

# Conditional Contracts and Caveatable Interests: A Mutual Exclusion ?

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It is generally said that there is a trust<sup>1</sup> in favour of a purchaser of land upon the signing of the contract of sale. The vendor is the legal owner, but he or she holds the beneficial interest in the land on trust for the purchaser until completion of the contract.<sup>2</sup> Thus, in the case of unconditional contracts for the sale of land, it is generally said the purchaser obtains an equitable interest in the land upon the execution of the contract.<sup>3</sup> In 1876, Jessel MR in *Lysaght v Edwards*<sup>4</sup> said the doctrine that, upon a 'valid contract for sale',

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

had been settled for more than two centuries.<sup>5</sup> A purchaser under an unconditional contract of sale acquires equitable ownership of land

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1 This trust is subject to qualifications because it involves a situation where the trustee vendor is entitled to look after his or her own interest, as well as that of the beneficiary purchaser. The vendor has a right to receive the purchase price from the purchaser, but until then, and subject to the terms of the contract of sale, the vendor trustee need not transfer the title over to the purchaser: see, for example, *Chang v Registrar of Titles* (1976) 137 CLR 177.

2 See *Chang v Registrar of Titles* (1976) 137 CLR 177; cf *Kern Corporation Ltd v Walter Reid Trading Pty Ltd* (1987) 163 CLR 164 at 191-192, per Deane J. It is arguable that once completion of the contract of sale has taken place and the purchase money has been paid in full, there is an express trust between the vendor and the purchaser; that is, the vendor holds the title to the property on trust for the purchaser until a transfer of title has taken place: see *Chang's* case.

3 *Chang v Registrar of Titles* (1976) 137 CLR 177; *Lysaght v Edwards* (1876) 2 Ch D 499 and the authorities cited therein. See also *Kern Corporation Ltd v Walter Reid Trading Pty Ltd* (1987) 163 CLR 164 at 191, per Deane J.

4 (1876) 2 Ch D 499.

5 Id at 506.

when the vendor is in a position to pass title according to the contract, or the purchaser accepts the title to the land. The purchaser's interest in the land under these circumstances is clearly sufficient to support a caveat.

There is an interesting but not entirely resolved question as to whether a purchaser under a conditional contract of sale has a caveatable interest in the property. Although the courts are now tending to say that such purchasers have an interest that is sufficient to support a caveat, it is not entirely clear what the nature of this interest is, and the basis upon which it is protected.

The typical scenario is as follows. Suppose A, a registered proprietor of certain land upon which it is erecting a block of home units, enters into a contract of sale with B under which B agrees to pay a certain sum in return for two of the units being built. At the time of contract, no strata plan had been registered in the Titles Office. Furthermore, the contract of sale contains a condition that the contract is subject to the approval of the strata plan by the Town Planning Board within six months after the date of contract. Suppose that six months have passed and A alleges that the contract has been terminated on the ground that the approval of the Board has not been obtained. What, if any, are the rights of the purchaser B? Is the interest of the purchaser sufficient to support a caveat? The facts of *Kuper v Keywest Constructions*<sup>6</sup> mirror the above scenario, and the court held that the purchaser's interest in the land was sufficient to support a caveat for the purposes of the Torrens Act.<sup>7</sup> The court went on to say that in a case such as *Kuper*, the purchaser under the contract has a caveatable equitable interest in the relevant land, notwithstanding the conditional nature of the contract.

*Kuper's* case and other similar cases raise an interesting question as to the nature of the interest of the purchaser. The writer's view is that the interest of the purchaser is based upon a reasonable expectation, by virtue of the contract with the vendor, that the latter will not act inconsistently with the former's interest in the land until the outcome of the condition is ascertained. Equity is willing to protect the interest of the purchaser because the vendor has engendered such an expectation by entering into the contract. Equity is therefore prepared to give appropriate equitable remedies in such circumstances. This is an 'equitable interest' in land which ought to be sufficient to support a caveat.

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<sup>6</sup> (1990) 3 WAR 419.

<sup>7</sup> The relevant Act in this case is the *Transfer of Land Act 1893* (WA) ss 137-140.

Before one begins an analysis of the purchaser's interest under conditional contracts, it is appropriate to examine the effect of conditional contracts and whether the nature of the condition - that is, for whose benefit the condition is included - makes any difference to the interests of the purchaser.

### Conditional Contracts

Where a contract for the sale of land is conditional upon the approval of an authority such as a Town Planning Board, an initial question arises as to whether there is in fact a binding contract.<sup>8</sup> This depends upon the intention of the contracting parties. In *Bahr v Nicolay*<sup>9</sup> the vendor, in order to finance the building of commercial premises on certain land, agreed to sell the land to the purchaser on condition that the purchaser would lease the land back to the vendor for three years and grant the vendor the right to repurchase the land. Clause 6 of the agreement provided:

The vendors hereby further agree that upon the expiration of the lease contained in cl 5 hereof they will enter into a contract with the purchaser for the purchase by the vendors of the land for a sum of FORTY FIVE THOUSAND DOLLARS (\$45,000) payable by way of TEN (10) per cent deposit with the balance of the purchase moneys to be paid at settlement. Settlement is to be effected thirty (30) days after payment of the deposit.

