

Sale of Land and Personal Property: The Purchaser as Beneficial Owner?

Prof Mark Pawlowski and Dr James Brown***

*Barrister, Professor of Property Law, School of Law, University of Greenwich

** Barrister, Reader in Law, Aston University

Introduction

A contract for the sale of land, which is capable of specific performance, operates in equity so as to confer a trust on the purchaser pending completion of the sale. Although some controversy exists as to the exact nature of the trust, it is well established that, upon exchange of contracts, equity will “treat that as done which ought to be done”¹ with the consequence that the purchaser acquires equitable ownership even though full (legal) title to the land will not pass until completion (and registration).

As land is unique, specific performance is readily available in the context of sales of land where damages would, clearly, not be an adequate remedy. The same cannot be said for contracts for the purchase of personal property where invariably the subject-matter is not unique and where a substitute can easily be acquired in the open market. In circumstances, however, where the property is unique or scarce (for example, a rare painting or vintage car), the maxim that “equity treats as done that which ought to be done” may be invoked so as to confer on the seller an equitable obligation to transfer the property to the purchaser in fulfilment of the contract. Where, therefore, the contract is specifically enforceable in this way, the seller, it is submitted, will again hold the property on trust for the purchaser where, as in a contract for the sale of land, there is an interval between the date of the contract and completion of the sale.

The notion that a seller holds personal property upon trust for the purchaser pending completion of the sale is admittedly controversial, but this article seeks to argue that the same principles governing equity’s intervention in sales of land should apply in the context of unique sales of personalty. It is submitted that equity’s role in imposing a trust on the vendor both in relation to sales of land and unique personalty may be important in order to safeguard the interests of the purchaser prior to, as well as after, completion of the sale.

Seller as trustee of land

¹ See, *Walsh v Lonsdale* (1882) 21 Ch D 9.

It is well established² that, during the interim period between exchange of contracts and completion, the rights and duties of vendor and purchaser are defined in terms of a trust – the vendor holds the legal estate upon trust for the purchaser and the purchaser becomes a beneficial owner of the land.³ The exact nature of the trust and the precise moment of its creation, however, has been the subject of some debate.⁴ Most agree that the trust arises by operation of law and not by reason of the intention of the parties⁵ and, therefore, falls to be classified as a constructive trust. In other words, the trust arises on the basis that it would be unconscionable for the vendor to refuse to perform his contractual obligation to transfer the land. However, although the constructive trust requires no formality (being exempt from the requirements of writing set out in s.52(1) of the Law of Property Act 1925 by virtue of s.53(2)), the contract for sale of land will only be enforceable if it is in writing complying with s.2(1) of the Law of Property (Miscellaneous Provisions) Act 1989. In *Scott v Southern Pacific Mortgages Ltd*,⁶ Lord Collins put the matter this way:⁷

"It has frequently been said that a purchaser of land obtains rights which are akin to ownership: by Lord Cairns in *Shaw v Foster* (1872) LR 5 HL 321, 338, 'the purchaser was the real beneficial owner in the eye of a court of equity of the property'; by Lord O'Hagan in the same case (at p 349), the ownership is transferred in equity to the purchaser, and the vendor is 'in progress towards' being a trustee. In more modern times it has been recognised that the purchaser's interest is a 'proprietary interest of a sort': *Oughtred v IRC* [1960] AC 206, 240, per Lord Jenkins. In *Jerome v Kelly* [2004] UKHL 25, [2004] 1 WLR 1409, para 32, Lord Walker made the point that 'beneficial ownership of the land is in a sense split between the seller and buyer on the provisional assumptions that specific performance is available and that the contract will in due course be completed...'"

² See, for example, *Holroyd v Marshall* (1962) 10 HLC 191 and *Lysaght v Edwards* (1876) 2 Ch D 499.

³ See, for example, *Sookraj v Samaroo* [2004] UKPC 50, where it was held that a purchaser who entered into a specifically enforceable contract for the sale of land acquired an equitable interest in the land and retained that interest for as long as the contract remained enforceable.

⁴ See generally, J Meagher, "(Re-defining) the Trust of the Specifically Enforceable Contract of Sale - The Vendor Purchaser Constructive Trust", (2018), Vol 24(3), *Trusts & Trustees* 266 and P Turner, "Understanding the Constructive Trust Between Vendor and Purchaser", (2012) 128 *LQR* 582.

