**PPSA.**

Replaced a complex, confusing and inaccessible common law system that placed emphasis on the form of a transaction. The statutory regime aimed to create set parameters that focused on the **substance** of the transaction – the intent of the parties to create a security interest – and to ensure consistency in how such transactions were dealt with.

*1998 report: three goals of the statutory regime -*

- create a cheap, accessible electronic register
- protect good-faith purchasers
- treat all transactions the same, irrespective of form

Statutory regime 'completely new set of rules': ***Graham v Portacom; Stiassny v CIR***

- Facilitate the provision of credit in a trading context by setting out a clear system of priorities – systemisation, consistency, clarification.
- all transactions, irrespective of their legal and technical form, regulated in same manner – consistency, substance over form
    - s 17(1)(a): **touchstone** idea of substance over form
- s 95 protects the continuance of commercial – debtors can pay creditors freely. But for, would stop flow of credit
- s 53 aims to balance two competing rights
    - good faith purchasers to take goods free from obligations
    - banks to ensure security interests remain protected, particularly within the context of insolvency
- s 17 (1)(b) commercial leases often have same practical and legal effect as other types of security agreements (conditional sale K, hire purchase agreements). inclusion ensures consistent regulation
    - 'regularly engaged in the business of leasing goods' an essential caveat to prevent too broad an application – such agreements are more likely to lack the security purpose.

**ROADMAP – WORKING THROUGH THE PPSA.**

## Is it a security interest?

**s 17(1)(a)** – the agreement in **substance**, secure payment or performance of an obligation.

- disregards the form of the transaction
- what is achieved by the transaction

**s 17(1)(b)** – irrespective of whether secure payment / performance, specific forms: lease for more than one year.

- acknowledges these types of transaction have same purpose of financing into apparent ownership

**s 16 –** definition of lease.

- (a): lease includes bailment (***Rabobank)***
- (b): indefinite leases; automatically renewable; continued possession of the lea

**s 16(c)(i):** regularly engaged in the business of leasing goods

***Rabobank:***

business of leasing goods = intending to profit

regularly engaged = not a single, one-off transaction

## Has the security interest attached?

**s 40 (1)(a):** valuable consideration given by creditor

**s 40(1)(b)**: debtor has rights in the collateral – **s 40(3)**: lesee rights sufficient

**s 40(1)(c) – s 36**

**s 36:** more than two creditors? enforceable against the other if

**s 36(a)**: in possession of the secured party OR

**s 36(b):** debtor has signed in writing an agreement which either (i) has adequate description or (ii) a GSA.

## Has the security interest been perfected?

**s 41(1)(a):** security interest has attached

**s 41(1)(b):** financing statement has been registered OR secured party has possession of the collateral

## Has the security interest ended?

**s 45:** security interest continues in the collateral **AND** extends to the proceeds, unless the secured party expressly or impliedly authorises the dealing.

**s 53:** s 45 does not apply if the sale by the debtor of collateral is made in the ordinary course of business.

***StockCo:***

- parties to the transaction
- nature and significance of the transaction
- frequency of the transaction
- location of the transaction
- reason for the transaction
- price paid
- number of goods sold

## Who has priority?

except when indicated otherwise in this act (i.e. s 95):

**s 66 (a):** perfected has security interest over the unperfected

**s 66 (b):** if both are perfected, determined by whichever occurred first:

(i): registration of financing statement

(ii): secured party took possession of the collateral

(iii): temporary perfection.

**s 95:** debtor initiated payment if debtor makes a payment to creditor, has priority over a security interest ***(Stiassny)***

**s 95(3):** negotiable instrument; electronic funds transfer; debt etc

- allows commercial continuing's, debtors would not be able to get loans otherwise

***POLYMER SYSTEMS v MONTOGOMERY***

complexities and arbitrary nature of common law system. *under common law, retention of title clauses were not a security interest, as debtor never granted title until $ transferred and a debtor can only grant security interests over things you had title in.*

**Issue:** whether retention of title clause in effect created a charge over the pipes Polymer supplied to CML
**Held** that CML was under a fiduciary duty to pay to Polymer the proceeds of the pipes, so long as Polymer could establish a tracing right to balance. However, the arrangement, had in effect created a book debt over the company. Under s 103 Companies Act, the debt was void because Polymer had not registered it.

- purpose of parties irrelevant
- complex means of figuring out what the law actually is
- hard for a party to know if they had created a security interest or not

Nowadays? s 17(1)(b): title of retention clause a security interest.

***JS BROOKSBANK v FELTEX***

application of s 17, s 40(1).

**Issue:** whether the supply agreement between Feltex and Brooksbank – wool would not be sent until payment received – had, in effect, created a security interest as per s 17, thus meaning Brooksbank's unregistered interest in wool accidentally delivered lost to ANZ's GSA?
**Held –**

- s 17(1)(a) did not apply: the agreement did not secure payment or performance of an obligation. The agreement was formulated not to purport Brooksbank to have recourse to the wool if payment was not made – i.e. to create a proprietary interest in the wool once title had transferred – but instead to **not pass *any* title, possessory or otherwise until payment had been made.** Fact of mistaken delivery does not change the substance of the agreement.
- s 40(1)(b) was not satisfied: ANZ's security interest had not attached to the wool. This is because mistaken delivery did not transfer any rights to Feltex sufficient to grant a security interest in the wool.

