CONVEYANCING

LECTURE ON 28 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.

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**Deposit**

A deposit is usually seen as “an earnest to bind the bargain”\(^1\). It does two things:

- acts as an indication that the purchaser is serious in undertaking the bargain
- acts as security for the performance of the contract.

In a normal conveyancing transaction it also forms part of the purchase price if the transaction is completed. We will deal later with what happens to the deposit if the matter does not proceed and the circumstance in which a purchaser might be able to recover the deposit under section 55A of the Conveyancing Act.

In *Brien v Dwyer and Anor* (1978) 141 CLR 378 the High Court considered the nature of a deposit in circumstances where a purchaser did not pay a deposit until some weeks after exchange and the cheque was not presented by the agent until later still. The date of exchange was 27 February 1973, the cheque handed over in March and deposited by the agent on 11 May 1973. On 11 May 1973 the vendors’ solicitors signed and served a notice of rescission based on the purchaser’s failure to pay the deposit. Barwick C J referred to a deposit in this manner\(^2\):

> It does provide an earnest of performance by the purchaser if the vendor is willing to be bound: it also affords some proof that the estate agent has procured for the vendor a willing purchaser and an agreement enforceable upon the vendor’s adherence to the terms of the document signed by the purchaser.

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\(^1\) *Howe v Smith* [1884] 27 Ch D 89 at 101

\(^2\) Page 385
While there have been many other cases where late payment of a deposit caused a difficulty the issue has now been dealt with in clause 2 of the 2005 edition of the Contract as follows:

2.2 Normally, the purchaser must pay the deposit on the making of this contract, and this time is essential.

2.5 If any of the deposit is not paid on time or a cheque for any of the deposit is not honoured on presentation, then the vendor can terminate. This right to terminate is lost as soon as the deposit is paid in full.

Stakeholder and agent

Does the agent holding the deposit do so as ‘agent’ for the vendor or as ‘stakeholder’ for both parties? The answer is to be found in the words of the contract if the issue as dealt with there. The 2005 contract provides:

2.1 The purchaser must pay the deposit to the deposit holder as stakeholder.

The ‘deposit holder’ is defined in clause 1 as ‘vendor’s agent (or if no vendor’s agent is named in this contract, the vendor’s solicitor)’. The combined effect is that the deposit when paid is held by the vendor’s agent or solicitor as ‘stakeholder’.

What then is a stakeholder?

A person holding money as ‘stakeholder’ holds that money for two parties, the vendor and purchaser, pending the occurrence of some event. If the contract is completed then the deposit is held for the vendor and can be paid to the vendor. The 2005 Contract provides for this in clause 16.10:

On completion the deposit belongs to the vendor.

In a conveyancing transaction the deposit is released by the stakeholder on the authority of the purchaser’s solicitor. A letter called an Order on the Agent is handed over by the purchaser’s solicitor to the vendor’s solicitor. Agents are always anxious to have these ‘orders’ as upon receipt of it they are normally entitled to deduct their commission and pay the balance to the vendor.

If the contract is not completed then the deposit is paid to the party entitled to it. For example, if the contract is rescinded under the cooling
off provisions then it is refunded to the purchaser less the amount of 0.25% that is payable to the vendor.

(I will deal with the Cooling Off provisions later in this lecture.)

If there is a dispute concerning which party is entitled to the deposit then the stakeholder cannot pay the money to either party. It is usual in these circumstances for the stakeholder to interplead and ask the court to direct how the deposit should be paid.

If the deposit were to be paid to an agent for the vendor as agent and not as stakeholder then the agent would be bound to deal with the deposit in accordance with the vendor’s direction. This is not the current method but could arise if the 2005 Contract was not used and the parties contracted on some other basis.

If any part of the deposit or the balance of purchase money is paid to the vendor prior to completion then this creates a charge for the amount paid in favour of the purchaser. The 2005 Contract provides as follows:

2.8 If any of the deposit or of the balance of the price is paid before completion to the vendor or as the vendor directs, it is a charge on the land in favour of the purchaser until termination by the vendor or completion, subject to any exiting right.

Holding and contractual deposits

Agents often request payment of a small deposit by a purchaser prior to the exchange of contracts. There is no legal basis for such a payment and it does not create any legal relationship between the parties. In his notes on this topic Scott Freidman referred to this as “a marketing ploy”. It is an unsatisfactory practice as it makes purchasers think they have a deal when they might not, and it does not prevent an agent selling the property elsewhere for a higher price.

