

SOME THOUGHTS ON BENEFICIAL INTERESTS AND BENEFICIAL OWNERSHIP IN REVENUE LAW

MARGARET STONE* AND VANESSA LESNIE**

I. INTRODUCTION

It is a fundamental principle of the law relating to stamp duties that the duty is levied on instruments, not on the underlying transactions to which they give effect.¹

Despite the undoubted truth of Justice Mason's comment and the importance of this "instrument principle", it would be a mistake to conclude that stamp duty legislation is not concerned with the substance of the transactions evidenced by dutiable instruments. The substance of the transactions which are evidenced or effected by the instruments will, of course, determine whether the instrument is stampable and, if so, the amount of duty payable.² This concern with the substance of transactions is nowhere more evident than in the application of so-called "Claytons" contract provisions.³ These provisions apply to certain

* BA (Syd), LLB (Hons) ANU, LLM (Yale); Adjunct Professor, Faculty of Law, UNSW; Partner, Freehill Hollingdale & Page.

** BCom, LLB (UNSW); Solicitor of the Supreme Court of NSW.

1 *DKLR Holdings (No 2) Pty Ltd v Commissioner of Stamp Duties* (1982) 149 CLR 431 at 449-52, per Mason J.

2 *Comptroller of Stamps v Yellowco Five Pty Ltd* [1993] 2 VR 529 at 538.

3 *Stamp Duties Act* 1920 (NSW) Division 3A, ss 44 to 44F; *Stamps Act* 1958 (Vic), ss 59, 64A; *Stamp Act* 1894 (Qld), ss 2B, 54(4), 54A, 54AB, 54AD, 64D; *Stamp Act* 1921 (WA), ss 31B, 73F; *Stamp Duties Act*

transactions which effect a transfer of property without the aid of an instrument. They pay lipservice to the instrument principle by requiring a person who is a party to a prescribed transaction to bring into existence an instrument which is then liable to ad valorem duty. The provisions were aimed at the practice which avoided the creation of such an instrument by using a written offer and oral acceptance. In New South Wales, Victoria, the Australian Capital Territory and the Northern Territory the provisions apply to a transaction which effects a change in beneficial ownership of an estate or interest in certain property.⁴

The use of the concepts of beneficial ownership and beneficial interest in stamp duty law is not confined to the Claytons contract provisions. Change in beneficial ownership or beneficial interest is used as the trigger for the imposition of duty or the exemption from it in many other circumstances.⁵ This widespread reliance on a change in beneficial ownership or the transfer of a beneficial interest focuses attention on the meaning of these terms.

Consideration of the legislative provisions which refer to beneficial ownership and beneficial interests raises a number of questions.⁶ It is not clear whether there is a distinction between the terms "beneficial ownership" and "beneficial interest". In New South Wales, for instance the Claytons contract provision refer to the "beneficial ownership of an estate or interest" in the relevant property. For the purposes of this paper we have not attached any significance to the difference between the terms and have used them interchangeably. In our opinion, when the legislation uses either of these terms as a criterion for liability or exemption, it is focusing on the right to enjoy the property.

The crucial question is in what circumstances a person has a beneficial interest. One source of confusion is that the term "beneficial interest" is often used as a synonym for an equitable proprietary interest. Strangely, none of the Australian stamp duty legislation defines either beneficial interest or beneficial ownership. However the term, as used in revenue legislation considered in this paper, is clearly not limited to equitable interests.⁷ The emphasis is on the concept of benefit, not on the jurisdictional divisions between legal and equitable interests.⁸

1923 (SA), s 71(e); *Stamp Duties Act 1931* (Tas), ss 70A, 70B, 70D; *Stamp Duties and Taxes Act 1987* (ACT), ss 49F-56, 64A-64E; *Stamp Duty Act 1978* (NT), ss 83A-83F.

4 *Stamp Duties Act 1920* (NSW), Division 3A, ss 44 to 44F; *Stamps Act 1958* (Vic), ss 59, 64A; *Stamp Duties and Taxes Act 1987* (ACT), ss 49F-56, 64A-64E; *Stamp Duty Act 1978* (NT), ss 83A-83F. By contrast the South Australian legislation refers to "a legal or equitable interest"; *Stamp Duties Act 1923* (SA), s 71(e).

