

## PART II – CREATION OF EQUITABLE INTERESTS IN LAND

### I Formalities

#### A General Law Land Conveyances

As a general rule, an agreement must be expressed in writing or else the dealing will fail and no interest will be conferred. The law's penchant for written records dates back to the *Statute of Frauds 1677* (UK), which was designed to ensure accuracy and certainty in dealings with land.

The *Property Law Act 1958* (Vic) sets out these formalities requirements in Victoria. Section 52 requires conveyances of general law land to be by deed:

#### **Section 52 — Conveyances to be by deed:**

*["conveyance" includes a mortgage, charge, lease, assent, vesting declaration, disclaimer, release, surrender, extinguishment and every other assurance of property or of an interest therein by any instrument, except a will]*

- (1) All conveyances of land or of any interest therein are void for the purpose of conveying or creating a legal estate unless made by deed.

Section 52 confirms that conveyances of this nature must be 'signed, sealed and delivered'. Otherwise they will be void. The particular characteristics that must be exhibited by a deed are set out in the *Instruments Act 1958* (Vic) s 126.

#### B General Law Land Dealings

Agreements creating an interest in land must be signed by the vendor (the person creating the interest): s 54(1). However, there is an exception in s 54(2) for short leases (of a term shorter than three years). The intention of this provision is to reduce the complexity (and therefore cost) of transactions involving leases of short durations.

#### **Section 54 — Creation of interests in land by parol:**

- (1) All interests in land created by parol and not put in writing and signed by the persons so creating the same, or by their agents thereunto lawfully authorised in writing, shall have, notwithstanding any consideration having been given for the same, the force and effect of interests at will only.
- (2) Nothing in the foregoing provisions of this Division shall affect the creation by parol of leases taking effect in possession for a term not exceeding three years (whether or not the lessee is given power to extend the term) at the best rent which can be reasonably obtained without taking a fine.

### C Torrens Land Dealings

Dealings in Torrens land are not effective until registered. Thus, if land is within the Torrens system, an agreement will not be effective to create or transfer an interest with respect to it until that agreement is registered: *Transfer of Land Act 1958* (Vic) s 40:

**Section 40 — Instruments not effectual until registered:**

- (1) Subject to this Act no instrument until registered ... shall be effectual to create vary extinguish or pass any estate or interest or encumbrance in on or over any land ..., but upon registration the estate or interest or encumbrance shall be created varied extinguished or pass in the manner and subject to the covenants and conditions specified in the instrument or by this Act...
- (2) ...[a registered instrument has effect as if it were a deed]...

A registered document is deemed to be a deed: s 40(2). This means that registration entails compliance with the formality requirements outlined above. Registration involves the transferor handing registrable documents to the transferee, who lodges the documents for registration with the Registrar.

Even deeds which purport to transfer interests in Torrens land will (despite being technically valid conveyances) have no legal proprietary effect until registered. However, as the High Court recognised in *Barry v Heider*, equitable interests may attach to unregistered dealings (see above Part I).

Note that several exceptions exist to the s 40 rule that instruments must be registered (eg, short leases, leasehold of tenants in possession: s 42(2)(e), adverse possession). The implications of s 40 are considered in greater detail at below Part VII.

### D Particulars and Exceptions

Section 53 describes the formalities required by three kinds of dealings:

- All dispositions of land: either by writing, devolution, or court order: s 53(a)
  - Essentially, all voluntary dealings between living persons must be in writing
- Declarations of trust must be in writing and signed by the trustee: s 53(b)
- A party's dealings with an existing trust must be in writing and signed by them: s 53(c)

However, these requirements are not applicable to the creation or operation of resulting, implied or constructive trusts. These species of trust are, by their nature, exempt from writing requirements: s 53(2).

**Section 53 — Instruments required to be in writing:**

- (1) Subject to the provisions hereinafter contained with respect to the creation of interest in land by parol —

- (a) no interest in land can be created or disposed of except by writing signed by the person creating or conveying the same, or by his agent thereunto lawfully authorised in writing, or by will, or by operation of law;
  - (b) a declaration of trust respecting any land or any interest therein must be manifested and proved by some writing signed by some person who is able to declare such trust or by his will;
  - (c) a disposition of an equitable interest or trust subsisting at the time of the disposition must be in writing signed by the person disposing of the same, or by his agent thereunto lawfully authorised in writing or by will.
- (2) This section shall not affect the creation or operation of resulting, implied or constructive trusts.

Further exceptions to the formality requirements are set out in s 55. Most notably, s 55(c) creates an exception for adverse possession, and s 55(d) acknowledges part performance (see below).

**Section 55 —Savings in regard to sections 53 and 54:**

Nothing in the last two preceding sections shall —

- (a) invalidate dispositions by will; or ...
- (c) affect the right to acquire an interest in land by virtue of taking possession; or
- (d) affect the operation of the law relating to part performance.

### E      *Consequences of an Informal Dealing*

Where not all the formal legal requirements are met, an equitable version of the contemplated legal interest (ie, the interest that would have passed had the agreement been valid) will usually be recognised. However, there must be evidence of the agreement in writing.

This principle only applies if there is evidence of some attempt by the parties to comply with the requirements. For example, if a conveyance must be by deed to effect a general law transfer of legal title, equitable title may be passed by an unsealed agreement, but not by oral contract. The agreement must be capable of specific performance.

### F      *Reasons for Formalities*

Critchley defines a 'formality' as

*a requirement that matters of substance must be put into a particular form (in order to have a specified legal effect).<sup>1</sup>*

She describes several justifications for the imposition of formal requirements:

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<sup>1</sup> Patricia Critchley, 'Taking Formalities Seriously' in Susan Bright and John Dewar (eds), *Land Law: Themes and Perspectives* 507, 508.

- Benefits to parties to the transaction
  - Warns parties about to enter legal relations that their actions have legal effects (prevents rash decision-making)
  - Prevents fraud or accidental acquisition or presumption of acquisition by a purchaser
  - Protects against pressure or influence by making it more difficult to enter a transaction (presence of a neutral third party, execution of formal documents, etc: more ways to pull out)
  - Encourages the use of legal professionals able to identify problems, deflect external pressure and advise the parties (though this may increase costs)
  - Clarifies the terms of the transaction; reducing an agreement to writing forces the parties to set the terms of their agreement and reveals gaps or uncertainties
  - Educates the parties about the legal effects of their transaction (requirements that notice be provided in relation to certain aspects, etc)
  - Creates verifiable, admissible evidence of the existence of an agreement and a conclusive statement of its terms (cf memory, which is unreliable); this is important in property law, where transactions have a longer duration than other areas
  - Channels the parties' intention towards a particular legal goal (negative channelling: if formalities are not complied with, the transaction is not effective)
- Benefits to third parties
  - Notifies third parties of the existence and terms of a transaction that might adversely affect them (at least where agreements must be registered: a 'mirror' of title is provided)
  - Protects third parties without notice of an agreement; if the transaction is *not* registered then, although third parties are unable to discover it, it will usually be ineffective against the innocent third party
- Benefits to courts
  - Provides conclusive evidence about the existence and terms of a contract in detail and to the required accuracy
  - Indicates an intention to enter a transaction (the greater the technical hurdles to doing X, the more likely that A, having jumped the hurdles, intended to do X)
- Benefits to the state
  - Records transactions for taxation purposes (eg, stamp duty or land tax on sales)
  - Enables statistical and other data to be collected for the purposes of gauging the economy and better optimising the efficiency of land registration systems

Critchley further notes that in many circumstances the parties will naturally gravitate towards the use of certain formalities. For example, most commercial contracts are written despite this being (in general) optional. Legal formalities requirements institute a requirement that a particular formality be used, but even in their absence it may still attain common usage for reason of the practical benefits to the parties identified above.

