FORMALITIES RELATING TO CONTRACTS FOR THE SALE OF LAND REVISITED

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It is a remarkable thing that there should be a controversy in the law relating to the formalities for so basic a transaction as a contract for the sale of land. Nevertheless, the law, particularly as a consequence of several Western Australian decisions, cannot be regarded as settled and the issue has generated considerable academic comment.[1]

The legislative provisions

The problem stems from the existence in Western Australia of two statutory provisions both of which on the face of it can be said to address the same issue. These provisions are section 4 of the English Statute of Frauds 1677 and section 34(1)(a) of the Western Australian Property Law Act 1969. Each section lays down different formal requirements and the controversy is how to reconcile the two provisions.

Section 4 of the Statute of Frauds relevantly provides that:

> No action shall be brought...to charge any person...upon any contract or sale of land, tenements or hereditaments, or any interest in or concerning them;...unless the agreement upon which such action shall be brought, or

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1. R P Austin "Moot Point" (1974) 48 ALJ 322; D Everett "Reconciliation of the Statutory Requirements for Writing in Land Transactions" (1987) 17 UWAL Rev 301; N Seddon "Contracts for the sale of land: Is a note or memorandum sufficient?" (1987) 61 ALJ 406; G C Chevalier *Cheshire & Fifoot's, Law of Contract* 5th Australian edn (Sydney: Butterworths, 1988) para 521.

some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorised.

Section 34 of the Property Law Act provides:

(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 differences between the two provisions are of significant practical importance. Under section 4 of the Statute of Frauds an oral contract is adequate (provided there is a written memorandum signed by the vendor or his authorised agent) and the agent does not have to be authorised in writing. Under section 34(1)(a) of the Property Law Act the interest can only be created by writing (that is relevantly, as regards this article, by a written contract) and, if signed by an agent, the agent must be authorised in writing.

For some three hundred years it was the accepted view that section 4 (or its equivalent) applied to contracts, whereas section 34(1) (or its equivalent) applied to express assurances relating to the creation or disposal of interests, and not to contracts. This was the view which was adopted and applied by Burt J (as he then was) in the first instance decision of *Hayes v Adamson*.[2] The case then went to the High Court as *Adamson v Hayes*[3] and subsequently several Western Australian decisions at first instance have relied upon the High Court decision as binding authority for the view that section 34(1)(a) applies to contracts for the sale of land and prescribes the formal requirements for entry into an enforceable contract of such a nature.

2. [1972] WAR 116.
3. (1973) 130 CLR 276.

Our submission is that the traditional view is correct and section 4 of the Statute of Frauds (or its equivalent), and not section 34(1)(a) of the Property Law Act, applies to contracts for the sale of land.

This submission is based on two main propositions:

(a) *Adamson v Hayes* has been misinterpreted and is not authority for the view propounded by the Western Australian decisions.
(b) On a proper construction of the whole of section 34 it is apparent that it does not prescribe formalities for contracts for the sale of land.

The *Adamson v Hayes* limb

Dealing with the first limb of our argument it is necessary to give close regard to *Adamson v Hayes* and the relevant decisions in Western Australia.

The facts in *Adamson v Hayes* are significant. They were broadly as follows. Adamson, Hayes and Freebairn pegged out and (under the Western Australian Mining Act 1904) acquired about twenty two mineral claims. These mineral claims were not acquired by the claimants beneficially for themselves alone, but from the outset were acquired and held upon trust in varying respects for themselves and others. The case was concerned with the enforceability of an oral agreement made by all those who had interests in the tenements. There were two elements to the oral agreement:

(i) Firstly, there was the so called "pooling agreement". By this agreement it was agreed that all the tenements, which were held in the names of either Adamson, Hayes and Freebairn, individually, or a combination of them, would forthwith be held as to 44 per cent for Hayes and Freebairn (the first and second respondents) and 56 per cent for Adamson and his family group (the appellants). In other words, there was a purported rearrangement of the equitable interests which the parties held in the tenements.
(ii) There was, secondly, the option element of the agreement. Under this element, it was agreed that the appellants would offer to a company, Western Titanium, an option to acquire a 50 per cent interest (to be taken from their 56 per cent interest) in the tenements provided that there was fulfillment of certain conditions. Should the conditions not be fulfilled,

> the respondents would be entitled to take up the option to acquire the 50 per cent interest in those tenements.

