

THE LAW REFORM COMMISSION
AN COIMISIÚN UM ATHCHÓIRIÚ AN DLÍ
(LRC 49-1995)

INTERESTS OF VENDOR AND PURCHASER IN LAND
DURING THE PERIOD
BETWEEN CONTRACT AND COMPLETION

IRELAND
The Law Reform Commission
Ardilaun Centre, 111 St Stephen's Green, Dublin 2

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THE LAW REFORM COMMISSION

The Law Reform Commission was established by section 3 of the *Law Reform Commission Act, 1975* on 20th October, 1975. It is an independent body consisting of a President and four other members appointed by the Government.

The Commissioners at present are:

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The Commission's programme of law reform, prepared in consultation with the Attorney General, was approved by the Government and copies were laid before both Houses of the Oireachtas on 4th January, 1977. The Commission has formulated and submitted to the Taoiseach or the Attorney General forty eight Reports containing proposals for the reform of the law. It has also published eleven Working Papers, nine Consultation Papers and Annual Reports. Details will be found on pp.62-67.

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NOTE

This Report was submitted on 5th April 1995 to the Attorney General, Mr. Dermot Gleeson, S.C., under section 4(2)(c) of the Law Reform Commission Act, 1975. It represents the result of an examination of the law relating to The Interests of Vendor and Purchaser in Land during the Period between Contract and Completion which was carried out by the Commission at the request of the former Attorney General, Mr. John Rogers, S.C., together with the proposals for reform which the Commission were requested to formulate.

While these proposals are being considered in the relevant Government Departments the Attorney General has requested the Commission to make them available to the public, in the form of this Report, at this stage so as to enable informed comments or suggestions to be made by persons or bodies with special knowledge of the subject.

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GLOSSARY

(Terms 1-6 are not placed in alphabetical order: as they are inter-related, they are listed in such a way as to ensure the greatest understanding of all of the terms. Thereafter the terms are listed in alphabetical order).

(1) Equity:

The body of legal rules which evolved to mitigate the severity and rigidity of the rules and procedure of the common law. Prior to the enactment of the *Supreme Court of Judicature (Ireland) Act, 1877*, this branch of the law was applied and administered exclusively in the Courts of Chancery: principles of equity were not enforced in the common law courts. This situation was amended by the Act of 1877 which created a single High Court in which common law and equity could be administered. In order to deal with situations in which the rules of the common law and the rules of equity differed, section 28(11) provided that in the event of conflict, the rules of equity shall prevail.

The term is also used to connote equitable interests.

**(2) Equitable
Or Beneficial
Interests:**

The interests in property which were created and enforced initially by the Court of Chancery, where it would have been against conscience to permit the legal owner of property to keep the benefit of the property for himself or herself.

**(3) Equitable
Or Beneficial
Owner:**

The person who, in the eyes of equity, is the owner of the property in question. Although he or she is not the legal owner of the property, he or she is entitled to the benefits thereof.

(4) Legal Owner:

A person to whom a conveyance of property is made is a legal owner of that property. In the case of registered land, the additional formalities of registration must be dealt with before the conveyancing process culminates in the transfer of the legal title. The process of conveyance is described in the introduction to Chapter 2.

(5) Trust:

A relationship recognised by equity which arises where the legal ownership of property is vested in one or more people, called **trustees**, who are obliged to hold the property for the benefit of beneficiaries, traditionally called *cestui(s) que trust*. The beneficiaries are the beneficial owners of the property, the subject matter of the trust. The interests of the beneficiaries will usually be laid down in an instrument creating the trust - i.e. in the case of an express trust - but they may be implied or imposed by law.

(6) Constructive Trust:

While express trusts arise from the acts of the parties involved, constructive trusts arise by operation of law. Equity provides that in certain circumstances, the legal owner must hold the property on constructive trust for the beneficiary or beneficiaries.

(7) Assurance:

The documentary evidence of the transfer of land.

(8) Lien:

Essentially, the right to hold the property of another as security for the performance of an obligation. More accurately, this is a **common law lien**; a common law lien necessarily involves possession of the other person's property which shall be vacated when the requisite obligation has been performed. An **equitable lien** exists independently of possession.

- (9) **Lis Pendens:** "Pending Action". A registered action, the subject matter of which relates to land, taken against a landowner.
- (10) **Resile:** To withdraw from. Used in the context of withdrawal from contracts.
- (10) **Specific Performance:** An equitable discretionary remedy by virtue of which a court compels a party to an agreement to perform his or her obligations according to the terms of the agreement. Specific performance will only be granted where damages represent an inadequate remedy e.g., in contracts for the sale of land, as each piece of land is treated by the law as unique. Specific performance is rarely granted of contracts for the sale of goods unless those goods are scarce or unique.