However, Critchley also describes several detriments of formalities:

- Costs of compliance
  - By creating a separate obstacle, transaction costs are increased
  - For example, lodgement fees, delay or expense in finding a witness, costs of running a land register, reducing the speed of very common transactions
- Failure of informal transactions

- If the transaction is wholly invalid, this might have a greater effect than if only some advantage (eg, legal title cf equitable title) was lost
- Naturally informal contexts (eg, familial or interspousal dealings) are most adversely affected by formalities
- Individuals without access to legal advice may suffer loss as a result of
  - Not knowing about or understanding how to comply with the formality
  - Thinking that the formality does not apply
  - Wanting to avoid undesirable consequences of complying with the formality (eg, awkwardness in informal contexts)
- The parties may also make an attempt at compliance but get it wrong
- It might even be impossible to comply in some cases
  
- Substantive unfairness
  - As Lord Hodson noted in *Pettit v Pettit*:
    - ‘the conception of a normal married couple spending the long winter evenings hammering out agreements about their possessions appears grotesque’
  - Formalities are thus most likely to be eroded by equity in situations of natural informality
    - This has shaped the evolution of the constructive and resulting trusts
  - Formalities can also act against weaker parties, Lord Browne-Wilkinson noted in *Barclays Bank plc v O’Brien*:
    - ‘the sexual and emotional ties between the parties provide a ready weapon for undue influence: a wife’s true wishes can easily be overborne because of her fear of destroying or damaging the wider relationship between her and her husband if she opposes his wishes’
    - This signals that the existence of a formal legal agreement may not reflect the true wishes of the parties; however, the formal nature of such an agreement is *prima facie* evidence to the contrary
  
- Undermining public policy
  - Trusts which are implied without the parties awareness (resulting and constructive) must be exempt from formalities requirements
  - Otherwise, their reason for existence would be undermined

## II Specifically Enforceable Contracts for the Sale of Land

### A The Doctrine of Conversion

The doctrine of conversion states that if a contract is specifically enforceable, it creates, at the moment of its formation, an equitable interest in its completion. The doctrine is most commonly invoked by purchasers seeking completion of a contract for the sale of land where the purchaser declines to go through with the sale in the intervening period between execution of a sale agreement and transfer of legal title. However, because the enforceability of such agreements often depend on whether an equitable interest of the type being determined exists, the doctrine of conversion has a highly circular mode of operation and the basis for existence is a subject of some dispute.

The traditional view of the doctrine of conversion is provided by Jessell MR in *Lysaght v Edwards*.

#### ***Lysaght v Edwards* (1876) UK:**

##### Facts

- The vendor in a transaction for the sale of land dies before the contract can be completed and title transferred to the purchaser

##### Issue

- Were the vendor's rights personal or proprietary before his death?
- When does the purchaser's interest arise?

##### Reasoning (Jessell MR)

- The purchaser's interest arises the moment that the contract becomes enforceable
- 'It appears to me that the effect of a contract for sale ... is that the moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser, the vendor having a right to the purchase-money, a charge or lien on the estate for the security of that purchase-money, and right to retain possession of the estate until the purchase-money is paid ...'
- 'In other words, the position of a vendor is something between what has been called a naked or bare trustee, or a mere trustee (that is, a person without beneficial interest), and a mortgagee who is not, in equity (any more than a vendor), the owner of the estate, but is, in certain events, entitled to what the unpaid vendor is, viz possession of the estate and a charge upon the estate for his purchase money.'
- Summary of principles:
  - If there is a valid contract for sale, then:
  - Vendor becomes trustee for Purchaser of the land;
  - Purchaser is beneficial owner;
  - Vendor has lien for unpaid purchase price;
  - Vendor has right to retain possession until the balance is paid (unless the contract otherwise provides);
  - Vendor is somewhere between a bare trustee and a mortgagee;
  - These are proprietary rights and survive the death of either party; and
  - Because the Purchaser has beneficial ownership from the moment of sale, risk of damage to the property passes to the Purchaser from that point
    - However, today see *Sale of Land Act 1962* (Vic) ss 34–6

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| <p><u>Decision</u></p> <ul style="list-style-type: none"> <li>• The vendor's rights are proprietary to the extent that they comprise a lien and the vendor has legal title</li> <li>• However, the purchaser also has an equitable interest as <i>cestui que trust</i></li> </ul> |
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It is worth noting from the outset that

*the doctrine has a number of consequences but its precise operation cannot be defined with confidence and the philosophical and practical base for the doctrine beyond its establishment throughout the centuries becomes evasive...<sup>2</sup>*

As a consequence of the doctrine of conversation, (equitable) proprietary interests can arise before formal effect is given to an agreement involving land. Upon signature to a contract between vendor and purchaser, the following rights and obligations are held and owed by each:<sup>3</sup>

| Vendor   | Purchaser   |
|--|---|
| Trustee for the purchaser  | <i>Cestui que trust</i>                                 |
| Personal interest: a right to payment                                  | Equitable proprietary interest: beneficial owner        |
| Dealings in breach of trust will be restrained                         | Liable for risk at common law                           |
| Has a right to the payment of the balance                              | Obligated to pay remainder of the purchase price        |
| Has a charge or lien on the estate to secure payment of purchase money | Has an equitable interest in completion of the contract |
| Can retain possession until purchase money is paid                     | Can obtain possession once balance is paid              |

In summary, contracts for the sale of land confer equitable title upon the purchaser before the property is transferred and registered. During this period prior to settlement, when conveyancing and financial matters are attended to by the purchaser, they retain an equitable interest in due completion of the contract and transfer of the legal title upon payment of the balance of purchase moneys. It is, however, only upon settlement of the contract, and registration of the legal transfer that legal title will pass to the purchaser.

For this to happen, title documents must be exchanged between the vendor's solicitors (or mortgagee) and the purchaser's solicitors (or mortgagee), the balance of the purchase price paid to the vendor (such as to discharge their lien) and the transfer lodged for registration. This means that legal title will pass only some time after the sale of land itself occurs, and that many things can go wrong for both parties (and the land) in the intervening period. The doctrine of conversion provides some (albeit small, especially in light of the indefeasible interest conferred by registration to a third party) measure of security for the purchaser that the vendor will make good on their obligations under the original terms of sale.

<sup>2</sup> BMM at 230.

<sup>3</sup> It is also arguable that the tort of conversion has some application here. Conversion consists of a wrongful interference with possession. However, the purchaser's interest under a contract for the sale of land is purely equitable.

### B *When Will Specific Performance Be Granted?*

As Mason J noted in *Chang v Registrar of Titles*, the doctrine of conversion depends on there being a specifically enforceable agreement. The event which creates the trust is the appearance of a specifically enforceable contract of sale.

Specific performance is a discretionary remedy. Whether specific performance is granted depends on the circumstances being such as to invoke the exercise of the Court's discretion to grant specific performance. In general, this will occur when:

- The parties intend to be legally bound to transfer title; and
- Valuable consideration is given in exchange for the seller's promise so to do; and
- Compensation is not an adequate substitute for performance.

Because the subject of a contract for the sale of land is land (a *sui generis* matter), compensation will rarely if ever be adequate.

An agreement need not be legally enforceable to be specifically enforceable in equity. Therefore, it need not comply with all the above formalities. However, specific performance will not be granted in circumstances where:

- Granting specific performance would cause undue hardship to the defendant;
- The purchaser is themselves in breach (eg, failed to pay the balance: they have 'dirty hands');
- The purchaser is unwilling or unable to perform (eg, where impecunious);
- The Court would have to supervise performance of the agreement;
- There has been a mistake, misrepresentation, or unconscionable conduct;
- The contract is illegal;
- Performance is impossible (eg, where title has been reconveyed);
- The plaintiff does not have clean hands;
- The plaintiff has delayed in enforcing their rights (*laches*) under the contract (they have 'sat on their dirty hands'); or
- The plaintiff has acquiesced to the defendant's non-performance.