The court concluded that there was a binding agreement between the parties to bring into existence the contract of sale contemplated by clause 6 of the contract. The case is within one of the categories discussed in *Masters v Cameron*,<sup>10</sup> where the parties had reached finality in negotiating the terms of the contract, and intended to be legally bound, but they also agreed the terms should be restated in a fuller and more formal contract. The contract constituted by cl 6 was conditional upon the execution of the contemplated formal contract.<sup>11</sup>

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8 See *Masters v Cameron* (1954) 91 CLR 353 which discusses the term 'subject to contract'; see also *Meehan v Jones* (1982) 56 ALJR 813; *Perri v Coolangatta Investments Pty Ltd* (1982) 41 ALR 441 re 'subject to finance' clauses. See also generally: J P Swanton, "'Subject to Finance" Clauses in Contracts for the Sale of Land' (1984) 58 ALJ 633; J Carter and D Harland, *Contract Law in Australia* (2nd ed, Butterworths, 1991) at paras 739 - 742.

9 (1988) 78 ALR 1.

10 (1954) 91 CLR 353 at 360. See generally, G Cheshire, *Cheshire and Fifoot's Law of Contract* (6th Australian ed, Butterworths, 1992) at para 166 ff.

11 Indeed, when the vendor sought a rectification of clause 6 to make it clear that the purchaser was under an obligation to resell the land back

Conditional contracts are not uncommon in commercial dealings. For example, the condition may provide that there would not be a binding contract until the approval of a third party has been obtained. This would be a condition precedent to the formation of the contract. By contrast, a condition may provide that, although there would be a binding contract between the parties, the performance of the contract by one or both of the contracting parties is to be suspended until the conditional event has been fulfilled. The condition is a condition precedent to the performance of a binding contract.<sup>12</sup> Contracts for sale of land which are conditional upon the approval of some authority would, subject to the contrary intention of the parties, normally fall under the latter category. This is because the condition is included as a consequence of regulations or by-laws, and neither party to the contract has any control over its fulfilment. Such conditions may take the form of a requirement for subdivision approvals, governmental consents, or registration requirements.<sup>13</sup>

In considering the rights of purchasers under conditional contracts of sale, is the nature of the condition relevant? For example, in the 'subject to finance' cases, the condition regarding the obtaining of finance is included for the benefit of the purchaser who may waive the condition if he or she so wishes. Should the purchaser waive the condition, the contract will proceed and the purchaser will be obliged to pay the vendor the agreed price on settlement. The purchaser may only bring the contract to an end when he or she can demonstrate best endeavours have been made to seek finance, and no satisfactory finance has been successfully obtained.<sup>14</sup>

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to the vendor and that such obligation was not dependent upon the execution of a further agreement, the trial judge, and subsequently the Full Court, did not consider it necessary to rectify the agreement. Clause 6 was sufficient to evince the parties' intention to that effect. There was no challenge to this view in the High Court: see note 9 above at 16, per Wilson and Toohey JJ.

12 See *Perri v Coolangatta Investments Pty Ltd* (1982) 41 ALR 441 at 452 per Gibbs J. His Honour explained, in the context of discussing the distinction between a condition precedent and a condition subsequent, that it is irrelevant how one classifies a condition so long as the parties are clear as to effect of the condition. It is crucial, however, that one is clear as to whether there is a binding contract between the parties in the first place. See generally: DW McMorland, 'A New Approach to Precedent and Subsequent Conditions' (1980) 4 *Otago LR* 469.

13 See discussion below.

14 See generally: *Meehan v Jones* (1982) 149 CLR 571. The court was of the view that the purchaser did not have a discretion whether or not to seek finance, but there was a divergence in opinion as to the precise nature of the obligation of the purchaser in the seeking of finance,

The position is the same where the parties have agreed to a binding contract for the sale of land, but that the performance of the contract will be subject to a more formal document being drawn up. The condition precedent to performance of this contract does not affect the agreement of the parties in relation to the sale. This position is similar to the grant of an option to purchase land. The grantor of the option has an obligation to perform which becomes enforceable on the fulfilment of the contingency, namely, the exercise of the option by the grantee. In such cases, even before the exercise of the option, the grantee/purchaser has an equitable interest in the land.<sup>15</sup> This is because the fulfilment of the condition depends on the election of the grantee/purchaser. If the grantee of the option decides to exercise it, the vendor is bound to sell the property and cannot refuse the purchaser unless the period during which the option must be exercised has expired, or the terms of the option agreement have not been complied with.<sup>16</sup>

One might say that if a contract to transfer is expressed to be subject to governmental consent, or the consent of a third party, the position of the purchaser differs from the above situations. It may be said that there is a distinction between these types of conditions and the 'subject to finance' clauses on the ground that the fulfilment of the condition precedent in the 'subject to approval of Minister' cases rests beyond the control of the purchaser. All that the vendor is contractually bound to do is to seek the approval: he or she cannot guarantee the approval. The likelihood of fulfilment of the contingency in the 'subject to approval of Minister' cases is therefore less certain than in the 'subject to finance' cases because the purchaser in the latter cases is able to waive or fulfil the contingency and bring about the performance of the contract. The same cannot be said where the approval of a third party is required. There is a possible argument that, before the approval of the third party is obtained, the purchaser does not have an interest in the land. This analysis, if accepted, would overlook the fact that, whatever the nature of the condition, there is a contingency stipulated in these contracts. A contingency is a contingency irrespective of how *likely* the contingent event is to occur.<sup>17</sup> Furthermore, it must be borne in

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ie whether the purchaser must act only honestly, or both honestly and reasonably.

