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## a. Requirements for Executory Agreements (promises)

### **Conveyancing Act 1919 (NSW) s 54A: Contracts for sale etc of land to be in writing**

1. No action or proceeding may be brought on any contract for the sale or disposition of any interest in land unless the agreement, or some memorandum or not thereof, is in writing, and signed by the party to be charged or by some other person lawfully authorised by that person
2. This section does not affect the law relating to part performance

- Person to be charged = person who agreement is to be enforced against
- **Effect:** Contracts for either the sale of an interest in land or a disposition of an interest in land (e.g. creating securities in land) are only enforceable if:
  1. They are contained in a written document (including all essential terms), **and**
  2. The document was signed by the person whom the contract is to be enforced against (or one of their authorised agents)
- **Exception: Part Performance**
  - Provides an exception to the requirement for written contracts – equity can enforce oral/ unsigned contracts re land where there has been part performance
  - **Test:** A contract can be enforced in equity where Plaintiff can establish that they carried out acts specifically and unequivocally referable to ‘the performance of some such contract as alleged’ → *Pipikos v Trayans 2018*
  - **High Threshold:**
    - Part performance in context of land sale requires the actual transfer of some right of ownership → Isaacs J in *Cooney v Burns 1922*
    - Payment of funds by P not directly to D (e.g. paying for lawyers to prepare agreement) is not sufficient → *Cooney v Burns 1922*
    - Payment of part of purchase price alone (without delivery of possession etc) not enough → *Khoury v Khouri*
    - “Steps towards performance” (e.g. drafting of agreements, taking possession of lease for purpose of inspection/preparation) are not themselves performance → *Cooney v Burns 1922*
  - Performance of various different acts may combine to demonstrate sufficient part performance (even where any act alone would not) → *Ciaglia v Ciaglia 2010*
  - Taking of possession, and improvements made by the purchaser of a property (with the knowledge of the vendor) are acts of performance → *Regent v Millett*

## Equitable Interests created by Agreements

- Where a contract does not meet formality requirements and is not subject to exceptions re part performance, purchasers/lessors may still have equitable interests which can be protected under equitable jurisdiction:

### A. Purchaser's Equitable Interests (Fee Simple)

- Validity v Enforceability of Contracts:
  - A contract is valid where it can operate normally – ie where there was offer and acceptance. Here, contracts for sale of land are only valid where the vendor had the right to transfer the title
  - Contracts can be valid but not enforceable (ie they can operate, but cannot be enforced by Courts because they do not meet statutory requirements)
- Vendor-Purchaser Constructive Trust → *Lysaght v Edwards 1876*
  - Where a *valid* contract re property interests is made, vendor becomes a constructive 'trustee' for the benefit of the purchaser up until legal title is transferred to the purchaser (ie until the purchase is completed)
  - **Rule:** This gives the parties equitable interests between the time that the purchaser accepts the title, and the title is actually transferred (ie even if they have not paid yet) :
    - Vendor: Gains a *personal interest* in the purchase money (which can be enforced against the purchaser)
    - Purchaser: Gains a *beneficial title* to the land (they become the equitable owner of the land before title has been legally transferred), subject to the payment of the purchase price
  - Note – a trust relationship is usually not established until some sort of act of performance of contract (e.g. payment of purchase price)
  - During this time, the vendor is subject to obligations similar to that of a trustee – ie cannot treat estate as his own, cannot wilfully damage it etc
  - However, not entirely the same as an express trust relationship. Vendor is entitled to keep rent and profits up until completion etc.
- Purchaser has **4 equitable interests** which pass to them in stages as title is made and purchase price is paid:
  1. An interest in the land that is enforceable against third parties
  2. An equitable right that the vendor exercise due care to preserve and maintain the land pending completion

## 1. Transfer by Sale – *Sale of Goods Act 1923 (NSW)*

- Definitions in Act: **s 5**
  - Goods: All personal chattel other than things in action and money.
  - Property: General property in goods (ie title to the goods)

