RECONCILIATION OF THE STATUTORY REQUIREMENTS FOR WRITING IN LAND TRANSACTIONS

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There has been recent debate[1] on the interrelationship of s. 54A and s. 23C(1)(a) of the *Conveyancing Act, 1919* (N.S.W.) and the equivalent sections in other States.[2] The debate centres around a High Court decision and several Western Australian cases dealing with the roles of the sections in requiring writing in land transactions.

Section 54A(1) is the modern re-enactment of s. 4 of the *Statute of Frauds* enacted in England in 1677[3] (referred to hereafter as s. 4 provisions). Section 23C is the re-enactment of ss. 3, 7, 8 and 9 of the *Statute of Frauds* (referred to as s. 9 provisions).

The New South Wales provisions are essentially the same as those applying in the other States and are as follows:

The Section 4 provisions

N.S.W. s. 54A –

(1) No action or suit may be brought upon any contract for the sale or other disposition of land or any interest in land, unless the agreement upon which such action or suit is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged or

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1. R. P. Austin, "Moot Point" (1974), 48 A.L.J. 322; A. G. Lang, "Enforcing Oral Agreements for the Sale of Land," [1980] A.N.Z. Conv.R.357; Seddon, "Contracts for the Sale of Land: Is a Note or Memorandum Sufficient?" (1987), 61 A.L.J. 406

2 Equivalents to s. 54A (N.S.W.) are: *Property Law Act 1936,* s. 26(1) (S.A.); *Statute of Frauds, 1677,* s. 4 (Imp. – of application in W.A.); *Instruments Act, 1958,* s. 127 (Vic.); *Statute of Frauds and Limitations Act, 1867,* s. 5(4) (Qld); and *Conveyancing and Law of Property Act, 1884,* s. 36(1) (Tas.).

Equivalents to s 23C(1)(a) (N.S.W.). are: *Law of Property Act, 1936*, s. 29(1)(a) (S.A.); *Property Law Act, 1969,* s. 34(1)(a) (W.A.); *Property Law Act, 1958,* s. 53(1)(a) (Vic.); *Law of Property Act, 1974,* s. 11(1)(a) (Qld); and *Conveyancing and Law of Property Act, 1884,* s. 60(2)(a) (Tas.).

3. (1677), 29 Car. II, c. 3.

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 Section 9 provisions

N.S.W. s. 23C –

(1) Subject to the provisions of this Act with respect to the creation of interests in land by parol –
   (a) no interest in land can be created or disposed of except by writing signed by the person creating or conveying the same, or by his agent thereunto lawfully authorised in writing, or by will, or by operation of law;
   (b) a declaration of trust respecting any land or any interest therein must be manifested and proved by some writing signed by some person who is able to declare such trust or by his will;
   (c) a disposition of an equitable interest or trust subsisting at the time of the disposition, must be in writing signed by the person disposing of the same or by his will, or by his agent thereunto lawfully authorised in writing.
(2) This section does not affect the creation or operation of resulting, implied, or constructive trusts.

The distinction is of importance as their provisions do not entirely coincide. Both relate to the requirement for writing in land transactions but under the s. 4 provisions any agent can effect the necessary writing, whereas under the s. 9 provisions only an agent who has been authorized in writing can effect the required writing.[4] In practical terms it therefore becomes necessary to determine whether it is essential in a given case to authorize a proposed agent in writing. The distinction between the provisions is also important in practice in a variety of other transactions where a preliminary agreement is not signed by all the parties to a transaction; for example, where an option to purchase or lease has been negotiated or where an agreement to lease or grant a mortgage has been agreed between the parties and where full documentation is not in existence.

4. Cf. s. 127 of the Victorian *Instruments Act, 1958,* requiring the agent to be authorized in writing.

Whilst the practical issues appear to be fairly narrow (the need for written authority of an agent and whether a note or memorandum rather than full documentation will suffice) the controversy raises some fundamental conceptual issues about the nature of contractual and proprietary interests which have been raised by some members of the High Court but which have been left open to confusing and contradictory comment.

The provisions not only have an entirely distinct history, they have an entirely distinct function. The s. 4 provisions deal only with the enforcement of contracts. The s. 9 provisions deal only with the creation or disposal of interests. This distinction is the essence of the current conceptual controversy.

Confusion apparently arises in two ways: firstly from the actual wording of the s. 4 provisions. The relevant part of the section provides that "no action or proceedings may be brought upon *any contract for the sale or other disposition of land or any interest in land unless the agreement* ... is in writing...". When read carefully it is clear that it only relates to contracts by which the parties have agreed to dispose of land or an interest in land. It does not refer to the actual disposal of that land or those interests in land. The disposal or creation of interests in land is dealt with by the s. 9 provisions (see the New South Wales s. 23C(1)(a), (b) and (c) above).