If the agent does hold such a ‘holding deposit’ what happens if this money is misappropriated by the agent and not refunded? As the money paid is not a ‘contractual deposit’ it is not held by the agent as agent for the vendor or as stakeholder, but is held for the purchaser and must be refunded to the purchaser at the purchaser’s request. The position changes once a contract has been exchanged.

In Sorrell v Finch [1976] 2 WLR 833 the House of Lords considered this issue. Finch owned a house and engaged Levy as agent to sell it for him. Levy showed 6 prospective purchasers the property and took deposits from each of them. Levy and the money disappeared.
When nothing seemed to be happening the purchaser, Sorrell, made enquiries and found that Levy had disappeared. Sorrell could not find Levy to sue him so sued Finch claiming that as he had engaged Levy he was responsible to repay the deposit. At first instance and in the Court of Appeal Sorrell was successful, but in the House of Lords the House found against him 5:0. In his judgement, Lord Edmund-Davies said:

It being common ground that, before a contract was concluded, neither vendor nor estate agent could gainsay the purchaser’s demand for its return. I fail to see that the justice of the case demands the vendor, however personally innocent, should be held liable to repay the depositor in the event of the agent defaulting. It is not open to the prospective purchaser to deny knowledge of his unfettered legal right to get his money back at that stage, and if, with what actual or imputed knowledge, he chooses to pay a deposit and leave it in the estate agent’s hands, while one must naturally have sympathy with him, such intuitions of justice as I possess do not demand that he should be recouped by a vendor who shares his innocence and differs from him only in engaging someone to find a purchaser for his home.

... It involves the inference that he possesses the authority of the vendor to receive it as his agent; but, although the deposit is received in that representative capacity, the recipient must nevertheless return it to the depositor at his request and the principal has no control over it, ...

We have already looked at some of the provisions in the 2005 Contract concerning the deposit. It is important to look at all of clause 2 and understand what it does.

Because clause 2.2 refers to the time for payment as being ‘essential’, this gives the vendor a right to terminate the contract if payment is not made. In practice, it is important to see that a deposit is paid or a deposit bond provided, at or prior to exchange. If the deposit is not paid ‘on the making of this contract’ then it is essential that the purchaser make payment before the vendor terminates. Clause 2.5 provides that if payment is made before termination, then the right to terminate is lost.

The Guide refers to clause 3 but as vendor duty has been abolished this clause is no longer relevant.

Forfeiture of Deposit

Clause 9 is an important clause as it provides for:
• the vendor’s right to retain a deposit for a breach of an essential term; and

• sue the purchaser for breach of contract.

Here we will deal only with 9.1 (we deal with 9.2 and 9.3 later in the course.).

9 Purchaser’s default

If the purchaser does not comply with this contract (or a notice under or relating to it) in an essential respect, the vendor can terminate by serving a notice. After the termination the vendor can –

9.1 keep or recover the deposit (to a maximum of 10% of the price); …

You must remember the difference between ‘terminate’ and ‘rescind’. A termination occurs because of a breach of a term of the contract. A rescission occurs where the contract provides for it or under the Cooling-Off provisions and is ‘from the beginning’, that is the parties go back to where they were. The exception is the forfeiture of the 0.25% under the Cooling-Off provisions.

Under clause 9, if the purchaser defaults in any essential obligation, the vendor is entitled to recover the deposit. The purchaser may fail to complete the contract either in accordance with an essential time for completion, or in accordance with a notice to complete that has made time essential. But what if the deposit is less than 10%? Can the vendor sue to recover an amount in addition to any deposit actually paid to make the ‘deposit’ up to the maximum allowed by the contract (10%)?

In equity any amount considered a penalty will not be recoverable. In contracts for the sale of land, it is generally accepted that a deposit of 10% is not excessive and that to forfeit this amount would not amount to a penalty. Equity would generally not interfere.

In the recent case of *Luong Dinh Luu v Sovereign Developments Pty Ltd and 2 Ors* [2006] NSWCA 40 the Court of Appeal considered whether a payment claimed under a contract amounted to a penalty.