### 1. Was there a Contract for Sale of Goods?

#### a. What is a Contract for Sale?

- A contract of sale of goods = a contract where the seller transfers or agrees to transfer property in goods to the buyer for a money consideration called the price → **s 6(1)**.
- A contract for sale may be absolute or conditional → **s 6(2)**
- Is the Act only applies where contract includes **2 elements**:
  1. Sale of a *good* (rather than a service)
  2. For the exchange of *money* (rather than other goods)
- **Contract must be concerned with a good**
  - **Test:** Was the substance/essence of the contract an agreement to purchase a good, or was it an agreement for the exercise of skill and labour in which the passing of some material is only incidental/ancillary? → *Robinson v Graves*
  - E.g. hiring a painter for a piece is really paying for the exercise of skill and expertise by that painter, rather than the painting itself
  - Conversely, the purchase of a custom-made bike is a purchase of the bike itself, with the labour only being incidental to this
- **Contract must be for sale of this good**
  - Hire-purchase agreements (where the hirer has an *option* but not a *duty* to purchase the good) is not included as sale of good → *Helby v Matthews 1895*
  - Whether an agreement creates a sale of a good or merely a hire-purchase agreement is a matter of construction (ie court will seek to find objective meaning of agreement by looking at its whole) → *McEntire v Crossley Bros*

#### b. Sale vs Agreement to Sell

- Where the contract transfers property in the goods from seller to buyer, the contract is a 'sale' → **s 6 (3)**
- Where the transfer is to take place at a future time or is subject to some condition, the contract is an 'agreement to sell' → **s 6 (3)**
- An agreement to sell becomes a sale when the time elapses or the condition is fulfilled → **s 6 (4)**

#### c. Existing v Future Goods

- The goods which form the subject of a contract of sale can be either existing goods owned/possessed by the seller or future goods → **s 10 (1)**
- Where a contract purports to sell a future good, the contract operates as an agreement to sell (above) → **s 10 (3)**

## 2. Was the Contract Made?

- Unlike contracts for sale of land, sales of goods do not have to comply with formality requirements
- A contract of sale can be made → s 8
  - a. In writing,
  - b. By word of mouth,
  - c. Partly in writing and partly by word of mouth, or
  - d. May be implied by the conduct of parties

## 3. Effect of Contract – When does property pass?

- 2 requirements for property to pass (ie title to be transferred from seller to buyer):

### 1. Title will pass when parties intended it to

- If contract expressly states when title is to pass, then this is when it will pass (so long as is ascertainable)
- If contract is not specific, intent must be determined through construction. Various rules/assumptions apply.

### 2. The subject of the property must be specific or ascertained

- Title cannot pass until the actual material object that is going to be transferred has been identified/determined
- This can either be done before contract is made (specific) or chosen by seller after contract is made (ascertained)

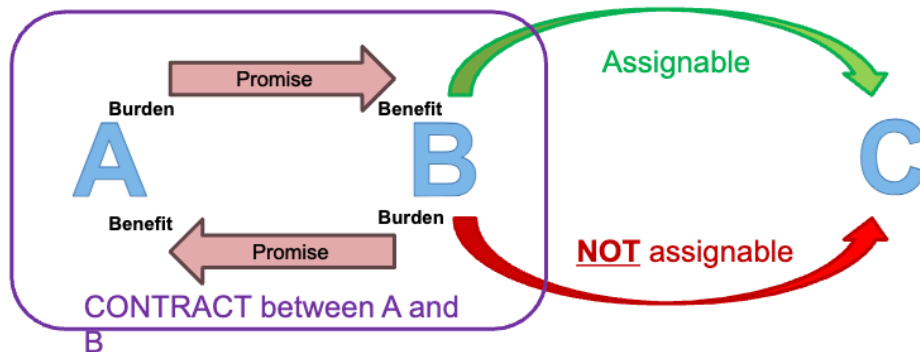
### 1. Is the good specific at time of contract?

