Week 11A - Equitable property

- Most usual way of acquiring an interest in property is as the result of a consensual transaction with previous owner e.g. sale or gift
- Possible for property to pass from one person to another independently of the consent of property owner (person dies interstate, goes bankrupt)
- Proprietary interest may be acquired otherwise than by succession to an interest held by another

Acquisition through taking possession

Land
- Acquired by taking possession of it and without consent
- Principle of relativity → however defective title of a possessor, will be protected against the title of a person with a lesser right to possess

Chattels
- At common law, a person could not have property in a wild animal → only when person took possession of animal that why could seek protection of legal system against 3rd parties
- A wild fox is not caught without wounding, circumventing or ensuring it so to deprive them of their natural liberty (Pierson v Post)
- A whale is ‘occupied’ by its hunters when it is harpooned, and remains so even if harpoon becomes detached as long as rope from harpoon so impedes whale’s movement so easily recaptured (Littledale v Scaith)
- A fish is possessed by a fisherman when it is within enclosed net, but not before (Young v Hitchens)
- Oysters cannot be stolen at common law though statute may make this an offence
- Proprietary interest of a beekeeper is establishes when bees are hived but lost when escape (Kearry v Pattison) → R v Gadd (1911) held that a person has title to bees if has hived them, able to pursue them or is not trespasser on land where they have swarmed
- Fitzgerald v Firbank held that owner of land has property in body of a wild animal which dies upon it

Manufacture or creation of objects
- If goods owned by A are changed by B’s manufacturing process into entirely different object so that original goods can not longer be identified, new object owned by B

Patents, copyrights and trademarks
- Protection accorded by common law limited and statutory intervention been necessary
- Commonwealth provided statutory code pursuant to s 51(xviii) of Constitution

Consensual transactions with proprietary interests - legal and equitable

Sale
- Most usual method of acquiring an interest in property
- For title to pass in law, certain formalities required + when absent equitable doctrine may determine that purchaser acquired an equitable interest

Goods
- Law codified by legislation
- When chattels sold, vendor and purchaser often make an agreement as to when title to property will pass
- In absence of agreement, Aus sale of goods legislation contains complex rules to regulate passing of title

Formal requirements for contract for sale of goods
- All states had formal requirements for contracts for sale of goods worth more than $20 but now no formal requirements necessary to transfer legal title in chattels
- All states adopted a Consumer Credit Code which regulates contracts for sale of goods when requirement to make payment is deferred
Land - legal and equitable interests

- Preliminaries accompanying sale of a fee simple interest in land more complex due to greater variety of possible interests in land and land more valuable than goods
- A time lapse between making of contract and passing of legal title by vendor to purchaser by conveyance or registered transfer → allows vendor to make arrangements to vacate possession and purchaser to investigate title and arrange finance for purchase

**Formal requirements for passing of a legal interest in land**

- Differ depending on whether land held under general law or Torrens
- Under Torrens title registration of a duly executed transfer is required to transfer the legal interest in land
- Under general law, rule is that all conveyances or dispossession of legal interests in land must be made by deed

At common law deed was document which was signed, sealed and delivered → deed formalities regulated by legislation → delivery requires some conduct by person executing deed which indicates intention to be bound by terms, may be delivered ‘in escrow’ which only take effect when a specified condition is satisfied and cannot be recalled by person executing it once delivered

- In NSW, use of deed apply to land under Torrens system

**Formal requirements for contracts for the sale of land; equitable interests arising out of enforceable contracts**

- Formal requirements for making of a contract for sale of an interest in land contained in legislation deriving from s 4 of the *Statute of Frauds 1677* (UK) → must be in writing, signed by the party to be charged or by some person by the party lawfully authorised → *Conveyancing Act* s 54A
- Sometimes be necessary to decide whether contract is for sale of an interest in land or for sale of goods on land → different formalities requirements
- Requirements for enforceable contracts for sale of land fall short of the documentary requirements for creation of legal interests → if contacts are to create proprietary interests they must do so on basis of doctrines that don’t emanate from common law
- Where an equitable interest comes into existence, former totality of rights contained in legal title are fractured → ‘a person solely entitled to the full beneficial ownership of money or property does not enjoy an equitable interest in that property. The legal title carries with it all the rights’ (*Westdeutsche Landesbank v Islington LBC* [1966])