It appears that some confusion has been generated by a reading of the s. 4 provisions as a prohibition on enforcement of "other dispositions in land". This interpretation of the sections is not only in disregard of the flow of the language and the marginal note but does not take into account the words that follow, viz: "unless the *agreement* upon which such action or proceedings is brought...is in writing".

The other difficulty has become the substance of the current debate. It relates to the method whereby assurances of interests in land are effected in equity. While sub-section (1)(a) of the s. 9 provisions (in Tasmania sub-section 2) prohibits the creation or disposal of interests in land except by writing signed by the person creating or conveying them or by his agent lawfully authorized in writing, the section does not preclude the creation or disposal of interests in land by operation of law.[5] The section only prohibits

5. S. 23C(1)(a).

the owner of the interest in land from *himself* actively effecting the conveyance without the necessary writing. When an owner of an interest in land enters into a contract for the sale or other disposition of an interest in land he is not himself actively disposing of that interest, and therefore he does not need to comply with paragraph (a) of the s. 9 provisions at that stage. He needs only to comply with the s. 4 provisions and may therefore authorize an agent to sign a contract on his behalf without the necessity of that authority being in writing. When *he proceeds to actually convey* that interest pursuant to that contract, the authority of the agent will need to be in writing to comply with the s. 9 provisions.

However, if he fails himself to convey the interest properly because he has not complied with the s. 9 provisions in some way, equity will order specific performance of the underlying contract provided that the contract either complies with the s. 4 provisions or has been partly performed.[6] It is because of this availability of specific performance of the underlying contract that lawyers rather loosely say that a purchaser under the contact for the sale of an interest in land is an equitable assignee of that interest. The equitable assignment results, however, not from the acts of the parties themselves but by the operation of equitable principles on those acts. The parties' acts were not sufficient to divest title to the interest because they did not comply with the s. 9 provisions. Title is divested in equity by the "operation of law", scope for which is specifically preserved by the s. 9 provisions. The particular principle actually used by equity in these circumstances, that is, the specific enforcement of a partly performed oral or unsigned contract, is also preserved in the s. 4 provisions and in the general saving provision of (for example) s. 23E (N.S.W.) and its equivalents[7] in other States.

Having regard to the different functional roles of the sections it is entirely logical that contractual obligations can be enforced on the production of a note or memorandum in writing signed by a general agent, whereas the actual disposal of an interest requires the greater formality of agency implemented fully in writing.

6. S 54A(2) (N.S W.), s. 36(2) (Tas), s 26(2) (S.A.) See also n. 2, supra.

7 *Conveyancing Act, 1919,* s. 23E(d) (N S W.); *Law of Property Act, 1936,* s. 31(d) (S.A.); *Property Law Act, 1958,* s. 55(d) (Vic); no equivalent provision in Queensland legislation; *Conveyancing and Law of Property Act, 1884,* s. 60(5)(d) (Tas.).

This rather simplistic analysis has been clouded by several recent cases.

Origins of the Controversy

In *Adamson v. Hayes*[8] the High Court needed to consider, *inter alia*, whether an oral agreement between a number of holders of mining tenements in Western Australia could be enforced. There existed an earlier written agreement by which the mineral claims were pooled and under which certain other obligations were undertaken. The oral arrangement varied the effect of the earlier written instrument and it was necessary for the High Court to determine the enforceability of the oral arrangement. The resolution of the issue actually depended on whether the particular judge held the arrangement to be still in the realm of contract or to be intended as an immediate assurance of title to the claims either absolutely or by way of a declaration of trust. In these circumstances, depending on the characterization of the pooling arrangement it was necessary for the parties to comply with one of the two different statutory provisions.

In some concluding obiter comments Gibbs, J., relied on statements by Latham, C.J., in *Commissioner of Taxes (Queensland) v. Camphin*[9] in determining whether the oral option agreement was effective. In doing so he took the comments of Latham, C.J., out of context and to a large extent has stimulated the ensuing controversy. In a number of subsequent Western Australian cases the controversy has continued, with reliance being placed on the dicta of Gibbs, J., in *Adamson v. Hayes* to support the proposition that oral contracts relating to land are unenforceable unless either complying with the s. 9 provisions or partly performed, even where there exists a note or memorandum complying with the s. 4 provisions.

Analysis of Judgments in *Adamson v. Hayes*

In reaching their conclusions each of the five judges viewed the operation of the agreement differently.

Barwick, C.J., in dissent, agreed with the Supreme Court that the arrangement,

8. (1973), 130 C.L.R. 276.
9. (1937), 57 C.L.R. 127.

