NSW** allows the court to make an order imposing an easement (right of way) over land if the easement is reasonably necessary for the effective use or development of other land that will have the benefit of the easement if:

a) use of the land having the benefit of the easement will not be inconsistent with the public interest, and

b) the owner of the land to be burdened by the easement can be adequately compensated for any loss or other disadvantage that will arise from imposition of the easement.

**Rights below the surface**

- Gold and silver are considered to be royal minerals and they belong to the Crown at common law. Also, coal and petroleum.
- Most Crown grants in NSW reserve minerals to the Crown.
- Also applied to Aboriginal Cultural Heritage.

**Fixture or Chattel**

Doctrine of Fixtures- mechanism that allows personal property to become part of the land.

1. **Sale of land**- On the contract, it will say what is included with the land/property purchase e.g. plants, carpet, blinds, home theatre etc.

If contract is silent- Decision will be made at law.
2. **Mortgagor and mortgagee**- If you don’t pay your mortgage and the bank decides to sell your property, that sale will include everything that has become part of the land. *NAB v Blacker (2000)*

3. **Landlord and tenant**- Tenant may remove some fixtures on termination of lease. *Vopak Terminal Darwin v Natural Fuels Darwin (2009)*

4. **Life Tenant/ Remainder person**- Life tenant is someone who is left property for their life. They have the legal right to retain possession of land for as long as they live. *Leigh v Taylor (1902)*

5. **Legatees under a will**- *Farley v Hawkins & Ors (1996)*

**Fixtures**

‘*Quicquid plantatur solo solo cedit*’ – whatever is fixed to the soil is part of the soil.

In modern times, the primary indicator of something has become a fixture is the intention of the affixer.

*Holland v Hodgson (1872)*: Whether something was affixed to the soil depended on:

1. The degree of annexation, and
2. The object of annexation

In *H v H* – the owner of the land installed looms in a mill by means of nails hammered into wooden beams. It was held that they were part of land.

*Sanwa Australia Leasing v National Westminster Finance (1988)*: Powell J said look at:

1. The nature of chattel in question
2. The manner in which it is usually, or most conveniently utilised,
3. The degree of annexation of the chattel to the land
4. The degree of time for which the chattel has been annexed to the land
5. The purpose for which the chattel has been annexed to the ground
6. Any statement of intention made by the owner of the chattel

Legal presumption: A chattel that’s rests by its own weight is prima facie still a chattel.

Other presumption- chattel which is to some extent affixed to the land is prima facie a fixture.

**REMEMBER**- all a presumption does is shift the burden of proof.

*NAB v Blacker (2000)*- Blacker was mortgagor (subject to a mortgage) and it went broke. Bank had to sell property (dairy farm). Argument- whether pumps running irrigation
equipment were chattels or fixtures (as part of the land therefore bank could sell).
- It was well known for the farmlands to be sold separately from plant equipment and IGA. The court eventually held that the pumps were chattels and could not be recovered as part of the Bank’s security.
- Pumps rested on their own weight for all operation purposes and could be moved, therefore owner of land could take it with them.

_Vopak Terminal Darwin v Natural Fuels Darwin (2009)_ - Under the sub lease, NFD was entitled to remove the tenants fixtures. NFD wanted to take the computer/ control system for the biodiesel plant. Court held: all of the items were extensively affixed, removal would be a lengthy and difficult process, and the object of attachment was the use of the premises as a whole as a manufacturing plant on a long term basis. Therefore fixture.

_Re Cancer Care Institute of Australia Ltd 2013_- Dispute about some expensive medical equipment. The machine was affixed to the floor of the facility by the concreting in of a steel frame. Held machine was not a fixture. It was affixed for the better use/enjoyment of the machine, as opposed to better use/enjoyment of the land. Chattel

**Conclusion about Fixture or Chattel**

The degree to which the thing is affixed to the land and whether it can be removed without causing damage either to itself or to whatever its attached to.

- The function of the item and whether it is attached for the better enjoyment of the land or better enjoyment of the thing itself is the most important consideration in these cases.

**The Doctrine of Estates**

**Entitlements to Land**

_Fee simple_- gives owner the biggest bundle of rights. Allows you to sell it (alienable), to include it in your will, to exclude others, to manage it, to receive income. Fee simple is the closest to absolute ownership.