5 While it is not necessary to give a comprehensive list of such instances, some examples may be of assistance: *Stamp Duties Act 1920* (NSW), s 73(2AE)(a),(c), 73(2AF)(b) - certain conveyances not charged with ad valorem duty; *Stamps Act 1958* (Vic), s 64A - transfer to trustee as beneficial owner; *Stamp Act 1894* (Qld), s 54AC - duty payable on change of beneficial ownership of marketable securities etc; *Stamp Act 1921* (WA), s 73AA - duty on conveyance not passing a beneficial interest; *Stamp Duties Act 1923* (SA), s 90(g)(6) - duty not payable by stockbroker where beneficial interest disposed of within designated period; *Stamp Duties Act 1931* (Tas), s 70B - transfer of the beneficial interest in real property to trustee; *Stamp Duties and Taxes Act 1987* (ACT), s 49F(1) - duty payable on change of beneficial ownership in marketable security; *Stamp Duty Act 1978* (NT), s 69P - duty not payable by stockbroker where beneficial interest disposed of within designated period.

6 See note 5 *supra*.

7 *Adele Grace Pty Ltd v Commissioner of Land Tax* [1977] 2 NSWLR 382.

8 The distinction between legal and equitable interests has its roots in the jurisdictional division between law and equity and was initially important for the most practical reason - that these jurisdictions were exercised

In our opinion a person may acquire a beneficial interest by acquiring either a legal or an equitable proprietary interest. These interests, in our view, are necessary for beneficial ownership but they may not be sufficient.

In linking the concept of beneficial ownership to legal and equitable interests, the legislature has attempted to “piggy-back” on the established rules for the creation and transfer of property interests. In focusing on the concept of benefit, it has used terminology which straddles the established concepts of property law. The use of property law concepts to determine liability in the context of revenue law is not uncommon and inevitably creates difficulties by using concepts which developed for quite different purposes.⁹

II. THE RELATIONSHIP BETWEEN BENEFICIAL OWNERSHIP AND OTHER INTERESTS

A. An Equitable Interest is Sufficient for Beneficial Ownership

The meaning of equitable and beneficial ownership were considered by the Court of Appeal in *Parway Estates Ltd v Commissioners of Inland Revenue*.¹⁰ P had agreed to sell its shareholding in S, a wholly owned subsidiary, to a third party (TP) on terms that required S to be divested of its assets (including several leases) before the sale was completed. P claimed that the lease transfers were exempt from stamp duty under s 42 of the *Finance Act 1930* (UK) claiming that it was “beneficial owner” of not less than 90 per cent of the issued share capital of S. Jenkins LJ (with whom the other members of the Court agreed) rejected this claim. His Honour held that, although P legally owned the required percentage of shares, its agreement with TP (which preceded the transfers) meant that at the time of the transfer of the leases the “equitable or beneficial interest in the shares had vested in [TP].”¹¹

Clearly the Court of Appeal equated equitable and beneficial interests and regarded the terms as interchangeable. At first instance, Upjohn J also held that the equitable interest in the shares had passed to TP when the agreement was made. However, his Honour also made the following comment:

However, I rest my judgment in the main on this: that when you look at the words ‘beneficial owner’ in s 42 of the Finance Act 1930, those words must in my judgment be construed in what has been described with another Statute as ‘its ordinary or popular sense....[W]hen one looks at the facts of this case, and asks oneself was [P] in its popular or ordinary sense the beneficial owner of the shares [on the date of

in different courts. Now that the superior courts have full legal and equitable jurisdiction the categories are mainly used in determining the priority between competing interests.

9 Consider for example, the difficulties arising from reliance on the doctrine of fixtures evidenced in such cases as *North Shore Gas Company Limited v Commissioner of Stamp Duties (NSW)* (1940) 63 CLR 52; *Emanuel (Rundle Mall) Pty Ltd v Commissioner of Stamps* (1986) 41 SASR 122; *Eon Metals ML v Commissioner of State Taxation (WA)* (1991) 22 ATR 601.