> ...did not involve any immediate creation or transfer of any interest in a mining claim from one of the parties to any other of them or indeed any present change at all in the interest of any person in any one or more of the mining claims. There was in my opinion, no intention to change the ownership in the individual claims, legal or beneficial, until it was necessary to implement the arrangements.... For example, the appellants, in my opinion, could not have called upon the respondents to transfer to them or any of them any claims or any interest in any of the claims except as part of the performance of the arrangements for the creation of a mining partnership.... What it did involve was mutual promises to join in any necessary instruments or procedures required to implement a transfer of the appellants' interests as a percentage of all the claims regarded as a unit to the partnership of the respondents when formed.... Though seemingly some claims were held on trust, I do not think the parties' arrangement called for any variation of such trusts until the partner had been found and a mining partnership was to be formed.[10]

Accordingly, Barwick, C.J., held that the agreement did not amount to the creation or disposal of an interest in land and s. 34(1) (W.A.) (a s. 9 provision) had no application.

Menzies, J., took a different approach. He did not regard s. 34(1)(a) (W.A.) to be relevant as he held[11] this sub-section should only be applied to the creation or disposal of legal interests as sub-sections (b) and (c), he argued, would be otherwise unnecessary. The argument has much to commend it. Sub-section (b) provides for declarations of trust and sub-section (c) provides for disposal of existing equitable interests. Apart from rights that flow from contracts capable of specific enforcement in equity, it is hard to envisage equitable rights that are not existing at the time of disposition; or are not created by declaration of trust; or are not rights arising under constructive, implied or resulting trusts which are specifically preserved by sub-section 2 of the s. 9 provisions.[12]

If this argument is accepted, the rights arising by the operation of equitable principles on contracts capable of specific performance will be governed by the provisions relating to the enforceability of those contracts: viz., the s. 4 provisions.[13]

10. 130 C.L.R. 276, 287-88.
11. Ibid., 292
12. *Conveyancing Act, 1919,* s. 23C(2) (N.S.W.); *Law of Property Act, 1936,* s. 29(2) (S.A.); *Property Law Act, 1969,* s. 34(2) (W.A.); *Property Law Act, 1958,* s. 53(2) (Vic.); *Law of Property Act, 1974,* s. 11(2) (Qld); and *Conveyancing and Law of Property Act, 1884,* s. 60(2) (Tas.).
13. See n. 2, supra.

This argument of Menzies, J., was rejected by both Walsh, J., and Gibbs, J. Walsh, J., argued[14] that s. 34(1)(a) (W.A.) (a s. 9 provision) should not be construed as limited to legal interests in land as he argued that, "it would be difficult to support that construction having regard to s. 33 of the same Act,[15] which makes a deed necessary for the conveying or creating of a legal estate". Gibbs, J., adopts a similar stance where he argues that, "s. 33 [W.A.] provides that conveyances of land are void for the purpose of conveying or creating a legal interest unless made by deed and the comparison of that section with s. 34(1)(a) (W.A.) supports the view that the omission to qualify 'interest' in s. 34(1)(a) (W.A.) by the word 'legal' was deliberate".[16] It is submitted that a simple comparison does not compel the answer argued for. Section 33 (W.A.) and its equivalents provide for the operation of effective conveyances of the legal estate as recognized at law. In other words, it deals with the legal assignment of legal interests in land but does not preclude either assignments recognized in equity or assignments of equitable interests. Gibbs, J., admits[17] that his interpretation creates overlapping between paragraph (a) and the rest of sub-section (1). He also refers to the consequence that if s. 34(1)(a) (W.A.) is applied to equitable interests there is an apparent conflict with the s. 4 provisions.[18]

This apparent conflict has been traditionally rationalized by arguing that s. 4 of the *Statute of Frauds* and its equivalents refers to agreements not operating as an immediate transfer or conveyance of an estate or interest in land, but as contracts to make or execute a grant or transfer, or conveyance, at some subsequent period[19]; and that paragraph (a) of sub-section (1) of the s. 9 provisions applies only to actual dispositions. Gibbs, J., however, proceeds to say, without further justification that s. 34(1)(a) (W.A.) may now refer to, "both agreements that operate as immediate transfers and

14. 130 C.L.R. 276, 297.

15. *Conveyancing Act, 1919,* s. 23B (N.S.W.); *Property Law Act, 1958,* s. 52(1) (Vic.); *Law of Property Act, 1936,* s. 28(1); *Conveyancing and Law of Property Act, 1884,* s. 60(1) (Tas.); and *Property Law Act, 1974,* s. 10(1) (Qld).

16. 130 C.L.R. 276, 304.

