

LAND LAW SUMMARY



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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 also 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 give you a taste of how a question relating to that topic may sound. For more detailed model exams please see the Lawskool Model Exam.

Note: A very useful discussion of many of the issues mentioned in this guide is contained in the Law Commission's Review of the *Land Transfer Act 1952* which is available online at www.lawcom.govt.nz.

Abbreviations

Two acts of parliament are referred to over and over again in any discussion of the law of real property in New Zealand. In this guide, they are abbreviated as follows –

LTA: the *Land Transfer Act 1952*

PLA: the *Property Law Act 2007*.

In New Zealand (and elsewhere), the old common law system of transferring estates in land by deeds of conveyance from previous owners has been replaced with a system of registration of title called the “Torrens” system. There is now very little privately held land left in New Zealand that is not held on Torrens system title, and most solicitors never have to deal with any. Nevertheless the old common law rules are still relevant so, to avoid lengthy phrases, we use the following abbreviations –

Torrens land: land held pursuant to registered titles issued under the *LTA*

Deeds land: privately held land which is not Torrens land.

CHAPTER 1: REAL PROPERTY

WHAT IS PROPERTY?

In law “property” means the rights of ownership that people have. Rights of ownership are relational – they are rights to assert possession and control against other people and exclude other people by orders for possession and ejection, injunctions and decrees of specific performance. Such rights include:¹

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

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

Practicality and public policy exclude some classes of things from being the objects of property rights, the most notable being

- people (so slaves cannot be owned);
- dead bodies of people (hence some recent notorious cases of disputes over dead bodies);
- human tissue;²
- wild animals not covered by the *Wildlife Act 1953* and *Wild Animal Control Act 1977* (mainly domestic animals reverted to a feral state) until they are captured or killed; and

¹ *Milirrpum v Nabalco Pty Ltd and Commonwealth* [1971] ALR 65.

² See for example *Moore v Regents of the University of California* (1990) 793 P 2d 479.

- objects in outer space, a principle which may well be tested if future astronauts start laying claim to bodies that they land on.

The law classifies objects of ownership into

- real property or realty (interests in land); and
- personal property (or “chattels”) – everything else.

*King v David Allen*¹

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 a company. They sued for specific performance of the contract and the issue reached the House of Lords.

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 licence, a personal right which could not be enforced against the company. The contract did not give rise to an interest in the land.

¹ *King v David Allen & Sons, Billposting Ltd* [1916] 2 AC 54.

REAL PROPERTY

Real property consists of certain interests in land. In the *LTA*, “land” includes *messuages, tenements and hereditaments, corporeal and incorporeal, of every kind and description, and every estate or interest therein*. Note the two basic categories of real property:

- corporeal hereditaments are the physical land and fixtures on it;
- incorporeal hereditaments are intangible rights and obligations which pass with the title to the land. The most familiar of these are easements such as rights of way and rights for services to cross land.

Real property is called “real” because, in medieval England, most legal actions could only result in an award of damages to the successful plaintiff, for example the value in money of wrongfully taken goods, but when possession of land was at stake, the courts would order return of possession of the thing (“res”) itself. Such actions were called “real” actions, and so the estates that could be enforced in that way were called “real property” or “realty”. Everything else is called “personal property” or “personalty”, and in this book we are concerned with personal property only in certain connections with land.

Chattels real

When leases were first devised they carried no right to sue for possession of the land, and so were classed as personal property. By the time the right to sue for possession was finally gained, that classification had become fixed in law, and leases are classified as a special kind of personal property: chattels real. Leases are now

recognized by the law as a kind of estate in land and can be registered and enforced like other estates, but the name remains

Where does the land begin and end?

The maxim *cuius est solum est usque ad coelum et ad inferos* means on the face of it that they who own the land own everything reaching up to the very heavens and down to the depths of the earth, but it is not to be taken literally in that sense. A landowner's rights to the airspace above his land are restricted to "such height as is necessary for the ordinary use and enjoyment of his land and the structures upon it",¹ and a number of statutes and regulations have reduced landowners' rights to the minerals and water under the surface of their land.

Strata and unit titles

The *LTA* does not prohibit the issuing of separate titles for different strata of the soil beneath a piece of land or for different layers of the airspace above it, and such titles are usually issued under the arrangements provided by the *Unit Titles Act 1972*.

The "land" comprised in such certificates of title is often limited strictly to the upper and lower boundaries of a building or of an apartment within a building.

The issue of airspace

Subject to local building restrictions (including height restrictions around airports) and the limitations of strata titles, a landowner can build to any height in the airspace

¹ *Bernstein of Leigh (Baron) v Skyviews & General Ltd* [1978] QB 479

above the land.¹ The owner in possession or a lessee can bring proceedings against trespass to the empty airspace over the land, and the court has shown a greater willingness to find a trespass where there is a permanent encroachment of the airspace than in other situations.²

What is “permanent”?