10 (1958) 45 TC 135.

11 *Ibid* at 148.

transfer] there can only be one answer to that question: it was not; it was bound by contract to transfer them to another the very next day.¹²

In relation to this comment, Jenkins LJ remarked that “little assistance can be derived from speculation as to what an ordinary person would take them to mean in their popular sense”.¹³ His Honour believed that there was nothing to take the case out of the general rule “under which there is no doubt that the equitable interest in the shares became vested in [TP]” when the agreement was first made.

The decision in *Parway* and the different approaches of Upjohn J and Jenkins LJ suggest that, while there is at least some overlap in the concepts of legal, equitable and beneficial ownership, there may also be some gaps between them. Identifying the gaps and overlap may be easier in the context of dealings in legal and equitable interests in various types of property.

B. Beneficial Ownership is not Confined to Equitable Ownership

The full legal interest in property carries with it an entitlement to the enjoyment of the property. Accordingly, such a legal owner is also the beneficial owner. This was recognised in *Adele Grace Pty Ltd v Commissioner of Land Tax*,¹⁴ where Sheppard J considered certain exemptions provided under the *Land Tax Management Act 1956* (NSW). The availability of these exemptions depended on the taxpayer being the “equitable owner” of the relevant property. His Honour suggested that the term “beneficial owner” would have been preferable to the use of the words “equitable owner” because in the context of the Act, the term “obviously contemplates a conveyance or transfer of the legal title”.¹⁵

The Commissioner argued that “equitable owner” meant the “full beneficial ownership conferring upon the transferee unfettered dominion and control over the property in question”. The taxpayer argued that the definition would include a “person who was entitled to receive the rents and profits of the land”. His Honour found that the word “equitable” was used in the sense of “beneficial” and that “[t]herefore, although the section must be construed by reference to that definition, it is not enough that the interest of the person to whom the transfer is made is a trustee only. The interest must be a beneficial one”.¹⁶ Ultimately it was held that the taxpayer could only have a beneficial interest in the property when she had an equitable interest in it.

This case indicates that the concept of “beneficial owner” is broader than that of an equitable owner and this is similar to the view expressed in *Parway Estates Ltd v Commissioners of Inland Revenue*.¹⁷

12 *Ibid* at 142.

13 *Ibid* at 148.

14 Note 7 *supra*.

15 *Ibid* at 386.

16 *Ibid* at 387.

17 Note 10 *supra*.

C. A Bare Legal Estate is not Sufficient for Beneficial Ownership

(i) *Transferring a bare legal estate - no change in beneficial ownership*

The legal owner who holds the estate on trust for another has no right to enjoyment of the trust property. Consequently a transfer of that legal estate to another trustee or to the beneficiary under the trust cannot cause any change in the beneficial ownership of the property. The position is different where the legal owner who is not subject to a trust attempts to create a trust by transferring the legal interest while retaining the equitable interest.

(ii) *Difficulties in transferring a bare legal estate*

Is there a change in beneficial ownership where the owner (O) transfers the legal estate in land to T so that T can hold the land on trust for O? This issue was considered by the High Court in *DKLR Holding Co (No 2) v Commissioner of Stamp Duties*.¹⁸ In that case T executed a declaration of trust in favour of O, and soon after O executed a memorandum of transfer in favour of T for nominal consideration. It was accepted that O intended to pass only a bare legal estate to T and to reserve to itself the whole of the equitable interest in the land. The question arose whether either instrument was liable to ad valorem duty. The Court held that while the transfer from O to T attracted only nominal duty, the declaration of trust created an equitable interest in the land and vested it in O. It was therefore liable to ad valorem duty.