15 *Commissioner of Taxes (Qld) v Camphin* (1937) 57 CLR 127.

16 See generally: J Carter and D Harland, *Contract Law in Australia* (2nd ed, Butterworths, 1991) at paras 248 and 1837; *Goldsbrough Mort & Co Ltd v Quinn* (1910) 10 CLR 674; *Laybutt v Amoco Aust Pty Ltd* (1974) 132 CLR 57.

17 Malcolm CJ in *Kuper v Keywest Constructions P/L* (1990) 3 WAR 419 supported the view that it is unnecessary to draw a distinction between

mind that the vendor has entered into a contract of sale with the purchaser albeit subject to a condition, and, until the condition is determined, the purchaser is legitimately entitled to expect that the vendor would not do anything inconsistent with the purchaser's contractual interest in the property.

### *The Nature of the Purchaser's Interest*

*McWilliam v McWilliams Wines Pty Ltd*<sup>18</sup> is a useful starting point in a consideration of the nature of the purchaser's interest. The vendor contracted to sell a parcel of land to the purchaser. The *Crown Lands Consolidation Act* 1913 (NSW) required the consent of the Water Conservation and Irrigation Commission to be obtained before any transfer of the land could occur. Before the requisite consent had been obtained by the vendor, the purchaser brought proceedings against the vendor for specific performance. The court held that the vendor had an obligation to take the necessary steps to obtain the requisite consent, but the purchaser did not have an equitable interest in the land prior to the fulfilment of the condition precedent. Justices McTiernan and Taylor said:

Under a contract for the sale of land unaffected by statutory provisions such as those to be found in [this case] the vendor assumes an obligation, subject to the terms of the contract, to execute a conveyance of the land sold to the purchaser or as he may direct. Further, where the purchase money specified in the contract has been paid the purchaser becomes entitled in equity to the land and the vendor thereafter becomes a bare trustee. But the contract in this case was subject to an implied condition that the sale of the farm land in question was subject to the consent of the Commission being obtained ... and, that being so, it could not be contended that the respondent company became entitled by force of the contract to an equitable interest in the land.<sup>19</sup>

*McWilliam's* case was followed in *Brown v Heffer*,<sup>20</sup> a case concerning the ademption of a gift of realty. The property was, at the time of the death of the testator, subject to a conditional contract of sale. The land in question was subject to the provisions of the *Closer Settlement Acts* (NSW),<sup>21</sup> requiring the consent of the Minister prior to any

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the various types of conditions that may be included in the contract. Contra, *semble*, McPherson J in *Re Androma Pty Limited* [1987] 2 Qd R 134 at 152.

18 (1964) 114 CLR 656.

19 *Id* at 660 - 661.

20 (1967) 116 CLR 344.

21 The relevant provision in that case was s 11(2) of the *Closer Settlement Amendment (Conversion) Act* 1943 (NSW) which provides that a transfer or other dealing with a settlement purchase lease shall not be effected,

transfer. The testator, subsequent to drawing up a will leaving land to his son, contracted to sell the same land to a third party. Before the consent of the Minister was obtained, the testator died. Shortly afterwards, the Minister's consent was given. The issue was whether the devise had been adeemed. If, before his death, the testator was bound by the contract of sale, then, at the time of his death, he was holding the land as trustee for the purchaser and was thus entitled to receive money in place of the land. Chief Justice Barwick, McTiernan, Kitto and Owen JJ held that the devise to the son was not adeemed by the contract of sale and, until the consent of the Minister had been obtained, the purchaser's interest, 'being commensurate only with what would be decreed to him',<sup>22</sup> did not extend to ownership of the land.

These two cases were relied upon by Dunn J in *Re Bosca Land Pty Ltd's Caveat*<sup>23</sup> where the question was whether a purchaser's interest under a contract of sale was sufficient to support a caveat. In this case, the *Local Government Act 1936-1975* (Qld) provided, in general terms, that in respect to Torrens title land, it is not permissible to transfer a portion of the land contained in a certificate of title without registering a plan of subdivision. The owners of the land contracted to sell to Bosca a lot in a proposed subdivision. The local authority had conditionally consented to the land being subdivided. This consent lapsed and the vendor purported to rescind the contract whereupon Bosca lodged a caveat. Justice Dunn stated that there is a difference between the vendor's obligation to obtain the relevant consent, and the equitable interest in the vendor's land the purchaser acquires upon a valid contract. His Honour, after referring to *McWilliam's* case and *Brown v Heffer*, said that these cases 'clearly demonstrate the caveator in this case has no equitable interest'<sup>24</sup> in the land, and the removal of the caveat was ordered.

It is important to note the context in which the *McWilliam's* and *Brown* cases were decided. In *McWilliam's* case, the court was concerned with a condition that had not been performed by the vendor, not with the nature of the purchaser's interest under the contract. In *Brown v Heffer*, the question was whether the specific gift had been adeemed, that is, whether, before the consent of the Minister had been obtained, the testator/vendor was entitled only to

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or if effected shall not be valid, unless the consent of the Minister has been obtained.

22 (1967) 116 CLR 344 at 350.

23 [1976] Qd R 119.

