

REAL RIGHTS AND PERSONAL RIGHTS

Definitions

At the heart of the common law of property is the distinction between “real” and “personal” rights. These are often referred to as rights “*in rem*” and rights “*in personam*”, but we’ll stick to the English terms in this course.

We have already discussed how the common law conceives of property. It is as a bundle of rights, powers and interests held over a thing. Ownership (which we will cover in subsequent lectures) is complete control (“dominium”) over a thing (subject of course to Constitutional and statutory limitations).

Real Rights

Real rights are best understood as legally “parcelled off” aspects of an owner’s complete control over a thing. They either restrain the owner of the property from doing something with it, or they give their holder a right (stronger than the owner’s) to do something with or on the subject property. Accordingly, in the applicable case law, real rights have been characterised as “subtractions from the *dominium*” an owner has over a thing. In **Ex Parte Geldenhuys**, De Villiers JP, in characterising whether a right is a “subtraction from dominium” had this to say –

“One has to look not so much to the right, but to the correlative obligation. If that obligation is a burden upon the land, a subtraction from the dominium, the corresponding real right is registerable; if it is not such an obligation but merely an obligation binding upon some person or other, the corresponding right is a personal right, or a right in personam, and it cannot as a rule be registered.” (at page 164)

“Subtraction from the *dominium*” is not the only characteristic of a real right. In addition, a right is only a real right if the person who creates it intends to bind not only the current owner of the property concerned, but all his successors in title.

So, for example, if Jack sells land to Vusi on condition that if Vusi later sells the land again, the purchase price may not be more than Vusi paid for it, the right created is not a real right, because it only binds Vusi, and not the subsequent purchaser. The intention to bind successors in title is not present. The condition only binds person B. This example is taken from **Fine Wool Products of South Africa v Director of Valuations 1950 (4) SA 490 (E)** (referred to in **Pearly Beach Trust v Registrar of Deeds** at 616F-J).

The above requirements for the existence of a real right are summarised by the Supreme Court of Appeal in **Cape Explosive Works Ltd v Denel (Pty) Ltd and Others** at paragraph 12 –

“To determine whether a particular right or condition in respect of land is real, two requirements must be satisfied –

- (1) The intention of the person who creates the real right must be to bind not only the present owner of the land, but also his successors in title; and*
- (2) The nature of the right or condition must be such that the registration of it results in a “subtraction from dominium” of the land against which it is registered.”*

Personal Rights

If a right created between parties does not meet both of these criteria, then it is a merely “personal” or “creditor’s” right, which is only effective against the person to whom it applies. In the **Fine Wools** example given above, Person A’s right is only against person B. He cannot stop anyone who owns the land after person B from selling it for more than Person B bought it. A personal property right prevents another person from dealing with property in a given manner or requires them to deal in a given manner with the property.

Registration

Another major practical difference between real and personal rights is that real rights may be registered at the Deeds Office. Personal rights may not (unless they are ancillary to a real right, but you need not worry about that exception for present purposes).

Here, some background is required. In South African law, ownership is not passed by the creation of a contract alone. In addition, the intention to pass ownership must also be present. So, for example, it is not enough for parties to an agreement for the sale of a car, for example, to exchange possession of the car for an amount of money. On their own, these acts are not enough to pass ownership. We can easily see why.

Imagine that you look out of your window and see two people who you have never met before – Vusi and Jim. Vusi drives up to Jim and gets out of his car. Jim gives Vusi R150 000 in cash, gets into Vusi's car, and drives it away. Has ownership of the car passed? The answer is that we just don't know. The car could already belong to Jim. Vusi might just be a panel beater returning it after repairs. Vusi might just be renting the car to Jim.

So, what is required, in addition to the acts associated with the passing of ownership, is the actual intention to pass ownership.

In the case of land, the intention to pass ownership is recorded at the Deeds Office, where a register is kept of who owns what land. When land is bought and sold, it is not enough to simply give possession of land to another person in exchange for money. The land must also be formally transferred at the deeds office (through a

process known as **conveyancing**). In order to secure the transfer of property, the Registrar of Deeds must be satisfied, amongst other things, that there is an intention to pass ownership of the land. The transfer is then registered against the title deed corresponding to the particular land in question.

Real rights short of ownership can also be registered at the Deeds Office. An example would be a servitude of right of way. Jim owns a large farm, one side of which is next to a public road. He decides to subdivide his farm and sell the half of the farm next to the road to Vusi, subject to a servitude of right of way over the portion of the farm he is selling. That will ensure that he will be able to get to the public road, by travelling over Vusi's property. But Jim wants to ensure that he can get to the public road even if Vusi later sells the farm on. Accordingly he makes sure that the sale agreement contains a clause which binds not only Vusi, but all his successors in title, to allow Jim to travel over the land. That right would be registerable as a real right, because it is a burden over Vusi's land in favour of Jim (a "subtraction from the *dominium*" of Vusi) which is intended to bind all Vusi's successors in title. Jim has accordingly created a personal servitude of right of way over Vusi's land.

Jim could go further, and require Vusi to agree that all of Jim's successors in title will be allowed to travel over Vusi's land to get to the public road, and that they (and Jim) will still have that right even if Vusi sells the farm on. This will undoubtedly enhance the value of Jim's land, and make it more attractive to potential buyers if he ever wants to sell it. If he specified this, Jim would have created a praedial servitude. (We will cover servitudes later on in the year, but note the distinction for now).

