

2017 MLL325: Land Law Exam Notes

Legislation

Property Law Act 1958 (Vic) (the 'General Law' legislation)

Transfer of Land Act 1958 (Vic) (the 'Torrens' legislation)

Electronic Conveyancing (Adoption of National Law) Act 2013 (Vic)

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WEEK 1: Topic 1

General Law Land and Priority Rules

There are two systems of land registration in Australia:

- i) General Law Land; and
- ii) Torrens Title Land.

Land under the general law system of land title is referred to as 'general law' land, or 'old title' land or 'common law' land. For general law land, the only way legal title can be transferred from one person to another is by *deed*, called a 'deed of conveyance'. For the sale of an interest in land, the vendor must *prove* his/her title to the land to the purchaser. To do this, the purchaser traces the vendor's title to check for a good root of title by examining the chain of title. The Torrens system was introduced to Australia in the middle of the 19th Century (1860s), attributed to Sir Robert Torrens. Land under the Torrens title system is known as 'Torrens title' land. An interest in land is known as a *registered* interest in land. It can also be called a legal interest in land, but should not be confused with a *legal* interest in General Law land.

Legal Interests in Land Under General Law

The general principle for the creation of legal estates is that all conveyances or dispositions of legal interests in land (unless they are by will) must be made by a formal deed. In Victoria, the PLA sets this out in s 52(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.

A 'conveyance' is defined by s 18 of the PLA to include a mortgage, charge, lease, assent, vesting declaration, disclaimer, release, surrender, extinguishment and every other assurance of property or of an interest by any instrument except a will.

The only exception to this statutory requirement applies to oral leases created for three years or less. The exception is set out in s 54(2) PLA:

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.

A 'deed' for the purposes of s 52(1) PLA will be a document which has been signed by both parties with the intention of operating as a deed. The document should be signed and witnessed by both parties and it does not need to have a wax or wafer seal; there should be a printed indication where the seal would be affixed. Any instrument which is not in the form of a deed will not create a legal interest under s 52(1) of the PLA. Section 73 and s 73A of the PLA set out requirements concerning the creation and execution of deeds.

Section 73(1) PLA sets out that where an individual executes a deed, they shall either sign or place their mark upon the same and sealing alone shall not be deemed sufficient. Section 73A sets out that an instrument executed after the date of the *Property Law (Deeds) Act 1977* which is expressed to be sealed shall operate as if it had actually been sealed.

These provisions set out that whenever a person has an estate and wishes to convey that estate to another, it must be carried out by way of deed (unless s

52(2) PLA applies). If there is no formal deed, then no legal interest can be created. If a deed has been executed, then the interest will be treated as legal because it is enforceable at common law. If no deed is executed, the interest may still be enforceable under the equitable jurisdiction.

Reading – pp 525-528 (execution by deed)

CB 10.2 – 10.5

Equitable Interests in Land

The creation of equitable interests in land does not have to occur by deed but it does usually have to occur in writing. This is to prevent fraud in the creation and transfer of interests in land. The case law tends to take a liberal view of what amounts to signing and writing in order to thwart evasion of contracts by unscrupulous vendors seeking to rely on non-compliance with the *Statute of Frauds*.

The main provision relevant to the enforceability of equitable interests in land is s53 PLA. S 53 provides:

- (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 authorized 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 authorized in writing or by will.
- (2) This section shall not affect the creation or operation of resulting, implied or constructive trusts.

Reading – pp 463-466 (formality requirements, Statute of Frauds)

CB 9.9 – 9.13

Section 126 of the *Instruments Act 1958* (Vic)

Section 126 of the *Instruments Act* is the Victorian re-enactment of the 1667 *Statute of Frauds* (Eng) and provides that:

An action must not be brought to charge a person upon a special promise to answer for the debt, default or miscarriage of another person or upon a contract for the sale or other disposition of an interest in land unless the agreement on which the action is brought, or a memorandum or note of the agreement, is in writing signed by the person to be charged or by a person lawfully authorised in writing by that person to sign such an agreement, memorandum or note.

This provision relates to the ***enforceability*** of all contracts or dispositions relating to land whether they are legal or equitable in nature. What it means is that an interest arising under a contract for the sale of land or a disposition of land will not be ***enforceable*** in court unless the written agreement creating the interest or a note or memorandum of the agreement is produced. This does not mean that an equitable interest over land cannot be created orally; it simply means that in order to enforce that interest in court, the oral agreement must be put into writing.

For example, an oral declaration of trust can be created, but if the beneficial interest under that trust is challenged, the beneficiary must enforce it in court and the court will require written evidence, signed by the settlor, that the oral declaration occurred.

The more difficult question concerns the effect of s126 upon equitable interests arising through part performance or through the imposition of the court. The effect of s 126 upon this type of interest is not to make them invalid, but rather *unenforceable*. Where there is no dispute on the matter, the unenforceability of the contract will be irrelevant to the parties. The difficult situation would only arise where the contract has only been partly executed (or not executed at all), there is no evidence in writing of the existence of the contract and there is a dispute. Despite the application of the formality requirements, there reaches a point where the parties have relied upon an agreement to such an extent and changed their position in accordance with it to such a degree that equity would consider it unfair and unconscionable to deny the existence of a valid interest purely on the basis of formality requirements. In this situation, the equitable jurisdiction is prepared to enforce an interest in land despite the absence of writing.