24 Id at 146. In *Re Premier Freehold Pty Ltd's Caveat* [1981] Qd R 547, Kelly J, as he then was, followed the same line of reasoning adopted by Dunn J and came to the same conclusion.

the sum of money representing the purchase price at the time of his death. In the former case, the purchaser had a contractual right to seek orders from the court which were appropriate to compel the vendor to perform his obligation in seeking the Commission's consent. In the latter case, the court simply had to decide whether the gift to the son had been adeemed by the contract. Unless there was a valid binding contract of sale to the third party, the gift had not been adeemed. The court held there could not be a valid binding contract of sale when, at the time of the testator's death, the contract was still subject to the Minister's consent. Thus, if one reads *McWilliam and Brown v Heffer* in their context, one might, with respect, hesitate to state that these two cases 'clearly' demonstrate the purchaser in *Re Bosca* had no equitable interest.

Nevertheless, a similar approach was taken in *Re Pile's Caveats*.<sup>25</sup> Justice Dunn was required to consider the legitimacy of a caveat lodged by a wife who claimed to have an interest in certain land. The legal ownership of the land was vested in trustees for herself, her husband and daughter. She claimed an estate in fee simple in one undivided half share in the land on the ground that the land was originally acquired in the joint names of her husband and herself. She had agreed to transfer the land to the trustees on her husband's representation that the transaction would not affect her beneficial interest. Dunn J said that, in order to maintain a caveat, a caveator must prove facts which indicate *prima facie* that he or she has an estate or interest in the land. The existence of a *prima facie* equity to relief involving land, he said, is not necessarily the same as the *prima facie* existence of an interest in the land.<sup>26</sup> The wife was therefore required to remove the caveat on the ground that she had no equitable estate or interest in the relevant land.

It now seems that the Queensland Supreme Court will not follow the *Re Bosca* line of reasoning. In *Re Henderson*,<sup>27</sup> the court indicated quite clearly that the reasoning taken in the *Re Bosca* line of cases was not correct. The court said that the words of s 98 of the then *Real Property Act 1861-1974* (Qld) were wide enough to encompass the interest of a purchaser under a conditional contract of sale, and that such a purchaser has a caveatable interest.

This brings us to the question: what is an 'interest' sufficient to support a caveat? In *Bacon v O'Dea*,<sup>28</sup> the Full Court of the Federal

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<sup>25</sup> [1981] Qd R 81.

<sup>26</sup> *Id* at 83.

<sup>27</sup> Unreported decision: Appeal No 104 of 1993, judgment delivered on July 12, 1993.

<sup>28</sup> [1989] 88 ALR 486 at 496-497.



Court said that in order for an interest to be caveatable, it must be a proprietary interest. Justice Dunn in *Re Bosca* and *Re Piles' Caveat* also seems to take the view that the 'estate or interest' for the purposes of s 98 of the *Real Property Act* must be a 'full' equitable interest in the sense that it is proprietary and gives the owner of the right a vested entitlement over certain land. This narrow interpretation does not seem to be reflected in the current judicial approach.<sup>29</sup> The word 'interest' is capable of a wider meaning than that given by Dunn J, and support for this view may be found in, for instance, *Re C M Group Pty Ltd's Caveat*.<sup>30</sup> There Dowsett J said he had difficulty

distinguishing between the 'interest' necessary to support the caveat and the equity necessary to support an injunction in the auxiliary jurisdiction in support of a common law claim or in support of an equitable claim. The distinction drawn by Dunn J in *Re Pile's Caveat* ... between protecting a claim by caveat and protecting it by injunction is not a convincing or compelling one, particularly as its validity is dependent upon giving a narrow interpretation to the concept of 'interest' for the purposes of the *Real Property Act*.<sup>31</sup>

An equitable interest in land need not equate with equitable ownership in land. The concept of 'property' has 'an almost infinitely gradable quality' and the amount of property which one may claim in a particular resource varies from a minimum value to a maximum value - rather like a sliding scale.<sup>32</sup> In the case of land held on trust for the benefit of a beneficiary, the equitable proprietary interest of the beneficiary arises because the trustee has an obligation to hold the property on trust for the beneficiary.<sup>33</sup> In such a case, the conscience of the trustee is bound to such an extent that the property

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29 *Kuper v Keywest Constructions Pty Ltd* (1990) 3 WAR 419; *Jessica Holdings Pty Ltd v Anglican Property Trust* (1992) 27 NSWLR 140; *Lohregger v Francis Broady Investment Corporation Pty Ltd* (Unreported, Supreme Court of Western Australia, Scott J, 19 November 1992); *Locke v Yogoat Pty Ltd* (Unreported, Supreme Court of New South Wales, Hodgson J, 24 November 1992); *Re Henderson* (Unreported, see note 27 above).

30 [1986] 1 Qd R 381.

31 [1986] 1 Qd R 381 at 389. Nevertheless, Dowsett J felt himself bound to follow *Bosca* in view of the decision of the Full Court of the Supreme Court in *Ovendon v Palyaris Construction Pty Ltd* (1974) 11 SASR 65. Subsequent decisions of the Supreme Court of Queensland have, it seems, taken the view that *Bosca* is correct; see, for example, *Re Androma Pty Ltd* [1987] 2 Qd R 134.

32 Kevin Gray, 'Equitable Property' (forthcoming issue of *Current Legal Problems* at p 161).

33 *DKLR Holding Co (No 2) P/L v The Commissioner of Stamp Duties (NSW)* (1982) 149 CLR 431.