In order to be effective against Jim and Vusi's successors in title, the right of way would have to be registered at the Deeds Office. That way, any potential buyer of the land (and anyone else) will be on notice that the right of way exists, and must be respected. Registration is normally essential to the enforcement of a limited real right (we will look at unregistered servitudes later in the course). Bear in mind however, that in **Hollins v Registrar of Deeds**, the Court held that registration of a condition does not, on its own, give rise to a real right (at 607). The condition must itself be capable of give rise to a real right (i.e. it must meet the two requirements for a real right established above).

Section 3 (1) of the Deeds Registries Act sets out all the rights that the Registrar may register as real rights. Section 3 (1) (r) furthermore contains the catch all provision authorising the Registrar to register –

“any real right, not specifically referred to in this subsection, and any cession, modification or extinction of any such registered right.”

The corollary of section 3 (1) is Section 63 (1), which prohibits the Registrar from registering “personal rights” unless they are “complementary or otherwise ancillary” to a real right or registerable condition.

This leaves the field wide open. The servitude example above is an easy case. In principle, however, so long as a right meets the requirements set out in the **Cape Explosives** case set out above, it is a real right, and so can be registered against a title deed.

There has been some controversy in the case law about what sorts of rights and obligations are capable of registration. The classic case is whether an obligation to

pay money can be so registered as giving rise to a real right. We deal with that below.

A Difficult Case: Payment of Money

There is some difficulty in the cases connected with whether an obligation to pay money (or a right to receive it) can ever give rise to a real right. At first blush, the answer seems to be “no”. As a matter of logic, the obligation to pay, and the right to receive, money can only ever arise between people. This was what the court in **Ex Parte Geldenhuys** found.

That case concerned the provisions of the will of Adriaan Geldenhuys and his wife. The Geldenhuyses left their farm to their children in undivided shares. The will provided for the eldest child, upon reaching majority, to claim subdivision of the land between each of the heirs by the drawing of lots. The lots would determine which child was allocated which portion of the farm. The will further provided that the child which drew the portion of the farm with the homestead on would have to pay 200 pounds to the child or children who did not. The question before the court was whether the right to claim subdivision by the drawing of lots and the subsequent right to claim payment of 200 pounds were real rights.

The court applied the “subtraction from dominium” test. In relation to the subdivision of land, the court found that the right to claim subdivision by drawing of lots did amount to a subtraction from the dominium over the land. Each owner’s undivided share is subject to the right of the other owner to claim subdivision – that is a burden upon the ordinary rights of ownership and is intimately connected with the land itself.

The Court also found that the right to claim payment of 200 pounds was NOT a real right, because it created merely personal obligations between the child with the homestead and the child or children who end up with the land without it. While the right to claim the money was not a real right, it could nevertheless be registered because it was closely connected with the obligation to subdivide the farm. (Although the Deeds Registries Act had not been passed by at the time, the Court was clearly applying a fore-runner to the “complementarity” principle contained in section 63 (1) of that Act).

So far so good. But now consider the decision of **Pearly Beach Trust v Registrar of Deeds**. In that case, a deed of sale specified that one third of the proceeds of any –

1. future expropriation or sale of the property to any authority entitled to expropriate; or
2. future granting of rights or options to prospect for minerals on the property.

must be paid to a nominated third party.

The court held that obligation to pay money in that case **did** create a real right because –

“one of the rights of ownership is the jus disponendi or right of alienation, and if this right is limited in the sense that the owner is precluded from obtaining the full fruits of the disposition it can be said that one of his rights of ownership is restricted”

In that sense, then, the obligation to pay money does subtract from the dominium of the owner and create a limited real right. This is so because the obligation to pay money burdens the land directly, and not just the owner in his personal capacity. No matter who the owner is, he will not be able to realise the full value of the land if it is

expropriated, sold to an expropriating authority, or if mineral rights are granted over it.

The position is further complicated by the decision in **Lorentz v Melle**. In that matter two co-owners of a farm (“Van Boeschoten” and “Lorentz”) agreed to subdivide it. Each agreed to the registration of a condition against their portion of the farm. The condition was that, in the event that a township was established and developed on any part of the farm owned by Van Boeschoten, Lorentz would be entitled to half the nett profits from the sale of erven in the township. The same condition applied if a township was developed on Lorentz’s portion of the farm. The question before the court was whether the condition gave rise to a real right. The court decided that it did not, because, as a general rule, the obligation to pay money is not a real obligation. It can only ever be a personal one. The court was not entirely clear about its reasoning. It seemed to be based on a hypothetical assertion that neither Van Boescheten nor Lorentz would have had a claim against each other’s estate if either one had become insolvent after the establishment a township, but before the profits from the sale of the township had been paid over to the other (at 1052).

This seems to beg the question. The question should rather have been whether the obligation to pay money burdened the land and whether it was intended to burden Van Boescheten’s and Lorentz’s successors in title. That depends on the construction of the words used in the condition. It seems fairly obvious that the condition was a subtraction from dominium over the land. Using **Pearly Beach** (which was, remember, decided later), we can see that the condition limited both Lorentz’s and Van Boescheten’s “jus dispondeni”. However, was there an intention to bind successors in title? Perhaps not. The condition itself appears to refer to Van Boescheten and Lorentz in their personal capacities. So, while the obligation does

satisfy the second condition set out in **Cape Explosives**, it probably does not satisfy the first.

Still, in deciding that the obligation to pay money could never ground a real right, the Court in **Lorentz** was probably mistaken. The question will always be, on the facts of the case, whether the requirements set out in **Cape Explosives** (which confirmed many years of authority pre-dating **Lorentz**) have been met.