⁵ See, generally, PH Pettit, "Conversion Under a Contract for the Sale of Land", (1960) 24 *Conv* 47. Under the doctrine of conversion, personalty is converted into realty and realty into personalty under a valid contract of sale. Thus, equity looks on the purchaser as the owner of the property which forms the subject-matter of the contract, and the vendor as the owner of the purchase money: see, for example, *Re Birmingham* [1959] Ch 523.

⁶ [2014] UKSC 52. In *Scott*, the Supreme Court held that a purchaser under a contract of sale prior to completion could not grant a proprietary right in favour of a third party. It was possible for the purchaser's personal rights to be "fed" upon completion of the sale but, in the instant case, the contract of sale, transfer and mortgage were one indivisible transaction and there was, therefore, no moment in time during which the purchaser acquired legal title to the property.

⁷ *Ibid*, at [62].

Whatever the precise nature of the trust, it undoubtedly gives rise to only a qualified form of trusteeship.⁸ As trustee, the vendor is placed under a duty to take reasonable care of the property.⁹ At the same time, he retains a right to remain in occupation of the land (and keep rents and profits) until the purchase price has been paid. At common law, this amounts to a lien on the land for any purchase money unpaid. If, on the other hand, the vendor has given possession to the purchaser, he retains an equitable lien on the land for the outstanding purchase price. Correspondingly, however, the risk of damage or destruction to the land (other than that associated with the vendor's duty of care) passes at common law to the purchaser on exchange of contracts as beneficial owner of the property.¹⁰ At the same time, the purchaser is entitled to certain benefits as beneficial owner of the land. He will be entitled to any improvements to the land pending completion, as well as the right to effect a sub-sale of the property or to charge it, if he so wishes.¹¹ Like the vendor, the purchaser may also have an equitable lien over the property pending completion for any of the purchase money in the event of the vendor's default.

There is also controversy as to the precise timing of the trust. In *Rayner v Preston*,¹² Cotton LJ characterised the unpaid vendor as being a trustee "in a qualified sense only"¹³ and Brett LJ expressly rejected the notion that the vendor is a trustee from the time of making the contract. In his view, if that were the true position, then the vendor would be accountable to the purchaser for all rents accrued due and received pending completion, which is clearly not the law. James LJ also considered it inaccurate to treat the vendor as trustee upon the making of the contract because (pending completion) it is uncertain whether the contract will actually be performed or not. Once, however, the contract is mutually performed, in his view, the completion relates back to the contract and "it is thereby ascertained that the relation was throughout that of trustee and [beneficiary]." Only at that point, according to his Lordship, is there "a complete and perfect trust, the legal owner is and has been a trustee, and the beneficial owner is as has been a cestui que trust."¹⁴

This is in contrast to the notion that the trust arises at the moment of contract irrespective of the availability of specific performance.¹⁵ In *Lysaght v Edwards*,¹⁶ Jessel MR was quite emphatic that: "the vendor is a constructive trustee for the purchaser of the estate from the

⁸ See, generally, VG Wellings, "The Vendor as Trustee", (1959) 23 Conv (NS) 173.

⁹ See, *Clarke v Ramuz* [1891] 2 QB 456, at 459-460, *per* Coleridge CJ.

¹⁰ See, *Vesey v Elwood* (1843) 3 Dr War 74. The Standard Conditions of Sale, normally used in sales, now provide that the vendor undertakes to transfer the property in the same physical state (fair wear and tear excluded) as it was in at the date of the contract.

¹¹ See, *Shaw v Foster* (1872) LR 5 HL 321.

¹² (1881) 18 Ch D 1.

¹³ *Ibid*, at 6.

¹⁴ *Ibid*, at 13.

¹⁵ See, *Shaw v Foster* (1872) LR HL 321; *Lysaght v Edwards* (1876) 2 Ch D 499; *Gordon Hill Trust Ltd v Segall* [1941] 2 All ER 379 and *Lake v Bayliss* [1974] 1 WLR 1073.

