



Miles and Dowler, *A Guide to Business Law 21st edition*

Study Aid – Chapter summaries

Chapter summary – ch 16 – real and personal property

1. Introduction

The law divides “property” into “real” and “personal” property:

- real property consists of land, fixtures and leasehold interests;
- personal property consists of *choses in possession* which consist of tangible movable property such as jewellery or electrical appliances; and
- *choses in action* is the term given to intangible property which has no form but is nevertheless an asset. Examples include shares in a public company listed on the Australian Stock Exchange or copyright royalties.

2. Ownership vs possession

Ownership in law recognises legal title over property. Possession means that you have physical control over something, but that your claim on that item would be defeated by the person who actually owns the chattel, or item.

In *Armorie v Delamirie* (1722) 93 ER 665, the finder of a jewel in a chimney was recognised as having greater rights to keep that jewel than all but the true owner. Possession then can sometimes be said to be “nine-tenths of the law”.

Ownership of real property (or land) is more complex than of personal property because the concept of “land” can include not only the ground itself, but the soil beneath and the air above.

The owner of land has only “ownership” to the extent that allows reasonable use and enjoyment of that land. In *Lord Bernstein of Leigh v Skyviews & General Pty Ltd* [1978] 1 QB 479, an English Baron sued an aerial photographer for taking unauthorised aerial photos of his country estate. Bernstein claimed that he owned the airspace above his land and thus Skyviews was trespassing. The Court recognised the ownership only to the extent of what is needed to reasonably use and enjoy that airspace, but did not find that Skyviews had committed a trespass. The Court did state, however, that since Bernstein's objections were now known to Skyviews, further photographs could constitute a nuisance.

3. Fixtures

The law recognises that certain types of chattels, known as “fixtures”, form part of the land and thus must stay when the land is sold, or possession is



surrendered. An example of a fixture would be a fence which is usually permanently fixed to the land. Sometimes, however, the status of a chattel (ie is it a fixture or a removable item?) is sometimes ambiguous. For example, what about a television antenna or a clothesline?

Disputes about the status of a chattel can be resolved when land is sold by stating in the Contract for Sale of Land, that the chattel is to be included in the sale.

Failing such inclusion, the court in *APA Co Ltd v Coroneo* (1938) 30 SR (NSW) 701, provided some tests to assist in resolving this issue:

- What was the purpose of the chattel?
- For what time was it intended to be attached?
- How securely was it attached to the property?
- Would there be damage to the land if the chattel was removed?

4. **Interests in land**

There are different categories of interests in land, sometimes called “estates in land”:

- fee simple (the best estate in land under our legal system, usually originating from grant of land from the Crown);
- life estates (an estate in land held for your lifetime, or the lifetime of another);
- joint estates (eg tenants in common and joint tenants); and
- expectant estates (ie you expect to receive your estate when a certain event occurs).

Tenants in common hold undivided, but distinct shares in property. However, tenants in common have the right to sell, mortgage, or otherwise dispose of their share as they wish.

Joint tenants, on the other hand, whilst holding an undivided share, may not dispose of that share. Where land is held by joint tenants, if one joint tenant predeceases the other, the survivor will receive the deceased's share. This principle of survivorship *cannot* be defeated by a will. It is therefore essential that persons seeking to be joint tenants be aware of this principle. Joint tenancy may be terminated by:

- sale of the whole property;
- agreement between *all* of the joint owners;
- court order; or



- partitioning (subdivision of land).

5. Land titles

LPI NSW is the government body which administers various statutes concerning ownership and transfer of land, among its many other functions.

It maintains two registers for the registration of land dealings (titling). The main system is for land under the *Real Property Act 1900* (NSW) – called Torrens title. The other register relates to registration of deeds, which include transfers of land under old system, or common law, title. Old system title is currently being completely phased out in favour of Torrens title. Old system title relies on proof of ownership through a chain of title (ie a list of documents) which dates back at least 30 years to a “good root” of title. This type of title often leads to problems which can be impossible to rectify. For example, loss of documents within the crucial “chain of title”. It is expensive, time-consuming to check and inaccurate – especially in relation to land dimensions.

Torrens title is a statutory title guaranteed by the New South Wales Government. The Torrens Assurance Fund (TAF) is maintained by the NSWs Government to provide compensation for owners (called “registered proprietors”) who have suffered loss as a result of fraud or an error on the part of the LPI NSW.