The dispute giving rise to the case arose because there was a failure of the conditions triggering Western Titanium's option and the appellants refused to allow the respondents' nominee to enforce the option agreement.

The importance of the distinction between the two elements of the oral agreement is that the pooling agreement was an agreement which was to take effect immediately so as to rearrange the existing beneficial interests upon which the tenements were held by the legal owners, Adamson, Hayes and Freebairn. The option element of the agreement, on the other hand, was an executory contract. It was a pre-condition to the operation of the option agreement that the pooling agreement be effective in its object of rearranging the beneficial interests in the claims.

It is of crucial importance to appreciate that the majority of the High Court judges in *Adamson v Hayes* considered only the pooling element and based their judgments on this aspect of the agreement. They did not deal with executory contracts for the sale of land. Only Gibbs J gave detailed attention to the option element of the oral agreement and dealt with the position of executory contracts.

The first judge in Western Australia to consider the question after *Adamson v Hayes*, was Virtue SPJ in the case of *Parker v Manessis*.[4] He concluded that the High Court decision required him to hold that section 34(1)(a) prescribed formalities in relation to the contract for the sale of land or interests in land. He rejected the argument that section 34(1)(a) applied only to the creation of legal interests as opposed to equitable interests.

The next judge to grapple with the issue was Wallace J in the case of *Monte v Buongiorno*.[5] The learned judge concluded that *Adamson v Hayes* was distinguishable, and that section 34(1)(a) referred to the formalities required for "the transfer or conveyance in the sense of assurance 'of an interest in land'",[6] and, in determining whether a contract for the sale of land had been validly created, he applied section 4 of the Statute of Frauds.

4. [1974] WAR 54.
5. [1978] WAR 49.
6. Ibid, 51.

Thus, when the case of *Redden v Wilks and the Registrar of Titles*[7] came to be decided by Burt CJ in 1979, there were two conflicting decisions of single judges in Western Australia. His Honour stated that "of the two decisions of this court which are in conflict, I would follow the decision of Virtue J in *Parker v Manessis*".[8]

He went on to say:

> In my opinion, the decision of the High Court in *Adamson v Hayes* requires one to hold, as I do, that a verbal contract for the sale of land or for the disposition for valuable consideration 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...such agreement is ineffective and cannot be specifically enforced. This, I think, would be so even if there existed a good memorandum in writing of the verbal agreement, because it is the verbal agreement which creates the interest and not the memorandum. Hence in a suit for specific performance it is no answer to the plea of s.34(1)(a) of the Property Law Act to plead as the plaintiff here does, the existence of the memorandum.[9]

The influence of this dictum from *Redden v Wilks* has been significant in this area of the law and has subsequently been followed by Rowland J in *Triffid Pty Ltd v Ratto*,[10] Brinsden J, obiter, in the Full Court in *Ratto v Triffid Pty Ltd*,[11] by Pidgeon J in *Ward v Thompson*[12] and by Commissioner Murray QC in *Blazey v Poletti*.[13] It has also been followed consistently in practice and is accepted in Western Australia as the present state of the law.

We respectfully submit that *Adamson v Hayes* did not require Burt CJ to hold as he did in the dictum set out above.

In order to sustain our argument it is necessary to analyse the judgments of the majority in *Adamson v Hayes* in some detail.

Menzies J held that the pooling agreement constituted either a declaration of trust respecting an interest in land in terms of section 34(1)(b) of the Property Law Act or a disposition of an equitable interest in terms of section 34(1)(c).[14]

7. [1979] WAR 161.
8. Ibid, 165.
9. Ibid.
10. [1985] WAR 19
11. [1987] WAR 237, 258.
12 (Unreported) Supreme Court of Western Australia 6 November 1985 no 1048 of 1985.
13. (Unreported) Supreme Court of Western Australia 23 May 1989 no 7664 It is of significance that Commissioner Murray QC did not refer in his judgment to the Full Court decision in *Abjornson v Urban Newspapers Pty Ltd* infra n 49.
14. Supra n 3, 292-293.