CHAPTER 1 : INTRODUCTION

- 1.1 Section 4(2)(a) of the *Law Reform Commission Act, 1975* provides that the Law Reform Commission shall, from time to time and in consultation with the Attorney General, prepare, for submission by the Taoiseach to the Government, programmes for the examination of different branches of the law with a view to their reform. Section 5(2) of the same Act states that where a programme so submitted is approved by the Government, a copy of the programme shall, as soon as may be, be laid before both Houses of the Oireachtas. In accordance with the above statutory provisions, the Commission's First Programme of Law Reform was, on the 4th January 1977, approved by the then Government and a copy thereof laid before each House of the Oireachtas. Included in the First Programme of Law Reform was "The desirability and feasibility of enacting in one statute or in some codified form a law dealing with the sale, and matters arising from the sale, of both movables and immovables are matters that the Law Reform Commission proposes to examine."
- 1.2 Pursuant to Section 4(2)(c) of the *Law Reform Commission Act, 1975*, the Attorney General may request the Commission to undertake research in relation to any particular branch or matter of the law and to formulate proposals for its reform, whether or not such branch or matter is included in a programme submitted and approved in accordance with the statutory provisions set out in the above paragraph. Thus, on the 6th March, 1987, the then Attorney General requested the Commission to formulate proposals for the reform of the law in a number of areas. Among the topics was:

"Conveyancing law and practice in areas where this could lead to savings for house purchasers."

- 1.3 The Commission recognised that a comprehensive review of land law was not feasible within the limited resources available to them at the time, and accordingly established a Working Group which was asked to identify a number of areas in which reform of land law or conveyancing law could be brought about more easily. The Working Group was asked to concentrate on areas where it could recommend changes in the law which would remove anomalies or redundant provisions.
- 1.4 At present, the Working Group comprises Mr. John F. Buckley, Commissioner, (Convener), Mr. George Brady, SC, Professor J.C. Brady, Mr. Ernest B. Farrell, Solicitor, Mr. Patrick Fagan, Solicitor, Ms. Mary Geraldine Miller, Barrister-at-Law, Mr. Tom O'Connor, Solicitor and Ms. Deborah Wheeler, Barrister-at-Law.
- 1.5 The Commission would like to record its deep appreciation of the contribution which the members of the Working Group have made to the Commission's examination of this difficult and technical area of the law. Their knowledge and experience have been invaluable in enabling the Commission formulate practical proposals for alterations of the law. As always, however, the Commission emphasises that it alone is responsible for the contents of this report.
- 1.6 The Commission has already published five reports in the area of land law and conveyancing law. The first contained General Proposals (LRC 30-1989) and the second dealt with Enduring Powers of Attorney (LRC 31-1989). In 1991, the Commission published LRC 39-1991 which contained two further reports; one which dealt with The Passing of Risk from Vendor to Purchaser and another with Service of Completion Notices. The Commission subsequently published a report containing Further General Proposals (LRC 44-1992).
- 1.7 In its report, The Passing of Risk from Vendor to Purchaser (LRC 39-1991), the Commission focused on one aspect of the position of parties in the intermediate stage of the conveyancing process between contract and completion. Other aspects of the relationship of the parties during this period fell outside of the ambit of that Report and, as the law in this area has given rise to some considerable controversy, the Commission decided to publish a separate Report on the Interests of Vendor and Purchaser in Land during the Period between Contract and Completion.

CHAPTER 2: INTERESTS OF VENDOR AND PURCHASER IN LAND DURING THE PERIOD BETWEEN CONTRACT AND COMPLETION

1. Introduction

2.1 The transfer of an interest in land from vendor to purchaser represents an elaborate and protracted *process* which "necessarily consists of certain defined steps which must take place in a certain defined order, if the result intended is eventually to be achieved."¹ Although it is true to say that a contract for the sale of land is governed, in essence, by the same legal principles as any other contract, a sale of land differs in numerous practical respects from the sale of other property. Indeed the complexity and sophistication of the conveyancing regime which has evolved around the transfer of interests in land is, perhaps, best illustrated by way of comparison with the transfer of ownership in goods.²

2.2 As a rule, property in goods may be transferred from seller to buyer with a minimum of formality and delay.³ The need for particular description of the interest to be sold and for identification of the rights and liabilities subject to which such interest shall vest in the buyer, does not arise in the case of goods. Rarely does the buyer need to investigate the seller's ability to transfer nor,

1 *Church of England Building Society v. Piskor* [1954] Ch. 553 at 561 (*per* Evershed M.R.).

2 The term 'goods' is defined in section 62 of the *Sale of Goods Act, 1893* - an Act which purported to codify the common law on the sale of goods - to include 'all chattels personal other than things in action and money'. Bell in *Modern Law of Personal Property in England and Ireland* (Butterworths, 1989), p.21 treats 'goods' as the modern term replacing 'chattels'.

3 It is well established that certain contracts must be evidenced in writing in order to be enforceable. Section 13 of the *Statute of Frauds (Ireland), 1695* provides that a contract for the sale of goods valued at more than £10 shall not be enforceable unless evidenced in writing. There are three exceptions to this rule: such contract shall be enforceable, although not in writing, where the buyer accepts and receives part of the goods sold, where he or she gives something in earnest to bind the bargain between the parties or, thirdly, where he or she makes part-payment. Section 2 of the *Statute of Frauds* provides that contracts which shall not be performed within a year, contracts to meet the debts of a third party, and agreements made in consideration of marriage shall also be evidenced in writing. This requirement also extends, of course, to contracts for the sale of land or an interest therein - also *per* section 2. This requirement, which has generated a sizeable case-law, is mitigated somewhat by the doctrine of part-performance. See Wylie, *Irish Conveyancing Law* (Professional Books Ltd., 1978, reprinted 1983), pp.333-376.

consequently, to obtain the advice of solicitors or other experts prior to completion of the transaction.