In his judgement Bryson JA described the way the deposit was shown in the contract as follows:

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4 Para 5
5 Provisions on the first page of the Contract relating to price were as follows:

- Price in words: SIX MILLION SIX HUNDRED THOUSAND DOLLARS
- Price $6,600,000.00
- Deposit $330,000.00 65,000.00 (10% of the price, unless otherwise stated)
- Balance $6,270,000.00 6,535,000.00

These provisions, including the two amounts struck out, were first typewritten, and the figures in italics were handwritten. As will be seen, as first typed the Contract showed the deposit as $330,000.00 which is 5% (and not 10%) of the price, and this was altered by hand to $65,000.00 which is a little less than 1% of the price; and the balance was altered correspondingly. The Contract provided for the vendor’s agent L J Hooker Port Macquarie to be the deposit holder.

The purchaser failed to complete the contract and after a series of negotiations the contract was terminated and the vendor sued the purchaser and 2 guarantors for the balance of the deposit by then amounting to $616,000.00. In the District Court the trial judge found that special condition 5 (see below) was not void for uncertainty and did not constitute a penalty.

Special Condition 5 was as follows:

5. In the event that the Purchaser pays less than ten percent (10%) of the purchase price as deposit then if the Purchaser commits a default hereunder the whole of the 10% deposit shall become due and payable notwithstanding that this Contract is not completed. This clause shall not merge on completion and the Vendor shall be entitled to sue for recovery of so much of the 10% deposit that remains outstanding as a debt due by the Purchaser to the Vendor.

Bryson then dealt with the first ground of the appeal which argued that the Special Condition was void for uncertainty. After being critical of the wording of the clause he came to the view that the wording was clear enough that the vendor was entitled to recover an amount of 10% of the purchase price if a lesser amount had been paid. He dismissed this ground.

He then turned to the question of whether the amount was a penalty and said⁵:

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⁵ Starting at para 24
24 Where parties make an agreement for a sale which is to be completed at some time in the future it is unremarkable and only to be expected that the vendor will require the purchaser to pay some part of the purchase money straight away so as to show that the purchaser is in earnest in committing himself to pay the rest, on the understanding that the purchaser will not get his earnest money back if he does not complete the sale. For contracts of sale of land it has long been customary practice and established law that the purchaser pays a deposit on account of the purchase money when the contract of sale in writing is made, and cannot recover that deposit if he later fails to complete the bargain and pay the rest; whether or not the vendor’s losses are actually more or less than the amount of the deposit. Notwithstanding the apparent inconsistency the invalidity of contractual penalties does not apply to contractual provisions for forfeiture of reasonable deposits in sales of land. In New South Wales it has long been usual to require a deposit of 10% of the purchase money, and this practice has not encountered challenge; on the other hand provisions relating to forfeiture of purchase moneys other than a reasonable deposit should be regarded as open to challenge. The assumption that provisions for forfeiture of deposits of reasonable amount are effective underlies statutory provisions for relief against their forfeiture; see s.55 of the Conveyancing Act 1919. The exception from the law relating to penalties relates and relates only to deposits, that is, to payments which truly have the character of earnest money paid on or in relation to entering into the Contract, and although provisions of contracts almost always establish what the deposit is, it is not open to parties to avoid the operation of penalties law by designating a payment or an obligation as a deposit if it does not otherwise have that character.

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27 In Ashdown v Kirk [1999] 2 Qd R 1 the Court of Appeal of Queensland enforced a provision in a contract for the sale of land which provided for a split deposit to be paid by two instalments and also provided that if the vendor terminated the contract "... the vendor may recover from the Purchaser as a liquidated debt the deposit or any part of it which has not been paid by the Purchaser." At page 8 McPherson JA said:

A deposit is considered an “earnest” of the bargain or its performance (Brien v. Dwyer (1978) 141 C.L.R. 378, 385) that is designed to demonstrate the sincerity of the contracting party who is to pay it. For that reason, it is ordinarily beyond the reach of equitable relief against penalties or forfeiture, at least if it is not excessive or unconscionable in amount, of which in Queensland the equivalent of 10 per cent of the purchase moneys is ordinarily considered the upper limit: Freedom v. A.H.R. Constructions Pty Ltd [1987] 1 Qd.R. 59.