Walsh J also analysed the pooling agreement saying:

> In my opinion, that part of the agreement (the pooling agreement) was intended to take effect immediately. It did not consist of mutual promises that at some subsequent time claims would be held in the specified manner. It was directed to an immediate settlement of the entitlement to the claims, this being a settlement which would make it possible for the appellants "out of their interests in the said claims" to offer the option described in paragraph 5(b) and would permit of the other agreed dealings by the parties with their respective interests in the claims. The shares specified in the pooling agreement did not correspond with the rights which the respective parties would have had under the Mining Act in the absence of any bargain concerning the beneficial ownership of those rights nor did they correspond with any bargain that had previously been made as to such beneficial ownership. *In my opinion, this part of the agreement constituted a set of dealings with equitable interests in the claim.* It would have been effective but for the lack of writing required by s.34(1)(a) to create or dispose of equitable interests in the claims to which it referred.[15] (emphasis added)

Stephen J in analysing the nature of the pooling agreement said as follows:

> Looking at the term pleaded at paragraph 5(a) ("the pooling agreement") it does appear to me to involve the creation of a series of equitable interests, each applicant or group of applicants for registration of a particular mineral claim *declaring* that the claim is to be held by him or them on behalf of all the parties to the agreement in the proportionate shares there agreed upon. This follows, I think, from the ordinary meaning of that part of the pleading. Paragraph 5 of the statement of claim, after reciting that the parties "discussed the ownership of" the claims goes on to allege that they then agreed that (as between themselves) the twenty two claims should be held by them in certain specific shares for all the parties to the agreement.
>
> If this be so the oral agreement did, by its first term, seek to declare trusts respecting each of their mineral claims thereby creating equitable interests and paragraphs (a) and (b) of s.34(1) will apply if, as I have held, the claims and the rights relating to them are "land" for the purposes of this section.[16] (emphasis added)

Gibbs J (as he then was) said:

> The intention of the pooling arrangement was that immediately upon its making the appellants should become beneficially entitled to fifty-six per cent and the respondents to forty-four per cent of each claim. I am disposed to think that the pooling arrangement amounted to a declaration of trust which will fall within s.34(1)(b) if the interests in the claims are interests in land, but I cannot regard this as a disposition of an equitable interest or trust subsisting at the time of the disposition within s.34(1)(c).[17]

15. Ibid, 296.
16. Ibid, 317-318.
17. Ibid, 303.

On analysis, it is submitted that the ratio decidendi of the case is (per Menzies, Stephen and Gibbs JJ) that:

(a) The pooling agreement amounted to declarations of trust;
(b) The interests created by the declarations of trust were equitable interests;
(c) Section 34(1)(b) of the Property Law Act applied to those interests.

Stephen J also held that section 34(1)(a) applied to those interests and Menzies J thought that section 34(1)(c) applied.

However, what must be emphasised is that all the judges dealt with the pooling agreement as an *express* declaration dealing with beneficial interests by the parties. The judges were at pains to stress that the pooling agreement took immediate effect and expressly dealt with the way in which existing beneficial interests were henceforth to be held.

This position is to be distinguished from that whereby a beneficial interest can arise pursuant to an executory contract for the sale of land or an interest in land. It is this type of contract which was contemplated under the option element of the agreement in *Adamson v Hayes* but which only Gibbs J considered in any detail.

As to the option agreement Gibbs J had this to say:

> It follows...that the agreement to give options in the present case were not interests subsisting at the time of the agreement; they were new interests, thereby created. They do not come within s.34(1)(c). Nor, in my opinion, is it possible to describe the parts of the agreement by which the options are granted as declarations of trust; they are not within s.34(1)(b). On the other hand, the agreement to grant the options, if valid, did create interests in the claims. If those interests were interests in land the agreement would in my opinion fall within s.34(1)(a). That paragraph in my opinion refers to equitable as well as legal interests in land...[18]

Gibbs J said that his view meant that there was overlapping between section 4 and section 34(1), which was anomalous but did not lead to such absurdity that it should be concluded that the legislature did not intend such overlapping to occur.[19]

It is generally accepted that an equitable interest arises in a purchaser as a consequence of a specifically enforceable contract to sell land or an interest therein.[20] However, in our submission, Gibbs

18. Ibid, 304.
19. Ibid, 305.
20. See eg, *Brown v Heffer* (1967) 116 CLR 344, 349; *Chang v Registrar of Titles* (1976) 137 CLR 177, Barwick CJ, 181 and Mason J (as he then was), 184.

