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PROPERTY INTERESTS IN LAW AND EQUITY

CREATION AND TRANSFER OF INTERESTS IN LAND AT LAW

DEEDS

- ❖ The general rule is that interests in land must be created and transferred by **deed** to be effective at law (*Conveyancing Act 1919 (NSW) s 23B(1)*)
 - A **deed** is a formal document which, at common law, had to be written on vellum or parchment, and had to be sealed and delivered. The requirements for a valid deed are now specified in s 38(1)
 - In relation to delivery, the maker of the deed must demonstrate that s/he intends the deed to be immediately binding on execution (*Xenos v Wickham (1867)*)
 - This may occur whether or not the deed is physically handed over (*Doe d Garnons v Knight (1826)*)

LEGAL INTERESTS CREATED BY PAROL OR BY CONDUCT

- ❖ Under the *Conveyancing Act s 23B(2)(d)*, leases which are not required to be in writing are exempted from the requirement of a deed, to be effective at law
 - By s 23D(2), leases for a period not exceeding 3 years at a market rent, taking effect immediately in possession and without taking a fine, may be validly created orally at law

CREATION AND TRANSFER OF INTERESTS IN LAND IN EQUITY – CONTRACTS FOR THE SALE OF LAND

- ❖ A contract for the sale of land is unlike a conveyance or an assurance, by virtue of the fact that it is a binding promise to convey or assure the interest at some time *after* the formation of the contract, usually on tender of the balance of the agreed purchase price
 - Until that time, the vendor (or landlord or mortgagor) remains the owner at law
- ❖ Under s 54A(1) of the *Conveyancing Act*, no action or proceedings may be brought upon any contract for the sale or other disposition of land or any interest in land, unless the agreement *is in writing*, and signed by the party to be charged or by some other person

thereunto lawfully authorised by the party to be charged

THE REQUIREMENT OF *SPECIFIC PERFORMANCE*

- ❖ Although a contract for the sale of land is enforceable if there is a sufficient memorandum signed by the party to be charged with it, it is only possible for the purchaser to have an interest in the property if s/he is entitled to the *remedy of specific performance*
 - Without this order, by means of which the court compels the vendor to make good the promise to transfer the property, the purchaser's remedy lies only in damages for breach
 - The remedy of specific performance is the **condition precedent** for the acquisition of a proprietary interest by the purchaser (*Stern v McArthur* (1988))
 - But the proprietary interest cannot exist at law: at the point of contract, no deed of conveyance or actual transfer of interest has been executed. The essence of the contract is to promise a conveyance or transfer *at a later stage*; that is, at the time of settlement

THE DOCTRINE OF PART PERFORMANCE

- ❖ The **doctrine of part performance** has been developed by courts of equity to assist purchasers where there is no signed documentation capable of satisfying the requirements of s 54A of the *Conveyancing Act*
 - The origin of the doctrine is to prevent the statute being used as an instrument of fraud: if one party honestly believed a contract existed, and in doing so incurred expenses, it would be unjust for the other party to then plead the statute
 - The doctrine has been preserved by ss 23E(d) and 54A(2) of the *Conveyancing Act*
 - Note that part performance requires a contract, whereas estoppel does not
 - Outcome is also different between the two – part performance leads to the specific performance of a contract, whereas the successful argument of estoppel leads to any number of discretionary remedies (including equitable