…
The references in Special Condition 5 to the deposit in the context of the obligation to pay up to 10% of the purchase price on default are confusing elements which do not, in my judgment, affect the essential character of the obligation as an additional payment which the purchaser must make if the purchaser is in any way in default. Where the additional payment was not made and, as in this case, the Contract has been terminated and the vendor sues for it as a debt, its character as a penalty, quite unrelated to any damage or loss incurred by the vendor, is in my opinion quite clear. If an attempt is made to consider it as a pre-estimate of damage, it is obvious that it is a grossly excessive amount in relation to some of the defaults upon which it may become payable, such as late delivery of the draft transfer, while for others, such as delay in completion or failure to complete by an essential time, the lack of any relation between a percentage of the purchase price and a pre-estimate of damage for breach demonstrates, to my mind, the absence of any justification.

Bryson dismissed the appeal and Handley and McColl JJA concurred with his decision.

The result of this case is that conveyancers need to be particularly careful when altering the way the deposit is shown on the front page of the contract. If the deposit is less than 10% of the purchase price then any attempt by a vendor to recover a further amount up to 10% is likely to be unsuccessful. If the deposit is referred to as 10%, but a lesser amount has been paid, then recovery is likely to be successful.

This issue came before the Court of Appeal again in the matter of *Ianello & Anor v Sharpe* [2007] NSWCA 61. The Ianellos (vendors) had purported to enter into a contract for the sale of their house at Hunters Hill for $4.5 million to Sharpe (purchaser). A deposit of $225,000.00 was paid. The front page of the contract as signed by the purchaser showed the price of $4,500,000.00 and a deposit of $225,000.00. This was followed by words signifying that this was 5% of the purchase price. After exchange the front page was altered to show the deposit to be $450,000.00.

The contract contained a special condition in the following terms:

14. Reduced Deposit
Notwithstanding anything else herein contained, the Vendor shall accept, on exchange of this Agreement, payment of $225,000.00 being part of the deposit. The parties expressly agree that if the Purchaser defaults in the observance or performance of any obligation hereunder which is or has become essential the balance of the deposit, namely $225,000.00 shall become immediately due and payable and the Purchaser shall forfeit the whole sum of $450,000.00 pursuant to Clause 9 hereof to the Vendor.
After the purported exchange on 4 April 2003, the normal steps were taken but the purchaser was unable to come up with the money and the vendors, after giving a Notice to Complete, terminated the contract on 12 February 2004.

The vendors commenced proceedings for the balance of the deposit amounting to $225,000.00. The purchaser claimed the return of the $225,000.00 already paid or an order for the return of the deposit. The primary judge found that the alteration to the deposit was material because of it no contract had been entered into.

The vendors appealed and Hodgson JA set out the issues as:

1. Were the alterations affecting the deposit material?
2. Was there error by the primary judge in refusing the amendment?
3. Was the provision concerning the second instalment of $225,000.00 a penalty?

Hodgson went on to consider questions 1 and 3 and felt that he did not need to deal with question 2.

His Honour said:

18 ... Both before and after the alteration, Special Condition 14 had the effect that $225,000.00 was payable on exchange of contracts, and a further $225,000.00 was payable “if the purchaser defaults in the observance or performance of an obligation hereunder which is or has become essential”.

(His Honour then quotes extensively from Luu)

29 The second matter is not directly relevant to the question of whether the second $225,000.00 is a deposit; but rather is relevant to the question whether, accepting it is not a deposit, it is or is not a pre-estimate of damages. ... in my opinion, accepting that the obligation to pay the second $225,000.00 would only arise in circumstances where the vendors have lost their bargain, nevertheless it cannot be considered a pre-estimate of damages. ...

30 In those circumstances, the Court shuld conclude that, if the second $225,000.00 is not part of a deposit, provision for its payment would be a penalty and not enforceable. ...

31 ...in my opinion the statement of principle in the last sentence of par.[24] of the judgement in Luu is correct; so that the name which the

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6 Paras 18, 29-32, 34
parties have chosen to give to a payment is not determinative of whether or not it is a deposit. ...

32 On that approach, in my opinion the obligation to make the second payment of $225,000.00 is not an obligation to pay a deposit or a part of a deposit. There never would be a time when this second $225,000.00 (as such) would be paid so as to show that the purchaser is in earnest in committing himself to pay the rest. On the contrary, the only time when Special Condition 14 obliges the purchaser to pay this sum is when the purchaser has demonstrated that he is not in earnest, and indeed the termination of the contract means that he would not be able to complete the contract. The obligation to pay the second $225,000.00 is inconsistent with the characteristics of a deposit. In my opinion, this would be equally so whichever version of the front page was operative.

