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NOTE

The Lawskool Property Law Summary covers real property law, which at times touches on the areas of equity and trusts and torts law. If some of the material does not sound too familiar with what you are learning in your “real property” course at university, it is probably related to Equity & Trusts. Don’t panic.

To assist you better understand how the law is applied in practice we have included an Exam Hints Section at the end of every heading. It may include an exam style question and a flow chart detailing the sub headings that you should make and how you should go about answering the question in an exam.

Please note that the sample examination questions will be easier than that of the standard which you will be tested on. Your real examination paper will contain lots of problems mixed together which will make identifying the issues one of your biggest challenges. Our sample questions, placed at the end of each section, will only contain issues related to that section. They are only meant to provide an example of how a question relating to that topic may be formulated. For a more detailed exam model, please see the Lawskool Model Exam.
CHAPTER 1: HOW DOES THE LAW DEFINE PROPERTY

The law conceptualises property as rights to things, as legal relationships between people with respect to objects.¹

Blackburn J stated that “property… generally implies the right to use or enjoy, the right to exclude others and the right to alienate.”²

The High Court examined the scope of the relationship in the case of Yanner v Eaton.³

“Property is that sole and despotic dominion which one [person] claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe”.⁴

Section 22(1)(c) of the Acts Interpretation Act 1901 (Cth) defines ‘land’ to include ‘messuages tenements and hereditaments, corporeal and incorporeal, of any tenure or description, and whatever may be the estate or interest therein’.

what can be considered property?

Property has been defined to mean “objects of ownership”. The law classifies objects of ownership into real property or realty (such as land and those things affixed to land and tenements) and personal property (such as goods and chattels).⁵

Real Property

Historically linked to land.

- Corporeal hereditaments – the holder of the interest has possession and enjoyment of the land, its surface, buildings and fixtures
  - The maxim cuius est solum est usque ad coelum et ad inferos means they who own the land own everything reaching up to the very heavens and down to the depths of the earth.⁶ This concept has however been dismissed by the courts.⁷

³ (1999) 166 ALR 258.
⁷ Lord Bernstein v Skyview & General Ltd [1978] 1 QB 479.
- Incorporeal hereditaments – intangible property such as easements and profits a prendre.

**Personal Property**
- Chattels real i.e. leases
- Chattels personal, i.e. choses in possession (tangibles such as books) and choses in action i.e. things that can only be recovered by bringing an action, or intangible property such as patents, trademarks, copyrights and shares.

*Note that there is current and contentious debate as to the ownership of medical science. The position of the common law is that the human body and its parts are not property. For example, Moore v Regents of the University of California: there are no property rights in human tissue.*

**The Distinction between PERSONAL and real property**

The difference between personal and real property stems from the different remedies available at common law. If a person was entitled to a real remedy (could recover the object as of right) it was classified as real property.

**Personal vs. Real Remedy**

**Personal remedies:** money, financial compensation.

**Real remedy:** allows plaintiff to enforce their right to the property against the world.

Remedies include: possession, injunction, specific performance, and eviction.

---

8 (1990) 793 P 2d 479.
Difference between personal rights and real (proprietary) rights

*King v David Allen:*¹⁰

**FACTS:** David Allen had a contract with King giving them permission to affix posters to the wall of King’s theatre. Theatre’s ownership was then transferred to another company. Can David Allen enforce the contract against the new company?

**ISSUE:** The difference between personal and real rights. Personal rights can only be enforced against parties to the contract. In contrast, real (proprietary) rights have a greater scope of enforceability and can be enforced against the world.

**HELD:** David Allen only had a personal right, which could not be enforced against the company.

_the rights of property_

As mentioned above, Blackburn J in *Milirrpum v Nabalco*,¹¹ held that the rights include:

- Right to use and enjoy
- Right to exclude others from use and enjoyment
- Right to alienate (transfer ownership etc).

Note:
- It is not necessary that all these rights co-exist before there is a proprietary interest (and all these rights are subject to qualification).

The concept of Property does not Include

- Slavery
- Airspace – contentious area due to the issues of aviation and satellites
- “Things owned by common license”. Things not governed by property rules such as public software.