J was, with respect, wrong to conclude from this premise that compliance with formalities which are described in section 34(1)(a) was a necessary condition for the enforceability of such a contract.

The nature of the equitable interest which arises or is created as a consequence of there being a specifically enforceable contract for the sale of land is widely referred to as being a constructive trust.[21] There has been a great deal of debate in the cases as judges have sought to define with greater precision the nature and scope of the rights and duties in equity which arise in the circumstances. This debate has been summarised recently by Connolly J in the Full Court of the Supreme Court of Queensland in the case of *Bunny Industries Ltd v FSW Enterprises Pty Ltd*[22] and Dawson and Deane JJ in the High Court in *Stern v McArthur.*[23]

Irrespective of the precise definition of the rights and duties which arise as a consequence of a specifically enforceable agreement, there is general consensus that:

(a) the equitable interest which arises has traditionally been described in the terminology of trustee and beneficiary;[24]
(b) such interest as arises is, at the very least, an equitable interest in land that may be "a lesser equitable interest than ownership";[25]
(c) the basis for the principle is to be found in the equitable maxim that equity considers as done what ought to be done;[26]
(d) the principle is one of the oldest principles in equity;[27]
(e) it is not an express trust that creates the interest, the interest is an incident of a specifically enforceable contract.[28]

In our respectful submission Gibbs J failed to consider the nature

21. See eg D J Hayton *Underhill and Hayton Law of Trusts and Trustees* 14th edn (London: Butterworths, 1987), 368-373; R P Meagher and W M C Gummow *Jacobs' Law of Trusts in Australia* 5th edn (Sydney: Butterworths, 1986) 287-289; H G Hanbury and R H Maudsley *Hanbury's Modern Equity* 12th edn (London: Stevens, 1985), 323-325.
22. [1982] Qd R 712.
23. (1988) 62 ALJR 588, 608. See also *Chang v Registrar of Titles* supra n 20; *KDLE Proprietary Ltd (In Voluntary Liquidation) v Commissioner of Stamp Duties* (1983) 155 CLR 288.
24. *Chang v Registrar of Titles* supra n 20, Mason J 184. See also the dictum of Sir George Jessel MR in *Lysaght v Edwards* (1876) 2 Ch D 499, 506-510.
25. *Stern v McArthur* supra n 23, 608.
26. *KDLE Proprietary Ltd (In Voluntary Liquidation) v Commissioner of Stamp Duties* supra n 24 Gibbs CJ, Mason, Wilson, Dawson JJ, 296; *Green v Smith* (1738) 1 Atk 572.
27. (1872) *Shaw v Foster & Anor* 5 LR HL 321.
28. Supra n 20.

of the interest which arises in respect of a specifically enforceable contract for the sale of an interest in land and the manner in which this type of interest is dealt with by section 34 of the Property Law Act. He accordingly fell into error in failing to conclude that the type of interest in question was exempted from the operation of the formalities set out in section 34(1)(a).

The "true construction" limb

We now turn to the second limb of our argument, namely that on its true construction section 34 does not prescribe formalities for contracts for the sale of land. Sections 34(1) and 34(2) exempt from the general operation of section 34:

(a) interests created or disposed of by operation of law; and
(b) resulting, implied or constructive trusts.

In seeking to define the ambit of these exemptions it is necessary to consider the nature of the interests exempted.

In *Re Llanover Settled Estates*[29] Astbury J, when considering the elements of express trusts and trusts arising by operation of law, quoted with approval the following extract from *Lewin, The Law of Trusts*: —

> The terms implied trusts, trusts by operation of law and constructive trusts, appear from the books to be almost synonymous expressions; but for the purposes of the present work the following distinctions, as considered the most accurate will be observed: — ..... Trusts by operation of law are such as are not declared by a party at all, either directly or indirectly, but result from the *effect of a rule of equity*, and are either:
> (1) Resulting trusts, as where an estate is devised to A and his heirs, upon trust to sell and pay the testator's debts, in which case the surplus of the beneficial interest is a resulting trust in favour of the testator's heir; or,
> (2) Constructive trusts, which the court elicits by a construction put upon certain acts of parties, as when a tenant for life of leaseholds renews the lease on his own account, in which case the law gives the benefit of the renewed lease to those who are interested in the old lease.[30]