34 Accordingly, in my opinion the alteration concerning the deposit did not affect the meaning or effect of the contract, so that a contract did come into existence. The vendors were entitled to forfeit the $225,000.00 paid on exchange; but were not entitled to be paid the second $225,000.00, because it was a penalty.

35 It follows that the appeal should be allowed, ...

Conveyancing Act sec 55

Section 55(2A) is in the following terms:

In every case where the court refuses to grant specific performance of a contract, or in any proceeding for the return of a deposit, the court may, if it thinks fit, order the repayment of any deposit with or without interest thereon.

The question of how this should be dealt with by the court has been considered by Skapinker at para 7-80 and by Rossiter7 at pars 4.25 et seq.

Rossiter says that the jurisdiction arises from both the inherent equitable principles of relief against forfeiture and relief against penalties. We have seen in Luong Dinh Luu v Sovereign Developments Pty Ltd and 2 Ors8 and Ianello & Anor v Sharpe9 that the New South Wales Court of Appeal is prepared to say that more than the contractual deposit will amount to a penalty. There are many cases dealing with the discretion of

8 Page 5 of these notes
9 Page 8 of these notes
a court to order the return of a deposit under s 55(2A) and the references to them are in both Skapinker and Rossiter.

In the last lecture we looked at *Tsekos and Anor v Finance Corporation of Australia Ltd* [1982] 2 NSWLR 347 when we considered whether the failure by the vendor to advise the purchaser of a proposal to resume the property constituted a misdescription of the subject matter of the sale. The court held that it did not but then considered whether the deposit should be refunded to the purchaser.

Rath J said\(^\text{10}\):

> I am accordingly of the opinion that the purchasers did not validly rescind the agreements; that their purported rescission and subsequent conduct were a repudiation of the agreements; and that the agreements were validly rescinded by the defendant. It follows that the plaintiffs have no entitlement to damages, or under cl 14 of the agreements. It also follows that the deposits are forfeited, but relief may be granted under the Conveyancing Act, 1919, s 55(2A).

The court has a discretion under s 55(2A), and it is a wide one: ...It is a judicial discretion, but does not appear to be capable of any precise definition.

... There are two circumstances in the case supporting an exercise of the discretion in the plaintiff's favour: firstly, that they were ready, willing and, presumably, able to complete, had it not been for the notice of council’s proposal to resume: and, secondly, that they had no notice before entering into the contracts of any intention by the council to acquire the properties. The defendant did have notice of the intention of council to resume, if a purchase by it was not negotiated, and did not disclose its knowledge to the plaintiffs, although it knew that the plaintiffs desired to improve the properties.

... The case may be one in which the court would refuse specific performance. ... However this may be, the case is one for the return of the whole of the deposits; and I think ... interest ...

In the earlier case of *Lucas and Tait (Investments) Pty Ltd v Victoria Securities Ltd* [1973] 2 NSWLR 268 Street C J the plaintiff sought an order that the court would not order specific performance of the contract and an order for the return of the deposit. Street C J determined that he would not make the order sought concerning specific performance and said\(^\text{11}\):

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\(^{10}\) Page 356  
\(^{11}\) Page 273
I refuse to declare that the contract would not be specifically enforced against the plaintiff at the suit of the vendor.

On the issue of the return of the deposit he quoted from several authorities and concluded:

It is one thing to recognise that there is a wide discretion conferred upon the court under this section; it is another thing to determine the guidelines for the exercise of that discretion. The section was designed to provide relief to a purchaser against an unjust and inequitable consequence of forfeiture of a deposit.

... A vendor who forfeits a deposit in strict enforcement of his legal rights is not to be deprived of it under s.55 (2A) unless it is unjust and inequitable to permit him to retain it.

... Equity has always looked with disfavour upon penalties or stipulations which result in a party to a contract making a profit at the expense of a defaulting party. It is clear that where the court in its discretion refuses specific performance, whether or not it also orders repayment of the deposit under s.55 (2A), it will still remain open to the vendor to sue the defaulting purchaser and recover against him whatever damages may be due to the vendor at law in the event of the contract having gone off through the purchaser’s breach.

... I decline to state my view upon where the boundaries of the discretion are to be drawn. Specific instances of its application are to be found in the cases. They all, however, come under the general category of circumstances in which the court held it to be just and equitable to deny to the vendor the enjoyment of a forfeited deposit.