Equitable interests arising from specific performance and part performance

We saw in MLL327 Property Law that equitable interests could arise where a court was prepared to issue a decree of specific performance (for example, an equitable lease in *Walsh v Lonsdale*). However, there are several pre-conditions to the awarding of a decree of specific performance

1. The contract must be valid. What is a valid contract depends upon the ordinary rules of contract law – offer, acceptance, consideration, certainty, intention to create legal relations, no vitiating factor such as illegality, mistake, misrepresentation and so on.
2. The contract must comply with the general requirements applicable to contracts for the sale of land.
3. Equity will not grant specific performance of a contract if the plaintiff has an adequate remedy at law in damages. However, equity has always taken the view that each interest in land, as a commodity, is unique. So, in the eyes of equity, damages will rarely be an adequate remedy for the failure of a vendor to complete a contract for the sale of land.
4. The party seeking specific performance must prove that he or she has performed, or is ready and willing to perform, the substance of his or her own obligations under the contract. So, for example, the plaintiff purchaser must be ready willing and able to pay the full purchase price on time.
5. If the contract is conditional, for example, “subject to finance approval”, the contract does not become specifically enforceable unless and until the condition is satisfied. It is common for a transfer of land to be subject to a statutory requirement that some government body or agency consent, be satisfied (e.g. the council for subdivision) prior to the contract being specifically enforceable.
6. There must be no bar to the award of the equitable remedy of specific performance. The equitable jurisdiction may use its discretion to refuse relief where undue influence, delay (laches), or acquiescence has occurred.
7. Specific performance of a contract for the sale of land will not be available unless the vendor has proven good title or the purchaser has accepted such title as the vendor has. It is a term of all contracts for the sale of land, either express or implied, that the vendor proves a good title to the land.

As discussed above, a lack of writing will not be fatal to the recognition of an equitable interest because the contract may still be specifically enforceable where there is no writing, or insufficient writing, if there have been sufficient acts of part-performance of the contract, that is, there were sufficient acts performed by the plaintiff who was seeking to enforce the contract. The doctrine of part performance allows for the enforcement of an oral contract for the sale of an interest in land, despite the absence of writing, when the contract has been sufficiently acted upon. The basis of the doctrine of part performance is that where one of two contracting parties has been induced, or allowed, by the other to alter their position on the faith of the contract (for example, taking possession of land and expending money in building), it would be a fraud on the party altering his or her position to set up the legal invalidity of the contract.

What is part-performance? There are two different perspectives:

1. The more stringent approach derives from the old House of Lords case of *Maddison v. Alderson* (1883) 8 App.Cas. 467. In that case, Lord Selborne explained the conceptual nature of the doctrine concluding that the acts relied upon as part-performance must be unequivocally, and in their own nature, referable to some such agreement as that alleged.
2. The more liberal approach was adopted more recently by the House of Lords in *Steadman v. Steadman* [1976] A.C. 536 where the court concluded that acts will constitute part performance if on the balance of probabilities they indicate that a contract of the kind existed.

Australian courts have not yet endorsed the approach in *Steadman* but may do so in the future. (See, *Regent v Millett*)

Hence, in order to establish part performance, the following must be shown:

- that the acts of performance unequivocally relate to the agreement alleged;
- that the act relied upon must have been done on the faith of the agreement and must have resulted in a change of position with respect to the subject matter of the contract such that the person would be unfairly prejudiced if the other party were to take advantage of the absence of any written evidence.

Section 53(2) PLA specifically provides that the requirement of writing does not apply to the creation of resulting, implied or constructive trusts. Further s55(d) PLA provides that the equitable doctrine of part performance shall not be affected by the formality requirements set out in s53 PLA.

Whilst s126 *Instruments Act* does not specifically acknowledge that part performance is an exception to those formality requirements, it may be treated in this way.

Reading – pp 467-468 (Doctrine of Part Performance)

CB 9.14

Scope and Range of Land Interests: Boundaries and Encroachments

The boundaries of land interests are determined according to natural and artificial measures. If the land does not abut water, the land boundaries will be defined in accordance with specific measurements in the certificate of title. By contrast, if the land does abut water, the boundary will be natural. Land abutting tidal water will have the mean high water mark as the boundary and land abutting non-tidal water will have the *ad medium filum aquae* rule i.e.

the boundary will be the centre of the water unless otherwise abrogated by statute. In Victoria see *Land Act* 1958 (Vic), s385.

Reading – pp 138-144 (Tidal water boundaries and water rights)

CB 3.18 – 3.21

The owner of land will have rights over all natural resources on the land, subject to legislative regulation. Any encroaching building or structure will vest in the owner of the adjoining land. Encroachment can also occur through airspace and any such encroachment may constitute a trespass

Reading – pp 148-150 (encroachments on to land)

CB 3.29