The Court dismissed O's argument that, as it was O's clear and minuted intention to transfer only the bare legal estate, the beneficial ownership in the land remained at all times with O. The majority of the High Court¹⁹ held that the transfer of the legal estate to T conveyed the entirety of the interest in the land and that it was only the declaration of trust which created a separate equitable estate in O. Central to the majority's decision was their view that the owner of the legal interest in land does not hold separate legal and equitable estates, but only one estate.²⁰ However, this is not inconsistent with the legal owner also being the beneficial owner of the property. In other words, while the legal owner cannot hold the property in trust for itself and therefore cannot be accurately described as having both legal and equitable estates in the land, it is possible for the legal owner to be entitled to the enjoyment of the land and thus to be the beneficial owner.

In *DKLR*, O attempted to retain the enjoyment of the land by reserving the equitable estate and transferring to T only a bare legal estate. The High Court held that O's attempt was ineffective and consequently there was a change in beneficial ownership.²¹ However, it was only Brennan J who expressly stated that O "could not except or reserve an equitable estate from the property transferred to it ... nor could [T] become a trustee of an interest excepted or reserved from the transfer".²²

18 Note 1 *supra*.

19 Gibbs CJ, Stephen, Mason and Brennan JJ.

20 See also *Corin v Patton* (1990) 169 CLR 540.

21 In fact there would seem to have been two changes, firstly effected by the transfer from O to T, and secondly by the declaration of trust in favour of O.

22 Note 1 *supra* at 474. Although not quite as explicit, it would appear that Gibbs CJ was of the same opinion: "Before the transfer there had been no severance of the legal and equitable estates in the land. It was only

Mason J, with whom Stephen J agreed, expressed a different opinion, at least with respect to land under the general law:²³

... at common law a bare legal estate may be conveyed by an absolute owner and the question whether a conveyance is of a bare legal estate or of an absolute estate in fee is one of intention Perhaps it may be otherwise with transfers of land under the Real Property Act 1900. A transfer in statutory form of an estate in fee simple may on registration operate to vest in the transferee the whole of the registered estate. But I do not need to decide this question.

It is interesting to speculate about the effect of the possible transactions considered in *DKLR*. If Mason J is correct and one can effect such a transaction, then perhaps one would be *creating* an equitable interest rather than bringing about a *change* in the beneficial ownership. On the majority's argument, the entire interest must be conveyed to T who can then become a trustee for O under the declaration of trust. If that view is correct, the owner of the legal estate has one interest not two. If T, having acquired the legal estate, has one interest then in order to "transfer" an equitable interest it would first have to have such an interest. But on the majority argument it cannot be trustee for itself and therefore cannot have such an interest. Therefore it is arguable that even on the majority reasoning, the declaration of trust *creates* beneficial ownership in O, rather than "causes or results in a change in the beneficial ownership". If by a declaration of trust it is possible to split a single legal interest into legal and equitable interests by reserving the legal interest to T and creating a beneficial interest in O there would seem to be no reason why O could not have done the same at the outset.

With respect therefore, there does not seem to be any reason why equity should not respect and give effect to the intention of transferor and transferee that only the bare legal estate is to be transferred. The opposite view theoretically involves the proposition that, even if only for an instant in time, the trustee holds the property for its own benefit, a proposition which the High Court has rejected. Even without the obstacle of the High Court's rejection, such a conclusion is not acceptable. For there to be a trust the situation must be such as would invite the intervention of equity. The situation hypothesised does not contain any of the elements of unconscionability or injustice which are generally required for equitable intervention. On the contrary, in the context of the intentions of the transferor, any attempt by the transferee to claim the benefit would itself involve unconscionability. The conclusion is a fiction which serves a useful purpose only if the equitable estate is regarded as a thing which must leave a discernible trail rather than a concept having instrumental value. It is an inherently essentialist view which is at odds with the history and tradition of equity.²⁴

when the declaration of trust took effect, which of course was immediately after the transfer, that there was a severance of the legal and equitable interests": at 443.

23 *Ibid* at 459-60. Aickin J commented that it was not necessary to decide if O could have reserved the entire equitable interest in the land by an appropriate form of transfer: at 464.