17. Ibid.

18. See n. 13, supra, for equivalent provisions in other States.

19. 130 C.L.R. 276, 304; quoting Agnew, *Treatise on the Statute of Frauds* (1876), 138.

to contracts to transfer in future and may thus cover much of the field already covered by s. 4 of the *Statute of Frauds*".[20] The result, of course, as he admits, is anomalous but it does not, he argues, "lead to such absurdity as to justify the conclusion that the legislature could not have intended it".[21]

Menzies, J., then proceeded to hold[22] that the relevant agreement amounted to declarations of trust of interests in land. On the basis that the parties orally agreed to replace the old trusts with new trusts, it was a declaration caught by s. 34(1)(b) (W.A.) In the alternative, he held that the oral agreement amounted to a disposition of an existing equitable interest by the former beneficiaries to the new beneficiaries because its effect was to alter the rights to the claims. If so, it would be ineffective unless it complied with s. 34(1)(c) (W.A.).

Walsh, J., approached the issue on the basis that s. 34(1)(a) (W.A.) applies to equitable interests[23] in land and that it applies to an oral agreement by which parties agree that property shall be held as to the beneficial ownership thereof in certain shares. He held[24] that there is no reason to hold that it can only apply to an oral statement expressed in the formal language that would be appropriate to a formal conveyance or grant. Whilst there is little to object to if this reasoning relates to mere formality of language, it is difficult to reconcile this reasoning with the wording of the sub-section. Section 34(1)(a) (W.A.) provides that no interest in land can be *"created or disposed of"* except in accordance with the Act. If the parties to an agreement do not intend by their agreement to create or dispose of any interests, his argument has less substance. However, unlike Barwick, C.J., Walsh, J., held that the agreement was intended to take effect immediately and that the agreement constituted a set of dealings with the equitable interests in the claims, thus infringing s. 34(1)(a) (W.A.).

As indicated above,[25] Gibbs, J., like Walsh, J., held that s. 34(1)(a) (W.A.) applied to equitable interests in land but he turn-

20. Ibid., *loc cit*
21. Ibid., 305.
22. Ibid., 293.
23. See n. 14, supra.
24. 130 C L.R. 276, 297.
25. See n. 17, supra.

ed his mind to the necessity that the oral transaction *create or dispose of* the interest in land; and it is this argument that has led to the subsequent judicial discussions. Gibbs, J., quoted[26] Latham, C.J., in *Commissioner of Taxes (Queensland) v. Camphin*[27]:

> The result of giving an option for value is that the person to whom the option is given acquires an equitable interest. But this equitable interest has not, in my opinion, been sold to him. The equitable interest is measured by what a court of equity would decree in an action for specific performance. The right of the person who may be called the owner of the option is a right to prevent the owner of the property in question from disposing of it inconsistently with the option, together with a right, if he exercises the option, to compel the owner of the property to carry out the contract which has been made by the exercise of the option. This right of the optionee is a right which has been created by the option, but it is not a right which the owner of the property ever possessed. He has created a new right in the optionee which is a right of property, but he has not transferred to the optionee any right which previously belonged to him as the owner of the property in relation to which the option was given.

He then drew the conclusion that the "agreement to grant, if valid, did create interests in the claims.... The interests created by the agreement to give the options in the present case were not interests subsisting at the time of the agreement: they were new interests, thereby created."[28]

It is at this point, however, that the argument loses sight of the fact that the interests are not created by the agreement of the parties: they are created by the operation of equitable principles on the acts of the parties in entering into an agreement. If that agreement subsequently turns out to be one in respect of which equity will order specific performance, then, and only then, can the equitable interests arise. They arise by operation of law, not by the act of the parties. The s. 9 provisions in sub-section (1)(a) specifically make this exception to the requirement of writing. Latham, C.J., in the judgment quoted by Gibbs, J., had carefully articulated this analysis[29]:

> When an option to purchase property has been given for value and the option contract is one which would be specifically enforced in equity, *a court of equity attaches to it* the consequence that it creates an equitable interest in the property which is the subject matter of the option *(London and*

26. 130 C.L R. 276, 303.
27 57 C.L.R. 127, 133-34.
28. 130 C.L.R. 276, 304.
29. 57 C.L.R 127, 132.

> *South Western Railway Co. v. Gomm* [(1882), 20 Ch. D. 562]. The contract remains a contract imposing an obligation on the person giving the option, but, when it is an option relating to land and capable of specific performance, the ordinary doctrine of a court of equity results in the person giving the option becoming a trustee of the land for the intended objects of the trust *(Central Trust and Safe Deposit Co. v. Snider)* [[1916] 1 AC 266 at 272].

Whilst the quotation used by Gibbs, J., refers to the owner of the property creating a new right in the optionee, the context of the case and the nature of the issue indicate that this was not a relevant issue at all. In *Camphin* the issue was to determine whether the option agreement amounted to a sale of property to the holder of the option within the meaning of s. 10(2) of the *Income Tax Acts, 1924-1933* of Queensland. The more careful analysis by Latham, J., in the second extract above is to be preferred in the context of the case because in the first quoted extract he was only concerned to establish that the right obtained by the optionee was a new right, one not previously held by the property owner and therefore incapable of sale.

