

TOPIC 7: ACQUISITION AND TRANSFER OF PROPRIETARY INTERESTS; SALE AND GIFT OF PROPERTY

Overview

To gift land:

- General law land: execute a valid deed (s 52(1) PLA)
- Torrens land: registration (s 40 TLA)
- No contract is involved — and because there is no contract, the Lysaght v Edwards principle (equitable interest arising from a specifically enforceable contract) cannot apply to a failed gift

To sell land:

- A valid contract of sale is required — it must be in writing and signed by the person to be charged (s 126 Instruments Act 1958 (Vic))
- Then, at settlement: execute the deed (both land types, s 52(1) PLA)
- Then, for Torrens land only: registration (s 40 TLA)
 - Registrable Documents:
 - i. An executed Memorandum of Transfer; and
 - ii. Duplicate certificate of title
 - Sequence is:
 - i. Settlement — vendor executes and delivers the memorandum of transfer (deed equivalent)
 - ii. Purchaser lodges documents at the titles office
 - iii. Registration — legal title transfers at this point only (registration is the responsibility of the purchaser)
 - A registered document under the Torrens system is deemed to be a deed → property rules as to implications of the execution of a deed apply to the registration of a transfer → registration takes the place of the deed required by s 52(1) PLA (MGG 8.105). However, the converse does not apply: a deed alone does not suffice to transfer an interest under the Torrens system → until registration, (despite executed deed) the purchaser holds no legal title and remains at risk of a competing instrument lodged first taking priority

STEP 1 - INTRODUCTION

In order for [vendor] to transfer [property] to [purchaser], it must be established whether [purchaser] has a legal or an equitable interest. If the formalities are met, there is a legal interest, if they are not met, there may be an equitable interest.

LEGAL INTEREST

Overview

- **General law land:** deed required (PLA s 52(1)) — signed, sealed, delivered)

	• Torrens land: deed required (PLA s 52(1)) plus registration required (TLA s 40) — legal title does not pass until registration
General Law Land	Under General Law Land, legal title is transferred upon the execution of a deed (PLA s52(1)), which must be signed (PLA s 73(1)), sealed (PLA s 73A) and delivered. • It is sufficient that the words “signed, sealed and delivered” be present on the deed -> note these exact words do not need to be used? In this case, the property is general law land given [facts]. Legal title will therefore transfer to [purchaser] upon valid execution of the deed. Conclusion: Success: The deed was signed (s 73(1) PLA), expressed to be sealed (s 73A PLA), and delivered at settlement when [purchaser] paid the balance of the purchase price and the deed was handed over. Hence, legal title conveyed upon settlement to [purchaser]. OR Failure: 1. The deed was not signed by [vendor i.e. executing party] (s 73(1) PLA). 2. The deed was not sealed as the document was not expressed to be sealed (s 73A PLA). 3. The deed was not delivered. Delivery is constituted by any act evincing an intention to be bound. In the sale context this occurs at settlement when the buyer pays the balance of the purchase price and the deed is handed over, which did not occur here. Hence, the statutory requirement under s 52(1) PLA has not been met and legal title has not been transferred to [purchaser].
Torrens Land	Under Torrens Land, legal title is transferred upon the execution of a valid deed (PLA s52(1)) and registration of title (s 40 TLA). The deed must be signed (PLA s 73(1)), expressed to be sealed (PLA s 73A) and delivered. • It is sufficient the word “signed, sealed and delivered” be present on the deed - there is no longer a requirement for literal red wax to be affixed so it can simply be expressed to be sealed (s 73A) In this case, the property is Torrens land as [vendor] is the registered proprietor. Legal title will therefore transfer to [purchaser] upon registration. Conclusion: Success: OTF, there was a validly executed deed (s 52(1) PLA) and the title was registered in [purchaser]’s name (s 40 of the TLA). Hence, legal title has passed to [purchaser] upon registration.. OR Failure: OTF, The statutory formalities have not been met as there was no valid deed

	(s 52(1) PLA) / no registration (s 40 TLA). Legal title has not been transferred to [purchaser].
IF FORMALITIES NOT MET (analysis moves to equitable interest)	As legal formalities have not been complied with, [purchaser] has no legal interest in land. HOWEVER, an equitable interest may still pass to the purchaser provided there is a valid contract for the sale of land, there is sufficient evidence of the contract and the contract is specifically enforceable.