24 See generally M Stone, "The Reification of Legal Concepts: *Muschinski v Dodds*" 1986 9 UNSWLJ 63.

III. THE RELATIONSHIP BETWEEN BENEFICIAL OWNERSHIP AND EQUITABLE INTERESTS

We have argued above that holding an equitable interest is sufficient to support a claim of beneficial ownership. This prompts an examination of the range of equitable interests recognised by the courts and the circumstances in which they arise. The following discussion highlights the difficulties in determining when and in what circumstances equitable interests arise. Obviously any difficulty in ascertaining the existence of an equitable interest has a corresponding impact on an associated beneficial interest.

A. Equitable Interests Arising Under a Contract of Sale

(i) *Specifically enforceable contracts of sale*

The scope of an equitable interest is commensurate with the relief equity will grant to protect it.²⁵ When a contract for the sale of property (be it land or otherwise) is specifically enforceable, then the purchaser is often regarded as the equitable owner of the property and the vendor is a trustee for the purchaser.²⁶ While this conclusion has been doubted,²⁷ a robust assertion of the principle is to be found in *Lysaght v Edwards*²⁸ in which Sir George Jessel MR asserted that:

The moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold and the beneficial ownership passes to the purchaser, the vendor having a right to the purchase money, a charge or lien on the estate for the security of that purchase money and a right to retain possession of the estate until the purchase money is paid, in the absence of the express contract as to the time of delivering possession.²⁹

One must, with respect, question the proposition that beneficial ownership passes from the moment there is a valid contract. If the contract is not one which equity would specifically enforce, or at least protect by injunction, then there can be no basis for the claim that an equitable interest has passed.³⁰ Conversely, if the contract is, for some reason, no longer specifically enforceable then the equitable interest formerly created by the contract will have been extinguished.³¹ However, where the purchase price has been paid and all that remains to be done is for the vendor to convey the legal title to the property then the courts will regard the vendor as a trustee in the strict sense and the purchaser as having the equitable title to the property.

25 *Brown v Heffer* (1967) 116 CLR 344; *In re Rudge; Curtin v Rudge* [1949] NZLR 752.

26 *Parway Estates Ltd v Commissioners of Inland Revenue*, note 10 *supra*.

27 "I venture to doubt whether it is a true description of the relation between the parties to say that from the time of making of the contract, or at any time, one is ever a trustee for the other. They are only parties to a contract of sale and purchase of which a Court of Equity will under certain circumstances decree a specific performance." *Rayner v Preston* (1881) 18 Ch D 1 at 10-11, per Brett LJ.

28 (1876) 2 Ch D 499.

29 (1876) 2 Ch D 499 at 506.

30 "It is often said that after a contract for the sale of land the vendor is a trustee for the purchaser ... But it must not be forgotten that in each case it is tacitly assumed that the contract would in a court of equity be enforced specifically": *Central Trust and Safe Deposit Co v Snider* [1916] 1 AC 266 at 272, per Lord Parker of Waddington.

31 *Marshall v Snowy River SC* [1993] 7 BPR 97567.

(ii) *The effect of outstanding obligations*

The extent to which there are rights and obligations outstanding by either party will determine the extent of the qualifications which must be made to the proposition that a trust has been created. This is not an all-or-nothing concept: the fact that the purchaser has a beneficial interest is not inconsistent with the vendor also retaining some beneficial interest. The point was made clearly by Kitto J in *Haque v Haque (No 2)*:³²

... by the operation of well-known equitable principles the making of the contract had to an extent transferred the beneficial ownership to the purchaser. The [vendor] was not a mere trustee for the purchaser, but his position was something between that of a mere trustee and a mortgagee. He could exercise for his own benefit such rights with regard to the land as were consistent with the contractual rights of the purchaser until payment of the purchase money in full and until that event he had a lien or charge for the unpaid purchase money. (Emphasis added.)