Stephen, J., was content to hold[30] that on the facts there was an intention to create equitable interests in the claims by informal declarations of trust. He further held[31] that the agreement created new equitable interests and was thus within both paragraphs (a) and (b) of s. 34(1) (W.A.).

Subsequent Judicial Analysis

The subsequent history of the issue in the Western Australian Supreme Court has culminated in the decision by the Full Court in *Ratto and Anor v. Trifid Pty Ltd.*[32] Brinsden, J., elected to follow the line of Western Australian cases[33] that treat *Adamson v. Hayes* as authority for the proposition that,

> A verbal contract for the sale of land or for the disposition of an interest in land is an agreement which creates an interest in land within the meaning of s. 34(1)(a) of the *Property Law Act* and accordingly, 'subject to the provisions hereinafter contained in this Act with respect to the creation of interests by parol' such an agreement is ineffective and cannot be specifically enforced... Hence in a suit for specific performance it is no

30. 130 C.L.R. 276, 318.
31. 130 C.L.R. 276, 319.
32. 56 L.G.R.A. 22.
33. *Parker v Manessis,* [1974] W.A.R. 54; *Redden v Wilkes and Registrar of Titles,* [1979] W.A.R. 161; *Trifid Pty Ltd v Ratto,* [1985] W.A.R. 19.

answer to the plea of s. 34(1)(a) of the *Property Law Act* to plead...the existence of a memorandum.[34]

In *Ratto and Anor v. Trifid Pty Ltd*, all three members of the Court held that on the facts there was no concluded agreement. Brinsden, J., however continued an analysis, which must be regarded as obiter, on the assumption that the parties had reached a concluded agreement for the extension of the lease. The facts established that there was no evidence that Mrs Ratto was authorized in writing by Mr Ratto to sign the letter on his behalf as his agent as required by s. 34(1)(a) of the W.A. *Property Law Act.* Brinsden, J., may have been induced to discuss the issue as it had been relevant to the judgement of Rowland, J., at first instance. Rowland, J., had considered[35] that the starting point was whether s. 34(1)(a) (W.A.) applied to equitable interests in land. He followed the majority view of the High Court (Walsh, Gibbs and Stephen, JJ.) that s. 34(1)(a) did so apply. He then held that it is therefore necessary to comply with the s. 34(1)(a) requirement for an agent to be authorized in writing or for there to be acts of part performance. In the Full Court, Brinsden, J., came to the same conclusion as to the necessity to comply with s. 34(1) and went on to consider the applicability of the doctrine of part performance to s. 34(1)(a). He concluded[36] that the doctrine did apply to the provision but that part performance had not been established in the particular case.

This line of reasoning raises several issues and indicates why the more "traditional view of s. 34"[37] ought to be reasserted.

Does sub-section (1)(a) of the s. 9 provisions apply to equitable interests in land?

The wording of the section is open to the interpretation that it does apply. It was said to apply by Walsh, Gibbs and Stephen, JJ., in *Adamson v. Hayes*[38]. Barwick, C.J., in dissent in the same case held[39] that s. 34(1)(a) (W.A.) did not apply because the

34. Per Burt, C.J., in *Redden v. Wilkes and Registrar of Titles,* ibid.
35. [1985] W.A.R. 19, 36.
36. [1985] W.A.R. 22, 45.
37. Per Rowland, J., in *Trifid Pty Ltd v Ratto,* [1985] W.A.R. 19, 36.
38. 130 C.L.R. 276, 297, 304, and 319-20 (per Walsh, Gibbs and Stephen, JJ., respectively).
39. Ibid., 287

agreement did not create or transfer any interest in the mining claims to anyone. "There was, in [his] opinion, no intention to change the ownership in the individual claim, legal or beneficial, until it was necessary to implement the arrangements...."[40]

Menzies, J., dealt with the specific question and held that "although expressed with great generality, its operation ought, in the light of the provisions of s.-ss. 34(1)(b) and (c), to be confined to the creation or disposal of legal interests. If it were to apply to equitable interests, it seems to me that (b) and (c) would not have been necessary."[41]

Subsequently, various Western Australian judges[42] have held it to apply to equitable interests, relying on *Adamson v. Hayes*. The argument[43] that the existence of s. 33 (W.A.) and its equivalents which require a deed for the effective assignment at law of a legal interest, precludes the limitation of sub-section (1)(a) of the s. 9 provisions to the assignment of legal interests is, with respect, fallacious. Section 33 (W.A.) sets the requirement of a deed for a legal assignment of a legal interest in land. It leaves room for sub-section (1)(a) of the s. 9 provisions to require a writing (duly signed) for an equitable assignment of a legal interest.