1. **Contract**  
   (a) Comply with rules of a contract  
   (b) Comply with *Conveyancing Act* s54A
   - Must be in writing s 54A(3), and
   - Must be signed by party to be charged/by someone legally charged with that right/agent
   - The question of what constitutes a sufficient 'memorandum' or contract is debated in *ANZ v Widin*:
     - A memorandum must include the description of
     - The subject matter;
     - The signature of the parties; and
     - A reference to the transaction.
   - Documents may be combined together to constitute such a memorandum, so long as the document
     which is signed by the defendant party makes a reference to the other document which the plaintiff
     seeks to incorporate (it does not need to be signed)
   - For the purposes of identifying an ambiguity relating to the combination of these documents, parol
     evidence (oral) is allowed. However, it cannot be used to incorporate terms.

1. **Settlement**

   - When the sale is registered, transfer of ownership occurs. There are two different potential systems for
     sale of land to occur in:
     (a) Old System - By way of deed. When signed, sealed and delivered, ownership passes.
     *Conveyancing Act* 1919 s23D(2) – short term lease (< 3 years) does not require a deed.
(b) Torrens System - Ownership must be transferred via registration.
- Due to the high value of land transactions, there is frequently a longer time lapse and greater deliberation in the passing of title.
- At this stage, it is only necessary to be aware of the formal requirements:
  - The main requirement is that sale of land can only be effected through a written agreement or memorandum signed by both parties (i.e., no oral agreements) (Conveyancing Act s 54A)
- Other requirements include:
  - Interest in land must be transferred by the use of an approved form
  - Transfer is only effective once registered. Upon registration, interest passes to the transferee
  - The formalities for a valid deed to transfer an interest in land are now regulated by legislation.
  - Intention is the crux of delivery. Has to do with the statute of frauds. Even a document which bears the words 'signed sealed and delivered' will not be a deed if insufficient indication that it was intended to be a deed or it doesn’t satisfy the deed requirements: Rose v Commissioner of Stamps.
  - A deed must be ‘attested by at least one witness not a party to the deed’: Conveyancing Act 1919 (NSW) s 38.

Conveyancing Act 1919 (NSW) s 54A 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 upon which such action or proceedings is brought, or some memorandum or note thereof, 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.

Electronic Transactions Act 2000 (NSW) s 7 A transaction is not invalid just because it took place wholly or partly by means of electronic communications. I.e. they satisfy the frauds provisions. “Signing” the document also includes any appropriately reliable method to electronically indicate the person’s approval. We use digital signatures and even attestation (third party witness).

What interest does purchaser have during settlement period? What are some of the consequences of that?
- In progress towards equitable ownership. Equitable property interest against 3rd parties. Beyond contract, proprietary interests.
- Historically, risk to purchaser. Fixed by statute.

What is the different between a legal/equitable lease?
- Equitable is enforceable against 3rd parties, but vulnerable to extinguishment.
- Must have court with equitable jurisdiction and must be willing to allow special performance.

Equitable Title - Equitable Doctrine of Conversion
- Whilst there is a requirement that land be conveyed/transferred and registered before title passes in law, a contract for sale of land which doesn't abide by those standards still has some effect - it passes equitable title to the purchaser.
- The vendor holds the title on a constructive trust for the purchaser
- This gives the purchaser an equitable proprietary interest enforceable against third parties
- Trust types: express trust (created by 2 parties expressly/impliedly), resulting trust (intention is presumed intention, arises because of actions of party), constructive trust (imposed by the law, no question of intention)

Bunny Industries Ltd v FSW Enterprises Pty Ltd (1982)
Facts
- The Plaintiff entered a contract for sale of land to buy a property off the Defendant.
- Before the land was registered, the Defendant sold it to a third party (Second Defendant) at a higher price.
- The Second Defendant registered the property before the Plaintiff did, and so gained an indefeasible title.
- The Plaintiff sued.

