Marist Brothers Community Inc v The Shire of Harvey: Formalities Relating to Contracts for the Sale of Land

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What formalities need to be complied with in order to make an executory contract for the sale of land enforceable? A recent decision of the Full Court of the Supreme Court of Western Australia resolves earlier doubts.

It is generally accepted that contracts for the sale of land should be in writing. However, neither the statutory source of this requirement, nor the nature of the writing required, has been clear for some time. The confusion arises because Western Australia has two statutory provisions which might, on their face, apply to contracts for the sale of land. Section 4 of the Statute of Frauds 1676[1] requires that a contract for the sale of land be evidenced by 'some [written] memorandum or note' signed either by the person against whom it is sought to enforce the contract or by that person's agent. The other provision, section 34(1)(a) of the Property Law Act 1969 (WA), provides that:

> [N]o interest in land is capable of being created or disposed of except by writing signed by the person creating or conveying the interest, or by his agent thereunto lawfully authorised in writing....

Given that a specifically enforceable contract for the sale of land

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1. This section, as amended by the Law Reform (Statute of Frauds) Act 1962 (WA), is still in force in WA.

immediately creates an equitable interest in the purchaser,[2] it is arguable that section 34(1)(a) of the Property Law Act was intended to apply to (and thus to override the Statute of Frauds in relation to) executory contracts for the sale of land.

There are at least two differences between the requirements of the Statute of Frauds and those of the Property Law Act. First, the Property Law Act requires that the transaction be 'in writing', whereas it is sufficient for the Statute of Frauds that the transaction be merely 'evidenced' by a written note or memorandum. Second, although the Statute of Frauds and the Property Law Act both permit the document to be signed by an agent, the Property Law Act requires that any such agent be authorised in writing. The Statute of Frauds has no such requirement.

The debate surrounding the question of which of these provisions applies to executory contracts for the sale of land had persisted for some time. However, in *Marist Brothers Community Inc v The Shire of Harvey*,[3] the Full Court of the Supreme Court of Western Australia finally provided an authoritative answer.

The impact of this decision can only be appreciated by placing it in the context of the authorities which preceded it. Furthermore, their Honours' reasons for judgment (especially those of Seaman J) refer to previous judicial and academic opinion.

BEFORE THE 'MARIST BROTHERS' LITIGATION: A SUMMARY OF THE DEBATE[4]

There was no High Court authority on point. *Adamson v Hayes*[5] provided no authority on the issue,[6] because this case primarily concerned a declaration of trust — not an executory contract.[7] Only Gibbs J[8] actually decided that section 34(1)(a) of the Property Law Act does apply to such contracts.[9] Nor was there any decision on point by the Full Court of the Supreme Court of Western Australia. There were several conflicting decisions by individual Supreme Court judges — the balance of opinion

2. *Lysaght v Edwards* (1876) 2 Ch D 499; *Chang v Registrar of Titles* (1976) 137 CLR 177.
3. (Unreported) WA Sup Ct 1 Dec 1994 no 940667.
4. The authorities are set out by Ipp & Siopis 'Formalities Relating to Contracts for the Sale of Land Revisited' (1989) 19 UWAL Rev 301.
5. [1974] 130 CLR 276
6. It is respectfully submitted that the decision of Virtue J in *Parker v Manessis* [1974] WAR 54 that he was bound by *Adamson v Hayes* supra n 5 to hold that s 34(1)(a) applied to contracts for the sale of land was not based on sound reasoning and was wrong.
7. This argument was ably put by Ipp & Siopis supra n 4, 305-307.
8. *Adamson v Hayes* supra n 5, 304.
9. It must be conceded that Walsh J (id, 297) and (possibly) Stephen J (id, 319-20) seem inclined to this view; but their Honours did not rule on the point.

being that the requirements of section 34(1)(a) of the Property Law Act do apply to executory contracts for the sale of land.[10] Thus, there was no authority on point which would bind a Supreme Court judge. Nevertheless, the balance of opinion being so inclined, it became accepted in Western Australia that contracts for the sale of land must satisfy the requirements of section 34(1)(a) of the Property Law Act.

However, published opinions (both judicial and academic) persuasively argued that the Property Law Act had never been intended to apply to executory contracts and that these were still covered by the Statute of Frauds. In *Abjornsen v Urban Newspapers Pty Ltd*,[11] faced with an executory contract to enter into a lease, Kennedy J gave a well reasoned and thorough examination of the origins and purpose of section 34(1)(a). He concluded that the provisions of the Property Law Act were not intended to replace section 4 of the Statute of Frauds. Rather, they supplemented the Statute of Frauds so that our law was similar to that contained in the Law of Property Act 1925 (UK). The English Act separates the requirements for contracts for the sale of land (section 40) from those which apply to conveyances (section 53). His Honour reasoned that, similarly, the requirements applicable to executory contracts are those set out in section 4 of the Statute of Frauds; section 34(1)(a) of the Property Law Act is concerned only with transactions which actually create or dispose of interests of land in the sense of being a conveyance or assurance.