2.3 The converse is true with regard to the transfer of an interest in land. A purchaser may not assume that the party purporting to sell the land is, in fact, the owner thereof nor that there is no other party with a superior or conflicting interest therein. Several careful enquiries and searches must, therefore, be undertaken. Title is investigated by the vendor's solicitor and an appropriate draft contract is then drawn up. The General Conditions of Sale of the Incorporated Law Society of Ireland⁴ are commonly used. The parties then proceed to enter into a binding contract for the sale of land. At this point a deposit is almost invariably paid. The purchaser's solicitor then investigates the title of the vendor to the property. When the vendor's title has been shown to the satisfaction of the purchaser, a conveyance is drafted.

2.4 The final stage in the process is, of course, completion. The conveyance of unregistered land is completed when, in essence, documents of title, an assurance of the property and possession of the land are handed over by the vendor to the purchaser in return for the balance of the purchase price. In the case of registered land, the process comes to an end when the formalities of registration have been dealt with. Condition 2 of the Incorporated Law Society's General Conditions of Sale (1991 edition) envisages that unless the individual contract otherwise provides, the closing date shall fall on the first working day after the expiration of five weeks from the date of contract and it is not uncommon for an even greater period to expire before the conclusion of the transaction.

2.5 In the light, therefore, of the considerable period of time which inevitably elapses before the land vests fully in the purchaser, it is vital that the rights and duties of the parties to the contract for sale in that interim period be carefully defined. Traditionally the interests of the vendor and purchaser in land during this period have been defined by reference to the concept of constructive trust.⁵ Thereunder, the purchaser becomes beneficial owner of the land, and the vendor holds the legal estate as constructive trustee for the purchaser. This equitable principle was established as early as 1661.⁶ It was confirmed in a series of English decisions in the late 19th century,⁷ and has been restated by courts in both Ireland and Britain ever since.

2.6 Such passage of time is in sharp contrast to a *sale* of goods, wherein

⁴ The latest edition is the 1991 edition.

⁵ See Wylie, *supra*, n.3, Ch. 11; Farrell, *Irish Law of Specific Performance* (Butterworths, 1994), Ch. 11; Oakley, *Constructive Trusts* (Sweet and Maxwell, 2nd ed., 1987), Ch. 6; Waters, *The Constructive Trust* (Athlone Publishers, London University, Institute of Advanced Legal Studies, Legal Series; No. 8), Ch. 2; Wellings, 'The Vendor as Trustee' (1959) 23 Conv. 173; Keane, *Equity and the Law of Trusts in the Republic of Ireland*, (Butterworths, 1988), paras. 13.08-13.09.

⁶ *Daire v. Beversham* (1661) Nels. 76, in which *Lady Foliam's* case (1651) was cited.

⁷ Notably *Holroyd v. Marshall* (1862) 10 H.L.C. 191; *Rose v. Watson* (1864) 19 H.L.C. 672; *Shaw v. Foster* (1872) L.R. 5 H.L. 321; *Lysaght v. Edwards* (1876) 2 Ch. D. 498.

contract and conveyance, i.e. the passing of property, are simultaneous events.⁸ *The Sale of Goods Act, 1893*, which purports to codify the law in this area, distinguishes between such a sale and an agreement to sell goods, by virtue of which the passing of property in the contract goods is postponed until a later date.⁹ The question might then be asked whether, in the event of an agreement to sell, a purchaser should be treated as beneficial owner of the goods in the period prior to completion. This issue has not been conclusively decided although it has been suggested in the English courts that no division of ownership in this manner may occur.¹⁰

2.7 The trust which arises between vendor and purchaser of land in the period prior to completion is clearly not an ordinary trust. The vendor, although a trustee, retains a personal interest in the land which he or she is entitled to protect. Until completion, therefore, the vendor must protect both the purchaser's and his or her own interest. Thus, although as a rule anything done by trustees regarding the trust property is deemed to be done for the benefit of the beneficiaries and not for the trustees, a vendor of land may retain possession of the property and keep the rents and profits arising therefrom until completion. He or she has also, however, a duty to the purchaser to take reasonable care of the property during this time.

2.8 It appears then, that the trust analogy may not always sit comfortably beside the pre-completion position of the parties with the result that the merits of resorting to the trust have been questioned by some, who have proposed that the matter should be resolved solely by reference to the principles of the law of contract.¹¹ The courts have not, however, concerned themselves with challenging the essential validity of the trust concept but have instead focussed upon examining its mode of operation in these circumstances.

2.9 They have, in the light of these examinations, arrived at two diverging conclusions as to the moment at which the trust arises. According to one view, a constructive trust operates from the time of contract.¹² On that date, the beneficial interest passes to the purchaser, and the vendor becomes trustee of the legal interest, whilst, as mentioned above, retaining certain personal rights with regard to the land. A requirement that the contract be one which is capable of specific performance is sometimes imposed.¹³

2.10 Clear judicial authority also exists, however, for the view that the beneficial interest in the land remains vested in the vendor until payment of the

8 Section 1(3) of the *Sale of Goods Act, 1893* states: "Where under a contract of sale the property in the goods is transferred from the seller to the buyer the contract is called a sale..."

9 Section 1(3) continues: "[b]ut where the transfer of the property is to take place at a future time or subject to some condition thereafter to be fulfilled the contract is called an agreement to sell."

10 See the *dictum* of Lord Atkin in *Re Wait* (1926) All E.R. 433 at 445-446. This *dictum* was "provisionally" endorsed by the House of Lords in the recent decision, *The Aliakmon* (1988) All ER 145. This matter is further considered at a later point in this report: see pages 13-14.