In other words, the issue is not whether there is a trust but what is the nature of the equitable interest which the purchaser has at any time.³³ In fact where there are obligations outstanding the courts may be wary of describing the vendor as a trustee because the description “tends to conceal the essentially contractual relationship which, rather than the relationship of trustee and beneficiary, governs the rights and duties of the parties”.³⁴

(iii) *Unconditional contracts*

In *KLDE Pty Ltd v Commissioner of Stamp Duties*³⁵ the High Court considered a claim under s 49C of the *Stamp Act 1894* (Qld) which provided that where “the effect of an instrument produced to [the Commissioner] is to convey, transfer or assign beneficial interest in property” from one company to another and those companies are associated companies, then the instrument is exempt. Companies were “associated” if it was shown that one company was the beneficial owner of at least 90 per cent of the other. The Court held that a purchaser who could compel a transfer of property by specific performance, had “beneficial ownership” of that property. The Court noted the view of Mason and Deane JJ in *Legione v Hateley*³⁶ that “the purchaser’s equitable interest under a contract of sale is commensurate, not with her ability to obtain specific performance in the strict or primary sense, but with her ability to protect her interest under the contract by injunction or otherwise”³⁷ but concluded that “it is common ground that the contract for the sale of land was an unconditional contract...[and] was capable of specific performance”³⁸ and therefore conferred an equitable interest in land.

32 (1965) 114 CLR 98 at 124.

33 The trust will not, for instance, be a bare trust at least until the contract is fully executed by the purchaser. Until that time the vendor is likely to have some beneficial interest in the property. The trust, and hence the beneficial interest of the purchaser, is created by equity. It is not a case of transfer or assignment; *Acorn Computers v MSC Microcomputer Systems Pty Ltd* (1984) 57 ALR 389 at 393, per Smithers J.

34 *Chang v Registrar of Titles* (1976) 137 CLR 177 at 190.

35 (1984) 155 CLR 288

36 (1983) 152 CLR 406.

37 *Ibid* at 446.

38 *Ibid*.

Brennan J on the other hand held that although “the purchaser has sometimes been described as a beneficial owner once the contract is unconditional, the effect of an unconditional contract for the sale of land is more accurately stated by Kitto J³⁹ as transferring ‘to an extent’ the beneficial ownership of the land.”⁴⁰ His Honour found that for the purposes of the statute he would “hold the interest of the purchaser to fall short of ownership unless and until a purchaser is entitled to insist upon a conveyance of title to the property”.⁴¹

(iv) *Conditional contracts*

The courts are particularly cautious in describing the vendor as a trustee where the contract is conditional on the occurrence of some event or the doing of some action. If the action is something to be done by the purchaser then the condition is unlikely to obstruct the creation of a trust for the purchaser.⁴² However if the action can only be done by a third party then the courts are less likely to find that an equitable interest has passed to or been created in the purchaser. This point and the difficulty in determining just when an equitable interest passes under a contract of sale is clearly illustrated in *Brown v Heffer*.⁴³

The question in *Brown v Heffer* was whether a purchaser of land under an incomplete contract had an interest sufficient to adeem the gift of that land in the vendor/testator’s will. The completion of the sale was conditional upon obtaining the Minister’s consent to the transaction. Barwick CJ, McTiernan, Kitto and Owen JJ held that the interest of the purchaser consisted of the rights which a court of equity would have specifically enforced. However the court also held that until the Minister’s consent was given the purchaser’s interest “does not extend to ownership of the land and the interest of the vendor is not yet converted into a right to receive money in place of the land.”⁴⁴ The point was expressed differently by Windeyer J:

[w]hile the question whether the Minister would consent was still pending, the testator or his executor was not at liberty to enter into any transaction inconsistent with an obligation to perform his contract with the purchaser. The purchaser’s rights to have the testator and his executor do nothing to his prejudice were enforceable in equity by injunction. But they did not create an equitable interest in the land.⁴⁵

Justice Windeyer’s conclusion that the purchaser did not have an equitable interest in the land until the contract for sale was unconditional is arguably quite different from that of the other judges. The comments of Barwick CJ, McTiernan, Kitto and Owen JJ can be understood to mean that until the Minister’s consent was obtained the vendor was not a bare trustee for the purchaser. That view is not inconsistent with the purchaser having some equitable interest in the land, if not a full equitable interest, and with the transaction being, from the outset, one which effected a change in the beneficial ownership of an estate or interest in the land.