¹⁶ (1876) 2 Ch D 499.

moment the contract is entered into.”¹⁷ However, as Thompson¹⁷ argues, it is difficult to view the trust as being entirely independent of the availability of specific performance. Indeed, several of the English cases emphasise the need for the contract to be capable of specific performance.¹⁸ In *Central Trust and Safe Deposit Co v Snider*,¹⁹ for example, Lord Parker made clear that in each case “it is tacitly assumed that the contract would in a Court of Equity be enforced specifically.”²⁰ So, if for some reason, equity would not enforce the contract, “the vendor . . . either never was, or has ceased to be, a trustee in any sense at all.”²¹ In the context of equitable tenancies, for example, no equitable lease arises unless the court is willing to order specific performance.²² As Thompson observes, “in the sphere of landlord and tenant, the availability of specific performance is regarded as a *sine qua non*, without which an equitable lease cannot arise; a proposition . . . which is equally true before a trust arises in the case of a contract to sell land.”²³

The purchaser’s proprietary remedy against the vendor

The primary benefit of the trust device to the purchaser of land is to afford him a significant measure of protection (beyond his contractual remedies) prior to completion of the sale. At common law, if a vendor (V) contracts to sell to a purchaser (P) and, before completion, V transfers the land to a third party (TP) in breach of contract, P cannot enforce the contract against TP.²⁴ A contract of sale does not have proprietary effect on parties other than the parties to the contract.²⁵ P’s only remedy, in the absence of equity’s intervention, is a

¹⁷ See, MP Thompson, “Must a Purchaser Buy a Charred Ruin?”, (1984) Conv 43.

¹⁸ See, *Howard v Miller* [1915] AC 318, at 326, per Lord Parker. The notion that specific performance must be available at all times if the trust is to subsist is also supported by *dicta* in *Plews v Samuel* [1904] 1 Ch 464 and *Central Trust and Safe Deposit Co v Snider* [1916] 1 AC 266, cited by MP Thompson, [1984] Conv 43, at 45.

¹⁹ [1916] 1 AC 266.

²⁰ *Ibid*, At 272.

²¹ *Ibid*, at 272.

²² *Warmington v Miller* [1973] QB 877.

²³ MP Thompson, “Must a Purchaser Buy a Charred Ruin?”, (1984) Conv 43, at 44.

²⁴ It is, of course open to the purchaser to register his interest as an estate contract in order to bind a subsequent purchaser of either registered or unregistered land. If the land is unregistered, the purchaser may register a Class C land charge under s.2 of the Land Charges Act 1972. If registered land, the appropriate entry will be by way of notice under s.32(1) of the Land Registration Act 2002.

²⁵ See, *Scott v Southern Pacific Mortgages Ltd* [2014] UKSC 52, at [65], per Lord Collins quoting Lord Cottenham LC in *Tasker v Small* (1837) 3 My & C 63, at 70, who said that the rule by which a purchaser becomes in equity the owner of the property sold “applies only as between the parties to the contract, and cannot be extended so as to affect the interests of others”. In the words of Lady Hale in *Scott*, at [122]: “the purchaser of land cannot create a proprietary interest in the land, which is capable of being an overriding interest, until his contract has been completed”.

common law action for damages for breach of contract against V.²⁶ In order to enforce the contract via a proprietary claim against the vendor, P must rely on a specifically enforceable contract in equity.²⁷ In other words, P must rely on equity's maxim that "treats that as done which ought to be done" in order to substitute his interest in the purchase money into the land itself under the doctrine of conversion.

Assuming V has gone ahead and sold to TP at a higher price, P may claim the profit element arising out of the sale in an action against V (on the basis that the sale proceeds now represent the trust property).²⁸ In this sense, therefore, the constructive trust plays an important role in securing the interests of the purchaser, especially if the proceeds of sale have been used by V in acquiring a valuable asset which itself has increased in value. If P's contract has not been registered (so as to bind TP), the trust relationship permits P to pursue V using a proprietary claim in equity in respect of the asset purchased from the proceeds of sale.²⁹ In *Lake v Bayliss*,³⁰ Walton J put the matter this way:³¹

" . . . it would be *pessimi exempli* if a vendor was entitled to shed the character of a trustee by a wholly wrongful act on his or her part. Once he has undertaken the role of trustee then it is a role which, unless discharged by some external circumstance, one must carry out to the bitter end if so required by the other party to the contract. The vendor cannot be heard to say that because of her wrongful act in reselling the property she never was a trustee."

On this reasoning, therefore, V (in our example) remains a constructive trustee right up to the time of the resale to TP and, accordingly, bound to hold the proceeds of sale as trust property to hand over to P on P completing his own obligations under the original contract.

A bare trust arising upon payment of the purchase money?

²⁶ The measure of damages will be the difference between the contract price and the market value of the property at the time of sale. It is possible that P would also have a tort claim against TP in the absence of equity's intervention.

²⁷ See, *Lake v Bayliss* [1974] 1 WLR 1073.