'belongs' to the beneficiary in equity even though the trustee is the legal title holder. The degree of 'property' that is vested in the beneficiary, if one pictures a sliding scale, is at the maximum value in equity. This proprietary interest of a beneficiary of a fixed trust can be contrasted with that of a beneficiary under an unadministered estate.<sup>34</sup> The amount of property that such a beneficiary can claim is less than that claimable by a beneficiary under a fixed trust. In *Commissioner of Stamp Duties v Livingston*,<sup>35</sup> the Judicial Committee of the Privy Council made it clear that the interest of the beneficiary of an unadministered estate is an equitable chose in action which entitles him or her to ensure due administration of the estate. While an equitable chose in action is an equitable proprietary interest in that it may be transmitted by will, or, on bankruptcy be vested in the official receiver,<sup>36</sup> the property right inherent in the chose in action is an expectation that the assets would pass to the beneficiary after due administration, subject to outstanding liabilities and costs of the administration. This equitable chose in action, in contrast to an equitable interest in a full proprietary sense, does not give rise to a claim over *specific* property; it merely gives a right to claim *some* property.

The full equitable proprietary interest of a beneficiary under a fixed trust and an equitable chose in action can be contrasted with what is called a 'mere equity'. *Latec Investments Ltd v Hotel Terrigal Pty Ltd*<sup>37</sup> is often cited as an example of a case in which a mere equity is involved. The facts of *Latec* can be shortly stated. A mortgagee had lent money to a mortgagor on the security of a mortgage over certain land on which was situated a hotel and a guest house ('the property'). When the mortgagor went into voluntary liquidation, the mortgagee sold the property, in circumstances which a court of equity would regard as fraudulent,<sup>38</sup> to its subsidiary. The mortgagor, however, took no action against either the mortgagee or the purchaser. Subsequently the purchaser gave to a trustee for debenture holders a security by way of charge over the property. Five years after the purported sale, the mortgagor sought to have the

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34 See *Commissioner of Stamp Duties (Qld) v Livingston* (1962) 107 CLR 411, and on appeal to the Privy Council, [1965] AC 694.

35 Ibid.

36 *Official Receiver in Bankruptcy v Schultz* (1990) 170 CLR 306.

37 (1965) 113 CLR 265.

38 When the mortgagee purported to exercise its power of sale, it set a reserve price of £85,000. The highest bid at auction was £58,000. This bid was rejected. Yet, very soon thereafter, the mortgagee sold the hotel to its own subsidiary for £60,000. The court held this was a fraudulent exercise of the mortgagee's power of sale.

sale and the transfer of land to the purchaser set aside on grounds of fraud.

Justice Kitto said that the mortgagor had a mere equity (an equity of rescission) to have the fraudulent sale to the purchaser set aside. This did not mean that either the contract of sale or the subsequent conveyance was void; it simply meant that the purchaser would have been compelled to act in relation to the mortgagor as if the mortgagee had sold and transferred the mortgage (as opposed to the mortgaged property) and the money thereby secured. Since the mortgagor had taken no steps to establish this equity of rescission for nearly five years, and a subsequent innocent party (the trustee for the debenture holders) had acquired an equitable interest in the property without notice of the mortgagor's equity, the mortgagor's interest had to be postponed.<sup>39</sup>

Justice Taylor did not agree that the mortgagor must first assert its equity of rescission before it could establish its equity of redemption against the purchaser. He took the view that the mortgagor whose land was conveyed to a third party in fraudulent circumstances had a full equitable interest in the land and if its interest was to be postponed, it had to be for reasons other than it being an interest inferior to the subsequent equitable interest of the innocent third party. He said, however, that on the facts, the mortgagor first required the assistance of a court of equity to remove the impediment to its title before it could assert its interest. In the circumstances equity would not intervene because an equitable interest in the relevant property had already passed to a purchaser for value without notice of the prior interest.<sup>40</sup>

The writer prefers, with respect, the functional approach taken by Menzies J in *Latec*. He looked at the circumstances in which the equitable interest was asserted. In the case where a person has a right to have a conveyance set aside for, by way of example, fraud, the conveyer has a mere equity - this directs attention to the fact that he or she has a right, *inter vivos*, to seek the assistance of a court of equity to sue and this right must be exercised before there can be any relation back of the equitable interest established by the suit. This, Menzies J continued, explains the decision of the court in *Phillips v Phillips*.<sup>41</sup> By contrast, in the case of a devisee who is claiming an

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39 (1965) 113 CLR 265 at 276. It has been argued that the interest of a chargee is a mere equity and not a full equitable interest: see generally D Everett, *The Nature of Fixed and Floating Charges as Security Devices* (Research Monograph Series, Centre for Commercial Law and Applied Legal Research, Monash University, 1988).

40 (1965) 113 CLR 265 at 285-286.