Because it is not normally possible to determine whether the purchaser will be able to perform their obligations until the day of settlement, some degree of uncertainty about whether specific performance is available remains at least until that time (*Bahr v Nicolay*).

### C *Present Status of a Purchaser of Land*

In *Tanwar Enterprises Pty Ltd v Cauchi*, the High Court all but eviscerates the doctrine of conversion as it applies (or rather, applied) in Australia. The more temperate description is that it 'throws into uncertainty the current validity of the doctrine of conversion'. In any case, the Court rejects established analogies with trust, accepted since *Lysaght v Edwards*. The rights of purchasers of land are treated as being determined by the terms of the contract itself.

Specific performance is not treated as determinative of a purchaser's interest in land prior to completion. Instead, this rationale is criticised as unsatisfactory for its circularity by the Court. If any charred remains could be identified of the established doctrines, they might be these:

- The relationship between vendor and purchaser is not one of trustee and beneficiary, but is instead 'essentially contractual';



- A purchaser's interest cannot be determined by asking whether specific performance is available, because specific performance in large part depends on the existence of the interest in question;
- Similarly, once a contract of sale has been validly terminated, it is unhelpful to ask whether specific performance could previously have been granted;
- Instead, the availability of specific performance depends solely upon whether it was unconscionable for the vendor to exercise their contractual right of termination; and
- Whether this was so depends largely on 'the special heads of fraud, accident, mistake or surprise'.

However, it should be emphasised that the precise nature of a purchaser's interest is unclear.

### ***Tanwar Enterprises Pty Ltd v Cauchi (2003) HCA:***

#### Facts

- Tanwar entered into three contracts to purchase adjacent parcels of land in Sydney, of a combined value of \$4.5m
  - Time is not stipulated to be of the essence, and a date for completion is set some six months away (28 February 2000)
- Because of financial problems, an extension granted to Tanwar (August 2000)
  - The contract is made conditional on the development approval of the local council; this condition is met and the contract is on foot, but Tanwar still couldn't raise the balance
- 20 August 2000: Cauchi, the vendor, issues a notice of termination
- Subsequently, the parties meet again, enter three new contracts, under which time is expressly made of the essence
  - The contracts provide for a 20 day settlement period: Tanwar *must* get the money to Cauchi before then
- 24 June 2001: at 4.00pm on the last day of the stipulated settlement period, still no money has been tendered
  - Tanwar calls the vendor and informs them that their loan from Singapore has been held up by various financial lucubrations
- June 25 2001: the balance of the purchase price not having been received, Cauchi issues a notice of termination, lawfully and pursuant to the amended contract of sale
  - The vendor is not in breach of contract by terminating because time is of the essence and the essential term (completion date) has been breached by Tanwar
- Tanwar's excuse turns out to have been accurate: the funds arrive the next day
- Tanwar seeks specific performance of the contract of sale, alleging that it would be unconscionable to allow the vendor's to exercise their legal right to terminate the contract

#### Issues

- Can specific performance be granted?
- What interest does a purchaser of land have prior to completion of the contract?

#### Reasoning

- Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ:
  - The issue arises of whether termination would result in forfeiture by Tanwar of an interest in the land (as in *Legione*)
  - The traditional view adopted by *Lysaght v Edwards* has hitherto been accepted as indicating that the purchaser acquired beneficial ownership upon formation of the contract of sale
    - The purchaser had before completion an equitable estate in the land which would be protect against loss by equitable principles

- Similar to the equity of redemption, failure to meet the terms of the sale by not completing the contract on the due date did not bar an order for specific performance
  - In this way, the purchaser's interest was said to be commensurate with their ability to obtain specific performance
  - However, analogies with trust and mortgage (from *Lysaght*) 'are no longer accepted'
    - 'At all events, the analogies drawn over a century ago in *Lysaght* with the trust and the mortgage are no longer accepted' (footnote omitted)
    - Approves Jacobs J *Chang v Registrar of Titles*:
      - The trustee analogy conceals 'the essentially contractual relationship which, rather than the relationship of trustee and beneficiary, governs the rights and duties of the respective parties.'
    - As Deane J noted in *Kern v Walter Reid*, 'it is both inaccurate and misleading to speak of the unpaid vendor under an uncompleted contract as trustee for the purchaser'
    - To treat the purchaser's equitable interest as commensurate with the availability of specific performance is fruitless because that is 'the very question in issue': 'it is bedevilled by circularity'
    - However, no conclusive opinion is expressed on this point
  - Where a contract of sale is validly terminated, 'it does not assist to found the equity of the purchaser upon the protection of rights to injunctive relief acquired under a contract the termination of which has taken place'
    - This seems to suggest that, if it is not unconscionable for a vendor to rely on a legal right to terminate, then, after termination, a purchaser can no longer obtain specific performance (it being too late to rely on a contract no longer in existence)
    - Whether it is unconscionable to exercise a contractual right of termination may be seen to depend largely on 'the special heads of fraud, accident, mistake or surprise'
    - These heads identify, 'in a broad sense', the circumstances making it 'inequitable' (unconscionable) to terminate such as to extinguish a purchaser's right to specific performance
    - Accident and mistake require some conduct on the part of the vendor to contribute to the breach
- Kirby J:
  - 'Whatever may be the precise content of the "equitable interest" of a purchaser under a contract for the sale of land, it is now accepted that, in a proper case, it is sufficient to sustain equitable jurisdiction to relieve that party against forfeiture of such an interest for time default, even in respect of a time provision agreed to be essential. The equitable interest has developed to relieve from forfeiture a party with a substantial stake in the property in consequence of an exercise of legal rights that is shown to be the result of fraud, mistake, accident or surprise or otherwise unconscionable in all the circumstances.'
- Callinan J:
  - The outcome does not depend on an exact characterisation of the parties' rights or interests under the contract of sale
    - That is, it does not matter 'whether the purchaser's interest, *certainly when the contract is, or has become unconditional*, amounts to an equity in the land' (emphasis added)
    - This seems to imply that such 'an equity' (presumably by which his Honour means an equitable interest) arises when the contract is on foot

and any preconditions have been met

#### Decision

- Here, there was no fraud or mistake involved; that there might be a failure by a third party was clearly foreseeable so there was no accident or surprise
- It is therefore not unconscionable for Cauchi to terminate the contract, and forfeiture is not harsh or unfair
- Tanwar no longer has an interest in the land on the basis of which to seek relief for forfeiture, but they can still seek specific performance [???

Unsurprisingly, lower courts are somewhat reluctant (certainly unconfident) to apply the *ratio* of *Tanwar* (if, indeed, one can be identified) in place of the hitherto unquestioned view of the vendor as constructive trustee for the purchaser. For this reason, it remains valuable to consider the most recent pre-*Tanwar* authority on the status of the trust analogy, if only to better illuminate the High Court's new approach against the shadows of its predecessor.

According to the former view, specific performance was assessed as at the time of the vendor's breach of trust, not at the time the action was brought (*Bunny Industries*). For this reason, a plaintiff purchaser may yet retain as against the vendor an equitable interest in reconveyance, despite the vendor's prior conveyance in breach of trust to a third party. Although specific performance would be impossible in these circumstances, the plaintiff's equitable interest means that it is possible to hold the vendor to account for any profits obtained from their wrongful sale.