39 In *Haque v Haque (No 2)*, note 32 *supra* at 124.

40 Note 1 *supra* at 301.

41 *Ibid.*

42 *Parway Estates Ltd v Commissioners of Inland Revenue*, note 10 *supra*.

43 Note 25 *supra*.

44 *Ibid* at 350.

45 *Ibid* at 351-2.

By contrast, Justice Windeyer's conclusion, that the purchaser's ability to prevent the vendors from prejudicing their interest was not an equitable interest in the land, leads to confusion as to when the purchaser does acquire an interest. This confusion has obvious implications in determining when the purchaser acquires a beneficial interest.

The effect of a conditional contract has also been considered by the courts in connection with the right to lodge a caveat on the title to Torrens system land. A valid caveat requires that the caveator have an interest in the land. In *Jessica Holdings v Anglican Property Trust*⁴⁶ Brownie J held that a purchaser of land under a conditional contract should "in appropriate circumstances" be treated as having an "interest" within the meaning of the relevant statutory provisions. In that case Brownie J decided that because the purchaser's interest was one which ought to be protected by injunction, then it should also be protected by caveat. In reaching this conclusion his Honour was influenced by the following comments of Mason and Deane JJ in *Legione v Hateley*:⁴⁷

In this Court it has been said that the purchaser's equitable interest under a contract of sale is commensurate only with her ability to obtain specific performance of the contract. A competing view - one which has much to commend it - is that the purchaser's equitable interest under a contract for sale is commensurate not with her ability to obtain specific performance in the strict or primary sense, but with her ability to protect her interest under the contract by injunction or otherwise.

Both *Legione v Hateley* and *Jessica Holdings* accept that the purchaser under a contract of sale may acquire an interest which falls short of full equitable ownership but which is or should be treated as, an equitable proprietary interest. This appears to have been recognised by Young J in *Townsend v Coyne*⁴⁸ where his Honour commented that the furthest the Australian courts have gone in considering whether a contingent interest is sufficient to support a caveat "is to say that an equitable interest may pass to a purchaser under a conditional contract before the time that the purchaser acquires a full equitable interest".⁴⁹

B. Other Equitable Interests Including those Without a Legal Counterpart

There are often difficulties in classifying equitable interests particularly where the interests have no obvious legal counterpart. Where this is so it is correspondingly difficult to decide if the holder of such an interest has a beneficial interest. *Livingston v Commissioner of Stamp Duties (Qld)*⁵⁰ is a good example of the difficulties of classification. In that case it was necessary to classify the interest of Mrs Coulson who had a one third interest in the residuary estate of Livingston, her late husband. Some of the property comprised in the estate was situated in Queensland and part in New South Wales. The executors and administrators of the husband's estate were in New South Wales, the State in

46 (1992) 27 NSWLR 140.

47 Note 36 *supra* at 446.

48 (1995) 6 BPR 13935. In making this comment Young J cited *Bevin v Smith* [1994] 3 NZLR 648 at 663 and *Jessica Holdings Pty Ltd v Anglican Property Trust, Diocese of Sydney*, note 46 *supra*.

49 *Ibid* at 13940.

50 (1960) 107 CLR 411(HC); [1965] AC 694 (PC).

which Mrs Coulson died. At the time of Mrs Coulson's death, Mr Livingston's estate had not been fully administered. The Queensland Commissioner sought to impose succession duties on Mrs Coulson's estate in respect of that part of Livingston's property situated in Queensland claiming that Mrs Coulson had a beneficial interest in that property and therefore on her death the right had become part of the property of her estate. Kitto J emphasised that Mrs Coulson's interest could be characterised in two ways:⁵¹

They may be described by saying that she was entitled to have the administration of the estate completed, and one third of the residue, when ultimately ascertained, paid or transferred to her. They may also be described by saying that she was entitled at her death to have every individual asset which at that time was comprised in the estate dealt with in a due course of administration. Both descriptions recognise that she was entitled to have a process carried out; but while the one emphasises the purpose of the process and its ultimate benefit to her, the other directs primary attention to the property presently available for the carrying out of the process. Which description is to be used on a given occasion is a question of appropriateness to the purpose in hand; but it is important always to remember that there is only the one set of rights that is being referred to.

