CONVEYANCING

LECTURE 14 MAY 2007

Note: Students should read the Chapters in Lang & Skapinker and the cases referred to in the Guide. These notes are NOT a substitute for reading the text and considering the cases.

Introduction

Conveyancing

“Conveyance” is defined by the The Australian Oxford Dictionary to mean “the transfer of property from one owner to another”. Conveyancing has the corresponding meaning so when we talk about the law of conveyancing we are talking about the laws relating to the transfer of property. This is likely to be a simplification, as it is generally accepted that conveyancing relates to many matters dealing with property and not just strictly speaking the transfer process.

As you will remember from Real Property there are some rules that are different for land under Old System Title and land under the provisions of the Real Property Act (or Torrens title). While the law relating to the creation of contracts for the sale of land do not differ depending on title, the practical steps to ‘convey’ title and the investigation of that title differ significantly.

Title and quality

The task of the conveyancer (whether solicitor or licensed conveyancer) is to ensure that title to land is ‘conveyed’ (whether by conveyance for old
system land or transfer for Torrens land) from the vendor to the purchaser. It is not the task of the conveyancer to ensure that the quality of the property being purchased is up to the standard expected by the purchaser. We will deal with this issue and the difference between ‘title’ and ‘quality’ in the next lecture.

‘Title’ is title to the land. In Real Property we dealt with the issue of whatever is attached to the land becomes part of the land. Because of this doctrine when we refer to ‘land’ we also refer to whatever is attached to it. This is explored further in the next lecture as well.

**Timeline**

It is important to consider the timeframe in which most conveyancing transactions take place. It is always finite and usually within the range of 4 to 6 weeks. The work to be completed within that timeframe is considerable and requires organisational skill as well as legal knowledge. If problems arise, they need to be addressed promptly and dealt with competently. Unlike some areas of law where matters tend to drift on and timelines, while important, are not as compressed, conveyancing is always carried out under pressure.

There is a timeline for a normal conveyancing transaction at the end of these notes.

**Mortgages**

While it can be said that a mortgage transaction is not a ‘conveyancing’ transaction, the reality is that most purchasers require finance to complete the purchase and that finance will be secured by a mortgage on the title to the property being purchased. For this reason, some time will be spent on the subject of mortgages as we progress through the
lectures. It would be useful to review your notes (if you still have them) from the Real Property subject. If not, then Butt is now in a 5\textsuperscript{th} edition.

**Leases**

Many residential properties are tenanted at the time they are listed for sale. It may be the intention of the vendor to sell the property with the tenant or to arrange for the tenant to vacate after a purchaser has been found. In either case, it is important to understand the effect of the Residential Tenancies Act and its impact on conveyancing transactions. Similarly, many commercial properties are occupied by tenants under either retail leases pursuant to the Retail Leases Act or commercial leases. With commercial property it is often the case that a sale is with the tenant as the lease has not expired and the property is being acquired for investment purposes. The effect of the relevant statutory provisions and how they impact on the vendor and purchaser must be understood and appropriate advice given to the client.

**Other interests and dealings**

Other matters that might affect a property and any dealing with it are forestry rights, easements, profits a prendre, water rights, restrictions as to use, positive covenants, sub-leases, unregistered short term leases. This listing is not exhaustive.

As we come across these matters, we will deal with them.

**Titles**

Land in New South Wales can be:

- Old system
- Real Property Act (Torrens)
- Strata title
- Community title
Qualified Torrens title
Limited Torrens title
Qualified and Limited Torrens title
Crown Lands title

While the majority of land is Torrens land an increasing percentage is under the provisions of either Strata titles or Community titles legislation. While the form of transfer is the same as for Torrens land, the vendor disclosure requirements and pre contract enquiries are different.

For Old System land a conveyance operates to ‘convey’ title and not a transfer under the Real Property Act. It is also necessary to check an Abstract of Title back to a starting point known as ‘a good root of title’.

For Qualified and/or Limited title, the title will be transferred by transfer under the Real Property Act, but it may be necessary to check the title back to the ‘good root of title’.

We will examine all these matters as we progress through the lectures.

**Formation of an enforceable contract for the sale of land**

Certainty of agreement
If there is to be a binding contract for the sale and purchase of real estate in New South Wales then it is necessary for the agreement to set out the three essential elements of parties, property and price. It is also necessary to have some certainty in the agreement between the parties so that there are no further elements or terms that need to be decided or determined for the agreement to be able to be put into effect. Skapinker¹

at page 1 refers to the decision of Mahoney JA in *Air Great Lakes Pty Ltd v K S Easter (Holdings) Pty Ltd* (1985) 2 NSWLR at 326-329 and quotes:

...[I]t is of assistance to distinguish between three questions: did the parties arrive at a consensus?; (if they did) was it such a consensus as was capable of forming a binding contract?; and (if it was) did the parties intend that the consensus at which they arrived should constitute a binding contract?...

The first question looks at the existence of a common intention...The second question looks to what the parties have agreed and to whether what they have agreed is capable of forming a binding contract...Thus, some of the terms of the consensus arrived at may be, as to the meaning of the them, too vague to be given legal effect:...The third question looks to whether, the parties' intention being congruent as to the terms of their agreement, they intend that agreement to be a binding contract in the sense of being legally enforceable as such. It is, of course, open to the parties to agree that it shall not...

