

Land Transfer and Formalities

- **General Law land**
 - PLA s.52(1) – All conveyances of **land** or of any interest therein are void for the purposes of conveying or creating a legal estate unless made by deed.
 - Conveyances must be made by deed. A deed is a formal document, signed by both parties, that has all the terms and conditions of a gift or sale. No deed = no title (at common law).
- **Torrens System land**
 - TLA s.40(1) – “no instrument until registered...shall be effectual to create, vary, extinguish or pass an estate...in land... but upon registration the state...shall be created...or pass”
 - TLA s.40(2) – “Every instrument when registered... shall be valid and effectual to all intents and purposes as a deed duly executed and acknowledged.
 - No registration = no title. Once registered, land is as good as having been put on an executed deed.
- **Equitable Title**
 - Title passes in equity when there is a specifically enforceable contract of sale (i.e. no need for deed or registration). This requires a binding contract and either:
 - A written contract, note or memorandum in writing (s.126 Instruments Act); or,
 - An oral contract supported by sufficient acts of part performance.
 - Equity operates over a contract that is specifically enforceable.
- **Conveyancing**
 - Once the deposit for a house is paid, you are the equitable owner.
 - Once the full settlement amount has been paid, you are the general legal and equitable owner.
 - Once the title is registered, you are the owner under the Torrens system.
 - The purchaser obtains equitable rights over a property the moment a specifically enforceable contract is formed.
- **Transfer of Title in Equity**
 - *Instruments Act (Vic) s.126(1)*
 - An action must not be brought against a party to...a contract for the sale or disposition of land unless the agreement (or memorandum or note) on which the action is brought is in writing signed by that party or by a person lawfully authorised in writing by them to sign such an agreement, memorandum or note.

ANZ v Widin

Facts: W met with ANZ and verbally agree to create a mortgage, as noted in ANZ diary. W signed instrument of mortgage without including the date of execution or title particulars (CT # mislaid by Sate Super Board). ANZ advanced \$ to W anyway. The title particulars

were later inserted and dated. W was declared bankrupt before the final dating – if the mortgage was effective after the date, it would be void.

Held: There is no legal mortgage, as there was no dating/particulars at first and the deed is invalid. Is there an equitable mortgage? **The diary note (contained date and particulars) and the incomplete deed (contained signature) could theoretically be combined to form a complete agreement under s.126, but only oral evidence linked the two which is insufficient to link documents.** Only oral evidence linked the two and so s.126 was not satisfied, the contract is not void but it is unenforceable. ANZ won anyway on the basis of oral agreements/part performance.

- **Oral Agreements and Part Performance**

Regent v Millett

Facts: R agreed M could live in their house if M paid the mortgage. Once it was paid R would transfer the title to M. M gained possession, paid mortgage instalments, renovated the property and borrowed money in anticipation of receiving further funds from R (from an loan refinancing). A year later, R reneged on the agreement and M sought specific performance.

Held: Part performance must be linked to the agreement. There are 3 possible tests:

1. Least strict – acts must, on balance, point to some existence of some contract and be consistent with the contract alleged.
2. Strict – must unequivocally, and with context, be preferable to some agreement that is alleged. Could it be explained by another type of contract?
3. Strictest – acts must necessarily imply the existence of the contract alleged.

The second test is to be applied. (2019 reaffirmed in *Pipikos*) Here, the payments were made to the bank rather than to M and the renovation costs (combined with possession) unequivocally pointed to the contract requiring R to pay mortgage instalments in exchange for later acquiring the property.

ANZ v Widdin

Held: Part performance included; the money deposited, ANZ's indemnity they took, authority to complete a blank mortgage, endorsed instalments of W's part as required. All combined, these unequivocally referred to a mortgage contract.

- **What property rights arise in equity under a contract of sale of land?**

- Once there is a contract in place, any equitable title is extinguished. However, this only applies a remedy in equity if breach of the contract could grant specific performance.
 - If specific performance could not be granted as a remedy, equitable title is not extinguished.
 - The sale of land being "subject to finance" will mean it is not specifically enforceable unless the finance has already been obtained.
- The vendor becomes a trustee in equity for the purchaser, and the purchaser becomes the equitable owner.
- The vendor has a charge or lien over the land as security for the unpaid purchase price and a possessory interest until the money is paid.
- The following cases refer to remedies in equity, not existence of equitable title.

Bunny Industries v FSW Enterprises

Facts: B and FSW entered a contract for sale of land and B paid the deposit. 10 days later, FSW sold the land to a third party for a higher price. That third party then became the registered proprietor. B had no claim as it was registered to the new purchaser and sought proceeds of sale from FSW (the profit from selling to a third party instead of B). The claim for proceeds rested on an action for breach of trust; that FSW held the property on trust from the date of sale.