The issue of airspace

*Only the owner in possession or in their absence, the lessee can bring proceedings against trespass to airspace (Rodrigues v Ufton).*¹²

¹⁰ *King v David Allen & Sons, Billposting Ltd* [1916] 2 AC 54.
¹² Rodrigues v Ufton (1894) 20 VLR 539
In determining whether there has been a trespass, the court will generally consider whether the encroachment to the airspace is permanent or temporary. The court has shown a greater willingness to find a trespass where there is a permanent encroachment of the airspace above the land than in other situations\(^\text{13}\) (Kelsen v Imperial Tobacco Co Ltd).\(^\text{14}\)

**What is “permanent”?\(^\text{15}\)**

The permanent encroachment cases are:

- **Kelson v Imperial Tobacco Ltd (1957)**\(^\text{16}\) - A sign from one property entering the airspace of the adjoining property
- **Wandsworth District Board of Works v United Telephone Co Ltd (1884)**\(^\text{17}\) - wires swinging across a neighbour’s property

**What is “temporary”?**

There are two main types of temporary encroachments to airspace:

1. Building cases
2. Aircraft cases

**1) Building Cases**

When houses or buildings are built, building equipment such as scaffolding and cranes can protrude over the adjoining property’s airspace. However without the use of such equipment the building could be substantially delayed.

**Woollerton & Wilson Ltd v Richard Costain Ltd (1970)**\(^\text{18}\)  
**FACTS:** The jib of the crane encroached upon the plaintiff’s airspace. The building contractors had tried to compensate the neighbours by offering a substantial sum of money.

**ISSUE:** Was it still considered trespass?

**JUDGMENT:** Although the court held that there was trespass they delayed the injunction giving the contractors time to finish their project.

---


\(^{14}\) *Kelsen v Imperial Tobacco Ltd* [1957] 2 QB 334

\(^{15}\) Ibid- *Essential Real Property* has a more detailed analysis on the discussion concerning trespass to airspace from p1-26

\(^{16}\) *Kelsen v Imperial Tobacco Ltd* [1957] 2 QB 334

\(^{17}\) *Wandsworth District Board of Works v United Telephone Co Ltd* (1884) 13QB 904

\(^{18}\) *Woollerton & Wilson Ltd v Richard Costain Ltd* [1970] 1 WLR 411.
2) Aircraft Cases

*Damage by Aircraft Act 1999 (Cth)*

According to the legislation when an aircraft travels at a reasonable height over property there is no liability for trespass. However, s11 states that if any damage is caused, then the defendants will be automatically liable and the plaintiffs do not need to prove intention or negligence.

*Bernstein v Skyview*:\(^ {19} \)

**ISSUE:** Whether the owner of an estate has an action against a company flying over the land without permission in order to take photographs of the estate to offer for sale.

**GRIFFITHS J:** The right of the owner is restricted to the airspace above his land to such height as is needed for the ordinary use and enjoyment of his land and the structures on it.\(^ {20} \)

In summary, subject to zoning laws, the owner of land may use their airspace to build to any height and for any purpose.\(^ {21} \)

**EXAM HINTS**

Below is a flow chart which you should follow when faced with a trespass to airspace issue. Use the flow chart in your response in the form of sub headings, the setting out will make your answer clearer. Note that these issues are only minor and will only make up part of a problem question. Nevertheless care should be taken not to skip over them.

**MODEL QUESTION**

For e.g. Annie’s neighbour Fred is extending his house. The only way to do so is by using a crane. The crane’s jib protrudes Annie’s airspace when it is not in use. Annie has complained to Fred but was rudely insulted and told to “get lost”. Annie now seeks your advice. Advise Annie.

**To order the complete version of the lawskool Property Law Summary please visit www.lawskool.com.au**

\(^ {19} \) Baron Bernstein of Leigh v Skyviews & General Ltd [1978] QB 479.

\(^ {20} \) Ibid 488.

\(^ {21} \) Victoria Park Racing Co v Taylor (1937) 58 CLR 479.