_A life estate_ – Is alienable but not heritable. There is a time limit- endures only for the life of the person on whom it is conferred. The holder of a life estate has full beneficial ownership of the estate, i.e. the right to use and enjoy the property during their own lifetime subject to the doctrine of waste. The life estate ceases at the death of the grantee.

_Leasehold interest_ – Have not always been considered to be estates in land but as ‘mere’ contractual interest. Not heritable. Only for a fixed term (time period) referred to as periodic tenancy. 3.55
Lecture 2

Legal and Equitable Interests in Land

Forms of title in Australia-

- Crown Title
- Old system or common law title (focusing today)
- Torrens title
- Native title

Old system title

- Held under principles of general law including equity
- Called ‘old system title’ because it was the system in force before the Torrens system was introduced in NSW in 1863.
- Old system title is also referred to as common law title
- Primary legislative instrument is Conveyancing Act 1919 NSW
- All lands subject to Crown Grants prior to 1 January 1863 in NSW were originally old system title.

Common law and equity

Common law is intended to apply generally to any particular set of facts

Equity is the court of conscience. Was introduced to soften the application of common law, especially where common law rules were to be used as an instrument of fraud.

Commissioner of Stamp Duties (Qld) v Livingston 1965: Viscount Radcliffe said “Equity in fact calls into existence and protects equitable rights and interests in property only where their recognition has been found to be required in order to give effect to its doctrines.”

Standard contract of Sale of Land/ Conveyancing transaction

Three steps:

1. Exchange of contracts
   - Two identical counterpart contracts are prepared
   - One is signed by the vendor and one by the purchaser
   - The counterparts are exchanged
   - Purchaser usually pays 10% deposit
   - At this point there is a binding contract
   - Purchaser has an equitable interest if specific performance of the contract would be ordered.

2. Settlement
- The vendor hands over a **deed of conveyance** (old system) or a **transfer in registrable** form (Torrens) plus the **certificate of title**
- Purchaser hands over the balance of purchase price.
- Purchaser is given possession of the property
- If Torrens title the purchaser will register the transfer
- Purchaser obtains a **legal interest** in property.

**Legal Interests over Old System Land**

Arise in 2 ways:

1. Through the application of Legislation primarily the *Conveyancing Act 1919*, NSW.

2. Through the application of common law principles.

**Conveyancing Act 1919**

S23B(1) – “No assurance of land shall be valid to pass an interest at law unless made by deed.”

**Modern definitions of ‘Deed’**- At common law a deed was a document that was signed, sealed and delivered with each of these words having a technical meaning.

Now, under s38 (1), in order to satisfy the **definition of a deed**:
- Must be signed by each party to the deed;
- With each signature witnessed by an independent person who is not a party to a deed.
- A document is sealed if some mark is placed on it intended to be a seal. If is sufficient that the instrument is expressed to be sealed or expressed to be a deed and is signed and attested;
- ‘Delivery’ requires some conduct by the person exercising the deed which indicates some intention to be bound.

**Exceptions to the requirement of a deed**

1) Short term leases in accordance with s23D (2) *Conveyancing Act*. Less than 3 years. **23D Creation of interests in land by parol.** Look at parol evidence rule.

2) Possessory titles: s 23E(c) *Conveyancing Act*. Possessory titles are acquired through action.

3) Law of part performance: s 23E (d)

**Creation of Interests in Land and Equity**
Some examples of equitable rights/ remedies/ doctrines:

The Trust
The fundamental premise underlying a trust is the split of legal and equitable title. The elements of a trust are:

Trustee- he/ she hold legal title to the trust property.
Trust property- Any form of property may be held on trust
Beneficiary- Person entitled to the benefit of the property, and they have equitable title. Entitle to bring the action against the trustee for breach of trust.
Equitable obligation- The trustee is under an obligation to hold the property for the benefit of the beneficiary and not for his own benefit.

Specific Performance
- An order of the court directing a party to a contract to perform his obligations thereunder according to its terms.
- Equity regards as done that which ought to be done.

The remedy of specific performance:
Conveyancing Act 1919 (NSW):

S54 A Contracts for sale etc of land to be in writing.