Apart from the breadth of the language used in sub-section (1)(a) of the s. 9 provisions this is the only reason given for rejecting Walsh, J's suggested limitation of the sub-section, yet it does not appear to be a compelling reason.

If, however, an arbitrary restriction of the sub-section is not adopted, what is the scope for the actual operation of sub-section (1)(a) of the s. 9 provisions with respect to equitable interests?

What is the nature of the equitable interests in land to which sub-section (1)(a) of the s. 9 provisions could possibly apply?

— If the equitable interest is created by will, the sub-section

40. Ibid.

41. Ibid., 292.

42. E.g., Brinsden, J., in *Ratto v Trifid Pty Ltd,* supra, n. 33; Rowland, J., in *Trifid Pty Ltd v Ratto,* supra, n. 36; Virtue, S.P.J., in *Parker v Manessis,* supra, n. 33; and Burt, C.J., in *Redden v Wilkes,* n. 33 supra. For the contrary view see *Monte v Buongiorno,* [1978] W A.R. 49 (per Wallace, J), and *Hayes v. Adamson,* [1972] W.A.R. 116 (per Burt, J.), overruled on appeal in *Adamson v Hayes,* n. 8 supra.

43. 130 C.L.R. 276, 297, 304 (per Walsh and Gibbs, JJ., respectively).

is excluded by the words of the sub-section itself.

— If the interest is already a subsisting equitable interest or trust it must be disposed of in accordance with sub-section (1)(c) of the section.

— If the interest is to be created by way of declaration of trust, sub-section (1)(b) must be complied with.

— If the interest results from the application of the doctrines of implied, resulting or constructive trusts, sub-section (1) has no application by virtue of sub-section (2) of the sections.

— If the interest results from the operation of law, sub-section (1)(a) has no application by virtue of the words of that subsection.

Having regard to the scope of these exclusions, it is submitted that there is no scope in fact for the operation of sub-section (1)(a) of the s. 9 provisions on equitable interests.

The creation of equitable interests under trusts of all types and under wills or by the operation of the rules of intestacy[44] are excluded. The disposal of subsisting equitable interests is covered by sub-section (1)(c). The only remaining category of equitable interests are those that arise under contractual obligations and it is submitted that there are several reasons why these equitable interests are not within the terms of sub-section (1)(a) of the s. 9 provisions.

Does sub-section (1)(a) of the section 9 provisions apply to equitable interests in land arising from contractual obligations?

The sub-section requires that the interests *be created or disposed of* in accordance with the sub-section. It is submitted that a contract does not of itself create or dispose of the interest in the land, but that any interests that are "created or disposed of" at the formation of a contract are "created or disposed of" by operation of law and are not "created or disposed of" by the parties to the contract. The sub-section itself allows for the operation of law, apart even from the requirement that the interest must be created or

44. "By operation of law," in s. 23C(1)(a).

disposed of by the conveying party or his agent authorized in writing.

Lord Radcliffe in *Oughtred v. Inland Revenue Commissioners*[45] articulated this argument with respect to the creation of an equitable reversionary interest in a parcel of shares by an oral agreement: "by his oral agreement... he created in his mother an equitable interest in his reversion, since the subject-matter of the agreement was property of which specific performance would normally be decreed by the Court. He thus became a trustee for her of that interest *sub modo*: having regard to sub-section 2 of section 53 of the *Law of Property Act, 1925* [the English equivalent of sub-section 2 of the s. 9 provisions], sub-section (1) did not operate to prevent that trusteeship arising by operation of law".

Lord Cohen agreed[46] that on the making of an oral agreement the son became a constructive trustee for his mother in the property, but if he wished to actually assign that existing interest to his mother he would need to comply with s. 53(1)(c) (the equivalent of sub-section (1)(c) of the s. 9 provisions).

It appears from this analysis that despite the requirement for writing in s. 53(1)(c) of the English Act, the son held the equitable interest on trust for his mother after entering into an oral agreement to that effect. The underlying reasoning was that "sub-section (1) did not prevent the trusteeship from arising by operation of law".[47]

In *Commissioner of Taxes (Queensland) v. Camphin*[48] Fullagar, J., drew on the same line of reasoning. In the extract already quoted above, he pointed out that *"a court of equity attaches to*[49] a contract which would be specifically enforced in equity the consequence that it creates an equitable interest in the property".

Barwick, C.J., in *Adamson v. Hayes*[50] in dissent held that the oral agreement did not involve any immediate creation or transfer of any interest in the mining claims. He argued that it merely in-

45. [1960] A.C. 206, 227.
46. Ibid., 230.
47. Ibid., 227 (per Lord Radcliffe).
48. 57 C.L.R. 127.
49. Ibid., 132.
50. 130 C.L.R. 276.

volved mutual promises to join in transfers of the claims when and if required.