EQUITABLE INTEREST

Step 1 - Binding Contract of Sale

Background Overview	What is the contract of sale process? 1. Vendor's Disclosure Statement – pre-contractual matters 2. Parties exchange contracts – both parties sign a version of the contract for the agreed purchase price and swap copies. a. Buyer also pays a deposit – percentage of the sale price 3. The settlement period (30-90 days) time to arrange funds to pay the purchase price 4. Settlement – buyer pays – marks the performance of the deed and the deed is complete (i.e. completes performance) a. If General Law Land conveyance is complete at this point 5. Registration – if Torrens land Legal interest is conveyed upon settlement for General Law Land. For Torrens, title passes to the buyer upon registration.
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The first issue is whether there is a binding contract between [vendor] and [purchaser]. Prima facie, the essential elements of contract formation are satisfied — offer, acceptance, consideration and intention — and there has been an exchange of contracts. This element is [satisfied / not satisfied] on the facts.

ASK:

- Offer and acceptance?
- Consideration?
- Intention?
- Certainty/Completeness?

Step 2 - Evidence of a Contract

NOTE: ALWAYS start with pathway 1 before moving to pathway 2

Pathway 1: Written Evidence (s 126 Instruments Act 1958 (Vic))	Under s 126 of the Instruments Act 1958 (Vic), a contract for the sale or disposition of an interest in land is unenforceable unless evidenced by a written agreement, memorandum or note, signed by the person to be charged OR by a person lawfully authorised in writing by that person to sign, in this case [vendor / authorised person]. Per ANZ v Widdin, sufficient writing requires the essential terms such as the price, parties and particulars of the property.
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	OTF, [promisee] will argue that [contract, memorandum or note] is sufficient evidence of a written agreement under s 126.	
	Signature	OTF, [vendor / lawfully authorised person] [has / has not] signed the document. Note: an electronic signature suffices (s 126(2)).
	Specification of property and Other Essential Terms	[Promisor] may argue the written document does not satisfy s 126 because - it fails to contain sufficient particulars identifying the property, as was the deficiency in Widin. OR - the document fails to record one or more of the essential terms of the lease, namely [the parties, the rent, the commencement date, and the maximum duration of the term], rendering the agreement unenforceable under s 126. <i>If applicable continue to combination of documents</i>
	Combination of documents:	While the signed document alone does not satisfy s 126 as it is missing [essential ingredient], two or more documents may be combined provided the signed document expressly or impliedly references the other document or transaction (Widin). <i>Note: Oral evidence cannot be used to create the link between documents. The connection must be spelt out of the signed document itself, either expressly or by implication (Widin).</i> OTF, [party] will argue that [signed document] should be combined with [other document / transaction]. 1. Establish Connection OTF, [party] may argue [document 1] expressly or impliedly references [document 2] because [reasoning]. However, [party] will argue no such reference can be found in [signed document] without relying on oral evidence given [facts], which is impermissible under s 126. <i>If past signed but future unsigned:</i> [party] will further argue that even if [signed document 1] references [future unsigned document 2], [future unsigned document 2] does not make express or implied reference back to [document 1] by way of [facts], meaning the documents cannot be read together regardless (total deficiency). <i>General - If not past signed future unsigned:</i> [party] will argue [document 2] makes reference to the dealings in [document 1] by way of [facts], such that the mutual connection is established. 2. Document 2 / Transaction: All essential terms contained?

	If reference to [other document / transaction] can be sufficiently spelt out of [signed document 1], parol evidence may then be given to identify which document is referred to or to explain the transaction and identify any document relating to it (Widin, Hill J). OTF, [reasoning as to whether the second document, once identified, contains all remaining terms not found in the signed document]. 3. Conclusion: On balance, the reference to [other document or transaction] [can / cannot] be spelt out of [signed document], meaning [document 1 and 2] can be read together and contain all the necessary terms in writing, satisfying s 126. ANZ v Widin Case Facts: • the written mortgage Widin signed did not sufficiently identify the land • ANZ had a separate diary note which currently identified the property • however, the diary note did not refer to the signed mortgage document • needed oral evidence to combine do diary entry was inadmissible for that purpose -> s 126 not satisfied • NOTE: Hill J, recognized a division of views as to whether oral evidence was permissible to clarify an ambiguity as to what document was referred to in the signed document but in the case before him there was no reference to any document without the oral evidence • (in this case there was no ambiguity there was total deficiency) Conclusion Pathway 1: s 126 is [satisfied / not satisfied] on the facts.
Pathway 2: Part Performance (alternative to s 126)	In the absence of satisfactory written evidence, an oral agreement supported by sufficient acts of part performance may give rise to an equitable interest (Regent v Millett). 1. Is there an oral agreement? OTF, [party] will argue there is an oral agreement between [parties] to the effect that [terms of agreement]. However, [party] may argue [no oral agreement / terms are disputed] because [facts]. 2. What is the applicable test? The strict test requires that the acts must be unequivocally, and in their own nature, referable to some such agreement as that alleged — that is, such as could be done with no other view than to perform such an agreement (Madison v Alderson; Pipikos v Trayans).