Permanent encroachments giving rise to an action in trespass have included

- Telephone wires;³
- Electric cables;⁴
- Advertising signs extending across a boundary.⁵

What is “temporary”?

There are two main types of temporary encroachments to airspace that have been held to give rise to actions for trespass:

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, and the courts are reluctant to issue orders that would prevent desirable development. -

¹ *Victoria Park Racing Co v Taylor* (1937) 58 CLR 479.

² *Kelsen v Imperial Tobacco Co (of Great Britain and Ireland) Ltd* [1957] 2 QB 334

³ *Wandsworth District Board of Works v United Telephone Co Ltd* (1884) 13 QBD 904

⁴ *Barker v Corporation of the City of Adelaide* [1900] SALR 29

⁵ *Kelsen v Imperial Tobacco Co (of Great Britain and Ireland) Ltd* [1957] 2 QB 334

*Woolerton and Wilson Ltd v Richard Costain Ltd (1970)*¹

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?

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

2. Aircraft cases

There is no right of action in trespass or nuisance by reason only of the passage of an aircraft at a reasonable height in the conditions and complying with civil aviation rules, but this exclusion does not extend to actual material damage by aircraft and persons and objects falling from aircraft.² The statute does not preclude a right to bring action if the aircraft is operated in such a way as to seriously interfere with the occupier's use and enjoyment of the land - for example by emitting vast quantities of smoke.³

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 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.

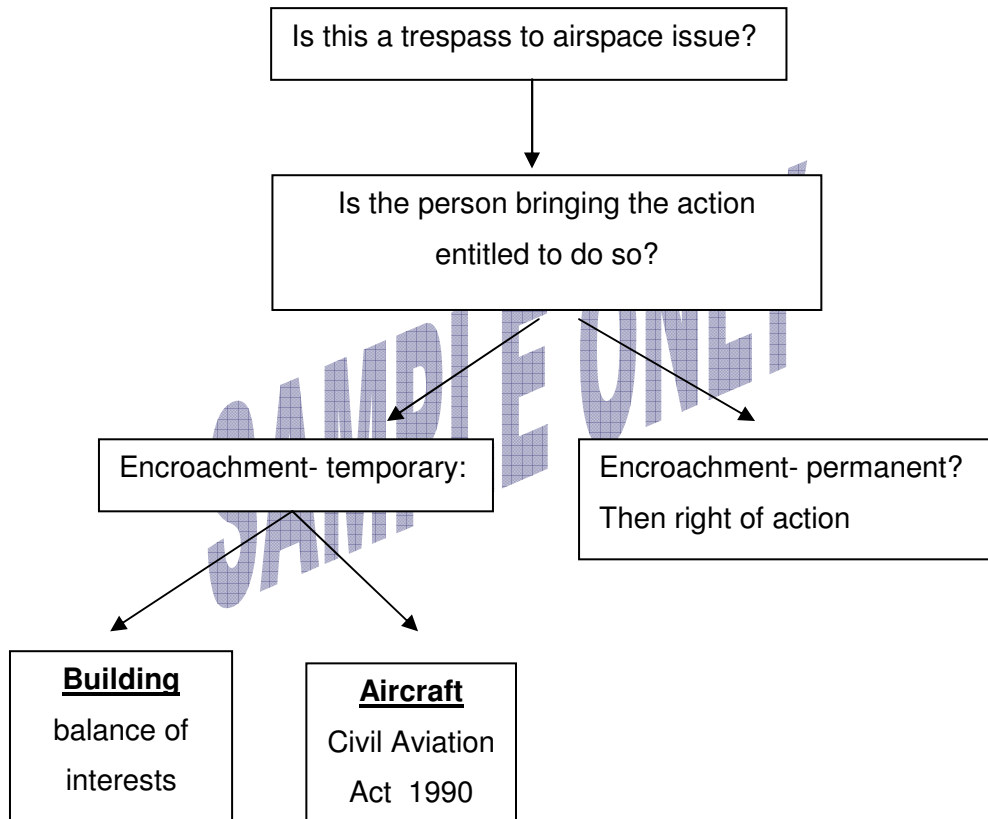
¹ *Woolerton and Wilson Ltd v Richard Costain Ltd* [1970] 1 WLR 411

² *Civil Aviation Act 1990* s97

³ *Bernstein of Leigh (Baron) v Skyviews & General Ltd* [1978] QB 479, 908 per Griffiths J. (obiter)

MODEL QUESTION

For eg. 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.



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