### ***Bunny Industries Ltd v FSW Enterprises Pty Ltd (1982) Qld SC:***

#### Facts

- In 1981, Bunny contracted with FSW to purchase land in Townsville for \$180 000 on deposit of \$1000, which was made
- The contract is specifically enforceable; settlement terms were three months after sale
- The vendor, FSW, subsequently realises that it could sell the property for more money elsewhere, so it enters a second contract with a third party, X, to sell for a higher price
- The land is transferred to X, who becomes registered as proprietor and has legal title
  - This means that the third party's title trumps any equitable title *if the equitable title arises later*
- Bunny seeks a declaration that FSW, the former owner, holds on trust the proceeds of sale and an order that it account for its profits
- Bunny cannot evict X, but does have a pre-existing equitable interest in the land as purchaser

#### Issue

- What is the nature of Bunny's interest in the land, if any, and when did it arise?
- Can Bunny obtain specific performance of the original contract of sale (that is, that the vendor be compelled to transfer the land to them)?
- If not, can equity intervene to assist the plaintiff in some other way?
  - Thus, if the contract is no longer specifically enforceable (because the land had been registered in the name of X), would the vendor be considered a constructive trustee for the purchaser and hence have to account for any profits from the sale to X?

#### Reasoning (Connelly J)

- Specific performance: no, too late

- Purchaser wants transfer of land to them after it has been transferred to a third party
- Once X is on the register, their title is indefeasible as against all challenges, subject to statutory exceptions (see below)
- Here, the time for specific performance has passed: even if FSW was fraudulent, this would not affect X's title — it would have to be that X that was itself fraudulent
- Constructive trust analogy accepted
  - Although the unpaid vendor has powers he is entitled to exercise for his own benefit, he is a trustee for the purchaser to the extent that he must convey title to the purchaser upon payment of the remainder of the purchase price
    - Once the purchase price is fully paid, the vendor holds title on a bare trust for the 'absolutely entitled purchaser' (*Bridges v Mees*)
    - 'Until then the vendor's trusteeship is a highly self-interested modified form of trusteeship' (Underhill at 338)
  - If the contract results in FSW being a trustee for Bunny, the content of the trust depends on whether specific performance is available
  - That is, there needs to be specific performance available in order to grant trust such that FSW holds the title for Bunny
  - Bunny still has an equitable fee simple: at the time the contract was entered into, they could have obtained specific performance (*contra Ong*) because at that time, the vendor was a trustee for the purchaser
    - Assess availability of equitable remedies as at the time of the contract
  - Breach of trust must be assessed at the time of the alleged breach of trust
    - Here, that time was when the land was wrongfully sold to X: at this point, FSW wrongfully repudiated the contract
  - The purchaser must have been willing to tender performance of his own obligations
  - At the time of that breach, specific performance could still have been granted because there Bunny had an equitable interest prior to X's registration
    - Equity would restrain transfer to X, but require payment of the balance by Bunny to FSW
    - Here, Bunny was ready, willing and able to perform
  - Therefore, an interest capable of specific performance existed at the time of FSW's repudiation
- Account of profits: an account of profits is available
  - Account of profits is another equitable remedy besides specific performance
  - The trustee must account to the beneficiary for profits derived from the land held on trust for the beneficiary
  - If successful, FSW would have to disgorge the profit and give it to the beneficiary, Bunny
  - This would be an equitable remedy to protect Bunny's equitable interest in conveyance of the legal title upon payment of the purchase money
  - Thus, for this interest to arise, the purchaser needs to have been entitled to specific performance
  - Although Bunny cannot get specific performance now, it could at the time of the breach of trust

#### Decision

- The availability of an equitable remedy is to be judged at the time when there was a trust in existence and the trusteeship was breached
- Here, specific performance is unavailable but FSW must account for its profits from the

- repudiatory sale in breach of constructive trusteeship to Bunny as unpaid vendor
- The difference between Bunny's purchase price and FSW's sale price to X must be given to Bunny, as well as the return of their deposit (~\$20 000)

As a result of the High Court's decision in *Tanwar*, the aspects of *Bunny Industries* predicated upon the doctrine of conversation must be regarded as bad law. However, even post-*Tanwar*, *Bunny* is still authority for the proposition that the availability of specific performance is to be assessed at the moment the contract was breached (ie, when the vendor dealt with the land inconsistently with the contractual rights of the purchaser). *Tanwar* suggests that specific performance will be granted when it would be unconscionable to allow termination of the contract (and, in the case of breach of an essential time stipulation, sets out four criteria for determining whether that is so).

- Right to performance: *chose in action*
- Priority issue: does the second purchaser have notice of the equitable fee simple of the first?

The purchaser's equitable interest arises when specific performance becomes available. At the latest, this is the time of completion (*Chang v Registrar of Titles*). However, it may be available earlier if the vendor conducts himself in breach of the contract and the purchaser shows ability, readiness and willingness to perform their own obligations.

### ***Chang v Registrar of Titles* (1976) HCA:**

#### Reasoning (Mason J)

- Specific performance must be available before there will be a constructive trust
- If there is no trust, then there is no equitable interest capable of protection
- The constructive trust arises 'at least when the purchaser has paid the purchase money' to the vendor
- 'It is accepted that the availability of the remedy of specific performance is essential to the existence of the constructive trust which arises from the contract of sale'

#### Decision

- On the facts, the contract could not be specifically performed because the government no longer recognised one of the parties to the contract, Taiwan, as formally existing

The preceding cases serve to illustrate how the traditional position in *Lysaght v Edwards* has been significantly modified over years subsequent, culminating in outright rejection in *Tanwar*. Numerous additional examples may be found, including *Bahr v Nicolay*, which suggests that a purchaser's equitable interest will not arise upon formation of the contract, but rather when they show themselves able and willing to perform their obligations. In some cases, this may not be until the date of completion. A further illustration is provided by the recent trend to predicate performance of many contracts upon the fulfilment of a precondition. Because the equitable interest does not arise until the creation of the contract (and, hence, the meeting of the contingent condition), many purchasers may find themselves without equitable recourse where such a condition is not fulfilled (*Brown v Heffer*).

### D *Basis of the Equitable Interest*

There are two competing rationales for the equitable doctrine of conversion:

- The vendor becomes a trustee of the property for the purchaser; or
- Specific performance compels the vendor to complete the conveyance.

The doctrine of conversion was originally described as establishing

*that the vendor is a constructive trustee for the purchaser of the estate from the moment the contract is entered into.*<sup>4</sup>

The basis for the doctrine is the equitable maxim that equity *regards as done that which ought to be done*. However, where the parties do not intend to transfer the title immediately (settlement), a proprietary interest is still passed in equity immediately, so this rationale appears unsatisfactory.

Alternatively, the equitable interest is said to derive from the availability of specific performance. However, this too is an unsatisfactory basis because of its circularity.

#### 1 *Critique of the traditional view*

According to Dennis Ong, it is not, strictly speaking, true that the trust arises at the moment of sale, because it is contingent upon specific performance.<sup>5</sup> The constructive trust in favour of the purchaser arises only at the moment when he becomes entitled to obtain specific performance. This must be, according to Ong, the date of completion (for it is not until then that specific performance is available).<sup>6</sup> [??? What if the vendor purports to deal with the land inconsistently before then? Would not a right arise to compel performance of the contract on its terms?]