In *Romanos v Pentagold Investments Pty Ltd & Anor* (2003) ANZ ConvR 601 the High Court considered the termination of a contract for non payment of the deposit and the question of the return of the deposit under s 55(2A). In this case the court found that there was insufficient evidence to show that it would be unjust or inequitable for the vendors to forfeit the deposit.

The report of this case is not long and should be read.

**Cooling off provisions**

This topic fits more easily under the heading of exchange of contracts but as I did not deal with it there, I will deal with it here.

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12 Pages 272-273
To understand the impact of the cooling off provisions on sales of land it is necessary to look at sections 66P to 66Y of the Conveyancing Act 1919.

The cooling off right only applies to ‘residential property’ so the first question is, what is residential property? It is defined in s 66Q to be:

- (a) land on which are situated (or in the course of construction) not more than two places of residence, and no other improvements;
- (b) vacant land on which the construction of a single place of residence alone is not prohibited by law; or
- (c) a lot or lots … under the Strata (Acts) comprising not more than one place of residence alone...

Section 66Q(2) excludes land or a lot used ‘wholly for non-residential purposes’ and ‘land that is more than 2.5 hectares in area’.

“place of residence” is defined to mean ‘a building or part thereof used, or currently designed for use, as a single dwelling only, and includes outbuildings or other appurtenances incidental to any such use.’

Section 66S the provides that every contract for the sale of ‘residential property’ is to have a cooling off period as set out in 66S(3), that is 5 business days after the contract is made. So, if we exchange today, the cooling off period will run out at 5 pm on Monday next week. The period can be shortened or lengthened as set out in the section.

There are four circumstances when the cooling off period does not apply:

- if a certificate under 66W is given ‘at or before the time the contract is made’
- the property ids sold at auction
- the property is sold on the same day as an auction at which the property was passed in
- when the contract is the result of the exercise of an option.

Section 66U sets out how the right is exercised and 66V sets out the consequences of rescission. I referred before to the 0.25% that a vendor receives where cooling off rights are exercised. This section sets out that this is payable.

Section 66W sets out the requirements for a certificate waiving the cooling off right.
Also note section 66X requiring a contract to have a notice attached.

Cooling off and the sections in this part of the Conveyancing Act would make good exam material.

**Vendor’s duty of care pending completion**

In his lectures Scott Freidman referred to the three stages of a transaction:

- the period leading up to exchange in which the parties are in no legal relationship at all
- the period between exchange and completion which we will look at
- the period when the balance of the purchase money has been paid at which time the vendor becomes a trustee for the purchaser.

It has been suggested that between exchange and completion that the vendor is a trustee for the purchaser. This does not seem to be a good characterisation as a trustee must do with a property what the beneficiary directs. This is not the case with property transactions. It is true that the vendor can’t damage or destroy the property and suffer no consequences but the purchaser can’t direct the vendor to do anything with the property other than expect it to be in the same state at completion as it was on exchange. This seems to fall far short of a trustee/beneficiary relationship.

In *Bunny Industries Ltd v F.S.W. Enterprises Pty Ltd & Ors* (1982) ANZ ConvR 627 the court heard a dispute concerning the sale of a property to two different purchasers. The second sale was completed and the first purchaser sued for the difference in values between the price they had agreed to pay and the second sale price. It argued that upon the first exchange the vendor became a trustee for it and accordingly held any ‘profit’ from the second sale for it.

In his decision in the Full Court of the Supreme Court of Queensland Connolly J set out the principles:  

> The principles may be summed up for present purposes as follows –

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13 Page 628
1. On the execution of the contract the vendor becomes a trustee for the purchaser. He is not however a bare trustee for he has a personal and substantial interest to the extent of the unpaid purchase moneys. He is “in progress towards” bare trusteeship and finally becomes such when the whole of the purchase moneys are paid and he is bound to convey.

2. The purchaser may devise, alienate and charge his equitable interest so that it is plainly not a mere right in contract.

3. The extent of the equitable interest is measured by the amount of the purchase moneys paid. Thus to the extent of the payments the purchaser acquires a lien exactly as if the vendor had given a mortgage to secure them.

4. Where there is a clear and undisputed contract, the Court will not permit the vendor to transfer the legal estate to a third person and the reason for this was explained in ... as being because in equity the property was transferred to the purchaser.