Further, in the 16th edition of *Lewin on Trusts*, the following is said:

> A distinction may be drawn between *express trusts* and trusts *arising by operation of law*. Generally speaking an express trust may be said to arise from the intention of a person to create a trust declared directly or indirectly. Precatory trusts, that is trusts created by expressions of wish or desire which on their

29. [1926] Ch D 626.
30. CCM Dale *Lewin, The Law of Trusts* 12th edn (London. Sweet & Maxwell, 1911) as cited in *Re Llanover Settled Estates* ibid, 636-637.

> true construction amount to declarations of trust, are express trusts, because in such cases the court finds as a matter of construction that the settler expressed, indirectly, an intention to create a trust. *Trusts arising by operation of law are trusts which are not declared by any person, either by clear or doubtful words.*[31] (emphasis added)

As to the question of constructive trusts, although there is debate about certain aspects, it is quite plain that the constructive trust is a trust imposed by equity regardless of the actual or presumed agreement or intention of the party. As was said by Deane J in *Muschinski v Dodds*:

> Viewed in its modern context, the constructive trust can properly be described as a remedial institution which *equity imposes* regardless of actual or presumed agreement or intention (and subsequently protects) to preclude the retention or assertion of beneficial ownership of property to the extent that such retention or assertion would be contrary to equitable principle.[32] (emphasis added)

There are old authorities which say that the basis for constructive trusts is public policy.[33]

The following extract from *Jacobs' Law of Trusts in Australia*, is typical of the views expressed by leading text book writers:

> The constructive trust differs in essential respects both from the express and the resulting or implied trusts. It differs from the express trust in that it is raised by *operation of law* without reference to the intentions of the parties concerned and indeed largely contrary to the desires and intentions of the constructive trustee; further, a constructive trust arises without the requirements as to writing which statute imposes in respect of express trusts, both testamentary and inter vivos.[34] (emphasis added)

What emerges is that trusts created by operation of law and constructive trusts have a significant common element, namely, they arise as a consequence of equitable principles and independently of, and even despite, the intention of the parties. Express trusts on the other hand only arise by reason of the intention of the parties.

It appears that Parliament, by exempting both trusts created by operation of law and constructive trusts, was intending to confine the

31. (London: Sweet & Maxwell, 1964) 8.
32. (1985) 160 CLR 583, 614. This dictum is referred to and adopted in *Baumgartner v Baumgartner* (1987) 164 CLR 137, Mason CJ, Wilson and Deanne JJ 148.
33. *Griffin v Griffin* (1804) 1 Sch & Lef 352, 354; *Blewett v Millett* (1774) 7 Bro PC 367; 3 ER 238.
34. *Jacobs' Law of Trusts in Australia* supra n 21, para 1301. See also 16 Halsbury *Laws of England* (4th edn 1980) para 1453; J G Riddall *The Law of Trusts* 3rd edn (London: Butterworths, 1987), 14; A J Oakley *Constructive Trusts* (London: Sweet & Maxwell, 1987) 1; R P Austin "Constructive Trusts" in P D Finn (ed) *Essays in Equity* (North Ryde: Law Book Co, 1985) 1.

formalities applicable by section 34 to interests created by the deliberate intention of the parties.

Accordingly, it is submitted that the crucial distinction inherent in section 34 is that between equitable interests expressly and deliberately created (to which the formalities were intended to apply) and equitable interests arising by way of operation of equitable principles (to which the formalities were not to apply).

The legislative history

The history of the relevant legislation supports our submission on the construction of section 34.

The Statute of Frauds was passed in England in 1677. It is clear that prior to the passing of the Statute of Frauds the beneficial interest acquired by the purchaser of land under a specifically enforceable contract was known and well established in the law.

Section 4 of the Statute of Frauds addressed itself specifically to contracts for the sale of land "...or any interest in or concerning them" and prescribed certain formalities in relation thereto.