The vendor does not become a constructive trustee for the purchaser until the vendor is obliged to transfer title to the purchaser. This is conditional upon the purchaser being entitled to specific performance of the conveyance. This is not possible until the purchaser has shown him or herself ready, able and willing to pay the balance of the purchase price. Thus, Mason J in *Change v Registrar of Titles* was prepared to set a boundary on the moment when the purchaser's equitable interest arises, stating that

*at least when the purchaser has paid the purchaser money the vendor becomes a constructive trustee of the property sold.*<sup>7</sup>

The traditional view of Jessel MR 'is not free from conceptual difficulty'.<sup>8</sup> The vendor's obligation to convey land to the purchaser arises only when the purchaser has paid the outstanding amounts owed under the contract. Therefore, far from arising at the moment of the contract, a bare trust arises only upon payment of the balance. Although Ong thought that the established principles were 'too deeply entrenched to be dislodged', his writings predate *Tanwar*, where the High Court was prepared to do just that.

With respect to Ong, it would be a misreading of *Lysaght v Edwards* to describe the constructive trust as arising immediately upon creation of the contract of sale. Master of the Roll Jessel qualified the above statement by the vendor's lien to which the constructive trust remains subject until payment of the balance. It is perfectly consonant with principle to treat the trust as arising conditionally upon formation but remaining subject to ready performance of the purchaser's own obligations.

<sup>4</sup> *Lysaght v Edwards* (1876) 2 Ch D 499, 510 (Jessel MR).

<sup>5</sup> Dennis Ong, *Trusts Law in Australia* (1999) 481.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Change v Registrar of Titles* (1976) 137 CLR 177.

<sup>8</sup> Ong, above n 5, 482.

However, the conceptual difficulties alluded to by Ong are not wholly without substance. The yardstick of specific performance leads to the untenable position that the existence of the trust is dependent on the remedy which its existence would create. Unless it is assumed that being ready, able and willing is sufficient basis to give effect to the contract (*Bunny Industries*), or — as the High Court did in *Tanwar* — use separate categories of fraud, accident, mistake or surprise to define the remedy, the equitable interest becomes contingent upon itself.

## 2 Defence of the traditional view

Robert Chambers argues that the analogy with constructive trusts can adequately explain the interests of purchaser and vendor in a sale of land.

The contract of sale is merely the vendor's enforceable promise to transfer ownership in the future. Its effect is to vest in the purchaser a right *in personam* (but not *in rem*, ie proprietary) to receive that conveyance of title upon completion. 'The reality (which equity recognises) is that the beneficial ownership moved when the contract was signed.'<sup>9</sup>

### E Implications for a Purchaser of Property

**Issue:** what interest does the purchaser have prior to settlement?

Legal:

- The purchaser does not have formal legal title until lawfully conveyed by the vendor upon settlement (payment of the balance)
- If the contract complies with the formality requirements, the purchaser has a legal right *in personam* to the execution of the agreement on its terms

Traditional equitable rationale:

- By analogy with the constructive trust, the vendor, upon entering into contract, becomes a trustee for the purchaser
- The vendor has legal title at common law, but equity protects the beneficiary purchaser so that ownership is split between law and equity
- The vendor has an equitable lien or charge over the land to which the trust is subject until the balance is paid by the purchaser

Modern equitable rationale: [???

- *Tanwar* rejects the analogy with the constructive trust
- The purchaser has an equitable interest if he or she could obtain specific performance of the contract by a court of equity
- Whether specific performance is available depends in part on whether it would be unconscionable for the contract to be validly terminated
- If no specific performance is available, then no equitable interest exists
- Whether specific performance is available should be assessed at the time of the vendor's dealing in breach of trust (*Bunny Industries*)

In summary:

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<sup>9</sup> Robert Chambers, *Introduction to Property Law in Australia* (2001) 260.

- A purchaser's interest is beneficial and equitable in nature
  - It arises before transfer, like Schmidt in *Barry v Heider*
- A vendor's interest is both legal and equitable
  - Legal, in the sense that he or she retains the certificate of title (for now)
  - Equitable, in the sense that they have a vendor's lien (charge on the land), a security to the satisfaction of which the purchaser's interest is subject
- The basis for the purchaser's interest
  - Either a constructive trust; or
    - Doubt about this analogy
    - See Ong, who describes it as 'illogical'
    - See also *Tanwar*, where it was expressly rejected
  - The availability of specific performance (emphasised in *Tanwar* as the basis)
- When does the purchaser's interest arise?
  - When specific performance becomes available (*Chang*)
  - According to Ong, this is when the balance is paid



## II Other Specifically Enforceable Contracts

### A Leases

#### 1 Legal leasehold in respect of general law land

If the duration of a lease does not exceed three years, then a legal leasehold may be created according to the terms of an agreement: *Property Law Act 1958* (Vic) s 54(2).

However, if a lease is longer than three years, formalities are needed to effect its creation: *Property Law Act 1958* (Vic) s 53(1).

#### 2 Legal leasehold in respect of Torrens title land

Leases three years or more in duration may be made by registering an instrument in its proper form: *Transfer of Land Act 1958* (Vic) s 66. Registration creates the interest: s 40(1).

The exception for short leases contained in the *Property Law Act* s 54(2) also applies to Torrens land. Therefore, if a lease does not exceed three years and takes effect on possession, the tenant's leasehold will amount to a legal interest notwithstanding that it has not been registered.

#### 3 Equitable leasehold

Courts will enforce a lease agreement even where formal requirements for the creation of the legal interest have not been complied with. The nature of the interest recognised is equitable that is, an equitable version of the (contemplated) legal interest is created. However, for an equitable leasehold to arise there must still be some written evidence of the agreement (*Walsh v Lonsdale*).

### ***Walsh v Lonsdale* (1882) UK:**

#### Facts

- The parties agree to lease a factory for a period of seven years; although they intended to enter a formal deed, they do not
- The tenant takes possession and the landlord subsequently sues for distress (seisin of the tenant's chattels for non-payment)

#### Issue

- Does equity regard the parties as part of a leasehold arrangement such that the tenant has an equitable right to possession for a term and the landlord has an equitable right to payment of rent?

#### Decision

- In equity, the parties should be treated as if a formal lease had been executed
- This will be so whenever a valid contract exists

In *Chan v Cresdon Pty Ltd*, the High Court of Australia held that an agreement to enter into a lease may be treated as an equitable lease between the parties to the agreement. However, the parties' rights cannot amount to legal interests.

**Chan v Cresdon (1989) HCA:**Facts

- A lease agreement is made between the parties
- However, it does not meet the formalities requirements

Issue

- What is the effect of non-compliance?

Reasoning

- The Court will treat the agreement for the lease as equivalent to the legal lease, but the tenant does not have a lease at law
  - No legal leasehold can be created
  - The agreement is the equivalent of a lease, in equity
  - But equity will not in effect turn the failed attempt to create a legal interest into the full legal interest
  - It will only go so far as to give effect to an equitable version
  - ‘While an agreement for a lease will be treated as an equitable lease for the term agreed upon and, as between the parties, as the equivalent of a lease at law, even if specific performance would be awarded in favour of the respondent, that does not establish the liability of the appellants as guarantors. The “obligations [of the lessee] under this lease” refers to the lease in its character as a lease and only a lease in law would meet this description for the purpose of the guarantee’
  - ‘Even assuming the agreement for lease would have been specifically enforceable in equity and that, as a result, an equitable lease for 5 years came into existence between [the lessor] and [the lessee], that equitable lease is a thing different from the unregistered form of lease executed by the parties. It arises from the agreement, not the instrument of lease ... the liability to pay rent was thus not an obligation “under this lease” within the terms of the guarantee’
- The equitable lease is more fragile than its formal legal counterpart: a *bona fide* (good faith) purchaser (not volunteer) for value (not donee) without notice (knowledge) will take priority over the equitable lessee
- Specific performance is necessary for any equitable interest to arise
  - Specific performance is a discretionary remedy
  - Therefore, it may not be available where the lessee has acted inequitably
  - If specific performance (or another equitable remedy) is inappropriate, then the agreement will not give rise to any equitable interest in the land
- The agreement may also be backdated to before the expiration of the lease
  - Because specific performance is discretionary, a court can ‘backdate’ it so that a lease that has expired can still be susceptible to a decree of specific performance

Decision

- The agreement creates an equitable, but not legal, leasehold estate

The issue of backdating in general law land may be contrasted to the inability of a court to backdate specific performance of a sale (and transfer) of Torrens land to a date prior to its sale to another party.