²⁸ See, *Lake v Bayliss* [1974] 1 WLR 1073, at 1076; *Daniels v Davison* (1809) 16 Ves Jun 249; *Shaw v Foster* (1872) Ch D 1 and *Luxe Holding Ltd v Midland Resources Holding Ltd* [2010] EWHC 1908 (Ch).

²⁹ If TP has dishonestly assisted in V's breach of trust, he may be liable as constructive trustee of the land in his own right: see, generally, *Royal Brunei Airlines v Tan* [1995] 2 AC 378; *Barlow Clowes International Ltd v Eurotrust International Ltd* [2005] UKPC 37 and *Abou-Rahmah v Abacha* [2006] EWCA Civ 1492. Similarly, TP may be a constructive trustee if he has knowledge of P's equitable interest such as to make it unconscionable for him to retain the benefit of the receipt: see, *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* [2001] Ch 437 and *Starglade Properties Ltd v Nash* [2009] EWHC 148 (Ch).

³⁰ [1974] 1 WLR 1073.

³¹ *Ibid*, at 1076.

It should also be possible to argue that P's equitable interest, upon payment of the full purchase price on completion,³² should bind a third party, if (in the case of unregistered land)³³ he has actual (or constructive) notice of P's interest, although there is currently some English authority against this view. In *Lloyds Bank plc v Carrick*,³⁴ the bank's primary contention was that the widow's interest in the subject property (a maisonette) arose out of her contract with her brother-in-law which was void for want of registration against the bank as a purchaser for money or money's worth.³⁵ As against this, it was argued on behalf of the widow that she had an interest separate and distinct from that which arose under the unregistered contract. Morritt LJ, who gave the leading judgment, concluded that, whilst the brother-in-law could properly be described as a bare trustee upon payment of the full purchase money, nevertheless, the source of the trust was the contract which, by virtue of s.4(6) of the Land Charges Act 1972, was void against the bank in the absence of prior registration. In other words, his Lordship was not prepared to superimpose a further trust on the vendor other than that which already existed in consequence of the parties' contractual relationship.

The reasoning of the Court of Appeal is open to criticism on the ground that there were, effectively, two trusts in this case. First, a qualified constructive trust arising under the contract. Second, an unqualified bare trust arising upon full payment of the purchase price but prior to completion. This second trust falls to be characterised as unqualified in the sense that the purchaser's interest in the trust property becomes "absolute" in so far as it is not subject to any contingencies or terms governing the trust.³⁶ Essentially, the trustee stands merely as nominee for the beneficiary. In *Re Cunningham and Frayling*³⁷ Stirling J had occasion to approve the definition provided by Hall VC in the earlier case of *Christie v Ovington*³⁸ that "a bare trustee [means] a trustee to whose office no duties were originally attached, or who, although such duties were originally attached to his office, would, on the requisition of his

³² If the purchase is funded with the aid of a mortgage, the contract of sale, transfer and mortgage will form one indivisible transaction so that the purchaser will not acquire legal title upon completion of the sale but merely an equity of redemption arising by virtue of the mortgage: see, *Scott v Southern Pacific Mortgages Ltd* [2014] UKSC 52. The consequence of this is that the purchaser's equitable rights arising under the contract of sale will remain personal and will not bind a third party. The purchaser's rights would only become proprietary and capable of taking priority over the mortgage if they were "fed" by the purchaser's acquisition of the legal estate upon completion: see also, *Abbey National Building Society v Cann* [1991] 1 AC 56.

³³ In the case of registered land, P's equitable interest would need to be coupled with actual occupation of the land in order to rank as an overriding interest under Schedule 3, para 2, to the Land Registration Act 2002.

³⁴ [1996] 4 All ER. 630. See further, MP Thompson, "The Widow's Plight", [1996] Conv 295.

³⁵ See, for example, *Midland Bank Trust Co Ltd v Green* [1981] AC 513.

³⁶ In particular, the vendor's legal and equitable entitlement to liens over the property. An alternative approach is to treat the initial trust as qualified by the vendor's liens but, upon full payment of the purchase money, there is no longer any basis for the liens and so the initial qualified trust becomes unqualified. On this analysis, therefore, there is only ever a single trust throughout which mutates into an unqualified (bare) trust upon full payment of the purchase money.

³⁷ [1891] 2 Ch 567.

³⁸ (1875) 1 Ch D 279.

[beneficiaries], be compellable in equity to convey the estate to them, or by their direction". The beneficiary, therefore, may at any time request that the legal title to the trust property is transferred to him – being a bare trust, the trustee must comply with the beneficiary's request.