Ownership of land is shown on the Torrens Register and if your name appears on this title as the “registered proprietor”, then your title is indefeasible against all later claimants.

Interests in Torrens land such as mortgages should be registered, as registration guarantees priority. For example, if John mortgages his land to Bank A, Bank A should register that mortgage on John's title. If John decides to borrow more money, but from Bank B, Bank B can also register their interest. However, since Bank B was a later mortgage, their mortgage ranks second in priority *after* Bank A. Thus when the land is sold, Bank A will be paid first, then Bank B and after they have been paid out, John will receive what is left.

It is also possible to have mortgages which are unregistered. These, however, will not be paid until all registered mortgagees have been paid out.

The legislation (ie the *Real Property Act 1900*) does provide a method by which an unregistered interest may receive some protection. The *caveat* is a statutory form of injunction which, when placed on a Torrens property, freezes all dealings with or upon that land. Caveats are often used in family law matters, where one spouse wishes to prevent the other from dealing with their common land until the matter comes before the Family Court of Australia.

Torrens title has many different forms, including Strata title and community title. Native title has been introduced by the *Native Title Act 1993* (Cth) after the famous *Mabo* case in which the High Court found that a form of ownership by indigenous people of Australia to some lands did indeed exist. Chapter 1 of the



text discusses this issue in greater depth.

6. Transfer of land

Legislation in most Australian jurisdictions requires that as a minimum standard, documents transferring an interest in land must be evidenced in writing.

The whole of the agreement need not be in writing, but the party seeking to enforce the agreement must produce written evidence of the agreement.

In reality, the above method would not give solid comfort of sound legal protection to buyers and sellers of land in Australia and would not cater for the complexities of land transfer. Therefore, most jurisdictions in Australia use a standard form contract to transfer land. In New South Wales, this takes the form of a contract jointly prepared by the Law Society of New South Wales and the Real Estate Institute. This is reviewed approximately every two years to take in changes to the law affecting property transfer and is used by most solicitors and conveyancers practicing in New South Wales. The text provides a sample front page of this contract.

7. Steps in a conveyancing transaction

The vendor of a property may choose the services of a Property Agent to sell his property, or do so privately. Regardless of the method of selling, a vendor must have a contract prepared in order to advertise his property for sale. Section 52A of the *Conveyancing Act 1919* (NSW) together with the *Conveyancing (Sale of Land) Regulation 1995*, require vendors to disclose specific information to a purchaser. This includes a zoning certificate and a complete title search. These must be attached to the contract.

The next step is for the parties to *exchange* contracts. That is, the parties each receive a copy of the contract signed by the other. The *Conveyancing Act 1919* provides also for a cooling-off period for the purchaser of *five* business days *after* the date of exchange. Section 66W of the Act allows a purchaser to waive his or her rights to this cooling off period, but they must sign a certificate stating that they have waived this right at the date of exchange. Similarly, the cooling-off period can be extended to a greater period by agreement between the parties. All certificates must be witnessed by an independent solicitor or barrister.

After exchange, the purchaser will make enquiries of various statutory bodies (eg the Roads & Traffic Authority, NSW and the Office of State Revenue (OSR)) to check on affectations. The OSR check is especially important as it confirms whether land tax is owing on the property. Land Tax runs with the land and if unpaid at time of settlement, can incur liability for the purchaser.

The purchaser has three calendar months from the date of exchange to pay stamp duty on the transfer of the property to the OSR. (This is a tax on the transfer of property.) Note that in New South Wales, mortgage stamp duty was phased out and no longer applies from 1 July 2009.



The purchaser or his solicitor or conveyancer usually has 21 days from the date of exchange to send requisitions on title to the vendor. These are particular questions relating to the property, the title or the vendor and may provide useful information about the property or the vendor which the purchaser should know (eg the vendor could be bankrupt and therefore has no right to sell the property).

If all is satisfactory, arrangements for settlement are made. These arrangements may also include an incoming mortgagee assisting with finance or an outgoing mortgagee who is discharging the mortgage.

Title deeds are handed over and the new purchaser's details are registered at the LPI NSW on the Torrens Register. LPI NSW also notifies rating authorities such as the applicable local council and water rating authority as to the new owner's details.