Contract + Equitable remedy = Equitable interest in land

The rule in Lysaght v Edwards (1876)
The general principle of this rule is that in the absence of an express agreement between the vendor and purchaser, the vendor becomes a trustee (constructive trust) of the property for the purchaser once there is a valid and binding contract between the parties.

Known as the ‘doctrine of conversion.’

Bunny Industries v FSW Enterprises 1982: Bunny contracted with FSW to purchase land in Townsville. Contract was to be settled in 3 months. During this time, FSW sold the land to another party.
- FSW attempted to give deposit back, but Bunny Industries wanted the property/ or the value of the property.
- Bunny wanted the equitable remedy of account of profits.
- Held that vendor was holding the property as trustee for the purchaser at the time of the second sale.
- Therefore, Bunny could get the account of profits. FSW was required to hand over the profit they made.

Tanwar Enterprises v Cauchi 2003: Tanwar entered into 3 contracts to purchase land from Cauchi. Time for completion of the contract was 6 months and initially there was no time
of the essence clause. (i.e. if party doesn’t complete by the due date, then other party can terminate)

- Tanwar ran into financial difficulties and could not complete. Cauchi terminated the contract. BUT Tanwar’s $4.5m became available the next day.

2 issues:

- Could court still order specific performance (equitable interest) even though the vendor had validly terminated the contract?
- What is the nature of the interest that a purchaser of land has in after entering into a contract but prior to completion.

Court held: they don’t want to use this trust terminology. They also don’t want to measure whether or not has an equitable interest in land by their ability to obtain specific performance.

We have to ask: would it be unconscionable for the vendor to terminate the contract. It is not just specific performance that will ground an equitable interest in the purchaser but any equitable interest including an injunction.

The Doctrine of Part Performance

**Penrith Whitewater Stadium v Lesvos 2007:** Part performance provides a basis upon which a court of equity will provide equitable relief concerning a contract, when that contract is unenforceable by reason of non-compliance with the statute of frauds. It may be that part performance can provide a basis for other equitable remedies, e.g. injunction.

Part performance- getting an equitable remedy e.g. specific performance. Don’t use this to prove an oral contract to get damages, because this is common law not equity!

**What are sufficient Acts of Part Performance?**

**The Strict Test:** The acts of part performance must be “unequivocally and in their own nature referable to some such agreement as that alleged.” Found in *Maddison v Alderson 1883* and approved by the HC in *McBride v Sandland 1918*.

*Ogilvie v Ryan 1976*- Ogilvie suggested that he would buy a house and that she should come and live with him and look after him. In return he promised that he would leave her a life estate in the house. He died and no mention was made of her in the will.

**Acts of past performance**- She gave up occupancy of her previous house, moved in with the deceased, performed services of housekeeping, and spent money maintaining the house after he died.

- Holland J **held** said susceptible of too many other explanations including love and affection etc.
Shows how strict this test is!

Annie then argued in favour of a constructive trust- and succeeded.

* Maddison v Alderson 1883: Unpaid housekeeper was trying to claim an oral promise that she would be left a life estate in the house. In this case the owner had left her a life estate in his will, however, the will was not properly attested and so invalid. - Even in these circumstances, shows how strict the rule is.

* Steadman v Steadman 1976: House of Lords held that payment of a lump sum by a husband to his estranged wife will be a sufficient act of part performance of a settlement agreement between them.

Part Performance

The payment of money alone is not usually sufficient specific; - A change of possession of land will usually be a sufficient act of past performance.

DO NOT USE EQUITABLE ESTOPPEL IN THIS COURSE/ASSESSMENTS.

Lecture 3

Transfer of Property

• For value or by way of gift – “the volunteer”
• At law and transfers in equity
• Of real property and transfers of personal property
• Inter vivos (while the transferor is still alive) or most mortem
• Through original acquisition, e.g. taking possession in the case of land, or manufacture or growing or breeding in the case of personal property

Title- Relating to Old System Title.

How do you decide who gets title to land? The series of acts and events that go to establishing a person’s ownership of land.

Title to old system land may be either:
- Documentary: created or evidenced by documents such as deeds of conveyance, wills etc.
- Possessory: created or evidenced by possession of the relevant legal kind for a specific period.