3. Acts considered individually:

[Act 1] — [party] will argue this act is unequivocally referable to an agreement of the kind alleged. However, [party] will argue there is a reasonable alternative explanation [explain see analogous facts below], meaning the act is not done with no other view than to perform such an agreement.

- In *Pipikos v Trayans*, payments toward the deposit and purchase price of a separate property were not linked to the subject property and therefore not unequivocally referable to an agreement of the kind asserted.
- Further, even the single payment of \$2,500 toward the mortgage on the subject property was equally consistent with family financial assistance between family members rather than performance of a contract to convey a half interest in land (the asserted agreement).
- Taking possession alone may be insufficient as it is equally explicable by a lease or licence.
- There was no giving or taking of possession of the land and no other acts indicative of a change in the respective positions of the parties in relation to the land (*Pipikos v Trayans*).

4. Acts considered in combination:

While individually the acts may be equivocal, [party] will argue that in combination they unequivocally point to a contract of sale.

- In **Regent v Millett**, taking possession, carrying out repairs, paying mortgage instalments and undertaking substantial renovations together were unequivocally referable to the alleged agreement and therefore sufficient to satisfy the requirements of part performance.
- In **Widin**, endorsing and accepting bills and having the other party sign various loan documents were held unequivocally referable to a contract of the general nature alleged — namely a mortgage — satisfying the strict test.

[Party] will counter that, as in *Pipikos*, each act has an independent explanation and no combination of individually equivocal acts becomes unequivocal merely by aggregation.

- In *Pipikos v Trayans*, even taken together, payments toward a separate property, a single mortgage payment on the subject property, and attempts to document the agreement were held insufficient as they were consistent with some transaction other than a sale and disclosed no change in the respective positions of the parties in relation to the land.

5. Conclusion Pathway 2:

On balance, [party's] acts [are / are not] unequivocally referable to the oral agreement alleged.

Hence, the doctrine of part performance is [likely / unlikely] satisfied rendering the agreement [enforceable / unenforceable] in equity notwithstanding the absence of writing under s 126.

Step 3 - Contract Is Specifically Enforceable

Finally, in order for an equitable interest to arise there must be a specifically enforceable contract (Tanwar). Specific enforceability is assessed at the time of breach, not when the contract is made (Tanwar; Bunny Industries).

If No Bars to Specific Performance:

OTF, [party] will argue the contract [is / is not] specifically enforceable because [facts].

Thus, the contract is specifically enforceable, giving rise to an equitable interest in [purchaser] in the land from the moment of exchange.

Scenario 1 - Purchaser at Fault

[Vendor] will argue the contract is not specifically enforceable as [purchaser] is [not ready, willing and able to complete and pay the full purchase price (Tanwar) **OR** [condition precedent] remains unsatisfied], meaning equity will not intervene.

A. Ready, Willing and Able to Pay Full Purchase Price on Completion Date

OTF, [purchaser] [is / is not] ready, willing and able to complete because [facts].

- **Insufficient Funds:** This is analogous to Tanwar, where the purchaser was not ready and able to complete because the funds had not arrived from Singapore on the completion date.

On balance, because [purchaser] [is / is not] ready, willing and able to pay the full purchase price by [completion date], the contract [is / is not] specifically enforceable and equity [will / will not] intervene.

B. Condition Precedent

OTF, [vendor] will argue [condition precedent] remains unsatisfied meaning the contract is not yet specifically enforceable.

- **Examples:** subject to finance or subject to building inspection clauses

On balance, because [condition precedent] [has / has not] been satisfied, the contract [is / is not] specifically enforceable and equity [will / will not] intervene.

Scenario 2 - Vendor at Fault

OTF, [vendor] has sold the property to [third party]. However, [purchaser] will argue the original contract was specifically enforceable at the time of breach because [purchaser] was ready, willing and able to complete and no bars to equity applied. Accordingly, an equitable interest had already arisen before the transfer to [third party]. Although specific performance is now unavailable because title has passed, the critical issue becomes the nature of [purchaser's] equitable interest and the remedies flowing from it.