So in addition to the ‘3 P’s’ of parties, property and price we need to have consensus, an agreement to be ‘immediately bound’, and a recording of the agreement in writing.

Skapinker refers to ‘the 3 P’s’ as ‘Objective essential terms’. These ‘3 P’s’ are essential to the formation of a binding contract for the sale of land.

There is a second group of terms referred to by Skapinker as ‘Subjective essential terms’. These are the terms that the parties to a transaction agree upon during negotiation and reflect the agreement they have reached. They may be terms dealing with the time for completion, disclosure of defects pursuant to the implied terms in the Conveyancing (Sale of Land) Regulation 2005 or the availability of finance (See *Meehan v Jones* later in this lecture). They are not essential to the formation of a contract for the sale of land as such, but reflect the bargain struck by the parties and are therefore ‘essential’ to the parties, or one of them.

Any reference in these notes to ‘Skapinker’ is a reference to this text.
In *Hall v Busst* (1960) 104 CLR 206 the High Court was required to consider the effect of an option contained in a Deed entered into at the same time as a contract for the sale of land being an island off the Queensland coast. The Option purported to require the purchaser, Hall, to refrain from selling the island without first offering it to the vendor, Busst.

The Option dealt with the establishment of the purchase price upon exercise in the following terms:

5. The purchase price relating to such option shall be the sum of Three thousand one hundred and fifty-seven pounds four shillings (£3157-4-0) to which shall be added the value of all additions and improvements to the said property since date of purchase by the Grantor (such value to be taken as at the date of exercise of this option) and from which shall be subtracted the value of all deficiencies of chattel property and a reasonable sum to cover depreciation of all buildings and other property on the land.

In his judgement Dixon CJ outlined the facts and said:

Plainly the third of the covenants so sued upon depends upon the existence of an enforceable option considered as a contract and the option cannot be enforceable unless the purchase price payable on the exercise of the option is sufficiently certain.

... But however that may be “the value of all additions and improvements” is not, in my opinion, sufficiently certain to give rise to an enforceable contract. There could be no external standard of value of additions and improvements to the island: no standard yielding a figure reasonably fixed or ascertainable. Still less would it be possible to find an external standard for the reasonable sum to cover depreciation even if one knew what “other property” is referred to.

... I am aware that it is said on the authority of *dictum* ...that it is enough if a contract for the sale of land stipulates expressly or impliedly that the price shall be the fair value: ...But that could only be when a recognized value or standard of value measuring the price existed. It would be, so it seems to me, as absurd to apply this to an island of the coast of Queensland as it would be to apply it to a great modern city building.

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2 Page 216
...In my opinion the price described in cl.5 is unascertained and it is too uncertain to be the basis of an enforceable contract. The option is therefore unenforceable.

In his judgement Fullagar J considered the question of a sale at ‘fair value’. He said\(^3\):

There are passages in the text-books which state or suggest that a “contract” to sell land “for the fair value thereof” is a binding and enforceable contract. ...it is said that “If a sale is at a fair valuation, no particular mode of arriving at the value being indicated, the court may enforce the contract and direct the mode of valuation.” For this proposition \textit{Emery v Wase} is cited. But there the contract was to sell “at the valuation of Mr John Bishton,” and all that Lord Eldon decided was that Mr Bishto had not made a proper valuation, ...

Menzies J also considered the question of how the purchase price could be calculated. He said\(^4\):

The task of valuing additions at the date of the exercise of the option and of valuing deficiencies at some unspecified time without some further agreement would, I am disposed to think, be impracticable, but however that may be, the ascertainment of “a reasonable sum to cover depreciation of all the buildings and other property on the land”, which presumably covers buildings and other property upon the land both on 15\(^{th}\) July 1949 and at the date of the exercise of the option, whether or not they had been improved, would seem to me quite impossible without further agreement. The price could not be determined without the deduction of depreciation specified with no greater particularity than “a reasonable sum.”

In \textit{Sudbrook Trading Estate Ltd v Eggleton and Others} [1982 3 WLR 315 the House of Lords was asked to consider an appeal from the Court of Appeal where that Court felt bound to uphold an appeal concerning whether the failure of a lessor to appoint a valuer pursuant to an option in a lease meant that the option failed and no binding contract came into existence. The Court of Appeal held that it could not order specific

\(^3\) Page 222
\(^4\) Page 231
performance of a contract until such time as the contract existed and that in this matter the contract did not exist until the valuer was appointed by the lessor.

In his speech to the House of Lords Lord Diplock quoted from the lease as follows:\(^5\):

> “give to the lessor notice in writing to that effect the lessees shall be the purchasers of such reversion as from the date of such notice at such price not being less than £12,000 as may be agreed upon by two valuers one to be nominated by the lessor and the other by the lessees or in default of such agreement by an umpire appointed by the said valuers”...

He then went on to say:

What one may ask, could be clearer, fairer or more sensible than that? ... They requested the lessors to nominate their valuer; but this the lessors refused to do.