***GRAHAM v PORTACOM***

application of s 17(1)(b), s 40, s 36, salience of statutory regime.

**Issue:** whether a mere possessory interest held in collateral by a debtor is sufficient to grant security interest under the PPSA, both to the Bank under the GSA, and under the lease to Portacom?
**Held** that Portacom had a security interest in the loos by virtue of s 17(1)(b). Thus, priority rules (s 66) must apply. The security interest had attached as s 40(3). s 36(1)(b) covers debentures / GSA.

*Did Portacom have a security interest in the loos?*

- s 17(1)(b): lease for more than one year
  - s 16 (b)(i): lease for an indefinite term.

*Did the Bank have a security interest in the loos?*

- s 40(3): a debtor has rights in goods which are leased to the debtor – NDG has both a possessory interest and proprietary interest in the loos

*Did that security interest attach?*

- s 40(1)(a): value given
- s 40(1)(b): debtor has rights (s 40(3))
- s 40(1)(c) – s 36
  - s 36(1)(a): loos in creditor's possession? no, loos never in HSBC's possession

- s 36(1)(b)(i): specific identification of collateral in security agreement? no: loos came into possession after GSA entered into
- s 36 (1)(b)(ii): security interest taken in all of debtor's present & after acquired property? **yes:** GSA wording sufficient.

***RABOBANK v MCANULTY (THE FEBRUARY SYNDICATE)***

application of s 16 lease definition: 'regularly engaged in the business of leasing goods'

**Issue:** whether a bailment of a horse by the Syndicate created a security interest in the horse, and therefore the Syndicate's unregistered interest would lose to the Bank's GSA?

**Held** that while the bailment was indefinite, it was not a 'lease for a term of more than one year' as the Syndicate was not regularly engaged in the business of leasing goods: the transaction was an isolated, one-off transaction and the Syndicate were not intending to profit off the transaction.

- ***s 17(1)(b) equates leases for more than one year as security interest in order to prevent the creation of a loophole***: in practical and legal effect, leases are often indistinguishable from hire purchases / conditional sale K as they create the same degree of apparent ownership. i.e. the means of financing someone into ownership. Should not be able to escape the PPSA by wording agreement as a lease
  - furthermore, some leases which are not for a term of one year (s 16(b)) will still be considered leases, as they, in effect, are a means of financing someone into ownership.
  - Hence the need for s 16(c)(i): acts to limit the application of this clause, as some leases are not intended to have the effect of apparent ownership.
- in business of = intending to profit
  - best reflects parliaments intent of treating lease as security interest
  - on facts, gratuitous bailment only – about caring for a horse.
- regularly = cannot be a one off
  - if first transaction was followed by other transactions, then that would be regular
  - c.f. Aus / Can approach – frequency ought not to matter. if component of business, that should be sufficient

***STOCKCO v GIBSON***

application of s 53: 'ordinary course of business'. *Two competing purposes: protection of good faith purchasers, protection of creditors / banks, particularly in the insolvency context (sale of assets quick, Bank loses interest).*

**Issue:** whether the sale by Crafar of 4000 cows to Nugen – then leased to StockCo – was in the ordinary course of business?

**Held** that s 53 ought to be interpreted narrowly; the adoption of a strategy to acquire more farmland did not change the business of dairy farming, milk production & trading of stock. On these facts, the sale was not in OCB, therefore s 45 had to apply and the Bank's security interest continued. seven considerations:

- nature & significance of the transaction: who can conclude the sale?
- parties to the sale: financial institution?
- location of the sale: normal place for such a sale?
- price paid: discounted or market price?
- quantity of products sold: proportion of assets
- reason for the transaction: financial difficulty / suspicious circumstances
- frequency of the transaction: regular or one-off

s 53 exists in order to ensure good faith purchasers of products sold in the ordinary course of business are protected – c.f. s 45: a security interest continues in the collateral, unless the secured party gives rise to proceeds **and** extends to the proceeds.

*i.e. the Bank would keep its security interest in the 4000 cows and in the proceeds from the sale.* s 53 ensures purchasers can buy goods without having to check the status of goods, or operate in fear of the collateral being repossessed.

The test requires a two step process:

1. *what is the ordinary course of business for the seller?*

   Here, the ordinary course of business was dairy farming, trading of stock and milk production.

2. *was the sale made in this ordinary course? i.e. was the sale of 4000 cows made in the OCB?*

   - **nature and significance of the transaction –** had to be conducted by lawyers, required director's resolution and was in response to financial difficulty
   - **parties to the sale –** StockCo was acting as a financial institution, usually would be a farm
   - **location of the sale** – a sale like this would usually be conducted in the stockyard, here it was conducted in lawyers office
   - **price paid** – neutral factor, market price
   - **quantity of products sold –** 15% of Crafar's stock, very unusual
   - **frequency of the transaction –** one-off transaction
   - **reason for the transaction –** suspicious circumstances, sale conducted in day.

***STIASSNY v COMMISSIONER OF INLAND REVENUE***

application of s 95, consideration of s 25, irrelevance of CL arguments under the statutory regime

**Issue:** whether the GST payment made by receivers to the IRD could be held on bare trust for the creditors, or whether s 95 applied, meaning the IRD takes priority over the bank.