In *Carrick*, therefore, the bare trust arising from the widow's payment of the full purchase money should have been regarded as entirely distinct from the constructive trusteeship arising from the contract and should, it is submitted, have been regarded as exempt from the requirements of registration under the 1972 Act. It is unfortunate that this vital distinction between constructive trust and bare trust was not made more apparent in *Carrick*. On exchange of contracts, as we have seen, the vendor becomes a constructive trustee of the property - he is not, at this stage, a bare trustee. Until payment of all the purchase money, he retains a personal interest in the property including a right to protect and maintain the property. Conversely, the purchaser's equitable interest remains qualified in the sense that it is dependent upon the continuing availability of specific performance. On completion, however, when the balance of the purchase price is paid, the full relation of trustee and beneficiary becomes established, which then relates back to the time of the contract.³⁹ It is submitted, therefore, that, in *Carrick*, the widow's equitable interest under the bare trust should have bound the bank irrespective of the fact that the parties' agreement had not been registered. In other words, the trust device should have prevailed in order to secure the purchaser's equitable interest against the third party notwithstanding the lack of registration.

Seller as trustee of personal property

As already mentioned, specific performance is not usually granted in respect of contracts for the sale of personal property. This is not because the subject-matter is of a personal nature, but because chattels are invariably not unique and so damages at common law may represent an entirely satisfactory remedy for the purchaser if the subject-matter can be bought elsewhere on the open market. Further, entry into the contract and completion are often simultaneous events. If, on the other hand, the property is either unique or scarce, specific performance is usually available provided that the court, in its equitable discretion, is satisfied that this is the most appropriate remedy.⁴⁰ It will be convenient to first explore the applicability of this general principle to contracts for the sale of goods.

(a) sale of goods

³⁹ See, *Raynor v Preston* (1881) 18 Ch D 1, at 13, *per James LJ*. Upon payment of the purchase price, the purchaser becomes fully entitled to the beneficial interest: see, *DHN Food Distributors Ltd v London Borough of Tower Hamlets* [1976] 1 WLR 852 and *Bridges v Mees* [1957] 2 All ER 577.

⁴⁰ See, *Michaels v Harley House (Marylebone) Ltd* [2000] Ch 104.

In most contracts for the sale of goods, the passing of property takes place when the contract is made⁴¹ – there is simply no equivalent of exchange of contracts and completion to be found as in the sale of land. However, s.17 of the Sale of Goods Act 1979 states that property in the goods is transferred to the buyer at such time as the parties to the contract intend it to be transferred. In some cases, therefore, the passing of property in goods may be postponed until a later date (for example, where the contract stipulates payment by instalments, or delivery at a later date or the contract is conditional upon the receipt of cleared funds)⁴² and the question then arises as to whether the seller should be treated as trustee of the goods for the purchaser in the period prior to completion. Or to put it another way, should the purchaser, in such cases, be treated as owning a beneficial interest in the property prior to the sale contract being completed?

The notion of a division of legal and beneficial ownership in the context of a sale of goods may seem somewhat odd at first glance, but it is submitted that the relationship of trustee/beneficiary should also represent an accurate reflection of the parties' position where the subject-matter of the sale is unique (and, hence, the contract specifically enforceable) and where it is intended that no legal title should pass until some future date. This was certainly the view taken by Lord Westbury in *Holroyd v Marshall*,⁴³ where his Lordship opined that the transfer of equitable ownership upon entry into a contract applied “not only [to] contracts relating to real estate, but also to contracts relating to personal property, provided that the latter are such as a court of equity would direct to be specifically performed.” Two English cases, however, suggest a contrary view, namely, that the vendor retains full legal and beneficial title until the property passes to the purchaser or possession has been delivered to him. In *Re Wait (trading as Wait and James)*,⁴⁴ Aitkin LJ, in the context of the Sale of Goods Act 1893, without expressly deciding the point, opined that:

“It would have been futile in a code intended for commercial men to have created an elaborate structure of rules dealing with rights at law, if at the same time it was intended to leave, subsisting with the legal rights, equitable rights inconsistent with, more extensive, and coming into existence earlier than the rights so carefully set out in the various sections of the [the 1893 Act].”

It is pertinent to observe, however, that in this case, there was a direct conflict between the remedy which the court was being asked to grant and the restrictions on the award of specific performance set out in (what is now) s.52 of the Sale of Goods Act 1979. So here, the equitable rule in question was clearly inconsistent with the express provisions of the Act. Aitkin LJ's *dictum* was, however, endorsed by Lord Brandon in the subsequent case of *Leigh*

⁴¹ See, s.18 of the Sale of Goods Act 1979.