... The option clause in each lease was obviously intended by both parties to the lease to have legal effect; that is to say, to create legally enforceable rights and obligations. What other reason could there be for going to the trouble of inserting those elaborate and carefully drafted provisions in the lease?

The option clause cannot be classified as a mere “agreement to make an agreement”. There are not any terms left to be agreed between the parties. In modern terminology, it is classified as a unilateral or “if” contract. ... The giving of such a notice, however converts the “if” contract into a synallagmatic or bilateral contract, which creates mutual legal rights and obligations on the part of both lessors and lessees.

The first obligation upon each of them, once the contract has become synallagmatic, is to appoint their respective valuers to fix what is the fair and reasonable price for the reversion.

Why should the presence in the option clause of convenient and sensible machinery for ascertaining what is a fair and reasonable price, which the lessors, in breach of their contractual duty, prevent operating, deprive the lessees of the only remedy which would result in justice being done to them?

\(^5\) Page 317-321
... the only thing that has prevented the machinery provided by the option clause for ascertaining the fair and reasonable price from operating is the lessors’ own breach of contract in refusing to appoint their valuer. So if the synallagmatic contract created by the exercise of the option were allowed to be treated by the lessors as frustrated the frustration would be self-induced, a circumstance which English law does not allow a party to a contract to rely on to his own advantage.

In *Bushwall Properties Ltd v Vortex Properties Ltd* [1976] 1 WLR 591 the English Court of Appeal considered a different issue concerning an alleged uncertainty in a contract for the sale of land. The case arose out of an exchange of letters setting out the purported agreement for the sale of land. The letters provided:

1. Purchase price to be phased as to £250,000 upon first completion, as to £125,000 12 months thereafter and as to the balance of £125,000 a further 12 months thereafter.
2. On the occasion of each completion a proportionate part of the land shall be released forthwith to us.

The problem before the Court was whether the provision dealing with ‘a proportionate part of the land’ being released was so uncertain as to make the contract unenforceable as the letters did not deal with how the area of land to be released was to be identified or who had the right to decide that area of land.

Counsel for Bushwall argued that this right was vested in the purchaser and that this constituted an implied term in the contract. Sir John Pennycuick found otherwise:

> Leaving aside the implication of a term, I see no ground upon which, under the general law as applied to contracts of the sale of land, where an intending vendor and an intending purchaser enter into a binding contract for the sale of land with completion in phases, the power of

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selection as to what part of the land is to be included in each phase must be regarded as vested in the purchaser. ...

It seems to me that this is a point of substance and not a mere matter of machinery. It represents an element in a contract which if left uncertain would render the contract as a whole uncertain and for that reason unenforceable. ...

The judge ... based their argument on the well-recognised principle that the vendor under a contract of which specific performance would be granted is a trustee (although a qualified trustee having regard to his rights with regard to unpaid purchase money) of the land for the purchaser. ...

It seems to me, however, that this argument begs the question. It proceeds upon the assumption that there is a binding and enforceable contract and affords no help in deciding whether the uncertainty as to selection precludes the creation of a binding and enforceable contract. ...

I conclude that the contract purported to be made by the letters of June 1968 was indeed unenforceable by reason of uncertainty; in other words, it was not an effective contract.

In Australia in Booker Industries Proprietary Limited v Wilson Parking (Qld) Proprietary Limited (1982) 140 CLR 600 the High Court was asked to consider a lease case where the lessor refused to recognise that an option in a lease had been validly exercised and required the lessee to vacate the premises. The lessee sought an order for specific performance of the option although the rent had not been determined in accordance with the provisions in the lease.

While Andrews J held that an order for specific performance should be granted the Full Court reversed this decision on the ground that specific performance could not be granted until the rent had been fixed. The appellant plaintiff appealed to the High Court. Gibbs C J, Murphy & Wilson JJ delivered a joint judgement. After referring to the authorities ‘both ancient and modern’ that courts will not enforce agreements that
are not complete or in circumstances where the renewal is at ‘a rental to be agreed’ their Honours went on to say

On the other hand, it is also well established that the parties to a contract may leave terms – even essential terms – to be determined by a third person: see the cases cited in ... In the present case, the lease itself provides the entire mechanism for determining the rental for the renewal term.

... No formality is required to effect the necessary appointment. Either party may request the President to facilitate the fulfilment of the agreement.

... It follows that at this stage an order could not be made for the specific performance of the agreement to grant a further lease: ... However, in order to give business efficacy to cl 4.01 and 3.05(b) it is necessary to imply a term that, once the conditions specified ... have been performed, both parties will do all that is reasonably necessary to procure the nomination by the President of an arbitrator.

In ... Sudbrook Trading a case concerning a lease which contained an option to purchase “at such price not being less than £12,000 as may be agreed ...” ... Lord Diplock said that an obligation on the parties to appoint their respective valuers would be a necessary implication to give business efficacy to the option clause.

... If a lessor agrees to renew a lease at a rent to be fixed by a third party, and agrees (expressly or impliedly) to do all that is reasonably necessary to ensure that the rent is so fixed, it is not right to say that there is no concluded contract until the rent is fixed. There is a contract which immediately binds the lessor to perform his obligation to do all that is reasonably necessary to ensure that the rent is fixed, ...