41 (1861) 4 De G F & F 208; 45 ER 1164.

equitable interest, the court's attention must focus on the result of the eventual avoidance of the conveyance upon the position *ab initio*, and consider whether, in the event of a successful suit (which might be brought by the devisee), the transferor had an equitable interest capable of devise. In such a case, the transferee would have been holding the equitable interest as trustee for the devisee. This was the approach taken in *Stump v Gaby*.<sup>42</sup> Meagher, Gummow and Lehane support the view of Menzies J as 'it clearly indicates that the one set of circumstances may generate equitable interests having incidents which vary with the purpose for which they are asserted'.<sup>43</sup>

This brings us to the question of the kind of interest a purchaser under a conditional contract may be said to possess. The writer takes the view that the purchaser has an equitable interest in land because it is an interest which equity will protect by the grant of an appropriate equitable remedy. It may not be a full equitable proprietary interest, but it nevertheless gives rise to some interest in the land the subject of the contract of sale. If one pictures a sliding scale again, this is a limited equitable interest in that the purchaser does not have any claim to the land as such, but nevertheless, has an interest in the land by virtue of the contract and this is the interest that equity will protect. In entering into the contract, the vendor's conscience is bound to comply with the terms of the condition and equity will protect the purchaser's interest in the land to that extent. The least the purchaser is entitled to expect is that the vendor will make reasonable efforts to obtain the approval and, in the meantime, will not act inconsistently with the purchaser's interest. Equity would thus protect the purchaser's interest by ordering specific performance of the condition or, in an appropriate case, an injunction. This approach is consistent with the view taken by Mason and Deane JJ in *Legione v Hately*.<sup>44</sup> Their honours were of the opinion that instead of assuming the purchaser's equitable interest under a contract of sale is commensurate only with his or her ability to obtain specific performance of the contract, the better view is that the

purchaser's equitable interest under a contract for sale is commensurate, not with her ability to obtain specific performance in the strict or primary sense, but with her ability to protect her interest under the contract by injunction or otherwise.<sup>45</sup>

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42 (1852) 2 De G M & G 623; 42 ER 1015.

43 C Meagher, W McGummow and J Lehane, *Equity: Doctrines and Remedies* (Butterworths, 1992) para 433.

44 (1983) 152 CLR 406.

45 *Id* at 446. Note, however, that the approach taken by Mason and Deane JJ has been criticised not only by Brennan J in his dissent in the same case, but also by Gummow J in 'Forfeiture Certainty: The High Court

Similarly, in *Stern v McArthur*,<sup>46</sup> concerning a purchaser's relief against forfeiture, Deane and Dawson JJ took the view that the extent of the purchaser's equitable interest is to be measured by the protection which equity will afford him or her. Thus, in a case involving a contract for sale of land, equity would grant not only specific performance in the strict sense of ordering the contract to be performed in accordance with the terms of the contract, but it may also order 'all of those remedies available to the purchaser in equity to protect the interest which he or she has acquired under the contract'.<sup>47</sup> In appropriate cases, the purchaser's right could be protected by injunction as well as specific performance. This approach recognises that the purchaser may be entitled to a 'lesser equitable interest than ownership' even though the contract is conditional.<sup>48</sup> This interest, in the writer's view, arises because the vendor assumes an obligation by virtue of the contract not to act inconsistently with the purchaser's contractual rights. Although the requisite governmental approval or other third party's consent may not be granted, equity will regard as done that which ought to be done so the purchaser has a right in equity to ensure the vendor fulfils his or her contractual obligations by not acting inconsistently with the purchaser's interest in the land pending the determination of the contingency.<sup>49</sup>

The issue raised in the decision of the Full Court of the Supreme Court of Western Australia in *Kuper v Keywest Constructions*<sup>50</sup> is similar to that in *Re Bosca*. The purchasers had lodged a caveat against the title to certain land which was subject to two contracts of sale. The vendors sought to have the caveat removed. The contracts of sale were conditional upon the vendor obtaining the necessary approvals and, in particular, the approval of the Town Planning Board for the strata plan. Chief Justice Malcolm, with whose judgment Pidgeon and Seaman JJ agreed, took the view that the

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and the House of Lords' in P Finn (ed), *Essays in Equity* (Law Book Company, 1985) p 30. This criticism has been rejected, since the approach in *Legione v Hateley* was repeated in *Stern v McArthur* (1988) 165 CLR 489, at least by Deane and Dawson JJ at 552; cf J Heydon, W Gummow and R Austin, *Cases and Materials on Equity and Trusts* (4th ed, Butterworths, 1993) at para 1719.

46 (1988) 165 CLR 489, per Deane and Dawson JJ at 522.

47 Id at 522, per Deane and Dawson JJ.

48 Id at 523.

49 The joint judgment of Mason CJ, Brennan, Deane and McHugh JJ in the High Court's more recent decision, *Chan v Cresdon Pty Ltd* (1989) 168 CLR 242 endorsed the judgment of Deane and Dawson JJ in *Stern v McArthur* (1988) 165 CLR 489 at p 522.