11 Waters, *supra*, n.5.

12 *Shaw v. Foster*, *supra*, n.7; *Lysaght v. Edwards*, *supra*, n.7; Henchy J. in *Tempany v. Hynes* (1976) I.R. 101.

13 Discussed *infra*, pages 7-14.

purchase money.¹⁴ The proportion of the beneficial interest which is vested in the purchaser at any moment prior to completion corresponds directly to the proportion of the purchase money which he or she has paid. In the light of the decision of the Supreme Court in *Tempany v. Hynes*,¹⁵ this is now the law in Ireland.

2. *Interests Of Vendor And Purchaser During The Period Between Contract And Completion*

(a) **Doctrine of conversion**

2.11 The constructive trust which arises where there is a contract for the sale of land operates by virtue of the doctrine of conversion.¹⁶ This equitable doctrine is in turn based upon the maxim "equity looks on that as done which ought to be done".¹⁷

2.12 According to the doctrine, personalty is converted into realty and realty into personalty under a valid contract of sale. Thereunder, equity looks on the purchaser as the owner of the property, the subject matter of the contract, and the vendor as the owner of the purchase money.¹⁸ Legal title to the land, however, cannot be affected by the application of the doctrine and only passes to the purchaser upon *completion* of the sale. It follows that the doctrine of conversion operates to separate the legal and beneficial interest and one, therefore, enters the domain of the law of trusts: while the vendor retains the legal interest, equity regards him or her as holding it on trust for the purchaser. In the words of Lord Cairns in the 19th century English decision of *Shaw v. Foster*:

"There cannot be the slightest doubt of the relationship subsisting in the eye of a Court of Equity between vendor and purchaser. The vendor was a trustee of the property for the purchaser; the purchaser was the real beneficial owner in the eye of a Court of Equity of the property
...¹⁹

This trust does not arise by virtue of the intention of the parties but by operation of law. In certain instances where equity considers it unfair or unjust that one person should benefit at the expense of another, it intervenes and imposes a trust to ensure that the benefit accrues to the person entitled thereto.²⁰ This constructive trust has been applied to fiduciary relationships: where a trust

14 *Rose v. Watson*, *supra*, n.7; *Tempany v. Hynes*, *supra*, n.12.

15 *Supra*, n.12; See Lyall, *The Purchaser's Equity: An Irish Controversy* 17 I.L.T.R. 11 (1989) 270. An amended version of this article can be found in Appendix A of Lyall, *Land Law in Ireland* (Oak Tree Press, 1994), pp.1007-1030 (hereafter called Lyall II).

16 See also Keane, *supra*, n.5, paras. 24.01-24.03; Pettit, *Conversion under a Contract for the Sale of Land*, (1960) 24 Conv. 47.

17 Keane, *supra*, n.5, para. 3.18.

18 See, for example, *Re Birmingham* [1959] Ch. 523, [1958] 2 All ER 397.

19 *Supra*, n.7.

20 "A constructive trust is the formula through which the conscience of equity finds expression"; *per* Cardozo J. in *Beatty v. Guggenheim Exploration Co.* (1919) 225 N.Y. 380 at 386.

already exists and the trustee gains some profit from his or her position as such, he or she is generally considered as holding that profit on trust for the beneficiary. Secondly, a constructive trust arises in a variety of situations where it would simply be inequitable for a person in possession of property to which he or she is not entitled to benefit from it. The case of vendor and purchaser is the most frequently cited and the oldest example of this category of constructive trust.

(b) Specific performance

2.13 As we have seen, the basis of the trust that is deemed to exist between vendor and purchaser is the maxim that equity regards as done that which ought to be done. In what circumstances, then, does equity consider that the equitable ownership "ought" to be transferred to the purchaser? The view is commonly taken that such transfer should only occur in respect of a contract which is capable of specific performance²¹ and, indeed, this would appear to represent a logical conclusion: if the contract is one in respect of which the equitable remedy of specific performance is available, it is one which in the eyes of equity "ought" to be performed.

2.14 Hence, specific enforceability is commonly treated as a pre-requisite for a *valid* contract for the sale of land. The *dictum* of Lord Westbury L.C. in *Holroyd v. Marshall*²² is often cited:

"In equity it is not necessary for the alienation of property that there should be a formal deed of conveyance. A contract for valuable consideration, passes at once the beneficial interest, provided the contract is one of which a court of equity will decree specific performance."

It is well established, however, that a court will not grant a decree of specific performance if in doing so it would force a bad title on the purchaser.²³ In

21 Wyllie, *supra*, n.3, p.501; Farrand, *Contract and Conveyance* (4th ed., Oyez Longman, 1983), pp.172-173; Williams on Title, (Butterworths, 4th ed. by Battersby, 1975), Ch. 12; Keeton and Sheridan, *The Law of Trusts*, p.194 *et seq.*; see, however, Pettit, *supra*, n.16.

22 *Supra*, n.7 at 209-210.