Sections 7 and 8 of the same statute provided relevantly that:

> 7. [A]ll declarations or creations of trusts or confidences of any lands, tenements...shall be manifested and proved by some writing signed by the party who is by law able to declare such trust...or else they shall be utterly void and of no effect.
>
> 8. Provided always, that where any conveyance shall be made of any lands or tenements by which a trust or confidence shall or may arise or result by the implication or construction of law, or be transferred or extinguished by an act or operation of law, then in every such case such trust or confidence shall be of the like force and effect as the same would have been if the statute had not been made; Anything hereinbefore contained to the contrary notwithstanding.

The legislative scheme of the Statute of Frauds was accordingly:

(a) Section 4 dealt with contracts for the sale of land;
(b) Section 7 dealt with express declarations of trust; and
(c) Section 8 contained the exemption from the Statute of interests created by the implication, construction or operation of law.

Thus from the inception of the Statute of Frauds the formalities applicable to contracts for the sale of land were different from those relating to conveyances and declarations of trust.

The rationale for the exceptions in section 8 of the Statute of Frauds (which are repeated in section 34(1)(a) and section 34(2) of the Property Law Act) is well explained by the author of *Lewin, Law of Trusts* as follows:

> As the Statute was directed against frauds and perjuries, it is obvious that resulting trusts are not within the mischief intended to be remedied. *The aim of the legislature was not to disturb such trusts as were raised by maxims of equity, and so could not open the door to fraud or perjury, but requiring the creation of trusts by parties to be manifested in writing* to prevent that fraud and perjury to which the admission of parol testimony has hitherto given occasion. The enactment itself is applicable only to this view of the subject; for the legislature could scarcely direct that "all declarations or creations of trust should be manifest and proved" etc, unless the trusts were in their nature capable of manifestation and proof; but, as resulting trusts are the effect of a rule of law, to prove them would be to instruct the court in its own principles, to certify to the judge how equity itself operates. The exception could only have been inserted *ex majore cautela* so the extent of the enactment might not be left to implication.[35] (emphasis added)

The exemption from the effects of the Statute of Frauds of interests created by the operation of law has, from early times, been recognised by the courts.

In 1717 in *O'Hara v O'Neill*[36] the plaintiff, O'Neill, surrendered a lease so that a new lease could be entered into in the name of his nominee. O'Neill nominated O'Hara. There was no formal declaration of trust. It was held that there was an implied trust which arose or resulted to the plaintiff O'Neill, by operation of law, from the surrender of his earlier lease in favour of O'Hara. This interest, which arose by operation of law, took the matter out of the ambit of the Statute of Frauds.

In 1762 in *Lane v Dighton* it was said by Lord Hardwicke, Chancellor, "...when lands are purchased by one in the name of another it is a resulting trust *by law*, and out of the Statute (of Frauds)."[37]

In *Forster v Hale*, also decided in the 18th century, where the evidence showed that an interest in land was purchased in the name of one person but that the money for the land was paid by others, it was held that a trust arose by operation of law in favour of those others, and consequently fell outside the Statute.[38]

In 1925, the English Law of Property Act was enacted. Section 40 was in similar terms to section 4 of the Statute of Frauds. Section 53

35 Supra n 30, 217
36. 7 Bro PC 227; 3 ER 148.
37. (1762) Amb 409, 414; 27 ER 274, 276.
38. (1798) 3 Ves Jun 696, 714, 30 ER 1226, 1234-1235, affirmed (1800) 5 Ves Jun 309; 31 ER 603.

of the Law of Property Act later became the model for section 34 of the Western Australian Property Law Act. A clear distinction is recognised in England between section 40 and 53 of the Law of Property Act.

The absence of confusion in England is no doubt assisted by the fact that section 40 is part of a division of the Law of Property Act headed "Contracts" whereas section 53 is part of the division headed "Conveyances and other Instruments". In England it is accepted that section 40 applies to contracts and section 53 applies to the creation or conveyance or disposal of interests.

There is considerable authority in England that supports the proposition that an oral agreement which gives rise to a constructive trust is excluded from section 53(1) of the Law of Property Act (the equivalent of section 34(1) of the Property Law Act).