The case of *Meehan v Jones and Others* (1982) 149CLR 571 is somewhat different. In Meehan, the High Court was asked to consider whether a finance clause was worded in such a way as to make the contract void for uncertainty or an illusory contract (that is, no contract at all). The special condition the subject of the action was as follows:

This contract is executed by the parties subject to the following:- (a) the purchaser or his nominee entering into a satisfactory agreement or arrangement with Ampol Petroleum Limited for the supply of a

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satisfactory quantity of crude oil... (b) the purchaser or his nominee receiving approval for finance on satisfactory terms and conditions in an amount sufficient to complete the purchase hereunder.

Gibbs C J said in his judgement:\(^8\):

The most important question ... is whether a contract for the of land was binding when it included a term which made the contract subject to certain conditions – particularly a condition making it subject the purchaser or his nominee receiving approval for finance on satisfactory terms and conditions.

(After setting out the clause in full)

The question that therefore arises is whether, assuming that the condition was satisfied within the time stipulated, a binding contract resulted.

When the words of a condition state that a contract is subject to finance, or to suitable finance, or to satisfactory finance, the question immediately arises whether the test which is required is a subjective or an objective one. ... The fact that opinions may differ as to which of these two meanings is given to the words of the clause does not mean that the clause is uncertain. If the Court, in construing the contract, can decide which of the two possible meanings is that which the parties intended, there will be no uncertainty. ... It is only if the court is unable to put any definite meaning on the contract that it can be said to be uncertain.

However the fact that the grantee has a discretion as to whether or not he performs those conditions does not render the option illusory. The case of a conditional agreement is analogous. The fact that the condition is one whose performance lies wholly or partly within the power of one of the parties to the contract does not mean that there is no binding contract once the condition is fulfilled. There is a concluded agreement as to the terms of the contract which, if the condition is satisfied, leaves no discretion in either party as to whether he shall carry them out. Once the condition is fulfilled, within the time allowed by the contract for its fulfilment, the contract becomes completely binding.

An interesting matter concerning the certainty of agreement arose in the 2005 case of **Igloo Homes Pty Ltd v Sammut Constructions Pty Ltd** (2006) ANZ ConvR 143. This interesting case concerns an argument over whether a contract price was inclusive or exclusive of GST. It highlights the need for a contract to be clear as to the GST applicable. While the

\(^8\) Page 575
contract in question was the 2000 edition and the GST provisions were different, it still shows how easy it can be to overlook this aspect of contract preparation. If there are GST implications because the property is other than residential property sold for continued residential purposes it is wise to have input from a client’s accountant as to the GST status of a vendor.

In *Igloo Homes Pty Ltd v Sammut Constructions Pty Ltd* (2006) ANZ ConvR 143 the New South Wales Court of Appeal considered an appeal from a decision of Campbell J. There were four contracts involved each of which contained the following note at the bottom of the first page:

NOTE: Subject to clause 13, the price INCLUDES Goods and Services Tax (if any) payable by the vendor.

Clause 13 of each contract provided that the price included GST subject to any other provision. There was an additional special condition as follows:

**STAMP DUTY and OTHER CHARGES**
(a) In addition to the purchase price the purchaser must pay to the vendor on completion an amount equal to any Goods and Services Tax (GST), value added tax or other tax of a similar nature which is payable or may be payable by the vendor in connection with the sale of the property to the purchaser...

Campbell J decided that the purchase price was exclusive of GST. On appeal the purchaser argued that the common intention of the parties from the negotiations was that the price was inclusive of GST and that it was a mistake that the contracts provided for the price to be exclusive of GST.

The case closely examined the negotiations leading to the formation of the contract. The parties gave conflicting evidence as would be expected. Other matters to arise in the case were:

- the contracts were not completed by the vendor’s solicitor before being collected by the vendor’s agent for signature by the purchaser
- differing versions of the negotiations as to the way GST was to be treated were given in evidence
- the transfers delivered for signature by the vendor showed a GST inclusive price without comment by the solicitor for the vendor and were signed
settlement figures were prepared by the purchaser acting for itself without showing GST and these figures were accepted by the vendor’s solicitor and cheque directions given
• the matter completed without the vendor’s solicitor collecting GST.

The Court of Appeal dismissed the appeal and the price was confirmed to be exclusive of GST.

While this judgement was delivered in 2005 and the case arose out of a contract dated 17 February 2004, it is clear that care is needed in identifying the GST status of a transaction when contracts are being prepared. The 2005 edition of the contract simplifies this but nothing takes away from our role in correctly completing the contract prior to exchange.

**Intention to be immediately bound**

Having considered the question of there being certainty in the agreement between the parties, we now look at the question of whether having reached an agreement, the parties intend to be immediately bound. For there to be an enforceable contract for the sale of land it is necessary to have:

• agreement on the essential terms
• writing
• consensus to be immediately bound

These issues were considered by the High Court in *Masters v Cameron* (1954) 91 CLR 353. By a written memorandum dated 6 December 1951 Cameron agreed to sell a farming property to Masters on terms set out in the memorandum. The last sentence read:

This agreement is made subject to the preparation of a formal contract of sale which shall be acceptable to my solicitors on the above terms and conditions, and to the giving of possession on or about the Fifteenth Day of March 1952.
In a written judgement the High Court said that there were three classes of contract:\footnote{Page 360}

\ldots one in which the parties have reached finality in arranging all the terms of their bargain and intend to be immediately bound to the performance of those terms, but at the same time proposes to have the terms restated in a form which will be fuller or more precise but not different in effect.