**Held** that PPSA rules must apply – under s 95 the IRD are a creditor like anyone else. s 25 is not made out merely because the debtor acts with knowledge (s 19 knowledge = actual knowledge) that other interests exist, the IRD took the payment in good faith.

- Bank: secured creditors proprietary interest in assets, holds a fixed charge which attaches to the proceeds of the sale. Thus, if debtor received proceeds, merely holding it on trust / as bare legal title for the secured creditor.
  - **Rejected:** ignores s 95. PPSA has introduced an "entirely new set of rules". Such equitable title can no longer govern.
  - **"**any secured creditor simply has a security interest whose priority depends upon the rule"
  - PPSA does not distinguish between equitable and legal forms of security – funcational approach
  - PPSA interest does not give creditor **full** rights and title – gives the secured creditor an **interest** in the property to the extent of the debtor's obligation
- Bank: s 95 cannot apply as the IRD knew of the existence of a GSA, therefore s 25 applies: the IRD did not act in good faith.
  - **Rejected**: the fact the IRD knew of the Bank's GSA is not enough to discharge acting in good faith. In order to satisfy s 25, the person receiving the payment must have known that the payment was **in breach of that agreement**
  - situation of mistaken payment different to that of when an ordinary creditor knows a secured creditor trying to claim the money back.
- **Purpose of s 95?** in order to carry on business, debtor's must be able to pay creditors, to suppose otherwise would have a "suffocating effect on the ability of the debtor to carry on business". Would become difficult for the debtor to secure credit, as creditors would never be paid back.

**PRINCIPLES OF LAND LAW.**

## ORIGINS – FEUDALISM.

prior to 1066: Saxons owned land under allodial ownership – land which has no lord. Some feudal systems exist but only to the extent of lords. This could challenge the power of the king.

1066: William I conquests, establishes feudalism. Land holding based on the existence of relationships – lord owns land, tenants provide goods & services, lords provides protection.

- William I created a 'perfect system'
- King sole grantor to lands – King becomes absolute owner of all soil
- All title can be traced back to King
- King – tenants in chief – tenants in desmesne (those who are actually in possession)
- Subinfeudation – the feudal relationship that could be created between a tenant in chief & tenant in desmesne – initially had no limits, 1290 legislation changed that

Estate: the abstract, intangible concept created by the law to explain what it was a tenant actually owned.

- **the nature of the interest each person on the feudal ladder had on the land**
- Defined by duration – the 'slice of time' a tenant could have in an estate

**Freehold** (uncertain duration):

- Fee simple: the most common form of estate. ends in very rare circumstances:
  - traditionally – if one died without an heir
  - nowadays – Admin Act will sort out
  - rights? use, possession, alienation
- Life estate: own estate for extent of your life.
  - rights? use, possession. Alienation limited as purchaser does not know how long getting for.
- Stratum: common ownership in apartment buildings of areas like lifts, stairs etc. Unit Titles Act.
- Fee tail: certain heirs, lineal inheritance only. while existing in equity, cannot exist in law anymore.

**Less than freehold** (ends at a certain time):

- leasehold, equitable interest

**Law of tenure:** governs the relationship between the Crown and the tenant.

**Law of estate:** governs the relationship between the tenant and the land.

## FEUDALISM IN NEW ZEALAND.

upon transfer of sovereignty, New Zealand adopted the laws of England 'as applicable to the local circumstances' (Imperial Laws Act 1858).

- Treaty of Waitangi article 2 – Crown sole right to pre-emption – suggests existence of tenure in New Zealand
- ***R v Symonds 1847***: fundamental maxim. doctrine of tenure must apply in NZ
  - **PLA s 57(1): all title comes from the crown, feudal incidents of title abolished.** *no incident of tenure; no need for permission of Crown to buy / sell land; no subinfeudation; no fee tail; can create future interests and estates in property.*

**Why does New Zealand still operate under the doctrine of tenure?**

Leaving aside inconveniences and the administration required to change land-ownership from tenure to one of allodial ownership, the doctrine of tenure serves an important purpose in the justification of radical title in the New Zealand legal framework.

- it is through the concept of radical title – the axiom created that allows the Crown to appropriate land for sale through the acquisition of sovereignty – that the existence of native title within the tenure system has been justified in New Zealand.

## RADICAL TITLE.

- As a sovereign (i.e. the Crown) enjoys supreme authority in and over a ***territory = imperium.*** The doctrine of tenure also requires the sovereign to have ***legal interest in the land = dominum:*** have the power to prescribe what parcels of land and what interests in those parcels should enjoyed by others and what parcels should be kept as sovereign's beneficial use i.e. absolute ownership.
- Radical title is therefore a 'logical postulate' required to legitimise the ***acquisition of control over territory*** into the ***absolute beneficial ownership of all land*** – i.e. the doctrine of tenure. allows sovereignty to grant an interest in the land, legitimising crown authorising another's interest to exist in the land.
- Radical title confers ***sovereignty* – it is a constitutional concept.** Thus, its existence gives the Crown authority to ***deal*** with the ***territory***. But if some prior interest exists – i.e. customary / native title – in the ***territory,*** then radical title operates only to legitimise the Crown as the source of authority / power. The Crown, in their role as sovereign, may extinguish such customary title.
    - If native title extensive (i.e. in New Zealand): radical title necessarily remains in the background
    - If native not extensive: radical title can fill the gap.
- It is only when there is no pre-existing interest in the land – i.e. waste lands / true terra nullius - that radical title allows the crown to use their control of the ***territory*** to acquire ***legal interest in the land.***