8. Foreign Investment Review Board

The Australian Government has a clear foreign investment policy which is clearly stated in the *Foreign Acquisitions and Takeovers Act 1975* (Cth). Foreign buyers intending to acquire real estate anywhere within Australia must obtain approval from the Government through the Foreign Investment Review Board, unless they are specifically exempted by the Regulations. See text for further discussion of this issue. Note changes to exemptions for US investors. See Chapter 6 for further discussion on AUSFTA.

9. Mortgages

A mortgage is a charge over land ordinarily to secure a sum advanced.

Land under both old system title or Torrens title can be mortgaged, although remedies available to the mortgagee differ slightly between the two titles.

Another difference is that mortgages under old system title convey the title to the mortgagee. During the course of an old systems mortgage, the owner retains only the equity of redemption, which is the right to have the land reconveyed back to him when the mortgage is paid out.

If the land is under Torrens title, the mortgagee can register his mortgage on the title, but ownership remains with the registered proprietor. When the mortgage is paid out, the mortgagee will prepare a Discharge of Mortgage which removes the mortgage from the title.

Remedies of the mortgagee of old system land are:

- A power of sale, which can be exercised two months after a notice is served on the mortgagor requiring payment, or 14 days after service of a notice requiring rectification of other breaches of the mortgage.
- Right of foreclosure, after application to the Equity Court for removal of the mortgagor's equity of redemption. If the application is granted, the mortgagor



has six months to pay all money owing.

- Appointment of a receiver to manage the property.
- The mortgagee can sue the mortgagor personally for the mortgage debt.

Remedies of the mortgagee of Torrens land are:

- Power of sale, but the default on the mortgage may exceed one month as a written notice must be served on the mortgagor – the notice must warn that the land can be sold if the default continues for one month after service of the notice.
- Foreclosure if default is greater than six months – method of application to LPI NSW and the land should be advertised for sale at public auction and if a suitable buyer is not found then the land is taken in satisfaction of the debt.
- Appointment of a receiver.
- The mortgagee can sue personally.

10. Mortgagee's duty to mortgagor

Authorities in Australia have generally found that the mortgagee's duty to the mortgagor is to act in good faith to obtain the best possible price. In *Pendlebury v Colonial Mutual Life Assurance Society Ltd* (1912) 13 CLR 676, a mortgagee advertised farming land in Victoria *not* locally, but in Melbourne. The price realised for the land was low and the High Court held that the mortgagee's failure to advertise the land properly was reckless and ordered compensation by way of damages to the mortgagor.

Mortgagees also have an obligation to act conscionably and are bound by obligations under contracts: see *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447.

Note recent changes to mortgagee obligations in various State jurisdictions.

11. Easements

An easement is a right annexed to land allowing it to use land in another ownership, thus creating a hindrance to the use of that other land.

There are “positive easements” which grant a right of use, such as a right of way; and “negative easements” which prevent something being done on the land of another (eg the right to receive light through a defined space).

The easement must have a dominant tenement and a servient tenement. The dominant tenement is the piece of land receiving the benefit of the easement. The servient tenement bears the burden. For example, Chris owns Lot A, which fronts a street. John owns Lot B which is directly behind Lot A and has no access to the street. John has an easement down the side of Chris's property



which allows him access to his land, making Chris's Lot A the servient tenement and John's Lot B the dominant tenement.

Easements may be created by express grant, implied grant, prescription or by the Court. The methods by which easements are created vary in accordance with the type of title. Similarly, termination of an easement may also vary.

Recent decisions of the NSW Supreme Court have shown that non-use may allow extinguishment of an easement, but not always.

12. Covenants

A covenant is an agreement in writing, usually by deed, where obligations are created. Like easements, they can be positive (eg a covenant to put slate tiles on a roof) or negative (eg no fence must be constructed beyond a building line of a house). Generally, the intention is that a covenant runs with the land and thus will affect subsequent owners, although this usually applies to Torrens land rather than old system land (although there are exceptions to this under ss 88D, 88E and 88EA of the *Conveyancing Act 1919*).

Covenants may be modified or removed in the following ways:

- operation of law;
- express or implied release;
- statutory power; or
- court order.

13. Securities over personal property

The *Personal Property Securities Act 2009* (Cth) created a new Personal Property Securities Register to record interests nationally in all property other than land and interests in tangible property that is affixed to that land. The new Register commenced in January 2012 and replaced over 40 personal property registers currently held throughout the Commonwealth of Australia. The new Register is administered by AFSA.