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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 in terms of what you are learning in your “real property” course at university, it is probably related to Equity & Trusts. Don’t panic.

To help you to better understand how the law is applied in practice we have included an Exam Hints Section at the end of every heading. Some of these sections will 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 your final exam. Your real examination paper will consist of facts giving rise to several different legal problems which will make identifying the issues one of your biggest challenges. Our sample questions, will only contain issues related to that section. They are 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’.\(^4\)

What can be considered property?

Property has been defined as ‘every species of valuable right and interest’.\(^5\) 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).\(^6\)

**Real Property**

Real property consists of land and interests in land. All real property interests can be classified as corporeal or incorporeal hereditaments.

- Corporeal hereditaments: tangible real property interests (such as ownership of a building or land), which may be inherited.
  - 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.\(^7\) This presumption has been limited by the courts in the context of airspace.\(^8\)
  - Incorporeal hereditaments: intangible rights attached to land such as easements, mortgages and the right to take natural resources from land (profit à prendre).

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\(^2\) *Milirrup v Nabalco Pty Ltd* (1971) 17 FLR 141.
\(^3\) *Yanner v Eaton* (1999) 166 ALR 258.
\(^5\) *Minister of State for the Army v Dalziel* (1944) 68 CLR 261, 290 (Starke J).
\(^6\) Ibid.
\(^8\) *Bernstein v Skyview & General Ltd* [1978] 1 QB 479.
Personal Property

Personal property consists of all other property interests, and can be subdivided into two categories:

- Chattels real: interests in land for a fixed number of years (e.g. leases)
- Chattels personal: all other forms of property.
  - Choses in possession (tangibles items capable of actual possession, such as books)
  - Choses in action (intangible rights that can only be enforced by bringing an action, such as patent, trademarks and copyrights)

Note that there is continuing debate as to the ownership of medical science. In Moore v Regents of the University of California, it was held that there are no property rights in human tissue; however, a 2011 decision by the Supreme Court of NSW found that a wife could have a proprietary interest in her late husband’s sperm.

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**: financial compensation (i.e. damages).

**Real remedies**: allow plaintiff to enforce their right to the property. Remedies include possession, injunction, specific performance and eviction.

Difference between personal rights and real (proprietary) rights

King v David Allen.
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. Could Allen enforce the contract against the new company?

ISSUE: Did Allen have a personal or real right to affix the posters? 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, rights in property may include:

- The right to use and enjoy;
- The right to exclude others from use and enjoyment; and
- The 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 concepts of real and personal property do not include

- Slavery: slavery is unlawful under the Commonwealth Criminal Code, with a maximum penalty of imprisonment for 25 years.
- Knowledge: though ideas and inventions may be classified as intellectual property.
- Airspace: some property rights in airspace are attached to a purchase of property, but within limits 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

Note: the issue of airspace concerns trespass to land, so may be dealt with in tort, rather than property, law.

Only the owner in possession or, in their absence, the lessee can bring proceedings against trespass to airspace (*Rodrigues v Ufton*).\(^{13}\)

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\(^{13}\) *Rodrigues v Ufton* (1894) 20 VLR 539.
A landowner or lessor will have rights over ‘the airspace above his land to such height as is necessary for the ordinary use and enjoyment of his land and the structures upon it’ (Bernstein v Skyviews and General Ltd). The ordinary use of land has been defined as ‘any ordinary uses of the land which the plaintiff may see fit to undertake’ (LJP Investments Pty Ltd v Howard Chia Investments Pty Ltd).

**Woollerton & Wilson Ltd v Richard Costain Ltd:**

FACTS: The arm of a crane encroached upon the plaintiffs’ airspace by approximately 50 feet. The building contractors had tried to compensate the neighbours by offering a substantial sum of money (£250 per week).

ISSUE: Were the plaintiffs entitled to an injunction and damages due to this encroachment?

JUDGMENT: A landowner has some rights to the airspace above their land. However, these rights are limited to that which is needed for the ordinary use and enjoyment of the land. By this reasoning the court held that the crane’s swinging over the plaintiff’s property did constitute a trespass. However, they delayed the injunction giving the contractors time to finish their project.

**Bernstein v Skyview:**

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. In summary, subject to zoning laws, the owner of land may use their airspace to build to any height and for any purpose.

**Legislative Exception for Aircraft**

Legislation in some jurisdictions permits aeroplanes to fly above private land at ‘reasonable’ heights, however, if any damage is caused then the defendants will be automatically liable.

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15 LJP Investments Pty Ltd v Howard Chia Investments Pty Ltd (1989) 24 NSWLR 490.
17 Baron Bernstein of Leigh v Skyviews & General Ltd [1978] QB 479.
18 Ibid 488.
19 Victoria Park Racing Co v Taylor (1937) 58 CLR 479.
20 Civil Liability Act 1936 (SA) s 62; Damage by Aircraft Act 1963 (Tas) s 3; Wrongs Act 1958 (Vic) s 30; Damage by Aircraft Act 1964 (WA) s 4; Civil Liability Act 2002 (NSW) s 72(1).
and the plaintiffs do not need to prove intention or negligence.\textsuperscript{21}

**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 into 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.

\textsuperscript{****}

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\textsuperscript{21} Damage by Aircraft Act 1999 (Cth) s11.