## *NGATI APA – ELIAS CJ.*

| PRECEDENCE | NATIVE TITLE. | RADICAL TITLE / ABSOLUTE OWNERSHIP. |
|---|---|---|
| • ***Wi Parata***: native title did not survive acquisition of sov<br>• ***Re NMB:*** NLC investigation of land near FSSB extinguished any title: **the land must have "remained with the Crown"**<br>  • **CJ:** decision based on its incorrect assumption that tenure displaced all property to crown.<br>• Treaty obligation a moral obligation, not legal – discharged when Crown granted title (through the mechanisms of the Native Land Court), then Crown only expected to give effect to the property right<br>  • **CJ:** error with this is it ignores NZ was accepted from the beginning as being owned by Māori; equates sov w ownership | • Māori owned all NZ when sov acquired in 1840<br>• therefore, any property interest acquired through sovereignty necessarily depends on extinguishing such native title<br>• while most land, following the NLC process, had been converted to fee simple, some land still exists which is not dependent upon title from the crown – it is simply a matter of custom and uage | • **influence of Salmond has confused NZ's understanding**<br>• while Salmond made clear of the distinction between imperium (sov) & dom (land ownership) – that on acquiring sov, the Crown only gains control over the territory – he said this distinction had been obscured by feudalism. In England, all territory became all property upon the application of feudalism<br>• BUT such an approach in New Zealand ignores the relevance of the <u>Imperial Laws Act 1858</u><br><br>**Common law?**<br>Common law of New Zealand must be different, necessarily depends on our local circumstances |

***MABO (NO 2).***

**Brennan J / Dawson J**

| TERRA NULLIUS. | NATIVE TITLE. | RADICAL TITLE / ABSOLUTE OWNERSHIP. |
|---|---|---|
| • Court must discard the authorities that depend on TN, in a modern Australia there is no room for such a false & inacceptable doctrine.<br>• enlarged terra nullius – i.e. an invention following the protest that land was occupied – exists on the basis that while indigenous in occupation, the indigenous were so primitive that TN essentially applied<br>• Thus, if we reject the existence of TN in Australia's history, the Court can also discard the distinction between the law of those countries not established by TN<br>• ***TN was the vehicle that gave the Crown sovereignty, but TN did not automatically give you ownership of 'waste lands' as a consequence because we can now accept a lot of the land was already in occupation by Aboriginals.*** | • general rule of common law that ownership cannot be acquired by occupying land already occupied aby another.<br>• once TN is rejected, and if it is found some ownership already existed, tenure cannot automatically flow from acquisition of sov.<br>• doctrine of tenure applies to every Crown grant of an interest, but not to the rights and interests which ***do not owe their existence to a Crown grant.***<br>• Crown does not need to recognise but clear & plain intention can extinguish – as an exercise of sovereign power - and then appropriate land<br>• However – high threshold placed on establishing NT: continuing occupation, customary use of land | • **logical postulate** required to support tenure and the subsequent ability of the Crown to appropriate land<br>• title to land is not per se relevant to the constitutional status of the country<br>• while tenure may have conflated imperium with dominom but they are two separate concepts<br>• '**fallacy'** of equating sov and beneficial ownership of land<br>• Tenure is very important, underpins system but it is not a corollary of radical title that crown acquires absolute ownership to the exclusion of native title<br>• acquisition of sovereignty is what can extinguish native title by valid exercise of power, not the existence of tenure<br><br>**Common law?**<br>Must not shatter the skeletal principles of common law. |
| • TN the basis of acquiring sovereignty at the time – we cannot change that now<br>• At the time, all ownership of land flowed as a consequence of TN.<br>• Issue: TN as a means of acquiring sovereignty over territory without asking permission different from assuming that ownership of such territory was then automatically vested in the Crown | • As a consequence of TN & the application of the doctrine of tenure, the Crown in Australia holds all interest in land<br>• Upon acquiring sovereignty, the Crown must have had to actively recognise the existence of native title and have granted the natives title<br>• This is because any title must derive from the Crown, therefore the crown must recognise the existance of any title | • **necessary consequence of radical title – exerting sovereignty over territory – that Crown then owns all land**<br>• on acquiring sovereignty, the Crown acquired radical title, which due to the doctrine of tenure, confers absolute ownership over the land<br><br>**Common law?** |

**TRANSFERRING TITLE TO LAND / FORMALITIES AND REGISTRATION.**

**Formality** regulates a party's power to give another party a right. in order to transfer the right, the right must be expressed or recorded in a particular form. Lon Fuller –

- Certainty: know what transaction is for
- Deliberateness: formality promotes caution
- Visibility
- Fraud prevention

**Registration** is required by the LTA. It is the act of registering that creates the right.

**Traditionally –**

- Individuals make the contract (derivative title)
- physical transferral – i.e. piece of land
- transferring ownership of the estate, as opposed to the actual land itself

**Now, statutory framework –**

- LTA / transferring title:
    - register under the LTA – registration of title action that creates the title (s 24(1)).
    - Sims: arose out of private conveyancing, deeds and the need to register deeds
        - cost / time in figuring out the chain of ownership
    - Sims: but registration of title a completely different concept
        - accurate identification of each parcel of land
        - accurate recording of all interests existing in the land – state guarantee
    - purpose of LTA? (s 3)
        - clear & secure who has title to land
        - compensation
        - open register

**But, equitable interests still exist – (easement context)**

- Did the right that granted possess essential characteristics of an easement?
- Was there valuable consideration?