5. The incidents of trusteeship exist only if and so far as a Court of Equity would in all the circumstances of the case grant specific performance of the contract ...

The court held that the vendor was a trustee for the first purchaser and liable to account for any ‘profit’ over and above the price in the contract with the first purchaser.

But why does the ability to ‘devise, alienate and charge’ the equitable interest of the purchaser mean that there has to be some other relationship? As Scott Freidman pointed out in earlier notes, an equitable mortgagee can sell the equitable interest without the law imposing some other relationship on the parties. An unregistered mortgage of Torrens land is an equitable mortgage and can be dealt with by the mortgagee.

If we ignore the equitable issues and look at common law, what would happen if the vendor in Bunny had sold the property twice? The first purchaser would have sued for breach of contract and claimed damages for that breach. An argument concerning the quantum would have raised the ‘profit’ caused by the second sale as indicating the first purchaser’s loss. It is likely that the result would have been the same.

In **Phillips v Lamdin** [1949] 2 KB 33 the court considered whether a vendor could remove a door from the premises between exchange and completion and replace it with an inferior door. The door was of some
significance and made by a craftsman named Adam. In his judgement Croom-Johnson J said:\textsuperscript{14}:

When the plaintiff went to view the premises there was in one of the rooms, a mantel-piece of a somewhat ornate design, which I gather has been attributed to one of the brothers Adam. In the same room, and matching the mantel-piece there was a door similarly designed and ornamented.

When she went to the premises after this long delay in completion the door was not there, and instead of the, to her, handsome and ornate door, there was a door in some sort of white wood, looking anything but attractive and which had never even been painted on the inside.

where a vendor remains in possession pending completion he owes a duty to take reasonable care to preserve the property. It is sometimes said that he is a trustee of the property but, if he is, it is not the same sort of case as of other trustees.

I entertain no doubt at all that the defendant is liable to replace the door and to bring it back. You cannot make a new Adam door. You cannot in these times re-fashion a door or make a copy.

The characterisation of the vendor as a trustee was referred to by Deane J in 	extit{Kern Corporation Limited v Walter Reid Trading Proprietary Limited and Ors} (1987) 163 CLR 164. While his comments are obiter they are of interest in deciding this issue. He said:\textsuperscript{15}:

For limited purposes, the distinction between legal title and beneficial ownership may provide a useful reference point in describing the position of the ordinary unpaid vendor of land under an uncompleted contract of sale. However, ... it is wrong to characterize the position of such a vendor as that of a trustee. True it is that, pending payment of the purchase price, the purchaser has an equitable interest in the land which reflects the extent to which equitable remedies are available to protect his contractual rights and that the vendor is under obligations in equity which attach to the land. Nonetheless, the vendor himself retains a continuing beneficial estate in the land which transcends any “lien” for unpaid purchase money to which he may be entitled in equity after completion.

... it is both inaccurate and misleading to speak of the unpaid vendor under an uncompleted contract as a trustee for the purchaser ...

\textsuperscript{14} Page 40-41
\textsuperscript{15} Para 1 of Deane J
Another useful case to consider is *Chang v Registrar of Titles* (1976) 137 CLR 177. Carpenter v McGrath also considers this question and we may look at this when we deal with illegality of structures.

**Protection of purchaser’s equitable interest**

It is clear from the discussion above that whatever the position of the vendor might be in the period between exchange and completion, the purchaser under a contract capable of specific enforcement has an equitable interest in the land. This equitable interest gives the purchaser a right to lodge a caveat under s 74F(1) of the Real Property Act 1900 to prevent the registration of dealings contrary to that equitable interest.

While it is not general practice to lodge a caveat to protect the purchaser’s interest in every conveyancing transaction, there are circumstances where this should be considered. For example:

- where the settlement time is longer than the normal 4 to 8 weeks
- where there is concern at the financial viability of the vendor
- where the integrity of the vendor is doubted
- where the deposit has been released to the vendor
- in a large transaction
- where the vendor is acting for him/herself and does not have the benefit of legal advice
- where any other circumstances exist that cause you concern

Failure to lodge a caveat will nearly always see the solicitor sued, generally successfully, regardless of whether it is normal practice to lodge a caveat or not. The risk of not lodging is always there, but this must be offset by the cost to the client of lodging and then either convincing an incoming mortgagee that the caveat will be removed automatically when the transfer is lodged or preparing and lodging a withdrawal of caveat.