In fact, the majority judgments in that case do not disagree with this distinction between present mutual promises and the future assignment of the property. The majority disagreed with Barwick, C.J., on the facts. Menzies, J., held[51] that the arrangement either operated as a present declaration of trust or an assignment of presently existing equitable interests under a trust in which case either sub-section (b) or (c) was relevant. Walsh, J.,[52] held that the agreement was intended to take effect immediately as an assurance of the various interests in the claims despite its lack of formality as an assurance. This analysis, it is submitted, is not inconsistent with the statement of the law by Barwick, C.J. It simply considers that factually the arrangement was not contractual but was intended to take effect immediately as a conveyance and therefore needed to comply with sub-section (1)(a) of the s. 9 provisions (s. 34(1)(a) (W.A.)).

Gibbs, J., came to the same factual conclusion. He held[53] that the intention of the pooling arrangement was that it take effect immediately as a declaration of trust thus requiring compliance with sub-section (1)(b). His comments relating to the scope of sub-section (1)(a) are, it is submitted, dicta and as discussed previously not compelling.

Wallace, J., in *Monte v. Buongiorno*[54] held that sub-section (1)(a) does not apply to an offer and acceptance document relating to the agreed acquisition of a shopping centre. He said that the sub-section is based on s. 3 of the *Statute of Frauds* and refers to such "final documentation as a transfer or conveyance in the sense of an assurance of the land.... The creation of equitable rights by the execution of the offer and acceptance is unaffected by the section."[55]

The conclusion seems inevitable, that if the oral arrangement is in fact contractual and not an intended immediate conveyance,

51. Ibid., 293.
52. Ibid., 296-97.
53. Ibid., 303.
54. [1978] W.A.R. 49.
55 Ibid., 51-52.

there is no scope for the operation of sub-section (1)(a) of the s. 9 provisions. A true contract does not create or dispose of interests in property. If the contract is subsequently held to be capable of specific performance, then the rules of equity operate to create or dispose of the interests the subject matter of the contract — either by operation of law (s.-s. (1)(a)) or by the doctrines of implied, resulting or constructive trusts (s.-s. (2)).

What is the role of part performance?

A number of the Western Australian judges in the cases noted above have entered into a discussion of the role of the doctrine of part performance in relation to sub-section (1)(a) of the s. 9 provisions.[56] It is submitted that the necessity to consider the doctrine at all in this context flows from the erroneous application of sub-section (1)(a) to contractual arrangements. For example, in *Ratto v. Trifid Pty Ltd*,[57] Brinsden, J., had held[58] (obiter) that the agreement in the case was inoperative under s. 34(1)(a) of the *Property Law Act* (W.A.) as the party executing the agreement was not authorized in writing so to do. He then needed to determine whether there were sufficient acts of part performance within the meaning of s. 36 of that Act.

With respect, the application of the doctrine to a transaction that "creates or disposes" of an interest in land is conceptually inconsistent. Sub-section (1)(a) of the s. 9 provision clearly refers to the creation or disposal of interests. Those who have argued that contracts *per se* create or dispose of equitable interests[59] are therefore driven to consider part performance in relation to sub-section (1)(a) compounding the conceptual difficulties. If, as argued by this writer, sub-section (1)(a) has no application to equitable interests arising as a result of contractual relationships, the difficulty need not be faced. In this latter case, the existence of specific provisions preserving the doctrine of part performance has little reference to the s. 9 provisions. In Queensland there is no provision preserving the

56. E.g., Burt, C.J., in *Redden v Wilkes*, [1979] W.A.R. 161, 165. See also Brinsden, J., in *Ratto v. Trifid Pty Ltd* (1985), 56 L.G.R.A. 22, 43; and Rowland, J., in *Trifid Pty Ltd v Ratto*, [1985] W.A.R. 19, 37.

57. 56 L.G.R A. 22.

58. Ibid., 42.

59. E.g., cases listed in n. 55, supra.

doctrine of part performance except in the s. 4 provision itself.[60]

If the doctrine is to be applied to an arrangement that creates or disposes of interests in land, the question must be asked: What is partly performed? Is it the creation or disposal of the interest that is only partly performed? Or is it the underlying contract to which the doctrine refers? Semantically, and, it is submitted, historically, the doctrine only applies to the partial performance of contractual obligations. It does not apply to the partial conveyance of an interest. The very nature of an assurance precludes the possibility that it can be partially performed — it is either effective or ineffective as an assurance. On the other hand, a concluded contract based on mutual promises can be partially carried out by the parties. In this circumstance, provided the doctrinal requirements are fulfilled, the court will order specific performance of the obligations undertaken by the parties to the contract.