⁴² See, for example, *Dennant v Skinner and Collom* [1948] 2 KB 164, where the parties had expressly stipulated that title should not pass “until a cheque was cleared”.

⁴³ (1962) 10 HLC 191.

⁴⁴ [1927] 1 Ch 606, at 635-636.

& Silliavan Ltd v Aliakmon Shipping Co Ltd, The Aliakmon.⁴⁵ His Lordship's view, however, was once again stated to be provisional only.⁴⁶

Despite their *obiter* nature, the observations of both Aitkin LJ and Lord Brandon clearly point to the conclusion that, because the Sale of Goods Act 1979 is silent as regards the creation of any trust in favour of the purchaser goods coming within the ambit of the Act, no separation of legal and equitable title may arise notwithstanding that the sale contract may be specifically enforceable. Until, therefore, the property passes to the purchaser, the matter lies solely in contract and the purchaser acquires no interest in the goods pending transfer of the legal title. As against this, however, reference may be made to s.62(2) of the 1979 Act which provides that "the rules of the common law . . . except in so far as they are inconsistent with the provisions of this Act . . . apply to contracts for the sale of goods." This would suggest that the principles of the general law (including equity) continue in operation to supplement the legislation - the expression "rules of the common law" referring (in broad terms) to "judge made law" (as opposed to statute law) and not, more technically, to those rules in contradistinction to the rules of equity. There is authority in both Australia⁴⁷ and New Zealand⁴⁸ which supports this wider interpretation of the statute, so it is conceivable that the device of the trust may yet be called into play in the context of a sale of unique goods in order to confer on the purchaser an equitable interest in the property pending transfer of legal ownership. This, in turn, it is submitted, would open up the possibility of allowing the purchaser to claim priority over the seller's creditors in the event of the latter's bankruptcy. In this connection, under s.306 of the Insolvency Act 1986, the bankrupt's estate vests automatically in the trustee in bankruptcy as soon as the trustee is appointed without the need for any formal conveyance, assignment or transfer. The seller's assets can then be sold off for the benefit of creditors. Certain property is exempt from sale, including property formerly held by the bankrupt on trust for any other person.⁴⁹ Similarly, if the seller is a limited company which has gone into liquidation, the liquidator (although not a trustee) acts as a fiduciary and agent of the company with a statutory duty to ensure that the assets of the company are called in, realised and distributed to creditors. Here again, the liquidator takes the company's assets subject to prior equities, including any equitable interest arising under a trust.

⁴⁵ [1986] 2 All ER 145.

⁴⁶ [1986] 2 All ER 145, at 151.

⁴⁷ See, *Graham v Freer* (1980) 35 SASR 424; *Leason Property Ltd v Princes Farm Property Ltd* [1983] 2 NSWLR 381 and *Vimig Property Ltd v Contract Tooling Property Ltd* (1986) 9 NSWLR 731. Contrast, *Watt v Westhoven* [1933] VLR 458.

⁴⁸ See, *Thomas Borthwick & Sons (Australasia) Ltd v South Otago Freezing Co Ltd* [1978] 1 NZLR 538, at 545 and *Timmerman v Nervina Industries (International) Property Ltd* [1983] Qd R 1. Contrast, *Riddiford v Warren* (1901) 20 NZLR 572, at 576 and 582, and *Re Martin, ex parte Avery Motors Ltd* [1991] 3 NZLR 630.

⁴⁹ In this regard, the trustee in bankruptcy takes the bankrupt's property "subject to all equities" existing prior to the bankruptcy: see, *Re Wallis, ex parte Jenks* [1902] 1 KB 719; *In Re Eastman, ex parte Ward* [1905] 1 KB 465, at 467, and *Tilley v Bowman* [1910] 1 KB 745.

Apart from the potential benefit of priority over the seller's creditors, the purchaser may also have the advantage of asserting a tracing claim in equity, consistent with the *Lysaght* ruling, against the seller in respect of the proceeds of sale where the latter has re-sold the property in breach of contract to a third party before completion of the sale.⁵⁰ Significantly, such an equitable claim would not be dependent on the purchaser's right to possession or legal ownership of the goods (which, of course, remain necessary prerequisites to possessory actions in tort). In this connection, there is nothing in the Sale of Goods Act 1979 to prevent the parties to a contract for the sale of goods from incorporating equitable principles into their contract by express agreement.