50 (1990) 3 WAR 419.

existence and extent of the purchaser's equitable estate or interest in the property the subject of a contract of sale is commensurate with his or her ability to specifically enforce the contract. His Honour went on to say that if the vendor's obligation to transfer title is subject to a contingency then any order for specific performance will be expressed to be subject to that contingency. After reviewing the earlier authorities on point, Malcolm CJ concluded a Court would be prepared to protect a purchaser's interest under a conditional contract at the so-called inchoate stage, both by granting specific performance in the sense of requiring the vendor to do all things necessary to be done to procure registration of the strata plan, as well as restraining the vendor by injunction from dealing with the land inconsistently with the purchaser's right to specific performance of the contract. His Honour said the estate or interest of the purchasers under the contracts was sufficient to ground a caveatable equitable interest in the relevant land, notwithstanding the conditional nature of the contracts.<sup>51</sup>

Although *Kuper* was not referred to by Brownie J in the New South Wales Supreme Court decision of *Jessica Holdings Pty Ltd v Anglican Property Trust Diocese of Sydney*,<sup>52</sup> the approach taken by Brownie J was the same. He said that in the case of

a contract which contains a condition requiring some stranger to the contract to give some consent, or take some other step, before the contract can be regarded as conditional, the purchaser in appropriate circumstances should be treated as having an 'interest' within the meaning of s 74F of the *Real Property Act* 1900 (NSW) or its analogues ...<sup>53</sup>

In *Kuper v Keywest Constructions* and *Jessica Holdings Pty Ltd v Anglican Property Trust Diocese of Sydney*, both Malcolm CJ and Brownie J, respectively, said the 'interest' of a purchaser under a conditional contract of sale is sufficient to support a caveat. Chief Justice Mason and Dawson J in *Bahr v Nicolay*<sup>54</sup> also said the purchaser has a contingent equitable interest in the land pending the satisfaction of the condition precedent. It is submitted that this approach, which gives a wide meaning to the word 'interest' in land, is correct. The Queensland decisions such as *Re Bosca* which has treated as synonymous a caveatable interest and a *vested* equitable

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51 Id at 432.

52 (1992) 27 NSWLR 140.

53 Id at 154.

54 (1988) 78 ALR 1.

proprietary interest are not, with respect, sound.<sup>55</sup> The primary purpose of a caveat is to protect the caveator's interest from being defeated by registration of a dealing, without the caveator having had the opportunity of approaching the court for an order to protect the interest claimed in the caveat.<sup>56</sup> As Owen CJ said in *Dwyer v Caird*:<sup>57</sup> 'a caveat neither confers nor takes away any right, it is simply a statutory injunction which restrains the [Registrar] for a time from issuing a certificate of title to the land in question'. The caveat system is supposedly designed to preserve the status quo pending resolution of the claim underlying the caveat.<sup>58</sup> If this is the case, it does not seem logical to give a narrow interpretation to the word 'interest' in the provision dealing with the lodgment of caveats. If a vendor, in breach of a conditional contract, seeks to sell the land to another purchaser, even the availability of an injunction to the purchaser under the first contract of sale is of no assistance if he or she was not aware of the actions of the vendor (and therefore the need to seek an injunction). The presence of a caveat on the register will at least give notice to a third party that there is in existence someone who has had prior dealings with the property and is claiming an interest in it, at least until the contingency is determined. This will give the purchaser a degree of protection prior to the fulfilment of the contingency and the opportunity of testing the claim in Court.<sup>59</sup> The alternative conclusion is not satisfactory because it would undermine the interest of the purchaser under the contract of sale in that a vendor is able, subject to liability for breach of contract, to walk away and enter into a more lucrative contract of sale with another purchaser. This kind of conduct is clearly not desirable nor should it be facilitated by a narrow interpretation of what may amount to a caveatable interest.

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55 The recent decision of the Full Court of the Supreme Court of Queensland in *Re Henderson*, note 27 above, has, it seems, suggested that these cases may not be followed in future.

56 P Butt, *Land Law* (2nd ed, Law Book Company, 1988) at p 502. See also: *General Finance Agency and Guarantee Co of Australia Ltd v Perpetual Executors and Trustees Association of Australia Ltd* (1902) 27 VR 739 at 744; and S Robinson, *Transfer of Land in Victoria* (Law Book Company, 1979) pp 357-364.

57 *Dwyer v Caird* (1888) 9 LR (NSW) (Eq) 424 at 425.

58 *Miller v Minister of Mines and the Attorney-General of New Zealand* [1963] AC 484 at 497. See also S Robinson, 'Caveatable Interests - Their Nature and Priority' (1970) 44 ALJ 351.

59 In Queensland, s 39 of the *Real Property Act 1877* (Qld) provides that unless a caveat is lodged with the written consent of the registered proprietor, the caveator must, within 90 days of lodging the caveat, take proceedings to establish his or her claim otherwise the caveat would lapse.

## Conclusion

Conditional contracts which require the approval of a planning authority to the subdivision of land, or the consent of a minister or licensing authority to the transfer, are common. It is therefore important to ascertain whether a purchaser under a conditional contract of sale may protect whatever interest he or she may have in the property prior to the fulfilment of the condition precedent. It has been shown that there are authorities in New South Wales and Western Australia which support the proposition that a purchaser in these circumstances has a caveatable interest under such conditional contracts. The position in Queensland is not completely settled in that the older cases such as *Re Bosca*<sup>60</sup> have not been overruled, although it is unlikely that they will be followed in light of more recent decisions.<sup>61</sup> Furthermore, s 122 of the recently enacted *Land Title Act* 1994 (Qld) provides, inter alia, that a person claiming 'an interest' in a lot may lodge a caveat. This use of the word 'interest' as opposed to the previous terminology of 'estate or interest in land' (s 98 *Real Property Act* 1861 (Qld) which is now repealed) implies that a more liberal approach is adopted in defining a caveatable interest. It is clearly preferable that a uniform approach is taken in determining what the nature of a purchaser's interest under a conditional contract is and it is hoped the High Court will adopt the New South Wales and Western Australian approach on this point. The interest the purchaser has is an equitable interest which is less than 'ownership' of the property in equity. It is an interest in the land which arises because of the contract between the parties. This contractual right should be sufficient to give rise to an interest (in the broad sense) in the land. There are dicta in the judgments of members of the High Court to the effect that the purchaser's remedies are not limited to specific performance of the contract but include other remedies such as injunctions. It is submitted that if the purchaser's interest is sufficient to entitle him or her to seek injunctive relief, it is sufficient to support a caveat. The caveat operates like a statutory injunction: it requires the Registrar to withhold registration until the caveator has had an opportunity to pursue any remedies he or she may have against the person lodging the dealing for registration. It is illogical that purchasers under conditional contracts may seek injunctions to protect their interests under the contracts but they are not able to lodge caveats to preserve the status quo.