[Purchaser] will argue that, consistently with Bunny Industries and the traditional approach in Lysaght v Edwards, [vendor] held the land on constructive trust from the moment the contract became specifically enforceable. By selling to [third party] for [higher price], [vendor] breached that trust, entitling [purchaser] to an account of profits equal to the difference between [contract price] and [third party's price] and return of the deposit.

- In Bunny Industries, the vendor was required to account for profits made through the subsequent sale to a third party despite specific performance being unavailable.
- The purchaser's equitable interest is proprietary rather than merely personal and may be devised, assigned or charged (Bunny Industries).

	However, [vendor] will counter that under the more recent High Court authority of Tanwar, the trust analogy is overstated and declining in influence — [purchaser's] interest is conditional and proportionate to the purchase price paid, resembling an equitable lien over the property or its proceeds rather than full beneficial ownership, such that [vendor] is only liable to satisfy that lien rather than account for the full profit made. The notion that a vendor is some form of trustee is now generally regarded as overstated and declining in influence, particularly where outstanding contractual obligations remain (Tanwar at [53]). Tanwar = equitable lean?????
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Step 4 - Conclusion

On balance, [purchaser] [has / does not have] an equitable interest in the land on the basis that [s 126 is satisfied / part performance is made out] and the contract is specifically enforceable (Tanwar). [Vendor] retains legal title but [purchaser] holds a proprietary equitable interest in the property from the moment of exchange.

STATUTORY REGULATION OF LAND SALE

Right/ Obligation	Rule
Vendor Disclosure Statement Ss 32A-P SLA	Under s 32A-32P SLA, the vendor must provide a signed vendor statement to the purchaser containing all prescribed information about the property before the contract of sale is signed. A due diligence checklist must also be made available to prospective buyers of residential land (s 33A SLA). OTF, [purchaser] may argue the vendor statement is incomplete / misleading / false / not signed / non-existent because [facts], entitling [purchaser] to rescind the contract (s 32K SLA). However, [vendor] may argue [purchaser] cannot rescind because [vendor] acted honestly and reasonably and ought fairly to be excused for the contravention (s 32K(4)(a)), and [purchaser] is substantially in as good a position as if all relevant provisions had been complied with (s 32K(4)(b)). OTF, [facts indicating honest and reasonable conduct and no detriment to purchaser]. E.g. honest acts: immediately removed the billboard for sale; tried to formalise the agreement Further, [purchaser] may claim damages for breach of s 32 under s 48A SLA. On balance, [purchaser] [is / is not] entitled to rescind the contract on the basis of

	vendor disclosure. Documents to be provided pre-contract: + Contract for Sale of Real Estate (standard deed) + Vendor statement (s32-32P SLA; before contract is signed) + Due diligence checklist (s33-33C SLA; before agreement is formalised)
Cooling Off Period S 31 SLA	Under s 31(2) SLA, a purchaser may terminate a contract for the sale of land at any time before the expiration of three clear business days after signing the contract, provided written notice of termination is given to the vendor. Upon termination, the vendor must return all moneys paid except for the sum of \$100 or 0.2% of the purchase price, whichever is greater (s 31(4) SLA). OTF, [purchaser] signed the contract on [date] and [has / has not] given written notice within three clear business days, meaning the cooling off period [has / has not] expired and [purchaser] [is / is not] entitled to terminate. However, [vendor] may argue s 31(2) does not apply because [the sale was by publicly advertised auction (s 31(5)(a)) / the land is used primarily for industrial or commercial purposes (s 31(1)(a)) / the land is more than 20 hectares and used primarily for farming (s 31(1)(b))]. Note: any provision purporting to exclude, modify or restrict the purchaser's cooling off rights is void (s 31(8) SLA). Sale of Land Act 1962 (Vic) s31 (1) This section applies to a contract for the sale of land <i>other than</i> (a) Land used primarily for industrial or commercial purposes; and (b) Land which is more than 20 hectares and is used primarily for farming - Together with chattels (if any) (5) This section does not apply to a contract for the sale of land where (a) The sale is by publicly advertised auction (b) The land is sold (c) The vendor and purchaser have previously entered into a contract for the sale of the same land in substantially the same terms (d) The purchaser is an estate agent within the meaning of Estate Agents Act 1980 or a corporate body (8) any provision in the contract or in any other document whereby any right conferred by this section on the purchaser is excluded, modified, or restricted shall be void and of no effect.
Insurance - Passing of Risk	Insurance — Passing of Risk Under the common law, risk passes to the purchaser at the time of contract (Ziel