**Then:**

- **Unregistered instrument in writing (PLA s 24) with valuable consideration**
- **Doctrine of part performance (PLA s 26)**
    - **a.** Sufficient oral contract, would be enforceable but for it not being written
    - **b.** the promisee has taken step to exercise a right or perform an obligation under the K
    - **c.** would be unconscionable for D to rely on statute to prevent enforcement of K.
- **Proprietary estoppel**
    - **a.** P's mistake as to his rights
    - **b.** detriment / expenditure as a result
    - **c.** D's knows P has made a mistake in his rights
    - **d.** D's acquiescence / encouragement meant in allowing P's detriment / expenditure

- Accepted that the bargain creates an equitable interest, but only the state that can give you legal interest
    - **e.** Initially, LTA interpreted that unregistered instruments / equitable K could only be enforced as in personam

**f.** modern rationale arises not from the possession of an unregistered instrument but from the contractual transaction which lies *behind* the unregistered interest

- equitable interest can be protected through lodging a caveat (ss 138 – 147).
  - **a.** equitable interests are binding against people if they know
  - **b.** therefore assuming on a register that you know
  - **c.** BUT: equitable interests are not binding against inconsistent, registered estates or interests
- Historical basis – ***Walsh v Lonsdale*** – no difference between ordering SP and the interest itself being performed

**Issues w formalities / registration–**

- cost
- autonomy – if you do not know the formality exists, yet fully intend to transfer the right, undermines your choice to do so

→ **Justification – the nature of land as a commodity**

- permanent
- unique / not substitutable
- valuable
- scarce
- can do more with your rights

***SALT OF THE EARTH v FINER***

Creation of equitable easement through the doctrine of part performance

**Issue:** did the agreement between the plaintiff and the deceased create an equitable easement, therefore legitimate for the plaintiff to lodge a caveat saying so?

**Held** despite not being recorded in writing, the plaintiff satisfied the doctrine of part performance through the acts of surveying, and preparation of the relevant documents.

*Did the right that was created have all the essential characteristics of an easement?*

- A service tenement exists on either property
- The right to be granted accommodates the dominant tenement and is related to the land itself
- dominant and servient owners are separate people
- right is sufficiently defined to be certain, a burden from the point of the servient owner and not amounting to a right of occupation
  - → Yes, gave each other a right of way on another's land

*Was there valuable consideration?*

- needed for the existence of the contract
  - → Yes, mutuality inherent in the proposed easement and P is paying all the legal costs (benefit for the deceased)

*As the contract was not in writing (s 24 PLA), was there a sufficient act of part performance? (s 26 PLA).*

- sufficient oral agreement such as would have been enforceable but for the Act?
- An act which amounts to a step in performance of an obligation, or exercise of a right under the K; and was done in the belief that such a K was in existence?
  - → Survey and preparation of easement documents amounted to a step in the performance of contractual obligation
  - → Done on the footing that a K relating to the land was in existence

*Do the circumstances make it unconscionable for the defendant to rely on the Act?*

***DELLACA v PDL INDUSTRIES***

doctrine of part performance: **distinction between an act in performance of the contract, and acts done in reliance that a contract exists.**

**Issue:** whether the acts carried out – entering / gaining possession, work done, contacting solicitors - by the plaintiff were acts done in performance of a contract, therefore satisfying the doctrine of part performance and enforcing a contract in equity which, in law, does not satisfy the formality requirements?

**Held** that the plaintiff's acts were not done in performance of the contract, but were done under his rights as a sub-lessee.

- *Did the rights created have sufficient certainty as to essential terms?*
    - → Yes: correspondence shows unconditional sale of land and buildings situated on the site for 55,000
- *Valuable consideration?* Y

**Doctrine of part performance.**

- *Oral contract enforceable but for the Act?*
    - → Yes (reasons above – sufficient certainty)
- *Did the plaintiff act which amounted to a step in performance of an obligation, or exercise a right under the contract; and was done on the footing a contract was in existence?*
    - there must be a distinction between the acts done in **performance** of the contract, and acts done in **reliance** that a contract exists
    - material on the facts was that settlement date was three months away, and the plaintiff was currently in possession of the property as a sub-leasee
        - → Therefore, the acts done – entry of the premise, doing of the work on the premises – were done under their rights as sub-leasee, they were not done in performance of the contract to buy land
    - the fact P inquired into the D's solicitors etc, was if anything, in preparation for / anticipatory of a contract

**Proprietary estoppel: *unconscionable for the defendant to deny the plaintiff's entitlement*.**

- *P's belief in the existence of rights under the contract*
    - → Yes – believed a contract had been concluded
- *P, because of that belief, commits an Act to his detriment or cost*
    - → Yes – carried out work on the building
- *D knows of P's belief in existence of rights under the contract*
    - → Yes – knew P thought the sale had been concluded, only upon getting higher valuation did they realise contract had not actually been signed
- *D encourages / acquiescent in P's act of detriment*
    - → No – D did not know P had surrender another lease, or had began work on this building

**POSSESSION AND ADVERSE POSSESSION.**

**Common law position**

- Possession the root of title
- Similar to personal property – every possession will create a title which is good against all subsequent intruders
    - exclusive physical control & intention to possess (exclude the world)
- Relativity of title

***ASHER v WHITLOCK***

relativity of title – possession or heir at law?