Or, secondly, it may be a case in which the parties have completely agreed upon all the terms of their bargain and intend no departure from or addition to that which their agreed terms express or imply, but nevertheless have made performance of one or more of the terms conditional upon the execution of a formal document.

Or, thirdly, the case may be one in which the intention of the parties is not to make a concluded bargain at all, unless and until they execute a formal contract.

The court concluded that in the first two circumstances, there is a binding contract. In the first case to perform what has been agreed. In the second case, a contract binding the parties to bring about the preparation and execution of the formal contract.

In the third case, there is no contract until the formal document is prepared, executed and exchanged.

\footnote{Cases of the third class are fundamentally different. They are cases in which the terms of agreement are not intended to have, and therefore do not have, any binding effect of their own.}

\ldots In the present case the context provides no reason for holding that the case is outside the application of the authorities. The formal contract, it is true, is to be \textit{on the above terms and conditions}, but it is to be acceptable to the vendor's solicitors, and the meaning is sufficiently evident that the contract shall contain, not only the stated terms and conditions expressed in a form satisfactory to the solicitors, but also whatever else the solicitors may fairly consider appropriate to the case.

\footnote{Page 361}
In *Allen v Carbone* (1975) 49 ALJR 161 the High Court considered whether a written note agreeing to the sale of property for $24,000 was a binding contract without the need to enter into a formal contract. The note included the words:

...and I will enter into a Contract for Sale in the form approved by the Real Estate Institute of New South Wales.

No contract was prepared by the solicitor for the vendor and no contract ever signed. The appellant purchaser commenced proceedings for specific performance claiming that the written note constituted a completed contract. In the Supreme Court of New South Wales the action was dismissed and the purchaser appealed.

In a joint judgement, the High Court said:

No doubt it is right to say that the intention of the parties to a contract wholly in writing is to be gathered from the four corners of the instrument.

... (Quoting from Godecke v Kirwan) “It has been held repeatedly that the question is one of construction in each case of the document or documents which are put forward as showing that a contract was made.”

... The first consideration is that the usual method of selling real estate in New South Wales is by means of the signing and exchange of contracts in the form approved by the Real Estate Institute of New South Wales.

... Then there is Ex. D which in our opinion puts the issue beyond all doubt. Prepared by Mr Cummings and signed by the respondent, it makes provision for the signing of a formal contract, a contract which as we know contains detailed terms and conditions neither agreed upon nor discussed in the conversation.

The question was further addressed by the Court of Appeal in *G R Securities Pty v Baulkham Hills Private Hospital Pty Ltd* (1986) 40 NSWLR 631. The issue was whether three letters together constituted a

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contract binding on the parties. The first letter was an offer to purchase a private hospital for $4.3 million on certain conditions. The second letter accepted the offer but proposed other conditions. The third letter from the purchaser to the vendor accepted the offer in the second letter.

In his judgement, with which Kirby P and Glass JA agreed, McHugh JA came to the following view¹²:

The principal issue in the appeal is whether the letters constituted a contract.

... In New South Wales, real estate is ordinarily sold by signing and exchanging contracts in the form approved by the Real Estate Institute and Law Society. Accordingly, even though the parties agree in writing that the real estate is sold for a specified price, the presumption is that no binding contract exists until ‘contracts’ are exchanged.

... However, the decisive issue is always the intention of the parties which must be objectively ascertained from the terms of the document when read in the light of the surrounding circumstances. ... If the terms of a document indicate that the parties intended to be bound immediately, effect must be given to that intention irrespective of the subject matter, magnitude or complexity of the transaction.

After detailing some of the contents of the letters and referring to the phrase in the second letter that upon receipt of acceptance there was to be “a legally binding agreement in principle”. His Honour went on:

Although the words “in principle” are curious, they cannot prevail against the conclusion to be drawn from the words “a legally binding agreement” Those words convincingly indicate that the parties intended to be bound immediately. Probably the phrase “legally binding agreement in principle” was intended to mean that the parties had reached agreement on the main matters and were content to be immediately bound.

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¹² Pages 634–636
Although uncommon, it is possible to have an oral contract that is enforceable as in *Waltons Stores (Interstate) Limited v Maher and Anor* (1988) 164 CLR 87.

Two more recent cases deal with the issue of whether correspondence between parties can constitute a binding contract. In the Queensland case of *Teviot Downs Estate Pty Ltd & Anor v MTAA Superannuation Fund (Flagstone Creek and Spring Mountain Park) Property Pty Ltd* (2004) ANZ ConvR 152 the Supreme Court of Queensland Court of Appeal considered whether correspondence between the parties was sufficient to constitute a binding contract.