The doctrine of part performance has no part to play except in relation to a contractual obligation. As Brinsden, J., acknowledged in *Ratto v. Trifid Pty Ltd,*[61] there is no authority that holds the doctrine to be relevant to a matter involving sub-section (1)(a) of the s. 9 provisions. The reason for the lack of authority is, it is submitted, because the doctrine relates only to the contractual relationship. In *Cooney v. Burns*[62] Isaacs, J., considered the nature of a suit for specific performance. He regarded it as,

> ...essentially a suit for enforcing a stipulated obligation relating to property.[63] The word 'contract' itself primarily means a transaction which creates personal obligations, but it may though less exactly, refer to transactions which create real rights.... If the personal obligations are such that according to the rules of equity operating on the conscience of the defendant it is right specifically to enforce the performance of the contract, then and then only, does equity regard the purchaser as owner of the property. The question then is what is the test which equity applies to such a case as the present? ... [In] searching for the right a special test is applied.... It is fraud arising from 'part performance' of the contract, or, in other words, part execution of the agreement. And the jurisdiction to compel performance of an agreement struck at by the statute does not arise unless the bargain is in fact made, though devoid of an enforceability either at law or in equity, has been so acted upon by partly performing it that for the defendant to recede from it at that stage would be a fraud on the plaintiff.

60. See n. 7, supra.
61. 56 L.G.R.A. 22, 43.
62. (1922) 30 C.L.R. 216.
63. Ibid., 232-33.

Dixon, J., in *J. C. Williamson Ltd v. Lukey and Mulholland,*[64] in discussing the availability of equitable remedies based on the doctrine of part performance, notes that[65]: "Equitable relief is obtainable, notwithstanding the *Statute of Frauds*, by a party who in pursuance of his contract has done acts of part performance consistent only with some such contract subsisting, but, if the doctrine is not confined to cases in which a decree might be made for the specific performance of the contract, it is at least true that the doctrine arose in the administration of that relief and has not been resorted to except for that purpose". He continues the argument and points out that, "the agreement gives no equitable interest, and the equity must arise, if at all, from part performance... and not merely upon the contract". Evatt, J., in the same case reviewed the doctrine and throughout his analysis related the development of the doctrine to the enforcement of equities resulting from acts done in execution of contracts. "The very name of the doctrine — 'part performance' — indicates that the object is always to enlarge part performance into complete performance."[67]

Accordingly, it is suggested that the doctrine has no application beyond the enforcement of contractual obligations. It does not operate to complete partial assurances as such. It may operate with that ultimate effect, however, by enabling specific performance of the underlying contractual obligation.

Conclusion

The distinction between the s. 9 and the s. 4 provisions is of practical importance in all Australian states (with the exeption of Victoria[68]) because of the differing requirements of each of the provisions in the case of an agency relationship and because of the lesser requirement of documentation under the s. 4 provisions. Under the s. 9 provisions, the *assurance* must be in writing and signed by the assuring party or by an agent authorized *in writing*. Under the s. 4 provisions, contracts in relation to interests in land are unen-

64. (1931), 45 C.L.R. 282.
65. Ibid., 297.
66. Ibid., 300.
67. Ibid., 310.
68. S. 127 of the *Instruments Act, 1958* (Vic.) requires the agent to be authorized in writing in relation to the note or memorandum required for the enforceability of oral contracts.

forceable unless either party performed, or evidenced by a *note or memorandum* in writing signed by the party charged or by that party's agent. Whilst these distinctions are of importance in most states, the controversy initially arose in Western Australia because the definition of "land" under the provisions differed, but it was further developed in *Trifid Pty Ltd v. Ratto*[69] in relation to an agency situation.

Adamson v. Hayes[70] is not authority for the obiter proposition articulated by Brinsden, J., in *Ratto and Anor v. Trifid Pty Ltd*[71] to the effect that oral agreements for the sale of land are unenforceable even where a memorandum in writing complying with the s. 4 provisions exists, unless there is part performance. The majority in the High Court held[72] that on the facts, the particular "agreement" operated as either a present assurance of existing equitable interests or as a declaration of trust. The majority view was that the parties intended the agreement to operate immediately and not as a contractual undertaking.

Accordingly, it is erroneous to regard the case as in any way denying the traditional view that the s. 9 provisions operate only in relation to the actual conveyance of interests in land, while the s. 4 provisions operate to govern the enforceability of oral contracts.

69. 56 L.G.R.A. 22.

70. 130 C.L.R. 276.

71. 56 L.G.R.A. 22; see n. 33, supra.

72. 130 C.L.R. 276, 293 (per Menzies, J.), 296 (per Walsh, J.), 303 (per Gibbs, J.), and 318 (per Stephen, J).