23 *Larkin v. Lord Rosse* (1846) 10 R.R. Eq. R.R. 70 at 74 (*per* Smith M.R.); *Molphy v. Coyne* (1919) 53 I.L.T.R. 177 at 179 (*per* Powell J.). As we saw on page 2, in Ireland, the contract is signed before the title of the vendor is established. The cost of investigating title is such that it would be unreasonable to expect a purchaser to undertake a full investigation of title without the security of a binding contract signed by the vendor.

addition to the requirements of the ordinary law of contract,²⁴ then, such contracts are valid only if the vendor is in a position to make title in accordance with the contract or if the purchaser is willing to accept such title as the vendor has, notwithstanding that it is not in accordance with the contract.²⁵

2.15 In this regard, it is interesting to refer to the *dictum* of Jessel M.R. in *Lysaght v. Edwards* upon which reliance is often placed:

"a valid contract' means in every case a contract sufficient in form and in substance, so that there is no ground whatsoever for setting it aside as between the vendor and purchaser - a contract binding on both parties. As regards real-estate, however, another element of validity is required. The vendor must be in a position to make out his title according to the contract, and the contract will not be a valid contract unless he has either made out his title according to the contract or the purchaser has accepted the title, for however bad the title may be the purchaser has a right to accept it, and the moment he has accepted the title, the contract is fully binding upon the vendor. Consequently, if the title is accepted in the lifetime of the vendor, and there is no reason for setting aside the contract, then, although the purchase money is unpaid, the contract is valid and binding; and being a valid contract, it has this remarkable effect, that it converts the estate, so to say, in equity; it makes the purchase-money a part of the personal estate of the vendor,

24 As a general rule, the law of contract demands the following, in order to ensure a legally binding and enforceable contract: a) an offer and an acceptance, b) intention to create legal relations, c) *consensus ad idem*, d) legality of purpose e) contractual capacity of the parties, f) possibility of performance, g) valuable consideration. A contract under seal need not be supported by consideration. Note, however, that equity does not favour voluntary transactions even though under seal and refuses to grant its own remedies, including specific performance, where the contract is a purely voluntary transaction. This refers not to its legal validity but rather to the specific-enforceability of the contract. Where the property, the subject matter of the contract, constitutes a "family home" within the meaning of the *Family Home Protection Act, 1976*, a conveyance by one spouse of any interest in that property to a person other than the other spouse shall be void unless the prior written consent of the non-conveying spouse is obtained: *per* section 3. Section 1(1) of this Act defines "conveyance" to include "an enforceable agreement (whether conditional or unconditional) to convey". Failure to ensure compliance with section 2 of the *Statute of Frauds, 1695* i.e., to obtain sufficient evidence in writing of a contract for the sale of land, does not render a contract invalid; rather it makes such contract unenforceable by action.

25 Luxton noted that the decree of specific performance which may be granted to a purchaser willing to accept a lesser legal *interest* is based upon equitable estoppel: "a vendor is not permitted after the contract to assert that he does not have what he contracted to sell. A purchaser of land, for instance, has been held entitled to specific performance with abatement where a vendor who purported to sell an estate in fee simple was discovered to be merely a legal tenant for life. In such cases specific performance is granted, and a trust in favour of the purchaser arises, not of the legal estate contracted to be conveyed, but only of the lesser legal title that the vendor is able to convey.

Where the lesser interest is a legal one, an order of specific performance is necessary because dealing with a legal estate requires the execution of a conveyance. If, however, the lesser interest is merely equitable, specific performance is inappropriate, for here no conveyance is required for that interest to pass. Equity is at liberty to treat the equitable interest - a creature of its own devising - as vesting in the purchaser without the need to order specific performance on the part of the vendor; and the method by which it achieves this is the imposition of a constructive trust. Thus such trust, by passing to the willing purchaser all that the vendor is capable of disposing, effects in regard to an equitable interest what an order of specific performance seeks to effect in regard to a legal one. By the same token, the imposition of such trust is subject, so far as is appropriate to the disposition of a merely equitable interest, to the same discretion as an order for specific performance. Thus, the purchaser will not acquire an equitable interest if, for example, he is unable or unwilling to pay the purchase price, or if it would result in his becoming an equitable co-owner with another person whose interest might thereby be prejudiced": Luxton, *Share Transfer Restrictions and the Relative Nature of Property Rights* [1989] J.B.L. 14.

and it makes the land a part of the real-estate of the vendee; and therefore all those cases on the doctrine of constructive conversion are founded simply on this, that a valid contract actually changes the ownership of the estate in equity."²⁶

2.16 In order to obtain a decree of specific performance it must also be shown to the satisfaction of the court that the requesting party has either fulfilled his or her part of the bargain or alternatively is ready, willing and able to do so.²⁷ The courts will grant the decree only in circumstances in which damages for breach of contract would not serve as an adequate remedy: an interest in land is recognised, however, as being a special interest as each piece is unique and distinct with the result that the loss thereof cannot adequately be satisfied by an award of damages. Thus specific performance is not usually granted in respect of contracts for the sale of goods - not because of their personal nature *per se* but rather because damages at law may represent as complete and satisfactory a remedy for the purchaser as the delivery of the goods contracted for. If, however, the contract goods are either unique or scarce, the courts are inclined to grant specific performance, provided, of course, that conditions are otherwise suitable for the grant thereof. Although the grant of the decree of specific performance is applied by reference to settled principles, it is ultimately an equitable and, consequently, discretionary remedy.

