

2006

Important concepts in real property

Michael Weir

Bond University, Michael_Weir@bond.edu.au

Follow this and additional works at: <http://epublications.bond.edu.au/nle>

Recommended Citation

Weir, Michael (2006) "Important concepts in real property," *The National Legal Eagle*: Vol. 12: Iss. 1, Article 3.
Available at: <http://epublications.bond.edu.au/nle/vol12/iss1/3>

This Journal Article is brought to you by the Faculty of Law at ePublications@bond. It has been accepted for inclusion in *The National Legal Eagle* by an authorized administrator of ePublications@bond. For more information, please contact [Bond University's Repository Coordinator](#).

Important Concepts in Real Property

Professor Michael Weir Deputy Dean, Faculty of Law Bond University

Most people are familiar with the concept of Real Property. Realty or real property is the land on which we all live. But what is derivation of this term? In this article we will discuss some of the history of the concepts behind our ownership of land and discuss the concept of fragmentation of proprietary rights that is a feature of how we conceive property rights.

What is Land?

English law separates 'property' into 'real property' – ie: realty; and 'personal property' – ie: personalty. The distinction between real and personal property has its roots in the medieval period of English history – ie: the late 12th century.

From 1066 to the close of the medieval period, which occurred in approximately 1485 AD, you had two types of legal actions to recover property. First, you had an action where the thing itself (in Latin the 'res'), could be recovered – this was called a 'real action' or an 'action in rem'. This means the specific thing, or 'res', is recoverable through the commencement of a real action came to be known as 'real property'.

Second, you had an action where the court could order

that the defendant return the thing to the successful plaintiff, but the defendant had the option of paying the plaintiff the value of the thing in money – this was called a 'personal action' or an 'action in personam'.

The reason it is called a personal action is because the order of the court was directed at the defendant personally, not at the thing retained by the defendant. The specific thing covered by such an action came to be known as 'personal property'.

If the defendant did not have the option of paying cash for the thing retained, that thing was known as 'real property'. So what 'thing' fell into the category of 'real property'? The law stipulated that only freehold interests in land could be the subject matter of a 'real action'.

Real Property – is property which is the subject of a 'real' (or 'in rem') action, – namely where you can get the property itself back – and the only property which fell into this category are freehold interests in land; whereas

Personal Property – is property which is the subject of a 'personal' (or 'in personam') action – namely where you could get the property itself back but the defendant had the option of paying you the money's worth in lieu of giving you the property back.

Freehold interests in land are fee simple interests and life estates. A fee simple interest is the highest interest in land acknowledged by the common law and gives almost absolute ownership. Under our system of law all fee simple interests are owned "of the Crown" under the doctrine of tenure that we have derived from our English forebears. A fee simple estate starts with a grant by the Crown. A life estate is an estate in land given by a fee simple owner that gives a person (the life tenant) a right occupy land during their lifetime. On the death of the life tenant the life estate is extinguished.



Corporeal and Incorporeal Hereditaments

Before we move on to discuss the reception of English law into the Australian colonies, I want to touch briefly on the distinction between corporeal and incorporeal hereditaments.

Corporeal and incorporeal hereditaments are a sub-category of Real Property.

Simply put, corporeal hereditaments are 'actual physical things over which rights of ownership can be exercised'.

Corporeal hereditaments are tangible objects such as land and all tangible objects which are affixed to the land such as trees, dirt, grass, buildings, etc.

Incorporeal hereditaments are 'intangible, non-physical, rights affecting the land – for example, easements (which includes a right of way enjoyed over another persons land, and profits a prendre (which is the entitlement to go onto someone's land and to remove material like timber, gravel etc.)

Incorporeal hereditaments are the intangible rights annexed to or issuing out of the land that the common law treated as real property.

Hence, if you have an easement across your neighbours land, that is an incorporeal hereditament – ie, real property – and if your neighbour denies you access, you can go to court and get an order compelling your neighbour to allow you to cross his or her land on the easement.

Fragmentation of Proprietary Interests

One feature of how we deal with property is the ability for a number of people to have an interest in both real and personal property at the same time. For example if one owns a parcel of land as the registered owner of that land that person can grant to another person an interest in the property for example:

- The owner can grant a lease of the property. When this transaction is created the owner becomes a landlord or lessor and owns the leasehold reversion during the term of the lease. The lease grants to the tenant or lessee exclusive possession of the land during the term of the lease. Even though the landlord still owns the land the tenant can exclude the landlord from the land during the term of the lease though normally a landlord has the ability to inspect the premises (on giving proper notice) or in the case of an emergency. This means for example normally a landlord should give you notice if he or she intends to enter your premises because the lease gives the tenant exclusive possession. When the lease is finished the landlord takes back possession of the land. A lease might be granted for a commercial purpose. These types of lease may be impacted upon by Retail Shop Leases Legislation – In Queensland by the *Retail Shop Leases Act 1994* and in New South Wales under the *Retail Leases Act 1994*. Residential leases – leases for properties where people live are subject to legislation such as in Queensland the *Residential Tenancies Act 1994* and in New South Wales the *Residential Tenancies Act 1987*.
- The owner can grant an easement over the land. One common type of easement is an access easement. This might give a neighbour a right to use part of the land to access a road. The owner who grants the easement is said to be the

owner of the servient tenement. The owner who enjoys the access right is the owner of the dominant tenement. An easement can be granted for drainage rights and for light and air ie in effect preserving your view.

- The owner can grant a life estate. This is often done in the context of a will where on the death of a person someone is given a right to occupy the land during their lifetime. On their death that right is extinguished and the party who has acquired the fee simple interest under the will can once again take possession of the land.
- The owner can grant a mortgage over the property. If an owner borrows money from a bank (often done to provide finance for the purchase of the land) the bank will take a mortgage over the land. The owner of the land will often be obliged to repay the money borrowed by monthly instalments. If an owner who grants the mortgage (in this relationship called a mortgagor) to the bank or financial institution (called the mortgagee) defaults in payment of the mortgage the mortgagee may be able to exercise a power of sale over the property. The proceeds of that power of sale can be used to pay off the debt owed by the owner/ mortgagor. In Australia the *Consumer Credit Code* regulates the relationship between the mortgagor and the mortgagee where the loan is for a personal or domestic purpose. For example, if your borrow money to buy a house to live in from a bank or financial institution most of these mortgages subject to the *Consumer Credit Code*. This code attempts to ensure that consumers are not treated unfairly by mortgagees and are properly informed before entering into finance arrangements.
- The owner can grant a Profit a prendre over the land. This gives a person the right to come onto the land the subject of the profit a prendre and to take some part of the land away. Most commonly this includes the ability to take away timber; gravel, turf or wild animals.

As you can see an owner of land can grant a number of interests in land all existing at the same time and involving the fee simple owner carving out a piece of his or her interest in the land. This is called fragmentation of proprietary interests. It allows the full use and development of land by the owners and unlocks some of the value in the land. A similar thing can occur with personal property. For example an author might write a book. The author or the publisher may retain copyright on the work ie the entitlement to control when and how the work is copied. The book itself is a chattel that can be purchased by a student. That student is then deemed the owner of the book and also has possession. If that student lends her book to a friend then the friend then has possession of the book. That friend can defend her possessory rights against someone other than the owner of the book if they attempt to steal the book. Accordingly, in this book can be found separate rights that can be enforced – another example of fragmentation of proprietary rights.

Class Exercise:

Discuss why it is important economically to allow fragmentation of proprietary rights in relation to real and personal property.