**Issue:** whether the defendant's continued occupation of the house created a title, and if so, whether title could succeed against the plaintiff – the heir at law?

**Held** that the D had generated a possessory title, good against all the world except the person who could show better title and here, the heir had better claim due to deriving the title from prior possession.

**Facts**

- Williamson incloses some land (Williamson is a squatter)
- dies, leaves to his wife for as long as she is unmarried, then passes to daughter
- wife marries Whitlock, Whitlock moves in, estate transfers to daughter
- daughter dies, wife dies, heir in law comes to claim

**Application**

- although Williamson was not the true owner, his acts and length of possession was sufficient for him to be able to create a devisable interest in the land
- Thus if Williamson could have ejected, daughter would have been able to, therefore heir in law should be able too: "at law, the right of the original possessor is clean"
    - c.f. feudalism / tenure: one in possession presumably has the crown grant

**Due to the importance of possession in determining title, we get this concept of adverse possession: legal ownership acquired through continuous occupation of land without permission of the paper title owner.**

*Why?*

- Possession has to the root of the title – practical means of proof. Impossible to find the original crown grant etc
- Thus, if possession = title (or alternatively best title against all the world except someone who can show better), how can we **secure** that title?
- Hypothetically anyone could turn up, show decades ago they had been in possession and therefore they had a better claim
    - → Statute of Limitations: law says there is a limit to how long you can sue, if wait too long adverse possessor gets better rights at law. when period expires, not only the right of actions becomes unenforceable at law, but the *actual title* of the owner becomes void in law.

**Adverse possession requirements –**

- complete exclusive physical control
    - Locking gate, building fence
- intention to exclude the whole world, including the true owner
    - cannot have permission / license of true owner – must be adverse. permission implies you aren't intending to exclude the whole world

- if you as adverse possessor, *know*, of a future use of a land, and you did not do anything inconsistent with that, then you cannot have intended to exclude.
    - BUT: ***Moran***: can be rebutted with very clear evidence.
    - enclosure an example of such evidence – enclosure the strongest possible evidence of intent
    - *"significant feature of complete enclosure of the land in question"*
- intention to possess for the time being, not intention to own or intention to possess always
- Sims: the true paper owner ought to know that some person entered into adverse possession, i.e. cannot adversely possess in secret

***BUCKINGHAMSHIRE COUNTY COUNCIL v MORAN***

adverse possession when possessor accepts land may be claimed by paper title owner in future, and current use is not inconsistent with that future use

**Issue:** whether the D had acquired title to the plot by adverse possession by enclosing the section and locking the gate, despite his use not being inconsistent with the Council's future plan to build a road, and his explicit acknowledgement that he knew they would be building the road at some point in the future?

**Held** that D had satisfied an intention amounting to adverse possession. D had acquired complete and exclusive physical control which amounted to an unequivocal demonstration of his intention to possess for the time being.

Despite the matter of law that it is not an intention to own, merely an intention to possess for the time being, and the matter of fact regarding the act of enclosure and locking the gate, it is still unclear where his intent really lies.

i.e. when he considers the by-pass being built in the future, does he consider himself **relinquishing** possession, or merely that his possession only ever operated under the Council's permission.

Correspondence indicates that D felt his rights came *from the Council* – I have these rights, I have first option to purchase if you don't build etc - *Council is allowing me to do this vs. I am doing what I want but maybe you can have it back once your build your road.*

*Implied Licence* – ***Leigh v Jack*** – doctrine that applied without the need for evidence.

Council: precedence established "a quite general rule that acts of trespass which do not substantially interfere with owner's present / future plans for land are deemed to have taken place under an implied licence

- D could never had been in adverse possession because his use was not interfering with the council's future plan to build a road, therefore D had an implied license to be there

Court rejects –

- implied license doctrine has, for the most part, been overwritten by the Statute of Limitations which instead looks at the traditional test of possession: factual possession & animus possendi
- it is simply too broad to suggest an owner who retains a piece of land with a view to its utilisation for a specific purpose in the future can never be treated as dispossessed, however firm & obvious the intention to dispossess, and however drastic the acts of dispossession may be

*Intention to possess*

Council: if you as possessor **know** of a future use of the land and you did not do anything inconsistent with that, then you cannot have intended to exclude

- D therefore never had the requisite intention, as he knew the Council intended to build a road

Court rejects –

- the fact that the defendant was well-aware that the Council had acquired the plot in order to construct a road on it at some time … should make the Court **more cautious** before finding factual possession + animus possidendi … but it remains a question of fact & degree
- there was very clear evidence on the facts here: D put new lock and chain on the gate.
    - ***Seddon v Smith*** - "Enclosure is the strongest possible evidence of adverse possession"

Council: no sufficient intention to possess unless there exists in **all future circumstances**

- Correspondence – letter – shows D acknowledge the road will be built in future circumstance: "*land should be kept by the owner of Dolphin Place if and until the by-pass is built"*

Court rejects –

- all that is required in law is an intention to possess for the time being to possess the land to the exclusion of all others, including the true owner
    - BUT DOES MORAN REALLY THINK HIS RIGHTS ARE NOT COMING FROM THE COUNCIL: WHEN THE COUNCIL COME TO BUILD THE ROAD, DOES HE INTEND TO **RELINQUISH** POSSESSION, OR MERELY UNDERSTANDS THE LAND WAS NEVER REALLY IN HIS POSSESSION.