- Depending on whether the actual physical good being sold has been identified, goods can be categorised as:
  - Specific Goods: Goods identified and agreed upon at the time of contract
  - Unascertained Goods: Goods not yet identified as subject to the contract at time the contract is made
  - Ascertained goods: Unascertained goods which become ascertained when the parties agree which specific goods are subject to contract (ie are identified after contract formation)
- **If the good is specific**
  1. Already ascertained.
  2. Look to intent to determine when title is intended to be passed – go to 3a and 3b(i)
- **If good is unascertained**
  1. Needs to be ascertained and appropriated before title can pass - go to 2
  2. Once the good has been ascertained, look to intent to determine whether this appropriation was intended to be enough to pass title – go to 3a and 3 b(ii)

## A. of contractual burdens/benefits

### 1. Assignment of burdens of a contract

- Burdens can only be transferred through **novation**:



- Novation = Where all three parties (the contractual parties and the potential assignee) come together and agree for the contract to be assigned to that assignee
- E.g. if A and B have contract, and B wants to assign its benefits/burdens to C.
- B cannot transfer its burden unilaterally – requires the consent of A.
- Effect of the novation is to void the contract between A and B, and create a new contract between A and C (meaning the original contract was not technically *assigned*)  
→ *Linden Gardens Trust 1994*

### 2. Assignment of benefits of a contract

- **General Rule:** A party can prima facies assign the benefits of a contract unless there are circumstances which preclude the assignment → *Pacific Brands Sport & Leisure 2006*
- Note: Benefit includes rights to performance, right to funds, right to terminate
- 2 main circumstances where benefit cannot be assigned:
  - a. Where there is a contractual prohibition on assignment
    - A contract may provide that rights under it are unassignable → this is a prohibition on the assignment of the *benefits* of the contract (because burdens are already unassignable without consent)
    - **Rules:**
      - If there is a term provided that a benefit *cannot be assigned*, any purported assignments will be void (will have no effect in law or equity) → *Linden Gardens Trust 1994*
      - If the term is simply a promise *not to assign* – the assignment will be effective, but other party can sue for breach
    - **Note:** Does not prevent assignment of fruits of contractual benefit

## 1. Assignments of future property

- **Rule:** Agreements to assign property (for value) become enforceable in equity once the property comes into the ownership of the assignor

### i. **Before assignor owns the property**

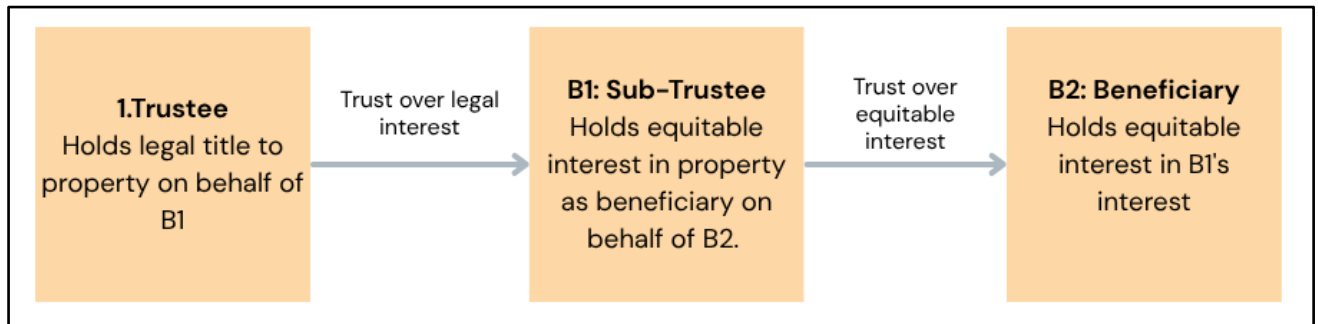
- While the property is still 'future property' (ie assignor does not yet own it), the agreement has no effect in law or equity
- Basic *nemo dat* rule – the assignor cannot assign something which they themselves do not yet have
- **Rule:** The assignee does not have any interest in the property at this point
  - Any promises to assign future properties as security will not have taken effect at this point – creditors will thus be unsecured if mortgagor goes bankrupt before the property comes into their ownership
- Note: Priorities between unassigned interests
  - In *Re Lind 1915* – court held that where there has been promises to assign to various promises, once the property comes into existence those with the earlier promise will take priority (based on earlier attempt to assign)
  - However, this may be decided differently today – seems inconsistent with general principle that no property rights exist until the assignor owns the property (in which case all the promises' interests would arise at the same time)