## B Mortgages

A mortgage is a security interest in land. They may be grouped into three kinds: common law, equitable and Torrens mortgages.

### 1 Common law mortgages

Common law mortgages can only exist of general law land. The title in fee simple would be conveyed to the mortgagee (usually a bank) by the mortgagor (normally a purchaser) for the duration of the mortgage, subject to the mortgagor's equity of redemption, which was a right to have the property reconveyed to them after their outstanding debt had been repaid to the bank.

The equity of redemption also protected a mortgagor against forfeiture of their partial repayments in the event of default. Thus, a purchaser may convey to the bank in exchange for finance, make some repayments but then have difficulty repaying the principal and not lose the entire land despite only borrowing a portion *and* making repayments against it. Equity extends the time for repayment, allowing for an extension in the event of default.

### 2 Torrens mortgages

Torrens mortgages entail the registration of a legal interest of the mortgagee bank over the land. However, this legal interest does not amount to ownership, and does not involve possession of the certificate of title. It is typically secured as a charge over the land, and the mortgagor retains legal ownership. Because Torrens mortgages are secured by means of a legal charge over the land, no conveyance of title is necessary.

Relevant provisions:

- TLA s 40(1): the mortgagee obtains a legal interest when the instrument is registered
- TLA s 74(1): the registered proprietor can mortgage by an instrument set out in a Schedule to the Act
- TLA s 74(2): a mortgage takes effect as a security and is an interest in land but does not amount to a transfer of land
- TLA ss 74–87: several terms in mortgage agreements are implied by statute

### 3 Equitable mortgages

An equitable mortgage is more flexible, and can arise by one of three courses of conduct.

First, a specifically enforceable contract of mortgage will create an equitable mortgage (*Barry v Heider*).

Second, the mortgagor can deposit their title documents with the mortgagee. These documents include the title deed and the duplicate certificate of title. Such deposit will amount to an equitable mortgage if accompanied by either:

- A written agreement or execution of an agreement in registrable form (and the money is advanced); or (third)
- An oral agreement, loan of money and deposit of title (*J & H Just (Holdings) Pty Ltd v Bank of New South Wales*).

The mortgagee's possession of the certificate of title protects their security interest by reducing the likelihood of subsequent inconsistent dealings with the land by the mortgagor.

The deposit by a party of a certificate of title to another coupled with the advancement of money to that party establishes the following:

- An (oral) agreement between the parties to grant the mortgage as security for the loan so advanced; and
- Sufficient acts of part performance of that agreement for equity to recognise the mortgage

Formalities requirements for an equitable mortgage will be satisfied so long as the essential elements of the dealing are recorded: a description of the land, the parties and the nature of the transaction (*ANZ Banking Group Ltd v Widin*). Express references to another document incorporate that other document so that descriptions spread across multiple documents may be read together.

### ***ANZ Banking Group Ltd v Widin (1990) FCA:***

#### Facts

- Bank made \$ available to Wardle in exchange for mortgage
- Formalities problem: form of mortgage incomplete
- Wardle declared bankrupt August 1983

#### Issue

- Issue was date when mortgage effective –on or after 24/2/83? (Bank wants priority in bankruptcy)
- Was there sufficient memorandum in writing to satisfy statute of frauds?

#### Reasoning

- On the facts, the manager's diary notes can only be connected to the mortgage document by oral evidence; this is inadmissible
- Here, failure of formalities is fatal (but see later, succeeded in OA and PP)
- Not permissible to adduce parole evidence (the memo in the Bank Manager's diary) to link the two signed but incomplete/informal documents so as to satisfy the Statute of Frauds.
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#### Decision

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## C      *Vendor's Liens*

A security interest other than a mortgage.

Arises when legal title has passed to the P but the full pp has not been paid to the V.

In equity, lien in favour of the V arises to secure the balance of the pp owing.

## D Options

- Option to purchase can give a proprietary interest in land – often in a lease
- Best view is that it arises when option granted (not when exercised)
- distinguished from a right of first refusal (not proprietary)
  - It can be difficult to distinguish between them!
- If exercise of option will produce SP contract for sale/lease, then the option is itself an equitable proprietary interest (because optionee can compel conveyance)
- Contrast holder of pre-emptive right (right of first refusal), who cannot compel the owner to sell (and so does not have an equitable proprietary right)
  - See further (and later this semester) *Bob Jane T-Marts* case

### ***Bob Jane T-Marts Pty Ltd v The Baptist Union of Victoria (1999) Vic SC:***

#### Facts

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#### Issue

- ?

#### Reasoning

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#### Decision

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### III Part Performance

#### A Introduction

An oral agreement purporting to create, vary or extinguish an interest in land is of no effect: *PLA* s 53. However, a court of equity will enforce the equities arising from acts performed in execution of an oral agreement. This exception to the formalities requirements is codified in Victorian the property law statutes. Thus, *PLA* s 55(d) provides that ss 53 and 54 do not apply to the acquisition of an interest by (adverse) possession or by *part performance*.

The rationale of the part performance doctrine is to prevent the writing requirement of the *Statute of Frauds* itself being used as an instrument of fraud. Giving effect to acts of reliance upon a vendor's oral promise prevents the vendor using the absence of writing to perpetrate a fraud by resiling from their promise.

Although detrimental reliance by the plaintiff upon the unenforceable contract may be an inherent corollary of partial performance, it is not the central issue. Part performance is largely concerned with evidentiary issues, allowing (normally inadmissible) parol evidence of the oral agreement be adduced from evidence of performance.

#### B Acts of Part Performance

##### 1 Traditional test

Acts of part performance must be 'unequivocally referable' to the agreement. Personal care cannot amount to part performance because it is not unequivocally referable; there is, rather, an alternative explanation of love and affection (*Maddison v Alderson*).

#### ***Maddison v Alderson* (1883) UK:**

##### Facts

- A cared for M, performing household chores and managing the servants
- M had said that, in return for her care, A would be granted a life estate
  - The agreement was oral
- M left the property to her in his will as a life estate, the remainder to his son
- The will wasn't signed properly and so was defective
- The son argued that the will was defective and so property should pass to him
- A argued that there was a binding oral agreement on the basis of part performance

##### Issue

- Can the oral agreement be enforced?

##### Reasoning

- Prima facie, the oral agreement is ineffective and inadmissible parol evidence
- However, a party may introduce evidence of behaviour evidencing part performance (and then lead evidence of the agreement)
- However, acts of part performance must be 'unequivocally referable' to the agreement
  - Acts of care and affection are not unequivocally referable to the agreement
  - A's behaviour isn't proof of the agreement, but perhaps of another thing (love and affection)

- Such acts of part performance can't be said *unequivocally* to be in return for the promise (here for a life estate) because there is another plausible reason
- Acts of care and affection are not *unequivocally referable* to agreement
- The Court would not 'turn courtesy into contract'
  - Care, good manners or politeness will not of themselves create a legally binding agreement
- 'There have not been wanting cases in which time and care have been bestowed by one person upon another, even from a vague anticipation that the affection and gratitude so created would, in the long run, ensure some indefinite reward. And legal tribunals have refused in those cases to turn courtesy into contract and compel any payment although such service had been performed'

#### Decision

- The agreement is unenforceable because part performance is not conclusive

The acts relied upon must have been *exclusively referable* to the agreement alleged by the party. This means that there must not have been a plausible alternative explanation (*Mason v Clarke*). Performing work on another person's land may be so referable.