The trial judge had found that the correspondence was not sufficient for this purpose. The Editorial Comment\(^\text{13}\) says:

> The purchaser and its related company instituted proceedings in the Supreme Court seeking orders for specific performance, contending that the vendor had accepted its offer to purchase the property by its letter dated 29 August 2003 in accordance with the first category of Masters v Cameron (1954) 91 CLR 353, 360. However, the vendor submitted that the letter fell within the third category of this case, where the “intention of the parties is not to make a concluded bargain at all, unless and until they execute a formal contract”.

The Court of Appeal agreed with her Honour, dismissed the appeal, and agreed that her Honour was entitled to consider several matters in determining her decision. These were:

- incomplete identification of the property
- a letter specifying not that a binding acceptance must be received by a certain time but that the offer could be withdrawn after that time
- it was contemplated that the signing of a draft contract would be a method of acceptance
- a draft contract was described as “a token of the preparedness to be bound to purchase” which was unnecessary if the offer was intended to be binding upon acceptance
- the eagerness with which the applicants (Teviot) sought to have a formal contract executed
- the provision of guarantors

\(^{13}\) Page 162
• the extent of the matters to be covered in the formal document

It is still important to ensure that correspondence does not lead to the argument that a contract is entered into without a formal exchange of contracts. While the Conveyancing (Sale of Land) Regulation 2005 makes it difficult to have a binding contract without attaching the required documents, it is not impossible. If the purchaser failed to rescind under clause 19 (within 14 days) for failure to attach documents a contract without any attachments could exist.

The problem of entering into a binding contract by letter was also discussed in Peter Warren (Properties) Pty Ltd & Ors v Jalvoran Pty Ltd (2005) ANZ ConvR 52. The plaintiff signed a letter addressed to the defendant setting out a purchase price, the deposit, the possible settlement date and other matters. It was expressed to be “Signed as an agreement”.

Solicitors were instructed by both parties to prepare a contract. Neither solicitor was made aware of the letter. Correspondence took place between the solicitors and a contract signed by the purchaser and a deposit cheque forwarded to the vendor’s solicitors. The vendor refused to exchange and the plaintiff claimed that the letter constituted a binding contract. In his judgement White J says:

The plaintiffs submitted that the parties intended to be immediately bound by the letter of 15 January 2003. They submitted that the letter used the formal language of offer and acceptance and that the words “signed as an agreement” indicated that the parties intended to be bound by the terms which they had then agreed. The plaintiffs submitted that the case fell within the first category of cases discussed by the High Court in Masters v Cameron (1954) 91 CLR 353 at 360 and was indistinguishable from the contract considered by Bryson J (as his Honour then was) in Plastyne Products Pty Ltd v Gall Engineering Co Pty Ltd (1988) NSW ConvR 55-376. They submitted that if the parties intended there to be no binding agreement for the sale of the property until formal contracts for the sale were exchanged, there was no point at all in the execution of the 15 January 2003 letter.

In Masters v Cameron the High Court ... identified three classes of case where parties have reached agreement ... but intend to record their terms in a formal document yet to be prepared.

(White J then restated the three classes of contract from Masters v Cameron)

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14 Page 57 et seq
In G R Securities Ltd v Baulkam Hills Private Hospital Pty Ltd (1986) 40 NSWLR 631 McHugh JA, with whom Kirby P and Glass JA agreed, said that there was a presumption that no binding agreement exists until contracts are exchanged (at 634).

The reason that the usual method of selling real estate in New South Wales is by formal exchange of contracts is:

“... that the form of contract ordinarily used contains important provisions for the protection of both parties, and a court would not lightly attribute to knowledgeable parties an intention to forgo such protection.”

(Lezabar Pty Ltd Pty Ltd & Ors v Hogan & Ors (1989) NSW Conv R 55-468 at 58, 388; 4 BPR 9498 at 9501 per Gleeson CJ).

His Honour examined the circumstances leading to the letter being signed and the events that subsequently transpired and found:

... I do not consider that the language of agreement in the letter of 15 January indicates that the parties are to be taken as intending to be immediately bound by the terms upon which they had agreed. The “agreement” which the parties recorded was an agreement on terms, not an agreement to be bound by the terms.

The editorial notes set out the points the commentator has extracted from the judgement.

One of the issues was the failure to attach any vendor disclosure documents to the letter pursuant to the requirement of section 52A of the Conveyancing Act. His Honour found that this meant that the purchaser could have rescinded within 14 days of the letter having been signed.

Conveyancing Act s54A

While we have looked at cases where the courts have said that it is generally necessary to have a written contract with a formal exchange for there to be an enforceable contract for the sale of land, it is possible to have an enforceable contract if the provisions of section 54A of the

15 Page 60
16 Page 62
17 Page 63
Conveyancing Act 1919 are met and the parties intend to be immediately bound.

Section 54A is in the following terms:

**SECTION 54A CONTRACTS FOR SALE, ETC., OF LAND TO BE IN WRITING**

1. No action or proceedings may be brought upon any contract for the sale or other disposition of 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 by him lawfully authorised.

2. This section applies to contracts whether made before or after the commencement of the Conveyancing (Amendment) Act, 1930, and does not affect the law relating to part performance, or sales by the court.

3. This section applies and shall be deemed to have applied from the commencement of the Conveyancing (Amendment) Act, 1930, to land under the provisions of the Real Property Act, 1900.