**ADVERSE POSSESSION IN NEW ZEALAND.**

s 21 Limitation Act; Crown land, 60 years; non-Crown land 12 years

s 19 Limitation Act: subject to LTA, s 21 can only apply to non-registered land.

→ s 155 LTA: can get prescriptive title on reg land, 20 years, so long as true owner does not oppose

Land register colours the importance of possession, as it is now easier to find out / prove the true owner is. Is AP still relevant?

- 1952 LTA: nullified adverse possession, no limit on when you could sue for a registered right.
- This was inconvenient: still circumstances where registered owner would disappear, person had been in possession could never get secure title
- This ignored **the fact the LTA superimposed on principles of common law, did not intend to replace them**
- s 155 – s170: can acquire title by prescription. Possessor must have been in *some kind of AP* as contemplated by Limitations Act in order to satisfy. But **clear distinctions between LA & prescriptive title under the LTA**
    - LA: time duration not only forbids the bringing of an act, but extinguishes the title itself as *soon as the time is satisfied, no positive act is required by the person asserting AP*
    - LTA: merely gives the right to apply for a record of title in land
        - person asserting AP *has to bring the right into existence*
        - if no application, paper / reg owner remains secure
- Strong safeguards exist for registered owner under s 155 – s 170:
    - 20 years, requirements of AP high threshold in first place
    - notice of application given to registered owner
    - registered owner can stop process quickly and easily by lodging a claim (s 162 – 167)

Does having prescriptive title undermine the purposes of registered title?

- s 3 LTA purposes - security of ownership / maintain integrity of title to estates and interests in land
- arguably yes, but it is very easy & quick for the reg owner to stop the process.

## PHYSICAL DIMENSIONS OF LAND / FIXTURES OR CHATTELS.

**Why does it matter if a thing is preserved as a chattel, or becomes a fixture to the land?**

- fixtures transfer w land, part of the security in mortgage
- whereas PPSA applies to chattels

**Presumption from *Holland v Hodgson:***

- if something is somehow affixed / attached to the land, even slightly, presumption that the thing was intended to become a fixture. onus rests on person proving it was intended to preserve it's status as a chattel
- if something only rests on the land by its own weight, presumption that the thing was intended to remain a chattel. onus rests on person proving it was intended to become a fixture.

How do we determine whether the presumption holds true or can be displaced?

- Degree of annexation
    - i.e. *to what extent is it attached to the land*
    - Electricity, plumbing etc connected? (***Lockwood***)
    - Difficulty in removing (***Lake Edge***)
- object of annexation
    - *i.e. what was the intent of attaching to the land*
    - purely visual, wholly objective – subjective intent irrelevant (***Lockwood***)
    - intended to be permanent? (***Lake Edge*** c.f. ***Lockwood***: not always relevant)
    - intended to increase the value of the land? ***Lake Edge***
- ***Lockwood:*** importance in distinguishing between not disproving the intent of the presumption, but proving the intent of the other – i.e. not about whether it was intended to become a fixture, but whether despite being attached ot the land, it was intended for some purpose – visible to a third party – to preserve its status as a chattel

### *LOCKWOOD BUILDINGS v TRUST BANK CANTERBURY*

irrelevance of subjective intent; importance in the requirements of displacing the presumption, as opposed to merely disproving the intent of the presumotion

**Issue:** whether a showhome, on a purely visual, objective consideration, would reasonably be seen as to be a fixture, or if it could be proven it was intended to be preserved as a chattel**?**

**Held** that no one would reasonably have concluded that the show home had been affixed to the land for a purpose intended to preserve its status as a chattel.

*Starting point – fixture presumption applies*

- nailed to foundations
- electricity & water connected

*Can it be rebutted?*

**Degree of annexation –**

- incontestable: nailed to foundations, electricity and water connected

**Object of annexation** –

- Tipping: must be objective, wholly visual
- fact show home only intended to be there for 16 months – i.e the subjective intent – must be irrelevant

- To be sure, sometimes questions of permanence may be relevant and a reasonable observer would see the flags and be aware that it was only a show home and thus likely to know it could be removed at some point – would not necessarily know exactly *when*
    - many modern homes are capable of being moved
    - the existence of reasonably observing at some point in the future the house could be moved, there is no certainty and one could equally contemplate the house being there indefinitely  does not prove the house was therefore intended to be a mere chattel
- the fact the a reasonable observer could consider the object of annexation was to keep house stable, that does not the same as intending to preserve status as a chattel

***LAKE EDGE DEVELOPMENTS v KAWARAU VILLAGE***

permanence; increase value of land can be relevant considerations

**Issue:** whether rock anchors had become a fixture, or preserved status as chatte;?

**Held** that relevant rock anchors have become a fixture, formed part of the land that transferred to LEDL. A common sense approach is required, which also can include whether the structure was intended to be permanent, and whether it was intended to benefit or improve the land on which it was installed.

*Starting point – fixture presumption applies*

- embedded in land

*Can it be rebutted?*

**Degree of annexation –**

- difficult / costly / destructive to remove

**Object of annexation** –

- clearly intended to be permanent – deep below surface, set in deep concrete
- benefitted and improved the land by contributing to stability
- required Council consent to install and remove, any third party would objectively know you do not just remove rock anchors freely

TESTS.