Importantly, even if part performance is accepted, the effect is not to enforce the contract. The Court simply allows parol evidence of the oral agreement to be admitted so that the agreement may be seen as existing; it is not specific performance (*Mason v Clarke*).

### ***Mason v Clarke* (1955) UK HL:**

#### Facts

- The owner of land grants a legal lease to Clarke
- The owner then enters into an oral agreement with Mason, a local rabbit hunter, to allow him the right to hunt rabbits on that land
- There is a contract between Mason and the owner, made for £100 consideration
- Clarke initially grants access to set traps, but then refuses to let Mason hunt rabbits, wanting to retain exclusive possession

#### Issue

- Can Mason hold Clarke to his oral agreement with the owner?

#### Reasoning

- What was the nature of M's right?
  - If the interest is proprietary, it may be enforceable beyond the contract (here no contract between M and C)
  - It is an equitable profit à prendre (proprietary)
- Part performance test
  - The oral agreement for the creation of a proprietary interest in land and evidence of the contract is valid except for the absence of writing
  - It is otherwise capable of specific performance
  - There must be sufficient acts of part performance by, on behalf of, any party claiming part performance
  - The acts relied upon must have been *exclusively referable* to the agreement alleged by the party
  - Are M's actions *exclusively referable* to the agreement?
    - Yes, paid workers to set traps

- Entered onto another's land
    - Paid 100 pounds
    - Why else would he do these things? (unless he *had a profit*)
  - Acts were exclusively referable
  - Therefore there is part performance
- If successful
  - Equity will not allow the *Statute of Frauds* (the writing requirement) to be used as an instrument of fraud
  - Equity does not abolish the need for writing, but seeks to further the same objectives (preventing fraud)
  - Clarke will be charged on the equities arising as a result of the acts of part performance
    - Mason has gone to the trouble of part performing the agreement
    - This creates an 'equity' because it would be unconscionable if Clarke could avoid his obligation by denying the agreement's validity
  - This puts the parties in the position they would have been in if the contract had been in writing
    - No-one is in a better position than before — the agreement is merely treated as existing
    - However, the agreement is not specifically enforced as such (just the equities arising from it)
  - However, the courts do not enforce the actual terms of the contract (just rectify the contract's enforceability)

#### Decision

- Part performance has occurred, and is referable to the agreement
- The agreement is valid and capable of SP

*McBride v Sandland* offers a further example of the application of the strict *Maddison* approach. It illustrates the difficulty of demonstrating that acts of part performance are 'unequivocally referable' in the context of a familial relationship.

### ***McBride v Sandland* (1918) HCA:**

#### Facts

- A father (McBride) is the landlord of his daughter (Sandland), who is a yearly tenant
- Sandland is in possession of the land, and claims that McBride agreed to grant her an option to purchase the land at a later date
- Sandland and her husband farm the land, paying rent and improving the land (sheds, sheep, tractors) over a long period of time
- Sandland then asks her father to transfer the land, but he refuses
- Sandland claims that her acts constitute part performance and are referable to the oral agreement to grant the option

#### Issue

- Is the option enforceable?

#### Reasoning

- Court applies *Maddison*
- A party cannot use equivocal acts (being in possession and spending money) in the context of a domestic or familial relationship so as to turn them into legal categories



- Equity is not prepared to interfere in family relationships

Decision

- No

*Ogilvie v Ryan* further illustrates the difficulty of demonstrating that acts of care and affection are part performance of an oral agreement.

***Ogilvie v Ryan* (1976) NSW SC:**

Facts

- O told Mrs R that if she lived with him and cared for him, she could stay in the house for life (be granted a life estate)
- Mrs R moves in with O and cares for him until his death
- O dies and does not leave R an interest in the house
- O's son, beneficiary under O's will, seeks to evict R

Issue

- Is the oral agreement enforceable?
  - Does R have an equity in performance of the agreement?

Reasoning

- There was an oral agreement, but acts of part performance were not *unequivocally referable* to that agreement
  - Applies *Millett v Regent*
- This was because there was an alternative explanation for Mrs R's conduct (love, devotion, care and affection to O)

Decision

- Although unsuccessful on part performance, Mrs R eventually succeeds on the basis of a common intention constructive trust (see below Part III)

2 *Contemporary developments*

United Kingdom courts have since relaxed the strict *Maddison* approach. However, this trend has not been followed in Australia.

***Kingswood Estate Co Ltd v Anderson* (1963) UK CA:**

Facts

- A tenant going into occupation adduces evidence of an oral agreement of tenancy
- The tenant argues that taking possession is part performance

Reasoning

- In determining whether there is part performance, look at all the circumstances
- Going into possession is evidence of some kind of oral agreement
- The Court can hear further evidence about the terms of the agreement

***Steadman v Steadman* (1976) UK HL:**Facts

- A married couple file for divorce; they disagree about the division of their assets and Mrs Steadman initiates proceedings
- An agreement is reached between them on the steps of the district courthouse
- The couple agrees that Mr Steadman will keep the house if Mrs Steadman pays him 1500 pounds
- They also make terms of custody arrangements: she has no interest in the house
- The value of the property subsequently goes up, and she seeks to undo the terms of the agreement
- He claims part performance (payment)
- Mrs Steadman argues that the payment of the 1500 pounds is equivocal

Issue

- Is the oral agreement enforceable?

Reasoning

- Look at the act of part performance, and ask:
  - On the balance of probabilities, has an agreement been entered into?
  - If so, take more evidence about the agreement
- It is sufficient that the events that have taken place render it *more likely than not* that a contract has been entered into — the Court can then decide on the balance of probabilities whether that is so
- This is significantly looser than the ‘unequivocally referable’ *Maddison* test

In *Regent v Millet*, the High Court of Australia explicitly states that it will not examine *Steadman v Steadman*. However, the Court does appear to approach the issue in similar fashion.

Order of enquiry:

- Go through ‘unequivocally referable’ approach
- Mention the possible influence of *Steadman*
- Then consider *Regent*

***Regent v Millet* (1976) HCA:**Facts

- The Regents are the parents of Millet; the Regents purchase a house
- An oral agreement is made with their children, the Millets, that the children could pay off the mortgage, live in the house and have it transferred to them when the mortgage is fully repaid
- The Millets went into possession, paid some money off the mortgage, performed repairs, and obtained another bank loan to cover the cost of some further repairs
- Mr Regent now refuses to transfer title
- He argues that taking possession and paying money in this manner is not unequivocally referable to the contract alleged by his children

Issue

- Has there been part performance?

Reasoning

- Taking possession, together with the expenditure of money has always been sufficient evidence of part performance
  - The Court reviews the case law to reach this decision
  - It is not true to say that the payment of money could here be for any number of purposes (unlike *Maddison*)
- Although the Court declines to consider the relevance of *Steadman* in Australia, it does redefine the *McBride* test
  - [Amanda Whiting: taking account of *Steadman* but not following it]
  - Acts must be unequivocally referable 'to some contract'
  - However, it is sufficient that the contract is *of the same general nature* as that alleged (*McBride*)
    - Just needs to relate to the general nature of the oral agreement alleged to have been made
    - Need not refer to specific clauses of the agreement
- 'If a vendor permits a purchaser to take possession of land to which an oral contract of sale entitles him, the giving and taking of possession will be sufficient act of part performance, notwithstanding that under the contract the purchaser was entitled but not obliged to take possession'

Decision

- The children are successful; the oral agreement is enforceable

If an agreement is written but spread across several documents, they cannot be incorporated into one unless explicit reference is made to each of the others (*ANZ Banking Group Ltd v Widin*). However, in a commercial or financial context, the lending of money may well be unequivocally referable to some such mortgage agreement, especially where the lender acts in a broader financial capacity for the borrower.