The form of note or memorandum is not set out in the section and any form of writing might qualify. It is essential that it set out the objective and subjective essential terms of the arrangement and identify the ‘3 P’s’, parties, property and price. It could be a formal contract, a letter, a receipt, company minutes, or other writing. It must be signed by the person ‘charged’, that is the person against whom you are alleging the contract exists. It is possible for the signature to be of another person authorised to sign on that persons behalf.

Many solicitors when forwarding a contract to another solicitor or party provide that no contract will come into force until formal contracts are exchanged.
At pages 38-40, Skapinker discusses this section in more detail and outlines many transactions that have been held to be enforceable on a note or memorandum.

**Exchange of contracts**

If then, it is important to have a formal written contract, and that contract is not to be binding on the parties until a formal exchange, when does that exchange occur?

The methods of exchange are:

- physical exchange
- postal exchange or exchange through the document exchange.
- telephone exchange

**Physical exchange** is the most satisfactory method as it allows the solicitors for the vendor and purchaser to check that the contracts are identical and have been correctly executed. Traditionally it has occurred at the office of the vendor’s solicitor although any mutually agreed location is satisfactory. Once satisfied that the counterparts are identical they are swapped so that the vendor’s solicitor has the copy signed by the purchaser and the purchaser’s solicitor has the copy signed by the vendor. The copies are dated and the contract is exchanged and binding. It is usual to pay the deposit at the same time.

**Postal exchange** is not satisfactory. It requires both solicitors to commit the copy of the contract signed by their client to the post or the document exchange on the basis that at some point they will cross and arrive with the other solicitor. Problems occur if after committing the contract to the post or DX a solicitor receives instructions not to exchange and attempts to withdraw the document. Is a telephone call to
the other solicitor advising that contracts are not to be exchanged sufficient? When does exchange occur?

In *Eccles v Bryant and Pollock* [1948] 1 Ch. 93 Lord Greene M.R. identified the issues as follows:\(^{18}\):

When an exchange takes place by post and a contract comes into existence through the act of exchange, the earliest date at which such a contract can come into existence, it appears to me, would be the date when the later of the two documents to be put in the post is actually put in the post. Another view might be that the exchange takes place and the contract thereby comes into existence when, and not before, the respective parties or their solicitors receive from their “opposite number” their parts of the contract. It is not necessary here to choose between those two views.

The issue arose out of a contract signed by a purchaser being forwarded by the purchaser’s solicitor to the vendor’s solicitor expecting that upon receipt of it the vendor’s solicitor would exchange and post the vendor’s signed copy to the purchaser’s solicitor. The same day as the purchaser’s solicitor posted the letter the vendor’s solicitor posted one saying that the vendor would not proceed. So the vendor’s solicitor received the contract signed by the purchaser but did not exchange and post the vendor’s signed copy.

The purchaser argued that exchange had occurred when the contract was received by the vendor’s solicitor as exchange by post had been agreed upon as the way to affect exchange. The vendor argued that there was no exchange as the contract signed by the vendor was not posted back to the purchaser.

Lord Greene M.R. came to his conclusion as follows:\(^{19}\):

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\(^{18}\) Pages 97-98
\(^{19}\) Page 102
What took place was this: Both parties did in fact sign their respective parts of the contract. The purchaser put his part in the post and it duly arrived. The vendor did not put his part in the post, but instead of doing so he wrote to repudiate the proposed bargain and declined to go on. There was no exchange. The vendor was doing exactly what he would have been entitled to do if the exchange was to take place over a table. If one assumes that that had taken place and the purchaser had handed over his document to the vendor across the table, no contract would have come into existence if the vendor had said “I change my mind” and refused to hand his part over.

The court held that contracts had not been exchanged and were not binding.

Telephone exchange is becoming more frequent although still not without risk. It does not allow the parties to check that the contracts are identical and can lead to arguments based on the contents of the telephone call. If exchange by telephone is to be used it is wise to ensure that notes of the call are made and a fax forwarded immediately after the call confirming what has been said and that contracts are exchanged.

*Domb and anor v Isoz* [1980] 1 All ER 942 is an English case concerning an exchange by telephone. The purchaser’s part of the contract was forwarded to the vendor’s solicitor with a letter requesting an amendment and asking that the contract be held *in escrow* until they agreed by telephone that contracts could be exchanged. The amendments were made to the copy of the contract signed by the defendant, Isoz, but by oversight were not added to the copy signed by the plaintiff, Domb.

The solicitors agreed in a telephone conversation that contracts were to be treated as immediately exchanged but the copy signed by the defendant was never forwarded to the purchaser and she refused to
proceed. The appeal arose from the refusal by a deputy judge to enforce the contract on the basis that there was no concluded contract.

After considering the issues at length, Buckley LJ. came to the following conclusion:

In the present case, in my judgement, Mr Bond (for the defendant) on 9th February constituted himself Mr Redstone’s (for the plaintiffs) agent to hold the defendant’s part of the contract to Mr Redstone’s order from the moment of the telephonic agreement, and to despatch it to Mr Redstone forthwith, or on Mr Redstone’s demand. At the same time Mr Bond became the holder of the plaintiffs’ part of the contract to the order of his own client, the defendant, and was discharged from any continuing obligation to hold it to Mr Redstone’s order as he had theretofore been bound to do in pursuance of the letter of 22nd December.