Held: A trust relationship arises where a Court would grant specific performance of a contract of sale. Upon execution of the contract, the vendor becomes a trustee for the purchaser. The vendor is more than a bare trustee because it has a personal and substantial interest to the extent of the unpaid purchase price. The purchaser may devise, alienate, or charge its equitable interest in the land, therefore their interest is more than personal (to the purchaser). The extent of the purchaser's equitable interest is equal to the money paid. Where the contract is clear, a court will not permit V to transfer title to a third party because in equity, the property is already owned by P. The second sale was a breach of trust and B received the proceeds of that sale.

Tanwar Enterprises v Cauchi

Facts: C owned 3 parcels of land which he sold to T for \$45M. T failed to pay on extended settlement date. C terminated the contract of sale one day later despite T being able to pay, as the contract stated the settlement date was an essential term. T sought an order for specific performance and an order for relief against forfeiture of its equitable interest in the land. Did T still have an equitable interest?

Held: A vendor under an uncompleted contract is not a trustee for the purchaser. A purchaser's equitable interest under the contract is equal to the availability of specific performance. A purchaser in breach of an essential term cannot insist on specific performance, but does have a lien to recover payments. T could not claim specific performance as he had breached an essential term.

- ***Statutory Regulations***

- ***Cooling off – SLA s.31***

- The purchaser may give notice they wish to terminate a contract of land sale any time before the expiration of three business days from that date they signed the contract. A deposit paid must be refunded except for \$100 or 0.02% of the purchase price, whichever is greater.
- This does not apply to land;
 - for industrial or commercial use, or
 - greater than 20 hectares in size, or
 - where the land is sold by public auction, or
 - when the contract is entered into within three business days of which a publicly advertised auction was to be held.

- ***Vendor's disclosure – SLA (Sale of Land Act) s.32***

- The vendor in a contract of land sale must give the purchaser, before they sign the contract, a signed statement containing information of;
 - Vendor's details

- Title details
 - Building permits issued in the past 7 years
 - Particulars of owner-builder warranty insurance
 - If the vendor is the owner-builder who completed building works, a written inspection report which lists any defects
 - Particulars of any mortgages or “charges” over the land (i.e. debts charged against the land)
 - Information regarding covenants, easements and any other restrictions on title (whether or not they appear on the title)
 - Planning information, particularly where zoning restricts land use
 - Information regarding outgoings payable by the owner of the property
 - Disclosure of any notices or orders issued by the authorities, regarding fencing, road-widening, sewerage etc...
 - If there is access to the property by road
 - Information on services connected to the property
- *Failure to comply with s.32 – SLA s.32K*
 1. This section applies if a vendor—
 - a) [supplies false information]; or
 - b) [fails to supply all the information required]; or
 - c) fails to give a purchaser a [signed] section 32 statement... before the purchaser signs the contract...
 2. The purchaser may rescind any contract for land sale which has been entered into on the basis of s.32 information at any time before the purchaser accepts title and becomes entitled to possession or to the receipt of rents and profits.
 3. The purchaser may rescind any contract for land sale where the vendor fails to give the purchaser a s.32 statement before the purchaser signs the contract at any time before the purchaser accepts title and becomes entitled to possession or to the receipt of rents and profits.
 4. Despite subsection (2) and (3), the purchaser may not rescind a contract for the sale of land if the court is satisfied that—
 - a) the vendor has acted honestly and reasonably and ought fairly to be excused for the contravention; and
 - b) the purchaser is substantially in as good a position as if all the relevant provisions of this Division had been complied with.
 - SLA s 32L (civil penalty provision)
- *Due Diligence Checklist – SLA s.33B*
 - Due diligence checklist to be made available
 - 1. A vendor offering land for sale that is vacant residential land or land on which there is a residence must ensure that a due diligence checklist is made available to any prospective purchaser from the time the land is offered for sale.

Penalty: 60 penalty units.

2. A vendor must ensure that the due diligence checklist is in the form approved by the Director of Consumer Affairs Victoria.
Penalty: 60 penalty units.
 3. Subsections (1) and (2) do not apply to a vendor if the vendor has engaged a person who is a licensed estate agent to act for the vendor.
 4. A person who is a licensed estate agent and acting for a vendor, offering land for sale that is vacant residential land or land on which there is a residence, must ensure that a due diligence checklist is made available to any prospective purchaser from the time the land is offered for sale.
Penalty: 60 penalty units.
 5. A person who is a licensed estate agent and acting for a vendor, must ensure that the due diligence checklist is in the form approved by the Director of Consumer Affairs Victoria.
Penalty: 60 penalty units.
- *Passing of risk – SLA s.34-36*
 - Under common law, the property would be at the purchaser's risk at the time of contract. (*Ziel Nominees v VACC Insurance*)
 - Statutes afford greater protection to Purchasers than under the common law.
 - SLA s.34: power to rescinding when house is destroyed before settlement, the purchaser can rescind the contract within 14 days of finding out about the damage.
 - SLA s.35: purchaser can benefit from vendor's insurance.'
 - SLA.36: If the vendor repairs it before settlement, the purchaser cannot rescind.

Formalities Checklist