Oughtred v Inland Revenue Commissioners[39] concerned an oral agreement whereby a reversionary interest in shares was to be transferred. Lord Radcliffe and Lord Cohen held that the oral agreement was effective and gave rise to a constructive trust, despite section 53(1)(c) of the Law of Property Act which requires a disposition of an equitable interest to be in writing.[40] Lord Jenkins (with whom Lord Keith concurred) assumed for the purposes of his speech that the oral contract had the effect of raising a constructive trust.[41]

In *Re Holt's Settlement* Megarry J said:

> Where, as here, the arrangement consists of an agreement made for valuable consideration, and that agreement is specifically enforceable, then the beneficial interests passed to the respective purchasers on the making of the agreement. Those interests pass by virtue of the species of constructive trust made familiar by contracts for the sale of land, whereunder the vendor becomes a constructive trustee for the purchaser as soon as the contract is made, albeit the constructive trust has special features about it.[42]

He pointed out that counsel had argued that section 53(2) does not affect the creation or operation of constructive trusts and accordingly, because the trust was constructive, section 53(1) was excluded. Megarry J accepted that argument.[43]

39. [1960] AC 206.
40. Ibid, 227 and 230.
41. Ibid, 239.
42. [1969] 1 Ch D 100, 116.
43. See also *DHN Ltd v Tower Hamlets* [1976] 1 WLR 852, 865 and 867.

When Western Australia enacted section 34 of the Property Law Act in 1969, section 53 of the English Law of Property Act was adopted in its entirety but section 4 of the Statute of Frauds was not repealed.

The significance of the legislature's decision not to repeal section 4 is self evident. It must have been intended that it would continue to apply to contracts. There is a great deal to be said for the argument that section 34 was intended to have the same effect as section 53 of the Law of Property Act had in England, that is, it was intended to be applied to "conveyances and other instruments". It should be noted that the Parliamentary debates concerning the Property Law Act showed that it was the intention of the Western Australian legislature to bring the law into line with the law in England and the other States — not to revolutionise the law on contracts for the sale of land![44]

Conclusion

If one accepts that the aim of the Property Law Act is, "not to disturb such trusts as were raised by maxims of equity" but to require the "creation of trusts by parties to be manifested in writing"[45] it would be incongruous to suggest that a trust, which is imposed by the courts as a matter of public policy, irrespective of the intention of the parties, would have to be in writing. In any event there is binding and conclusive authority that the beneficial interest which arises as a consequence of a specifically enforceable contract for the sale of land, arises through the operation of the maxim, equity considers as done what ought to be done. There are, accordingly, strong reasons based on the express wording of section 34, the purposes of the Statute and decided cases, to exempt contracts for the sale of land from the writing provisions set out in section 34(1)(a).

Nothing in the above argument of course detracts from the requirements of section 4 of the Statute of Frauds. If section 4 is not complied with, the agreement, in the absence of part performance, is not capable of specific performance and no equitable interest in land arises.

In our submission, it is still open to a court in Western Australia to rationalise the law relating to contracts for the sale of land by

44. See also the analysis of the origins of Section 34 of the Property Law Act by Kennedy J in *Abjornson v Urban Newspapers Pty Ltd* infra n 49.
45. *Lewin, The Law of Trusts* supra n 30.

recognising that section 34(1) has no bearing in relation to prescribing such formalities and thereby extricating the law from the difficulties faced by having to explain the relationship between section 4 and section 34(1).[46]

It seems that the exemptions from the operation of the formalities of section 34(1), discussed above, were not argued in *Adamson v Hayes* in the High Court as neither Gibbs J nor the other members of the court make reference to such arguments or deal with them in their judgments. Secondly, the exemptions were not discussed in the judgment of Burt CJ in *Redden v Wilks* and were apparently not raised in that case.[47] Accordingly, the judgments of Gibbs J and Burt CJ are not binding upon those points.[48]

The Full Court of Western Australia recently considered the question of the formalities required for an agreement for a lease in the case of *Abjornson v Urban Newspapers Pty Ltd.*[49] In this case the plaintiff lessor claimed damages from the defendant tenant for breach of the notice provisions in an agreement for lease. The question was whether the plaintiff was entitled to receive six months' notice as provided for in the agreement of lease or only one month's notice on the basis that the defendant was in possession as a monthly tenant. The defendant gave only a month's notice alleging that the agreement was unenforceable by reason of defects in the formalities. The agreement in question complied with formal requirements in section 4 but not with those in section 34(1)(a). The Full Court held unanimously, but for different reasons, that the plaintiff was entitled to damages and that compliance with section 4 of the Statute of Frauds was sufficient to found a claim in damages.