On these grounds in my judgement the events which occurred in the present case on 9th February constituted an effective exchange of contracts, and the sale by the defendant to the plaintiffs of 34 Erskine Hill thereby became binding.

On the issue of the counterparts not being identical the court held that the clause omitted was machinery provision and did not affect the question of whether the contract had been exchanged. The parties had agreed to the inclusion of the clause and it had been omitted by the oversight of the solicitor.

In *Sindel v Georgiou and anor* (1984) 154 CLR 661 the High Court considered the issue of non identical counterparts and whether in these circumstance it was possible to have a binding exchange and concluded agreement. The case arose out of a sale after an auction and the vendor was represented by a solicitor but at that time the purchaser was not. The vendor’s copy of the contract signed by he purchaser reflected the agreement that had been reached but the purchaser’s copy signed by the vendor was deficient in several respects.

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20 Pages 948-949
The contract was not completed in accordance with its terms and the vendor rescinded the contract for the purchasers’ failure to complete. The purchasers sought an order for specific performance.

In a joint judgement the court held\(^{21}\):

In the present case the foundation for saying that the delivery of identical parts was essential is more fragile than in the usual case of exchange between solicitors. Here, exchange took place between the solicitors for the vendor and the first respondent at a time when no solicitor was acting for the purchaser and the evidence is that both the solicitor and the first respondent understood that by their exchange of parts they had entered into a binding contract.

It is not a case, as in *Harrison v Battye*, where the two parts contradict each other. The lack of correspondence between them arises because of a failure to complete the counterpart signed by the appellant and to annex thereto a copy of the survey report. There is nothing in either part to raise any doubt as to the agreed terms.

The appellant’s counterpart, that signed by the first respondent, contained all the terms agreed upon. It was the copy that deleted cl.17(d). This copy satisfied s. 54A of the Conveyancing Act 1919(NSW) as amended.

In *Longpocket Investments Pty Ltd v Hoadley* (1985) NSW Conv R 55-244 (or 1986 ANZ ConvR 757) the Court of Appeal considered an exchange where the “subject to finance” clause was different in each copy of the contract. The argument concerned whether the differences were material enough to amount to no binding contract. The Court of Appeal formed the view that the differences were material and found that no contract existed. In particular, the Court found that the word “thereabouts” to be “a word of imprecision. ... Its imprecision invites conflict.”

\(^{21}\) Page 668
<table>
<thead>
<tr>
<th>Vendor’s solicitor</th>
<th>Purchaser’s solicitor</th>
</tr>
</thead>
</table>
| Property listed for sale with agent advised by agent and confirms instructions with client orders:  
  title searches  
  planning certificate  
  sewer plan  
  survey, building certificate  
  HOW insurance |  
| commences preparation of contract including special provisions to make any disclosures or deal with other matters |  
| attach certificates and complete contract |  
| copy of contract to agent for advertising |  
| buyer found and sale advice received |  
| completed contract submitted to purchaser’s solicitor |  
| Any pre contract questions answered |  
| contract received and considered, client contacted and instructions confirmed |  
| client advised of importance of pre purchase inspections and pre contract enquiries |  
| pre contract enquiries made of the vendor’s solicitor and replies considered |  
| purchaser signs contract and exchange arranged (with or without 66W certificate) |  

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<table>
<thead>
<tr>
<th>Exchange (time starts to run)</th>
<th>Exchange (time starts to run)</th>
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</thead>
<tbody>
<tr>
<td>contact vendor’s mortgagee to</td>
<td>raise requisitions, prepare transfer</td>
</tr>
<tr>
<td>arrange discharge of mortgage</td>
<td>&amp; notice of sale, order statutory</td>
</tr>
<tr>
<td></td>
<td>inquiries, contact mortgagee</td>
</tr>
<tr>
<td>reply to requisitions</td>
<td>order survey or building certificate</td>
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<tr>
<td></td>
<td>or both</td>
</tr>
<tr>
<td>arrange for transfer to be signed</td>
<td>arrange for payment of stamp duty</td>
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<tr>
<td></td>
<td>or for exemption from duty</td>
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<td></td>
<td>submit transfer to vendor’s solicitor</td>
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<td></td>
<td>for signature</td>
</tr>
<tr>
<td></td>
<td>check replies to requisitions and</td>
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<td></td>
<td>replies to enquiries</td>
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<tr>
<td></td>
<td>chase mortgagee for funds</td>
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<td></td>
<td>prepare and submit settlement</td>
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<td>figures to vendor’s solicitor and</td>
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<td></td>
<td>client</td>
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<tr>
<td>chase mortgagee for payout,</td>
<td>register transfer if no mortgage</td>
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<tr>
<td>confirm discharge of mortgage held</td>
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<td>and where settlement will take place</td>
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<td>check settlement figures and give</td>
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<td>cheque directions to purchaser’s</td>
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<td>solicitor</td>
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<td>arrange settlement</td>
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<tr>
<td>attend settlement</td>
<td></td>
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<tr>
<td>report to client</td>
<td></td>
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</table>