2.17 As such, it is questionable whether the interests of the parties to a contract for the sale of land should be determined by reference to the availability of the decree of specific performance. The courts in England have adopted the view that once a contract is shown to be capable of specific performance, conversion is deemed to occur with retrospective effect from the date of the conclusion of the binding contract.²⁸ Oakley notes that this approach developed in the 19th century. Before that, the courts seem to have adopted the view that conversion occurred at the moment of contract.²⁹ Apart even from the discretionary nature of the remedy, it appears to leave the parties in an unacceptably precarious situation given that title is not, as a rule, shown by the vendor until he or she adequately responds to the purchaser's requisitions - usually at the closing. English authorities also establish that no conversion shall be deemed ever to have occurred if the vendor fails to show title in accordance with the contract and the purchaser does not agree to accept such title as the vendor, in fact, possesses.³⁰ The Irish courts do not appear to have dealt expressly with the issue of the retroactive operation of the doctrine of conversion, although Henchy J. may well have been referring to this issue in *Tempany v. Hynes* when he noted that the purchaser is treated as the owner in equity from the moment of the contract "at least in cases where the parties proceed to the

26 *Supra*, n.7 at 506-507.

27 This principle draws upon the equitable maxims which state that he who seeks equity must do equity and that he who comes to equity must come with clean hands. See Keane, *supra*, n.5, paras. 30.07-30.08.

28 *Lysaght v. Edwards*, *supra*, n.7.

29 *White v. Nutts* (1702) 1 P. Wms. 61 at 62 (*per White L.J.*). See Oakley, *supra*, n.5, p.149.

30 *Broome v. Monck* (1805) 10 Ves. 597; *Re Thomas* (1886) 34 Ch. D. 166; *Polewas v. Samuel* 1 Ch. 464.

stage of conveyance."³¹

2.18 Some authors have queried the status of specific performance as a criterion for the operation of the doctrine of conversion. Pettit,³² whilst acknowledging that certain judicial *dicta*, such as that of Jessel M.R. in *Lysaght v. Edwards*, lend weight to the view that a valid contract should be defined in terms of the availability of the remedy of specific performance, concludes that this approach cannot be maintained in the light of other cases in which the doctrine of conversion was found to operate despite the non-availability of specific performance.

2.19 The decision of the English Court of Appeal in *Gordon Hill Trust Ltd. v. Segall*³³ is one such case. Here the defendant entered into a contract to purchase property in use as a school. The agreement provided that vacant possession would not be given and completion would not take place until alternative accommodation had been secured for the pupils of the school. The defendant subsequently contracted to sell the premises to the plaintiffs. When the original contract was not completed due to failure to fulfil the condition, the plaintiffs sued the defendant for deceit, alleging that he had fraudulently misrepresented that he was the owner of the property. The Court of Appeal took the view that despite the fact that specific performance was not available in respect of the original contract, the defendant had nevertheless become the owner in equity of the property from the date of that contract. From that time, the vendors were precluded from dealing with the property in any way, except with the defendant's consent.³⁴ It followed that what the defendant had represented to the plaintiffs was in fact true. A similar approach to the requirement of specific performance was adopted in *Lake v. Bayliss*.³⁵

2.20 More important, perhaps, is the decision of the House of Lords in *Rose v. Watson*.³⁶ Here the owner of an estate, part of which was the subject of a contract for sale, executed a mortgage over it. The mortgagee gave notice of the mortgage to the purchaser. The contract obliged the purchaser to pay certain portions of the purchase price to the vendor at stated intervals together with interest on all that remained unpaid. He initially complied with the obligation to make these payments but subsequently declined to complete the purchase, alleging that the representations upon which he had been induced to enter into the contract for purchase were unfulfilled. In a preliminary action,³⁷ the Court found that the fact of the non-fulfilment of such representations was indeed sufficient to absolve the purchaser from liability to specifically perform the contract. Despite the non-availability of this remedy, the House of Lords in the subsequent decision of *Rose v. Watson* held that the purchaser had, by the

31 *Supra*, n.12 at 109.

32 *Supra*, n.16.

33 [1942] 1 All E.R. 379.

34 *Id.* at 388 (*per* Luxmoore J.).

35 (1974) 1 W.L.R. 1073.

36 *Supra*, n.7.

37 *Myers v. Watson* 1 Sim. (ns.) 523.

payment of a portion of the purchase price, acquired an equitable interest (which they rather unsatisfactorily equated with the purchaser's lien by virtue of which the purchaser could obtain the return of the purchase money forwarded. This point is considered in greater detail at a later stage).³⁸

2.21 This decision prompted Keane to comment, extrajudicially, that although the contract in question must be *a valid* one - in the sense of being legally binding - it need not necessarily be one of which the courts would grant specific performance. He then notes that *Rose v. Watson* was endorsed by the Supreme Court in the governing case of *Tempany v. Hynes*, although this particular point was not discussed.³⁹ It is thus questionable whether the requirement of specific performance prevails in Irish law today.⁴⁰ This matter will also be considered below.⁴¹

2.22 The Commission prefers the view that the parameters of the vendor/purchaser relationship in the period between contract and completion should not be defined by reference to the availability or otherwise of specific performance. It is clearly preferable that the interests of the parties at any given time in this interim period be capable of identification as precisely as possible, unhindered by the uncertainties attendant upon this equitable remedy, particularly in view of the delays involved in showing title.⁴²

2.23 Indeed, the Commission endorses the *dictum* of Lord McNaghten in *Tailby v. Official Receiver*⁴³ when considering Lord Westbury's statement in *Holroyd v. Marshall* - "perhaps the leading judicial statement in favour of the availability of specific performance as a criterion for conversion."⁴⁴ Neither case was concerned with contracts for the sale of land but rather with the equitable assignment of future property: the considerations involved, however, are clearly analogous.