To say a purchaser under a conditional contract of sale should be regarded as having an interest in the property sufficient to support a

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<sup>60</sup> [1976] Qd R 119.

<sup>61</sup> See *Re Henderson*, see note 27 above; cf *Re Dimbury Pty Ltd's Caveat* [1986] 2 Qd R 348; *Shanahan v Fitzgerald* [1982] 2 NSWLR 513.



caveat does not mean that, while the condition is still unfulfilled, the purchaser has an equitable interest in the property as determined by *Lysaght v Edwards*.<sup>62</sup> The purchaser cannot become the *equitable owner* of the land until the vendor is in a position to give a 'clear' title in the sense that he or she is able to transfer the property effectively at law: that is, all requirements imposed by legislation for a valid transfer have been satisfied. Until this condition is satisfied, the vendor retains the power to exclude persons from the land and is able to mortgage or charge the land, or deal with the land in ways consistent with its ownership.<sup>63</sup> This makes it even more important for the purchaser to be able to protect his or her interest by means of the caveat system because otherwise it is unlikely that the subsequent acquirer of the equitable interest in the land would have notice of the purchaser's earlier claim to the land. Any prejudice or inconvenience suffered by the vendor as a result of an unreasonable lodgement of a caveat can be compensated by the caveator.<sup>64</sup>

In practice, to allow a purchaser under a conditional contract of sale to lodge a caveat would mean that parties to the contract of sale must negotiate suitable terms relating to the lodgement of a caveat on the register. Generally, once a caveat has been lodged, the Registrar cannot proceed to register an instrument lodged for registration.<sup>65</sup> In most jurisdictions, a caveat remains on the title until a dealing inconsistent with the caveator's claim is lodged for registration. In these circumstances, the Registrar must notify the caveator that a dealing has been lodged and the caveator must, within a certain period specified in the Act<sup>66</sup> either consent to the registration of the dealing or commence proceedings to establish his or her right to maintain the caveat. If the outcome of the contingency stipulated in the contract has not yet been determined, then the

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62 (1876) 2 Ch D 499.

63 For factual examples, see: *Re Dimbury Pty Ltd's Caveat* [1986] 2 Qd R 348; *Shanahan v Fitzgerald* [1982] 2 NSWLR 513.

64 See *Real Property Act 1900* (NSW) s 74p; *Real Property Act 1886-1975* (SA) s 191(x); *Transfer of Land Act 1958* (Vic) does not specifically provide for compensation but see s 90(3); *Transfer of Land Act 1874* (WA) s 140; *Real Property Ordinance 1925* (ACT) s 108; *Land Titles Act 1980* (Tas) s 138; *Real Property Act 1992* (NT) s 191(x); *Land Title Act 1994* (Qld) s 130.

65 See generally A Bradbrook, S MacCallum, and A Moore, *Australian Real Property Law* (The Law Book Company, 1991), para 5.81.

66 See *Real Property Act 1900* (NSW) s 74j; *Real Property Act 1886-1975* (SA) s 191(v)-(vi); *Transfer of Land Act 1958* (Vic) s 90; *Transfer of Land Act 1874* (WA) s 138; *Real Property Ordinance 1925* (ACT) s 106; *Land Titles Act 1980* (Tas) ss 135-6; *Real Property Act 1992* (NT) s 191(v)-(vi); *Land Title Act 1994* (Qld) s 126.

purchaser will be able to maintain his or her equitable interest in the land. If, however, the outcome of the contingency has been determined unfavourably to the purchaser so that the contract of sale is discharged, the vendor has an interest to ensure that the purchaser proceeds with haste to remove the caveat from the register so that the vendor can sell the land to another party. A certain time period during which the purchaser must remove the caveat should be nominated as a condition in the contract. Any delays could cause loss to the vendor who must then be entitled to claim damages from the purchaser.

In conclusion, the writer would answer in the negative the question whether there is a mutual exclusion between a caveatable interest and the interest that arises from a conditional contract. Contrary to the statement of McTiernan and Taylor JJ in *McWilliam v McWilliam*<sup>67</sup> that a purchaser under a conditional contract is not entitled to claim an equitable interest by virtue of that contract, it is submitted that an equitable interest can arise even under a conditional contract. The interest equity is willing to protect is the expectation created under the contract, and equity holds the vendor bound in conscience to act consistently with the terms of the conditions agreed upon by the parties. This equitable interest is sufficient to support a caveat.

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<sup>67</sup> (1964) 114 CLR 656 at 660-661.