***ANZ Banking Group Ltd v Widin (1990) FCA:***Issue

- Was there an oral agreement?
- If so, has it been partially performed?

Reasoning

- How can the informality of the mortgage documents be cured?
  - The identity of the bank, land owner, and the amount of money are all known
  - However, the documents do not record the precise identity of the land secured by the mortgage — against which block should the mortgage be recorded?
- Can these terms be implied into the document? [???]
  - No, as a matter of policy, the mortgagor's interest cannot be assumed to be a property
  - It is important that the bank only has the capacity to sell the property to which they are actually entitled
  - The Court cannot bring the evidence together
  - This illustrates how failure of formalities can have large implications
- Part performance

- On faith of oral agreement, the bank has lent money
- Unequivocally referable? Ordinarily, money could be lent or paid for various reasons, none of which necessarily entail the existence of an agreement
  - Here, however, there was more than mere expenditure of money
  - This isn't a familial context, but a commercial/financial one
  - A bank only lends money for commercial (not gratuitous) reasons: banks are not charities
  - The bank's acts must have been made on faith of some agreement, and were therefore unequivocally referable to it
  - The bank had acted in a financial capacity for Widin; it had moved money around, engaged in multiple transactions, and the like — it did more than loan money
  - Taken together, these transactions were unequivocally referable to a mortgage agreement
- The Court is bound to apply *Regent v Millet* because, being only the Federal Court, it cannot apply *Steadman* without approval from a higher authority
  - However, it is unnecessary to apply a broader test of part performance
- The bank had altered its position on the basis of an agreement
  - The bank had altered its position on the faith of an agreement with Widin and so it would be fraud on the part of the Trustee in Bankruptcy (the legal owner) to rely upon the lack of writing to deny the bank's interest (this is similar to what happened in *Regent v Millet*)

#### Decision

- There was an oral agreement and sufficient acts of part performance to render enforceable the same [but evidence on facts??]

### 3 Summary

- For evidence of an oral agreement to be led such as to enable its enforcement, there must be sufficient acts of part performance
  - Sufficient acts
    - Entering into possession of the interest as far as was possible (spending money, laying snares, employing staff: *Mason v Clarke*)
    - Expending money to improve the land during possession (*Millet v Regent*)
    - Deposit of title deeds and loan of money to create an equitable mortgage (*ANZ v Widin*)
  - Insufficient acts
    - Mere possession (but look to circumstances for clarification) (*McBride v Sandland*)
    - Payment of money without more (*McBride v Sandland*)
    - Housework and care performed 'out of love and devotion' (*Ogilvie v Ryan*)
      - But not looser test in United Kingdom cases, which only require acts to suggest an agreement on the balance of probabilities (*Kingswood Estate v Anderson; Steadman v Steadman*)
- Those acts must be *unequivocally referable* to some such agreement
  - Acts are unequivocally referable and in their own nature referable to an agreement of the same general nature as that that alleged (*Regent v Millet*)
    - Domestic chores and nursing care are not referable (*Ogilvie*)
    - Payment of money is not referable (*McBride*)

- Acts done to establish the existence of the agreement must be permitted but do not have to be specifically required by the agreement
- This establishes the existence of the oral agreement alleged
- There must not be any other reasonable explanation for the performed acts
  - Care and affection (*Ogilvie v Ryan*; *Maddison v Alderson*)
- The acts must be done in reliance and the other party must permit them on this footing
  - Otherwise there is no inequity to remedy

### C      *Hypothetical*

- General rule
  - Formalities requirements: ss 53 and 55 *PLA*
  - Prima facie, Ken's agreement with Barbie is unenforceable as a result of the *PLA* (formalising *Statute of Frauds* in Victoria)
- Exception
  - Part performance: seeks to prevent use of the *Statute of Frauds* to perpetrate a fraud
  - Allows for the enforcement of interests in circumstances where formalities have not been complied with
- Requirements of act of part performance
  - Must be 'unequivocally referable' to 'some agreement' (*Regent v Millet*)
  - This phrase has been interpreted in *Ogilvie v Ryan* as meaning that there must be no other plausible explanation (love, affection, etc)
  - *Steadman v Steadman*: UK case only, broader approach but has not yet been expressly applied in Australia
  - *Regent v Millet*: only need be referable to 'some agreement' in the general nature of the alleged oral agreement, not specific clauses
    - Mere payment is usually equivocal
    - Here, unlike *Steadman*, where the husband signed documents, Ken only paid money to Barbie — nothing more
  - *ANZ v Widin*
    - Commercial banking facility: all bills forwarded to the bank, bank pays them, charges interest to the company
    - ANZ did this in return for security from Widin; however, there was not a registered mortgage — just a few scattered items of evidence: a note in the bank manager's diary, a standard form of mortgage without particulars filled in, and oral agreement of mortgage in relation to the house
    - Widin becomes bankrupt; bankruptcy trustee (who recovers money) wants to sell the house; bank disputes this, claiming that they are entitled to it
    - Act of part performance: paying money to Widin's creditors in the form of bills
    - Test: must be *unequivocally referable*; here, paying the bills is more than mere payment of money — referable back to the oral agreement
    - Agreement enforceable
      - Identity of parties: bank a commercial entity (doesn't pay money gratuitously)

- Application
  - Mere act of payment likely to be equivocal unless broader *Steadman* approach is adopted
  - But is Ken likely to be paying money gratuitously to his ex-wife, except as pursuant to some agreement?
    - Possible that *Regent v Millet* test satisfied, by reference to the nature of the parties (as in *ANZ v Widin*, but in another context)
  - However, the courts' general reluctance to interfere in familial situations may lead to the agreement being unenforceable

## **IV Conveyancing Practices**

### **A A Typical Transaction Involving Land**

#### **1 Discussions with an agent of the seller**

- Selecting sale type
- Granting the realtor authority to act as agent (eg, 'exclusive auction authority' for a term, usually 30 days)

#### **2 Discussions with the vendor's solicitor**

- Preparation of s 32 statement (obtaining copies of title documents, etc)
- Inclusion of current title information in contract of sale by auction
- Drawing up of costs agreement with solicitor

#### **3 Auction/private sale**

- Negotiations (eg, sale conditional upon finance)
- Signing memorandum of sale (optional)
- Payment of deposit

#### **4 Buyer's research and registration**

- Title search
- Registration of transfer
- Obtaining finance
- Determining and implementing a method of co-ownership, if applicable

#### **5 Post-sale conduct by buyer's solicitor**

- Prepare statement of rate adjustments
- Settlement documents (disbursements, etc)
- Notice of acquisition
- Final title search (changes since search at time of sale)
- Lodgement of transfer with Land Titles Office

#### **6 Settlement**

- Payment of balance by the buyer
- Mortgagor releases duplicate certificate of title
- Bank takes title documents for registration
- Cheque to old mortgagor
- Cheque from new mortgagor
- Remaining balance to vendor
- Transfer of keys

**B**      *Possible Contingencies*

- Inaccurate value estimate
- Buyer has second thoughts (private sale cooling off provisions unless solicitor consulted)
- Disagreements about apportionment of rates etc
- Property damaged between sale and settlement
- Lack of interest at auction/private sale
- Changes to title/encumbrances in between preparation of documents for initial auction and subsequent sale
  - 5 week delay — new registered or unregistered interests (or loss thereof)
- Misrepresentation by omission in relation to fixtures, subsequent dispute by buyers
- Misrepresenting level of interest in the property
- Difficulty obtaining finance by buyers
- Disputes about chattels, condition of property upon settlement