2.24 *Tailby v. Official Receiver* involved the equitable assignment by way of mortgage of all of the book debts - both those already existing and those which had not yet come into existence - of a company. In the eyes of equity, an assignee acquires the equitable ownership of future book debts the moment such debts come into existence. Hence, when the company at issue in *Tailby* extended credit to another firm after the date of the equitable assignment i.e., when future debts were created, the debtor-firm duly repaid the assignee. When the assignor-company was adjudged bankrupt, the Official Receiver, acting as trustee of the company's estate, sought repayment from the assignee of the amount paid to it by the debtor-firm, arguing that an assignment by way of mortgage of all of a

38 See pages 15-16 and pages 38-41.

39 Keane, n.5, para. 24.03.

40 Especially in view of the decision of Keane J. in *Re Barrett Apartments Ltd.* [1985] I.R. 350: discussed *infra*, pages 40-41.

41 See pages 40-43.

42 In fact, it must be conceded that the uncertainty as to the availability of specific performance has not been expressed by any Irish court to be central to any matter to be determined in the case before it.

43 (1888) 13 App. Cas. 523.

44 *Per Pettit supra*, n.16, p.66.

company's future book debts - no matter how accrued - was too vague to ensure the successful transfer of any equitable interest to the assignee.⁴⁵ The House of Lords unanimously rejected this argument.

2.25 The Court recognised that an assignment may be vague in the sense of "indefinite and uncertain"⁴⁶: if so, it would, indeed, be ineffective to transfer any interest to the assignee. The term may also, however, be used to mean broad and "embracing much within its terms".⁴⁷ An assignment of all of the future book debts of a company was, it was conceded, vague in the latter sense⁴⁸. Nonetheless, all of the future book debts of a company could, upon their coming into existence, be identified with certainty. This, in the opinion of the House of Lords, was the standard to be met: "when there is no uncertainty as to identification, the beneficial interest will immediately vest in the assignee".⁴⁹

2.26 Lord McNaghten's *obiter* comments on specific performance are particularly interesting for our purposes. He referred to Lord Westbury's *dictum* which is often cited in support of the view that this separation of title between assignor and assignee occurs only when specific performance is available. Lord McNaghten doubted, however, whether his colleague had intended to lay down any general rule that specific performance is a criterion to be applied to every case of equitable assignment dealing with future property. In his view the general rule, which predated *Holroyd v. Marshall*, was that once parties reached agreement on those matters sufficient to ensure a binding contract, the subject matter of which was adequately defined, that alone "in a court of equity, as against the party himself, and any party claiming under him, voluntarily or with notice, raises a trust."⁵⁰ He added that:

"Great confusion [would] be caused by transferring such considerations applicable to suits for specific performance - involving, as they do, some of the nicest distinctions and most difficult questions that come before the courts to cases of equitable assignment where nothing remains to be done in order to define the rights of the parties ...

The truth is that cases of equitable assignment where the consideration has passed, depend on the real meaning of the agreement between the parties. The difficulty, generally speaking, is to ascertain the true scope and effect of the agreement. When that is ascertained you only have to apply the principle that equity considers that done which ought to be done if the principle is applicable under the circumstances of the case. The doctrines relating to specific performance do not, I think, afford a test or measure of the rights created."

45 This argument was successful in two lower courts.

46 *Per* Lord Herschell at 528.

47 *Id.* at 531.

48 *Id.* at 529.

49 *Per* Lord Watson at 533.

50 *Supra*, n.43 at 546, quoting Lord Thurlow in *Legard v. Hodges* 1 Ves. Junr. 478.

2.27 The certainty and clarity following on from the operation of the doctrine of conversion upon entry into a binding contract *simpliciter* - regardless of the remedy of specific performance - recommends this approach to the Commission.

Comparison with the transfer of property in goods

2.28 As we have previously noted,⁵¹ the transfer of property pursuant to a contract for the sale of land is a uniquely lengthy transaction around which a more complex legal structure has developed than exists with regard to sales of other forms of property. It has, nonetheless, been suggested that the relationship of trustee/beneficiary is also an accurate reflection of the position of parties to an agreement to sell goods i.e., under which no legal title shall pass until a future date, in the period prior to such passage. This may indeed be an important issue, given the extent to which the rights and duties of the parties to the contract have traditionally been influenced by the transfer of the equitable ownership.⁵² Lord Westbury in *Holroyd v. Marshall*, for example, continues on from the passage quoted above,⁵³ regarding the transfer of equitable ownership upon entry into a contract, with the statement:

"and this is true, not only of contracts relating to real estate, but also to contracts relating to personal property, provided that the latter are such as a court of equity would direct to be specifically performed."

Applying this *dictum*, therefore, a buyer of goods under an agreement to sell, should acquire the beneficial ownership upon contract provided that specific performance would be granted. It appears to follow logically, however, from the approach advocated in *Tailby v. Official Receiver*, which, it will be submitted, represents the approach currently prevailing in this jurisdiction,⁵⁴ that buyers of personal property in general - and not only those making unique or scarce acquisitions - should become owners in equity by virtue of the contract alone.