(b) contracts to sell other unique personal property

The use of the trust in the context of other contracts for the sale of personal property has been more rewarding in terms of judicial development.⁵¹ Thus, Lord Jenkins in *Oughtred v IRC*,⁵² in the context of a contract for the sale of shares in a private company, accepted that an agreement involving a surrender of a reversionary interest in shares for valuable consideration was similar to that of a purchaser of land between contract and completion. In his Lordship's view, the purchaser's interest was "no doubt a proprietary interest of a sort, which arises, so to speak, in anticipation of the execution of the transfer for which the purchaser is entitled to call." Lord Radcliffe (in his dissenting speech)⁵³ in the same case was more robust adopting the view that the parties' agreement gave rise to equitable ownership in the reversionary interest in the shares by virtue of a contract which was specifically enforceable in equity. Upon payment of the consideration, the seller "became in a full sense and without more the trustee . . . [and the purchaser] effective owner of all outstanding equitable interests."⁵⁴ The result, in his view, was that the contract gave rise to a trust which was capable of avoiding the formal requirements of writing contained in s.53(1)(c) of the Law of Property Act 1925.

Similarly, in *Re Holt's Settlement*,⁵⁵ Megarry J, relying on the dissenting speeches in *Oughtred*, held that an agreement to surrender a life interest in the income of a trust fund made for valuable consideration, which was specifically enforceable in equity, passed the beneficial interest to the purchaser by virtue of a constructive trust. Such trust, in his words, was "made familiar by contracts for the sale of land, whereunder the vendor becomes a

⁵⁰ See, *Bunny Industries Ltd v FSW Enterprises Property Ltd* [1982] Qd R 712.

⁵¹ See, generally, Bridge et al, *The Law of Personal Property*, (2017, 2nd ed.), at 14-100 et seq.

⁵² [1960] AC 206, at 240.

⁵³ *Ibid*, at 227-228.

⁵⁴ *Ibid*, at 227-228.

⁵⁵ [1968] 1 All ER 470, at 476. See also, *Neville v Wilson* [1997] Ch 144, where Nourse LJ (giving the judgment of the Court of Appeal) concluded that: "the analysis of Lord Radcliffe [in *Oughtred*], based on the proposition that a specifically enforceable agreement to assign an interest in property creates an equitable interest in the assignee, was unquestionably correct." See further, *Chin v Collins (Inspector of Taxes)* [1981] AC 533 and *Michaels v Harley House (Marylebone) Ltd* [2000] Ch 104.

constructive trustee for the purchaser as soon as the contract is made, albeit the constructive trust has special features about it.” Again, in *Chinn v Collins (Inspector of Taxes)*,⁵⁶ Lord Wilberforce expressly approved the suggestion that a contract for the sale of shares in a private company, “accompanied or followed by payment of the price”, passed “at once” the equitable interest in the property so that the purchaser was entitled to call for an immediate transfer of the shares from the trustee.

The upshot of this analysis, it is submitted, is that the device of the constructive trust arising on a specifically enforceable contract for sale is not limited to transactions involving the sale of land – the trust may also be employed to characterise a purchaser of unique personal property as equitable owner provided the contract is capable of specific performance. Similarly to the principle which operates between a vendor and purchase of land, equity will “treat that as done which ought to be done” with the consequence that a contract to sell personal property will generate a constructive trust pending formal completion of the transaction. As with contracts for the sale of land, therefore, the purchaser can be seen as acquiring two distinct and successive rights, namely, the equitable interest arising by virtue of the sale contract (which is linked to the availability of specific performance) and the equitable interest arising under a bare trust (replacing the constructive trust)⁵⁷ which comes into existence on full payment of the consideration.⁵⁸

Conclusion

We come back to basic principles. A contract for the sale of land generates a form of constructive trust which is dependent on the availability of specific performance. Although the vendor’s qualified trusteeship⁵⁹ makes the constructive trust somewhat unique, it does allow the purchaser, as a beneficial owner, to assert an equitable tracing claim against the vendor in respect of the proceeds of sale in the event of the vendor re-selling the property to a third party prior to completion. At this stage, however, the vendor’s trusteeship applies only as between the parties to the contract,⁶⁰ so that the purchaser’s equitable interest ranks against third parties in the same way as other equitable interests and is subject to the requirements of registration for both registered and unregistered land.

⁵⁶ [1981] AC 533, at 548.