Kennedy J's judgment was soon followed by Ipp and Siopis's article 'Formalities Relating to Contracts for the Sale of Land Re-visited'.[12] The authors made a detailed analysis of this issue and agreed with Kennedy J's reasoning. Furthermore they argued that section 34(1)(a) of the Property Law Act does not apply to executory contracts for the sale of land because the equitable interests created by contracts arise by way of operation of

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10. In 1974, Virtue J in *Parker v Manessis* supra n 6 confronted with a contract which satisfied the Statute of Frauds, but not s 34(1)(a) of the Property Law Act, declined to decree specific performance. Four years later, in *Monte v Buongiono* [1978] WAR 49, Wallace J dealing with a very similar case, came to the opposite conclusion. He held that s 34(1)(a) did not apply and that, as the requirements of the Statute of Frauds had been complied with, the contract was specifically enforceable. The tie was not broken by Burt CJ in *Redden v Wilkes* [1979] WAR 161. Faced with these conflicting decisions and a contract for the sale of land which satisfied only the Statute of Frauds, the Chief Justice followed *Parker v Manessis* and expressly declined to follow *Monte v Buongiono*. However, Burt CJ's dicta on this point were obiter since he held that there had been part performance. Thus the case fell within the exception contained in s 36(d) of the Property Law Act, which exempts from the requirements of section 34(1)(a) cases in which part performance has been made. Several subsequent cases (*Trifid Pty Ltd v Ratto* [1985] WAR 19, 36; *Ratto v Trifid Pty Ltd* [1987] WAR 237, 258; *Gregory v MAB* [1989] WAR 1, 9; and several unreported decisions) followed *Redden v Wilkes*.

11. [1989] WAR 191.

12. Supra n 4.

equitable principles; they are not deliberately created by the parties and thus fall outside the ambit of section 34(1)(a). This argument is supported by section 34(2) which expressly excludes interests arising by constructive trust or by operation of law from the scope of section 34.

In light of these opinions, the relationship between section 4 of the Statute of Frauds and section 34 of the Property Law Act in regard to contracts for the sale of land was ripe for re-examination by the judiciary. An opportunity to do so arose in *Marist Brothers Community Inc v Shire of Harvey.*[13]

MARIST BROTHERS: THE FACTS AND DECISION AT FIRST INSTANCE

The Marist Brothers Community Inc sold land at Australind to the Shire of Harvey for $50 000. The land was initially to be used to house old people. At the time of the sale, the relevant land was not yet a separate lot. Subsequently, however, the Marist Brothers subdivided their land. The land bought by the Shire was surveyed and a separate certificate of title was issued for it. The contract of sale was contained in five letters between the Shire clerk (on behalf of the Shire) and Messrs Peet & Co (on behalf of the Marist Brothers). The correspondence began with an offer by the Marist Brothers to sell the land to the Shire for $50 000 (subject to certain stipulations) and culminated in a final acceptance of the offer by the Shire 14 months later. Prior to settlement, the Marist Brothers sought to resile from the agreement. The Shire of Harvey brought an action for specific performance. The Marist Brothers resisted.

The trial judge, Owen J, accepted that the letters constituted an offer and acceptance, that the parties intended to create legal relations and that Mr Taylor, who had signed the letters on behalf of Peet & Co, had done so as the lawfully authorised agent of the Marist Brothers. His authority, if not actual, was apparent.

The Marist Brothers argued that the requirements of section 34(1)(a) of the Property Law Act applied to this contract and were not satisfied, first, because the contract was not in writing within the meaning of the section and, second, because Peet & Co was not authorised in writing to act as their agent.

Owen J said that he was 'prepared to assume' that section 34(1)(a) of the Property Law Act applies to such contracts.[14] However, he specifically stated that he would not rule on this point. Instead, he held that it was unnecessary to do so, because, in the event, the requirements of section

13. (Unreported) WA Sup Ct 24 Mar 1993 no 930203.
14. Id, 48.

34(1)(a) of the Property Law Act had been satisfied. His Honour held that the correspondence did constitute a contract 'in writing' within the meaning of the Property Law Act and that no further instrument was required.[15] On the issue of whether or not Peet & Co was authorised in writing, his Honour held that there might have been express written authority. Alternatively he held that, in view of the fact that the Marist Brothers did not call their bursar, Mr Taylor, or any of those likely to know of the existence and extent of any written authority and that they allowed Peet & Co to act on their behalf, knowing that the Shire believed those actions to be binding, the Brothers could not now deny that Peet & Co was authorised in writing.[16] In any event, Owen J held that, even if section 34(1)(a) would otherwise apply and was not satisfied, the requirements of section 34(1)(a) were not applicable in this case because the Shire had partly performed the contract by putting the $50 000 purchase price in a trust account under the name 'Shire of Harvey — Marist Brothers Land Account' and also by paying the surveyor's fees.[17]

Owen J concluded that a binding and enforceable contract existed and so, as the Shire had, at the relevant time, been willing and able to perform that contract, he granted a decree of specific performance.[18] The Marist Brothers appealed to the Full Court of the Supreme Court of Western Australia.