### ii. **Once assignor owns the property**

- **Rule:** Once the assignor comes into ownership of property matching the agreement, that property becomes subject to the terms of the agreement → *Holroyd 1862*
- At this point:
  - A constructive trust exists over the property until it is assigned to the assignee
  - The assignee obtains a beneficial interest in the property until this occurs
- Note – if only a partial assignment, only the portion of the property which is assigned will be subject to constructive trust
- Note: Existence of choses in action
  - A chose in action will often only come into 'existence' upon a certain condition/occurrence – e.g. a right to litigate re property, a right to sell mortgage assets
  - These will therefore only be 'assigned' at the point at which they come into existence (even if associated property was assigned prior) → *Equuscorp 2012*



## Declarations of Sub-Trusts



- The subject of a trust does not need to be a legal interest. Can declare a trusts over equitable interests (on infinite levels)
- **Sub-Trust:** Where a beneficiary of a trust declares that they hold their equitable interest on trust for a third party.
- **Test:** Whether a declaration of a sub-trust is a disposition depends on whether the sub-trustee retains active duties (remains in picture):

### i. Discretionary trusts

- Where B1 retains some active duties as a trustee
- This is usually in situations where they declare that they hold the equitable interest for either B2 or B3
- B1 still has duty to assign the interest between potential beneficiaries and thus cannot disappear from the picture.
- **Effect:** This creates a new interest for B2 (or B3). However, B1's interest remains unchanged.
- **This does not fall within 23(1)(C)**

### ii. Bare sub-trustee

- Where there is nothing left for B1 to do (no active duties)
- From moment sub-trust is declared, B1 disappears (they cease to hold the equitable interest) → *ISPT 2003*
- Because B1 as a trustee only has an equitable interest, equity can get rid of that interest and just say Trustee holds for B2
- **Effect:** B1 thus assigns their interest to B2.
- **This does fall within 23(1)(C)**



## 7. Priorities

- **Inconsistency:** Where there are multiple interests in a single property which are unable to co-exist
- Can arise where either types of interests are inconsistent (e.g. ownership), or
  - a. Where type of interests is inconsistent:
    - E.g. A's bike is stolen by a thief who sells it to B.
    - Both asserting exclusive ownership rights – cannot coexist
  - b. Where the value of the property cannot satisfy both interests:
    - E.g. A owns land and grants a first mortgage to both B and C.
    - If property is worth less than total security, then both interests cannot be satisfied.
- **Note:** Often due to defective transaction which do not usually pass good title – e.g. due to effect of theft or fraud

	Conflict	Rule
1.	Legal vs Legal Interest	<ul style="list-style-type: none"> <li>▪ <b>General Rule:</b> <i>Nemo dat</i> – one cannot transfer title which they do not have</li> <li>▪ Subject to statutory exceptions under the <i>Sale of Goods Act, Con</i></li> </ul>
2.	Legal vs Equitable Interest	<ul style="list-style-type: none"> <li>▪ <b>General Rule:</b> if equities are equal, law prevails</li> <li>▪ <u>Where equitable existed first:</u> legal interest will prevail so long as they did not have notice of equitable interest</li> <li>▪ <u>Where legal interest existed first:</u> preferences legal interest unless there is some gross misconduct</li> </ul>
3.	Equitable vs Equitable Interest	<ul style="list-style-type: none"> <li>▪ <b>General Rule:</b> <i>Qui prior</i> – prima facie, first title is considered to be stronger</li> <li>▪ However, courts do not apply this strictly – look for an outcome which is the '<u>best equity</u>' (based on conduct of parties)</li> <li>▪ Special Rules:               <ul style="list-style-type: none"> <li>○ <u>Equitable personality:</u> equitable interests in chose in action</li> <li>○ <u>Mere equities:</u> interests which can only exist in equity.</li> </ul> </li> <li>▪ Bona fide purchaser rule.</li> </ul>

### Legal vs Legal Interests: Chattel

- **Nemo Dat Rule:** A person cannot pass title which they do not have
  - Relevant where a person steals property and sells it to an innocent third party
  - True owner can always recover the property from an innocent third party, because that third party never obtained any title
  - Problem: creates uncertainty for purchasers
- **For Chattel:** *SOGA* creates exceptions in various situations to protect the title of innocent purchasers where they purchased from a party without title to the goods
  - **Important:** Do not apply where purchaser acted in bad faith (ie had notice of defect)
  - **Note:** Title will pass to the purchaser where owner has given their authority/consent to the sale → s 26(1)