⁵⁷ An alternative approach is to treat the initial trust as qualified by the vendor’s liens but, upon full payment of the purchase money, there is no longer any basis for the liens and so the initial qualified trust becomes unqualified. On this analysis, therefore, there is only ever a single trust throughout which mutates into an unqualified (bare) trust upon full payment of the purchase money.

⁵⁸ There may still be an interval between payment of the full purchase money and formal registration of title (in relation, for example, to the purchase of shares) during which time the purchaser will retain only an equitable interest in the property under the bare trust.

⁵⁹ See, *Rayner v Preston* (1881) Ch D 1, at 6, *per* Cotton LJ.

⁶⁰ See, *Tasker v Small* (1837) 3 My & Cr 63, at 70-71, *per* Lord Cottenham LC. See also, *Scott v Southern Pacific Mortgages Ltd* [2014] UKSC 52, at [65], *per* Lord Collins.

Upon completion of the sale, however, the full relationship of trustee and beneficiary is established in the form of a bare trust (relating back to the date of the contract). In the words of Lord Walker in *Jerome v Kelly*:⁶¹

“If the contract proceeds to completion the equitable interest can be viewed as passing to the buyer in stages, as title is made and accepted and as the purchase price is paid in full.”

The consequence of this, it is submitted, is that the purchaser now acquires a full equitable proprietary interest which, in the context of unregistered land, is enforceable against a third party with notice (actual or constructive) of the interest regardless of registration.⁶² A different conclusion, as we have seen, was reached in *Carrick*, where the Court of Appeal refused to recognise the nature of the bare trust (arising on full payment of the purchase money) as being essentially different from the constructive trust (arising on exchange of contracts). In the writers’ view, however, the widow’s equitable interest under the bare trust, consistent with the nature of that trust and coupled with the bank’s constructive notice of her interest,⁶³ should have bound the bank irrespective of registration. Moreover, had the title comprised registered land, her equitable interest coupled with actual occupation would have ranked as an overriding interest under (what was then) s.70(1)(g) of the Law of Property Act 1925.⁶⁴ Outside the facts of *Carrick*, however, where the purchaser is not in occupation, the equitable interest would only bind a third party if registered as an estate contract where the property is registered or unregistered land.

By analogy with sales of land, a contract for the sale of personal property which is unique or scarce generates equity’s intervention by means of the remedy of specific performance. This, in turn, it is submitted, operates to make the seller under an uncompleted contract a trustee of the property for the purchaser. In the context of the sale of goods, despite English *dicta* to the contrary, it is submitted that the trust device has a useful role to play in providing the purchaser with priority over the seller’s creditors (in the event of the seller’s insolvency) and an equitable proprietary claim to the proceeds of sale where the seller re-sells to a third party prior to completion. If the seller uses the proceeds to acquire another asset (for example, shares) which increase in value, the purchaser will be entitled to trace into that asset as trust property. Once the purchase money is paid in full, however, consistently with the notion of

⁶¹ [2004] 1 WLR 1409, at [32].

⁶² In certain circumstances, the purchaser may be minded to pursue a tracing claim in respect of the proceeds of sale rather than enforce his equitable interest against the third party.

⁶³ Although the bank’s charge was preceded by a questionnaire signed by the brother-in-law to the effect that, to the best of his knowledge, there were no other persons in occupation of the property, the bank was not entitled to rely simply on the questionnaire because it knew (through one of its officers) that the widow was resident. See, generally, *Kingsnorth Finance Co v Tizard* [1986] 1 WLR 783.

⁶⁴ See now, Schedule 3, para. 2 of the Land Registration Act 2002. As Morritt LJ himself points out in *Carrick*: “the result would have been different if the title to the maisonette had been registered. In such a case the interest of Mrs Carrick, who was in possession of the maisonette and of whom no enquiry had been made, would have been an overriding interest . . . As such it would have been binding on the bank.”

the bare trust arising in contracts for the sale of land, the nature of the equitable proprietary right changes so that the purchaser now acquires, consistent with current authority, a full equitable interest in the property which, it is submitted, is capable of binding third parties.⁶⁵ Here again, the distinction between the constructive trust and bare trust becomes significant – the latter conferring an automatic proprietary claim to the property (relating back to the contract) which is no longer personal to the parties and independent of the availability of specific performance.

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⁶⁵ A bona fide purchaser of the legal estate would, of course, take free of the purchaser's prior equitable interest. As we have seen, however, the seller's trustee in bankruptcy (or liquidator) takes the property subject to prior equities.