Ss 34-36 SLA	Nominees). However, ss 34-36 SLA afford the purchaser greater protection. Where the dwelling house is so damaged as to be unfit for occupation before the purchaser becomes entitled to possession, [purchaser] has three options: 1. Rescission (s 34 SLA): [purchaser] may rescind the contract by written notice to [vendor] within 14 days of becoming aware of the destruction. Upon rescission, [purchaser] is entitled to a refund of all moneys paid and return of any documents of title (s 34(2)). OTF, the property [is / is not] unfit for occupation because [facts] and the damage occurred before [purchaser] became entitled to possession on [date], meaning [purchaser] [can / cannot] rely on s 34. 2. Vendor's insurance (s 35 SLA): [purchaser] may rely on [vendor's] insurance in relation to any damage or destruction to the land after entering into the contract and prior to gaining possession, and may be able to claim under s 50 of the Insurance Contracts Act. OTF, it is [clear / unclear] whether [vendor] has insurance, meaning this [is / is not] a viable option. 3. Vendor repairs (s 36 SLA): where [vendor] repairs the damage prior to settlement, [purchaser] cannot rely on ss 34 or 35. OTF, [vendor] [has / has not] repaired the damage, meaning [purchaser] [is / is not] precluded from relying on ss 34 and 35.
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GIFTS OF PERSONAL PROPERTY

Introduction
To make an effective gift of a chattel, the donor must satisfy five requirements: capacity, ownership, immediate intention to gift, acceptance by the donee, and delivery of possession. Mere words are insufficient to constitute delivery (Re Cole; Re Stoneham).
1. Capacity
The donor must have the mental capacity to understand that the gift is absolute. OTF, [donor] [has / does not have] capacity because [facts]. • In Re Beaney, a gift made just before death was set aside on the ground that the donor had dementia and lacked capacity to understand the gift was absolute.
2. Ownership
The donor must own the property at the time of the gift. OTF, [donor] [does / does not] own [chattel] because [facts].

3. Intention to Make An Immediate Gift

The donor must intend the transaction to take immediate effect as a gift, relinquishing all interest in the property to the donee rather than merely allowing the donee to use and enjoy it. A promise to give something in the future is not enforceable. OTF, [donor] [did / did not] intend to make an immediate gift because [facts].

4. Acceptance

The gift must be accepted by the donee. OTF, [donee] [has / has not] accepted the gift because [facts].

5. Delivery

Delivery may be actual, constructive, or symbolic. OTF, [donor] [has / has not] delivered [chattel] to [donee] because [facts]. The donor's intent and the donee's possession must align — if the donor withdraws their intention before the donee attains possession, there is no effective delivery (Thomas v Times Book Co).

Donee already in possession

where the donee is already in possession of the chattel, no further act of delivery is necessary, however a clear and unambiguous statement of intention is required (Re Stoneham).

Donee effects delivery by finding

where the chattel is not in the donor's possession and the donee must find it, the donee taking possession with the donor's consent constitutes sufficient delivery (Thomas v Times Book Co).

- In Thomas v Times Book Co, Dylan Thomas told his agent that if he found the original manuscript he could keep it — the agent finding it at the pub with the donor's consent was held sufficient delivery to perfect the gift.

Constructive delivery by handing over keys

where the chattel is stored in a locked location, handing over the keys coupled with an irrevocable licence to enter and take the goods constitutes sufficient delivery, provided the donee can actually access and remove the goods (Wrightson v McArthur).

- In Wrightson v McArthur, handing over the only keys to locked rooms containing identified goods together with an irrevocable licence to enter the premises was held sufficient to pass possession to the donee.

Symbolic delivery

symbolic delivery is sufficient where actual delivery is impractical given the size or nature of the chattel (Rawlinson v Mort).

- In Rawlinson v Mort, the donor placed his hand on an organ and used words of gift while handing over the receipt — this was held sufficient symbolic delivery even though the organ could not be physically moved immediately.

6. Conclusion

On balance, the requirements of [capacity / ownership / intention / acceptance / delivery] [are / are not] satisfied. Accordingly, the gift of [chattel] [is / is not] effective and [donee] [is / is not] entitled to the property.