THE FULL COURT'S DECISION

The Full Court handed down its judgment on 1 December 1994 unanimously dismissing the appeal. A majority of the court (Pidgeon and Seaman JJ) held that section 34(1)(a) did not apply to executory contracts for the sale of land.

The main judgment was delivered by Pidgeon J. His Honour was not willing to hold that Peet & Co had been authorised in writing.[19] Thus, as the requirements of section 34(1)(a) of the Property Law Act had not been met, the issue of whether or not that section applied to such contracts was squarely raised.

Pidgeon J traced the history of section 34(1)(a), referring to the explanatory memorandum which accompanied the Property Law Act when it was introduced into Parliament in 1969.[20] He considered the structure and wording of Part IV of the Act, noting the heading for this Part

15. Id, 50-51.
16. Id, 46.
17. Id, 56.
18. Id, 67.
19. *Marist Brothers Community Inc v The Shire of Harvey* supra n 3, 17.
20. Id, 19.

('Conveyances and Other Instruments').[21] He also summarised the relevant authorities[22] and referred to Ipp and Siopis's[23] article. Having considered all of these, he concluded that:

(a) 'Part IV of the Property Law Act, which contains section 34, is a part that deals with conveyances and other instruments.... The transaction in the present case has not reached the stage of requiring a conveyance.... The agreement was an agreement to convey, at a future time, the legal interest in the land as distinct from creating an interest in the land';[24]
(b) section 4 of the Statute of Frauds was applicable and there was sufficient writing to satisfy it;[25]
(c) *Adamson v Hayes* did not decide that section 34(1)(a) extended to run-of-the-mill executory contracts for the sale of the fee simple;[26] and
(d) the contract between the Shire and the Brothers was specifically enforceable.

Seaman J agreed with Pidgeon J. [27] He went on to agree with Ipp and Siopis's analysis of *Adamson v Hayes*[28] and with the argument by Kennedy J in *Abjornsen* that section 34(1)(a) was not directed at executory contracts.[29]

Rowland J was not prepared to 'reopen the debate' regarding the construction of section 34(1)(a).[30] His Honour, while not dissenting from his fellow judges, expressed reservations about their conclusions. He felt that their observations about the history of section 34(1)(a)might be correct and he concluded that, on balance, Pidgeon J's interpretation of the section was correct.[31] Nevertheless he was not satisfied that such an interpretation could be reconciled with the High Court's decision in *Adamson v Hayes* and with the view expressed by the majority in that case.[32] So, in view of the fact that *Redden v Wilkes*[33] had generally been followed in Western Australia, Rowland J declined to rule on this point. In any event, his Honour agreed with the trial judge that it was unnecessary do so because, as a matter of fact, Peet & Co were authorised in writing (or, alternatively, the Marist Brothers were not entitled to dispute this).[34] Furthermore his Honour was

21. Id, 20.
22. Id, 25.
23. Ibid.
24. Id, 26.
25. Ibid.
26. Id, 27.
27. Id, 2.
28. Id, 4.
29. Ibid.
30. Ibid.
31. Id, 3.
32. Id, 4.
33. Supra n 10.
34. Id, 7.

not prepared to disturb the trial judge's finding that the Shire had partly performed the agreement.[35]

Western Australian lawyers will be relieved that this matter has now been authoritatively resolved. It is understood that no appeal to the High Court is to be made. The land concerned in the case was Torrens title land, but the reasoning applies equally to old system title. It is interesting to note that Pidgeon and Seaman JJ both adopted the argument put by Kennedy J in *Abjornsen*, that section 34(1)(a) was intended to apply to instruments which actually create or convey an interest in land, leaving section 4 of the Statute of Frauds to prescribe the formalities for executory contracts. This argument accepts that the wording of section 34(1)(a) could in theory apply to executory contracts but asserts that, as a matter of historical fact, this was not Parliament's intention. None of the judges took up Ipp and Siopis's ancillary argument that section 34(1)(a), on its own terms, is inapplicable to executory contracts, because the equitable interests created by these contracts arise as a result of equitable principles, not from the intentions of the parties. Thus, the argument runs, they fall within the exclusion, contained in section 34(2) of the Property Law Act, of interests arising 'by operation of law' or by 'constructive trust'. This argument seems to be supported by logic. Surely it is circular to argue that a contract, which only creates an equitable interest in the land sold if the contract is specifically enforceable,[36] is not specifically enforceable unless it satisfies the requirements necessary to create an interest in land. Comment on this subject might have been helpful, because the nature of the equitable interest created by an executory contract for the sale of land (the so-called *'Lysaght v Edwards* trust') could also benefit from judicial clarification.

35 Id, 9.

36 *Chang v Registrar of Titles* supra n 2