The majority of the High Court rejected the claims of the Commissioner, holding there was no beneficial interest in the Queensland property for the purposes of the legislation. The Privy Council affirmed that decision but on the basis that there was no beneficial interest anywhere in any of the assets.

Livingston's case illustrates that a right enforceable in equity may be categorised in more than one way. From one aspect, Mrs Coulson's interest is ultimately an interest in the actual property comprised in her deceased husband's estate. From the other aspect, Mrs Coulson's interest is purely procedural and administrative. Another good example of the way in which an interest may be viewed from two perspectives is the High Court's treatment of equities, most notably in *Latec Investments Ltd v Hotel Terrigal Pty Ltd*.⁵² This case recognises that the equitable right to set aside a fraudulent conveyance, or one made in breach of a mortgagee's duty on sale, may be an equitable interest for the purposes of devisability but a mere equity in the context of competing interests. Any uncertainty in determining the existence of an equitable interest will have a corresponding effect on the determination of beneficial ownership.

Other situations in which equitable interests may be created informally raise the question whether there has been a change in beneficial ownership. For instance the principle of estoppel may result in a person acquiring an equitable proprietary interest. A good example is *Crabb v Arun District Council*⁵³ in which a landowner acquired a right of way over Council land as a result of relying to his detriment on representations by the Council that it would allow such access. Similarly the imposition of a constructive trust will create an equitable interest in favour of the beneficiary.⁵⁴

51 *Ibid* at 448

52 (1965) 113 CLR 265.

53 [1976] 1 Ch 197; see also *Inwards v Baker* [1965] 2 QB 29; *ER Ives Investment Ltd v High* [1967] 2 QB 379 *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387; *Silovi v Barbaro* (1988) 13 NSWLR 466.

54 *Ogilvie v Ryan* [1976] 2 NSWLR 504; *Baumgartner v Baumgartner* (1987) 76 CLR 75.

IV. CONCLUSION

(i) *Discrepancy between concepts and terminology*

As we have shown a person will have a beneficial interest or beneficial ownership only in circumstances which give rise to a legal or equitable interest. This reliance on property interests without using the terminology of property law is unnecessarily confusing. If property law concepts are to be used, property law terminology should be the medium of expression.

(ii) *Disadvantages of emphasising substance rather than form*

The provisions which rely on beneficial ownership as a criterion of liability necessarily involve a consideration of the substance of a transaction rather than its form. Where the transactions involve the creation or transfer of equitable interests the process of determining liability is unduly complicated because of the discretionary and evolving nature of equitable relief. Where the form of the equitable relief, and hence the nature of the resulting equitable interest is well established the discretionary aspect is not intrusive. However in the developing areas of equity there is a great deal of uncertainty which could be avoided if the imposition of liability were to concentrate on the form and not the substance of the transaction.

(iii) *An alternative to reliance on beneficial interests*

Where there is an agreement but no stampable instrument, beneficial interests and ownership have been relied upon as the criterion for imposing an obligation to produce a dutiable instrument. This is unduly complicated. We believe that a better solution could be based on provisions relating to written agreements. Consider, for instance, the provisions of *the Stamp Duties Act 1920 NSW* which impose conveyance rates of duty on written agreements. Section 41(1) provides that:

Every agreement for the sale or conveyance of any property in New South Wales shall be charged with the same ad valorem duty to be paid by the purchaser or person to whom the property is agreed to be conveyed as if it were a conveyance of the property agreed to be sold or conveyed and shall be stamped accordingly.

Only a very slight modification would be required to make s 41 applicable to transactions which are not made or evidenced in writing. For example, an obligation to produce a stampable statement of the transaction could be imposed where the agreement referred to in the section is not in writing. Any exemptions from the obligation to produce a statement could be separately specified. Approaching the problem of transactions which are not in writing by introducing a concept of beneficial ownership or interest introduces an element of complexity which appears to be unnecessary.