Argument
- The Plaintiff argues that the profits made by the Defendant were held for his (Plaintiff's) benefit on a constructive trust, since equitable title has already passed to him.

**Legal issues**
- Contracts For Sale of Land - Equitable Title

**Judgment**
- Once a contract for sale of land is entered into, the purchaser acquires an equitable fee simple. The vendor still has the legal fee simple title, but it is held on a constructive trust for the purchaser.
- For this to apply, the contract must be capable of specific performance (ie, if a court may grant specific performance in such a case).
- The trust is 'in progress towards' a bare trust. With every payment, the purchaser acquires more equitable interest in the land. Once money has been transferred completely, the trust becomes a bare trust and the trustee (vendor) must transfer the land.
- In this case, a construction trust was indeed formed.
- However, since the title passed to a third party, the court did not grant specific performance (ie the property), but rather ruled that all profits made by the Defendant were held on trust for the Plaintiff and are therefore awarded to the Plaintiff.

→ SC applied principle of *Lysaght v Edwards* (1876) (origin of doctrine) that a specifically enforceable contract of sale confers an equitable interest on the purchaser of the land.

→ Equitable principle applied in *Bunny* applies only when there is an enforceable contract for the sale of an interest in land.

- Principle that an unpaid vendor retains an equitable lien over land for balance of purchase money - lien survives conveyance of legal interest to purchaser
- In Qld, *Land Title Act* 1994 abolishes lien → an equitable interest resulting from a transaction for value arises 'by activation of Equity of the conscience of the receiver of the valuable consideration. A trust is created; there is not a transfer or assignment’

**Tanwar Enterprises Pty Ltd v Cauchi (2003) Facts**
- The Plaintiff [Tanwar] entered into a contract with the Defendant [Cauchi] to purchase three properties.
- After some problems with the date of settlement, the parties agreed on a certain date for settlement, which was to be 'of the essence’.
- The Plaintiff did not have the funds on the date, but said he could have them the next day (he did).
- On the next day, the Plaintiff was ready to settle but the Defendant already terminated the agreement.

**Argument**
- The Plaintiff argued that it had equitable interests in the land and therefore seeks specific performance or relief against forfeiture.

**Judgment**
- The court analyses the relationship of a mortgagee and a mortgagor and how equitable interests arise.
- A mortgagee (the lender) acquires the land in fee simple. The mortgagor (borrower) acquires an 'equity of redemption' which entitles him to receive the title back once he pays the debt.
- Whilst at common law, a date can be specified for the payment, equity will not deem the equitable interest of the mortgagor lost just because the date has passed.
- However, this means that the notion in law that a vendor-purchaser relationship is essentially a mortgagee-mortgagor relationship is false.

**Insurance and risk during the settlement period**
- *Lysaght v Edwards* (1876) - the purchaser is entirely responsible once he acquires the equitable interest (although the vendor is required to take reasonable care of the property so long as he is still in possession)
- A plaintiff cannot use vendor’s insurance to pay for damages after vendor no longer has insurable interest in the land → *Ziel Nominees Pty Ltd v VACC Insurance Co Ltd* (1975) - HC held that the
purchaser of property damages by fire after making of contract not entitled to benefit an insurance policy taken out by vendor. Because the vendor had received the purchase price of the property he no longer had any insurable interest in it and was not entitled to any indemnity for damage - vendor no longer had any right under policy to assign purchaser