PPSA –

s 17 (1)(a) ; (b) – s 40 – s 36 – s 41 – s 66 – s 95 / s 45 – s 53

regularly engaged in the business of leasing goods = ***Rabobank*** – intending to profit, cannot be a single one off transaction

sold in the ordinary course of business = ***StockCo – s 53***

- nature & significance of the transaction: lawyers needed for concluding v managerial staff can conduct
- parties to the sale: financial institution?
- location of the sale
- frequency of the transaction: one-off, or regular
- price paid: discounted or market
- reason for the transaction: suspicious / financial difficulty
- number of things sold

***JSB Brooksbank:*** not a title retention clause, never intended title to pass until $, whereas title retention clause prevents any title from passing at all, mistaken delivery did not change that. ANZ no attach as Feltex no rights

***Graham v Portacom***: new regime, poss rights OK

***Rabobank:*** lease / bailment, regularly engaged in the business of leasing goods

***StockCo***; s 53 importance, balance between good faith purchasers and protecting banks, particularly in an insolvency context, OCB test, ought to be construed narrowly

***Stiassny***: s 95 importance, debtor suffocated otherwise, new regime

1992 LC report: treat all transactions the same, protect good faith purchasers, create a cheap open register

NATIVE TITLE –

- the crown, when acquiring sovereignty in a colony, gains control over territory – imperium
- radical title 'logical postulate' required to legitimise the ability of the Crown to appropriate land and grant interest in land
- thus radical title confers sovereignty – exercising power over territory in *order to* achieve dominom, evoke the doctrine of tenure. radical title gives the Crown the *ability* to do so, but does not automatically flow from the title
- but the common law makes clear that if someone has a prior, existing interest in land, you cannot assert ownership over it
- therefore it cannot follow from the existence of radical title that dominon *automatically* flows from the title
- if there is a prior existing interest – such as native customary title – radical title merely operates in the background
- this is because the interest that existed prior to the Crown acquiring sov did not emanate from the crown, therefore operates outside the doctrine of tenure
    - for example – in ***Mabo*** once found Australia was never actually TN – while it was the vehicle that allowed sovereignty at the time, it is not true – it must be accepted that there prior, existing interests in the land
    - for example – in NZ it was accepted – before ***Wi Parata*** – that Māori owned all law
- thus radical title *allows* the Crown, in exercising their sovereignty, to extinguish such interests through sovereignty, and then radical title comes to the foreground, the Crown can appropriate the land, and the doctrine of tenure can be evoked – all future interests can emanate from the crown
- but the existence of the doctrine certainly never considered all *past* interests had to emanate from the crown
- so, until it is extinguished, native title operates to effect
    - ***Mabo*** – high threshold for native title: continuing occupation, traditional use of land. can extinguish relatively easy
    - ***Ngati Apa*** – existence of treaty means less of a threshold for native title: all title not investigated by NLC (or bought by the crown – e.g. south island) hypothetically could be native title, customary interest still exists in some part of NZ

- This is the issue with the decision in ***NMB:*** assumed that the strip of land between land that had been investigated, therefore "it remained with the Crown" – i.e. implicit in that statement, is that the doctrine of tenure applied to all land in NZ. but we know that cannot be true as native title was there prior

FEUDALISM.

ss 57 – 59 PLA – still exists, but all practical incident removed. don't need crown permission etc

FORMALITIES.

in order to transfer the right, have to transfer in a particular form

Lon fuller: certainty, deliberateness, visibility, autonomy

issues: cost, autonomy

s 10 / s 24(1) LTA – reg creates the right

Sims: arose out of deeds, conveyancing but completely diff concepts

equitable interests exist?

s 51(2) LTA emphasis on the instrument, so can be justified on the basis of the bargain that lies behind the instrument

s 24 PLA: must be in writing

s 26 PLA: doctrine of PP

- have all essential characteristics of easement
- valuable consideration
- oral K enforceable – i.e. sufficient certainty – but for not the Act
- act done that is a step towards performing obligation, exercising right and done on the footing a K is in existence
- unconscionable for D to rely on the Act to not enforce the K

also prop estoppel –

- p's mistake as to rights
- p detriment / cost in exercising those rights
- d knows p mistake
- d encourages / acq in p mistake

***Salt of the earth / Dellaca***

ss 138 – 147: lodge caveats on register can assert equitable interest against person who has seen register but superseded by legal interest

ADVERSE POSSESSION

ss 155 – 170 LTA prescriptive title in NZ – super imposed not replaced

common law: possession root – ***Asher*** relativity of title still exists

exclusive physical control + intention to possess

***Moran***; intention to possess for the time being, despite fact knew road would be built in future, and was not doing anything to inconsistent w that, buying new lock and chain for gate very material, enclosure strongest evidence of AP, satisfies

mark thinks it is unclear still – correspondence would imply he believed his rights still emanated from council – not relinquishing possession when comes time to build road, just thinks he has some rights from the general situation

PHYSICAL DIMENSIONS

presumption – distinction between proving presumption and displacing presumption – wholly visual

degree of annexation: depth in ground, connection to things, ease in removing

object of annexation; permanence (***Lockwood tho***), benefit the land,