The case is, to an extent, distinguishable from the cases before the single judges in the Western Australian Supreme Court where, in each instance, the relief claimed was for specific performance.[50] Nevertheless, the case is particularly significant for the approach of Kennedy J, which is generally in accord with the submissions made

46. *Adamson v Hayes* supra n 3, Gibbs J, 304-305.
47. It should be noted that in *Monte v Buongiorno* supra n 5 there is a reference to section 34(2) in the judgment but the point is not developed. To the extent that Wallace J by such reference was raising the arguments made herein the judgment is of course supported.
48. *National Enterprises v Racal Communications* [1975] Ch 397, 406.
49. [1989] WAR 191.
50. See text accompanying n 4 to 13.

in this article. It is noteworthy that Kennedy J pointed out that section 34 of the Property Law Act

> . . . is essentially directed to the creation of interests in land. It is not directed to agreements as such. A number of judgments in *Adamson v Hayes* (1973) 130 CLR 276 made this distinction.[51]

Other legislation

The arguments raised are also relevant to other legislation.

Section 80 of the Petroleum (Submerged Lands) Act 1967 of both Western Australia and the Commonwealth provides that:

> A legal or equitable interest in or affecting an existing or future permit, licence, pipeline licence or access authority is not capable of being created, assigned, affected or dealt with, whether directly or indirectly, except by an instrument in writing.

In *Terrex Resources NL v Magnet Petroleum Pty Ltd & Others* Kennedy J said:

> The purpose of s.80 is to prevent legal or equitable interests in permits from being created, assigned, affected or dealt with, whether directly or indirectly, except by an instrument in writing. It does not provide that oral agreements shall be of no force — c.f.s.81(2). Accordingly, although an oral agreement may not, for example, assign an interest in a permit, this is not to say that it does not create a personal right in contracts. I consider that it does — c.f. *Adamson v Hayes* (1973) 130 CLR 276 at pp.297, 304, 306, 319-320, the note by R P Austin (1974) 48 ALJ 322 at p.324 and N C Seddon "Contract for the Sale of Land" (1987) 61 ALJ 406.[52]

This extract from Kennedy J's judgment, it should be noted, is in line with the approach he adopted in *Abjornson v Urban Newspapers Pty Ltd.*

We submit that section 80 of the Petroleum (Submerged Lands) Act is not intended to apply to interests which are created by operation of law. Section 80 requires equitable interests affecting permits to be created or dealt with by instruments in writing. Such a provision is appropriate, of course, to interests which are created or disposed of by express declarations or conveyances. The provision is not appropriate to interests which are created by operation of law. It is inappropriate because such interests are not created by instruments in writing. They are created by equity. It is accordingly submitted that section 80 does not apply to equitable interests which are created by operation of law — such as constructive trusts.

51. Supra n 49, Kennedy J, 200.
52. (Unreported) Full Court of the Supreme Court of Western Australia 24 May 1988 no 7139.

Section 119(2) of the Western Australian Mining Act 1978 appears to be based on section 80 of the Petroleum (Submerged Lands) Act. It provides that:

> A legal or equitable interest in or affecting a mining tenement is not capable of being created, assigned, effected or dealt with, whether directly or indirectly, except by an instrument in writing signed by the person creating, assigning or otherwise dealing with the interest.

The argument mentioned in relation to the Petroleum (Submerged Lands) Act accordingly applies to section 119(2) of the Mining Act.

It is true that, in contrast with section 34 of the Property Law Act, neither the Petroleum (Submerged Lands) Act nor the Mining Act expressly exempt interests created by operation of law or constructive or implied trusts from the operation of their provisions. However, as is pointed out in *Lewin's, The Law of Trusts* the exceptions could only have been inserted ex majore cautela. As trusts created by operation of law "are the effect of a rule of law, to prove them would be to instruct the court in its own principles, to certify to the judge how equity itself operates".[53] Again it is emphasised that as such trusts are imposed by way of public policy (often to combat unconscionable dealing) it would require very clear wording in a statute to require the courts to desist from applying that policy and imposing trusts in the way that courts have been doing for hundreds of years.

53. Supra n 30.