- BUT no longer applies → states now legislated to provide some protection to purchasers where property damaged
- The Conveyancing Act 1919 (NSW), ss 66J-66O offers protection in such cases where the property has been damaged in that in-between period
- s 66K - The risk of damage to land should not pass to the purchaser until the transaction is completed or until the time stipulated by the parties
- s 66L- In case of substantial damage to property after contract for sale, but before passing risk to the buyer, the buyer may rescind the contract
- s 66M- If buyer wants to proceed despite the substantial damage, the purchase price is to be reduced to such an amount as it just and equitable
- s 66N - court allowed to refuse to enforce the contract if it is deemed unfair in the wake of damage in the in-between period
- Insurance Contracts Act 1984 (Cth) s 50 deals with problem of damage occurring after a contract of sale, by providing that purchaser is deemed to be insured under vendor’s contract of insurance
  • Vendor has to take reasonable care whilst in possession → Clarke v Ramuz [1891] vendor held liable for damage caused to land by a trespasser removing large quantity of surface soil between date of contract of sale and conveyance
  • Earl of Egmont v Smith (1877) if after the contract of a sale, a lease of the premises expires, the vendor awaiting completion is under a duty to re-let the premises after consulting purchases to ascertain their wishes while vendor awaiting completion is not a bare trustee without any beneficial interest in land
  • Where there is a conditional contract for purchase, purchaser doesn’t get an equitable interest until condition is met → Completion of sale depends upon obtaining approval by local council of proposed subdivision, approval not expected for 6-8 weeks, V proposes to mortgage land, P seeks interlocutory injunction to restrain V → Shanahan v Fitzgerald [1982] held no term preventing V from mortgaging land could be implied into contract, unless the circumstances would put it beyond D’s power to complete contract or show that it was D’s intention in mortgaging land not to complete contract

Equitable Leases
• The idea that a contract for sale of land transfers an equitable fee simple interest to the purchaser (before it is made a legal fee simple through registration) also applies to leases.
• There are 3 types of leases:
  - A legal interest is conferred through the use of a deed
  - A common law lease is conferred by taking possession and paying rent
  - An agreement to lease confers an equitable leasehold interest (equitable lease)
• Two requirements for an equitable lease:
  - Court must have a equitable jurisdiction
  - Court must be willing to grant specific performance as an equitable remedy

Walsh v Lonsdale (1882)
Facts
  - The Plaintiff [Walsh] entered an agreement to lease a property off the Defendant [Lonsdale] for 7 years
  - The agreement was made, but there was no actual formal lease (ie, a deed), which means it is not a legal lease.
  - The Plaintiff was behind on his rent and the Defendant tried to use his right to 'distress' (right of a landlord to take tenant's chattels if behind on rent).
  - The Plaintiff is trying to get an injunction against the distress.

Argument
- The Plaintiff argues that the lease was not properly signed and therefore the landlord does not have the right to distress.

**Legal issues**
- Contracts For Sale of Land - Equitable Leases
- Fusion Fallacies

**Judgment**

**Equitable Leases**
- An equitable lease arises where there is an agreement to lease in writing which does not abide by formal requirements (ie, not a deed).
- An equitable lease, where the court would grant specific performance on the agreement, should be respected as if it a legal lease.
- The lessee acquires an equitable interest in the property, and accordingly, the lessor acquires some protections in return for that interest.
- Both parties have the same entitlements as they would if it was a legal lease, for example, the lessor can re-enter the land under certain conditions (such as breach of contract etc), and only under those certain conditions (ie, he can be barred from entering unless these conditions are fulfilled).

**Fusion Fallacies**
- in this judgment, Jessel MR commits the fusion fallacy of common law and equity when he declares: 'There are not two estates as there were formerly, one estate at common law by reason of the payment of the rent from year to year, and an estate in equity under the agreement. There is only one Court, and the equity rules prevail in it'.
- Nevertheless, this case is good law (it has been affirmed since).