**Insurance and passing of risk**
At common law, the purchaser acquires an equitable interest at exchange and has an insurable interest. If the property is destroyed between exchange and completion then the purchaser is still bound to complete and the vendor effectively suffers no loss. This is not always true as the vendor might have contracted to sell commercial premises but not manufacturing machinery which could be destroyed as well.

The situation is set out in *Ziel Nominees Pty Ltd & Anor v V.A.C.C. Insurance Co. Ltd & Anor* (1978) 50 ALJR 106 where the High Court considered a claim by a vendor for payment under an insurance policy for damage caused to property between exchange and completion. The vendor lodged a claim and authorised the insurer to pay any process to the purchaser. The purchase was completed and the insurer denied the claim. The insurer argued successfully that as the policy was one of indemnity in favour of the vendor there was no loss as the vendor had received payment in full for the property when the sale was completed.

In his judgement with which Stephen J and Jacobs J agreed, Barwick C J said\(^{16}\):

> It is settled law that upon the signature of an enforceable contract of sale of land the purchaser is bound to complete, irrespective of the destruction of the improvements on the land in the meantime and the purchaser has, upon that signature, an equitable estate in the land commensurate with the estate which the vendor has agreed by the contract to transfer or convey. The purchaser accordingly has an insurable interest which he can immediately protect by cover note or policy of insurance.

> ... Thus a vendor who receives the price which he has agreed to accept for the land suffers no loss by the destruction of the improvements on the land meanwhile.

> ... It follows in my opinion ... the vendor was not and could not at that time have become entitled to any moneys under the policy: and this for the simple and direct reason that he had not and could not suffer any loss by reason of the destruction or damage of the improvements on the land which he had sold.

A similar case arose in *Kern Corporation Ltd v Walter Reid Trading Pty Ltd* (1987) 163 CLR 164.

The common law position has been altered by two statutory provisions, s 50 of the Insurance Contracts Act 1984 (Cth) and the passing of risk provisions in the Conveyancing Act 1919 (ss 66J – 66O).
Section 50 – Insurance Contracts Act 1984 (Cth)

Read and understand this section. It effectively says that if a purchaser signs a contract for property that the vendor has insured under a contract of general insurance and risk has passed to the purchaser, then the purchaser is deemed to be an insured under the contract of insurance until:

- the sale is completed
- the purchaser enters into possession
- the purchaser takes out his own policy
- the contract of sale is terminated.

The provision, while of use in some circumstances has several drawbacks:

- it doesn’t help if the vendor has no insurance
- the vendor may be underinsured
- the company may be able to deny liability for some reason connected to the vendor.

Conveyancing Act – ss 66J – 66O

These sections should be read carefully and understood. They are good exam material.

Section 66K reverses the common law position and provides that risk does not pass until completion or the purchaser enters into possession.

Section 66L provides that where land is ‘substantially damaged’ (defined in 66J(2) to mean “if the damage renders the land materially different from that which the purchaser contracted to buy”) between exchange and settlement or early possession, then the purchaser is entitled to rescind the contract. For the effect of a rescission see 66L(4).

Section 66M provides for an abatement of purchase price where the land is damaged. It applies whether the land is ‘substantially damaged’ or not so a purchaser has a choice of rescission for substantial damage or abatement in the price.

Section 66N allows the Court to refuse specific performance of a contract where a purchaser claims an abatement for substantial damage where it would be “unjust or inequitable” to force a vendor to complete and have a large abatement in the price.
Section 66O is critical. It provides that the provisions cannot be excluded in sales of ‘dwelling houses’ but can be for other buildings. ‘Dwelling – house’ is defined in 66O(1).

The first case to deal with a reductio in purchase price appears to be *Shadlow & Anor v Skiadopolous & Anor* (1988) ANZ ConvR 55-383. This case should be read carefully as it sets out a good summary of the principles involved.

A similar issue was considered under the same sections where a pre-fabricated building was removed from property between exchange and completion. The court found that removal of the building constituted ‘damage’ within the terms of 66M. See *Robert Pryke Investments Pty Ltd v Blazai Pty Ltd* (2001) ANZ ConvR 162.

The editorial note to this case lists several other cases where decisions have been made under both the NSW provisions and other provisions.