2.29 More recently, however, the English courts have tended towards the view (without deciding the matter conclusively)⁵⁵ that where personal property the subject matter of the sale comes within the ambit of *The Sale of Goods Act, 1893*,⁵⁶ the question of property rights is governed exclusively by this piece of codifying legislation. In other words, as the Act is silent on the question of the acquisition by the purchaser under an agreement to sell of the beneficial ownership, no separation of legal and equitable property may occur - regardless of whether the contract is one of which specific performance would be granted

51 See page 3.

52 A discussion of the rights and duties of the contracting parties under a contract for the sale of land can be found at pages 31-44. In some more recent cases, attention has focussed, however, upon the contractual basis of the rights and duties of the parties regardless of the transfer to the purchaser of any equitable interest; see pages 44-46.

53 See page 7.

54 See pages 40-43.

55 See n.10.

56 See n.2.

or not. The question has not been discussed in the Irish courts.

(c) **The operation of the trust**

2.30 Despite the pedigree and vintage of the constructive trust as the device by which the vendor/purchaser relationship is governed in the period between contract and completion, judicial disagreement still exists over the event which triggers the operation of such trust. As Henchy J. noted in the recent decision of *Hamilton v. Hamilton*:⁵⁷

"Judicial opinion in Ireland and England has been unanimous in holding that when a vendor and purchaser enter into a valid and enforceable contract for the sale of property, supported by payment by the purchaser of part of the purchase price the vendor becomes a constructive trustee for the purchaser of a beneficial or equitable estate in the property. The only area of disagreement is the extent of that estate."

This disagreement is evident as early as the 18th century in reported English case law and is seen in Ireland in judicial decisions throughout this century.

2.31 As stated previously, definition of the interests of the vendor and purchaser by reference to the constructive trust can be traced as far back as 1661. The court in *White v. Nutts*,⁵⁸ in 1702 concluded that the contract itself operated to transfer the beneficial ownership of land. In 1738, Lord Hardwicke noted in *Green v. Smith*, that "the vendor of the estate is, from the time of his contract, considered as a trustee for the purchaser."⁵⁹ Eleven years later, however, in *Mackrell v. Hunt*, a case which involved a sale by auction, the same judge took the view that until title is accepted and the purchase money presented in court, no trust arises.⁶⁰ Similarly in *Wall v. Bright*,⁶¹ the court accepted that payment of the purchase money is the event upon which the vendor becomes trustee.

2.32 In contrast, Story, in his book, *Equity Jurisprudence* (1861), asserts that

"[w]here a contract is made for the sale of land, the vendor is, in equity, immediately deemed the trustee for the vendee of the real-estate and the vendee is deemed a trustee for the vendor of the purchase money. Under such circumstances, the vendee is treated as the owner of the land ... [and] the money is treated as the personal estate of the vendor."⁶²

2.33 This confident assertion comes, however, between the opposing views

57 [1982] I.R. 486 at 483-484.

58 (1702) 1 P.W. 61.

59 (1738) 1 A.T.K. 572 at 573.

60 25 May 1749, noted at (1816) 2 M.O.D. 34.

61 (1820) 1 J.A.K. P.S.W. 494.

62 Story, *Equity Jurisprudence*, Volume 1 (Little, Brown and Co., 1861), p.432.

stated in *Wall v. Bright* and the famous *Rose v. Watson*⁶³ decision, when the House of Lords held that the payment of money was a prerequisite for the acquisition by the purchaser of any portion of the equitable estate in the property the subject matter of the sale. In *Rose v. Watson*, Lord Westbury stated that:

"When the owner of an estate contracts with a purchaser for the immediate sale of it, the ownership of the estate is, in equity, transferred by that contract. Where the contract undoubtedly is an executory contract, in the sense, namely, that the ownership of the estate is transferred, subject to the payment of the purchase-money, every portion of the purchase-money paid in pursuance of the contract is a part-performance and execution of the contract, and, to the extent of the purchase money so paid, does, in equity, finally transfer to the purchaser the ownership of a corresponding portion of the estate."⁶⁴

This is somewhat unclear. Lyall comments that:

"The first sentence seems to support the view that an executory contract unperformed by the purchaser passes, in itself, an equitable interest to the purchaser, although it is not clear what is meant by 'immediate'. He then confuses the matter completely by the next sentence. By 'executory contract' he says he means one by which ownership is transferred 'subject' to the payment of the purchase money. Does this mean the whole beneficial interest is actually transferred, but subject to being returned if the money is not paid? Or is it only transferred *if* the money is paid?"⁶⁵

2.34 Lord Cranworth's judgment is somewhat clearer. He concluded that:

"There can be no doubt, I apprehend, that when a purchaser has paid his purchase money, though he has got no conveyance, the vendor becomes a trustee for him of the legal estate. When, instead of paying the whole of the purchase money, he pays a part of it, it would seem to follow, as a necessary corollary, that, to the extent to which he has paid his purchase money, to that extent the vendor is a trustee for him; in other words, that he acquires a lien, exactly in the same way as if upon the payment of part of the purchase money the vendor had executed a mortgage to him of the estate to that extent."⁶⁶

2.35 This approach contrasts with the view implicitly adhered to in the Irish case, *Waldron v. Jacob and Millie*⁶⁷ which followed soon thereafter. In this case the first defendant had agreed to sell a house to the plaintiff although he, the vendor, did not comprehend that any binding obligation arose from such

63 *Supra*, n.7.

64 *Id.* at 190.

65 Lyall, *supra*, n.15 at 272; Lyall II, *supra*, n.15, p.1013.

66 *Supra*, n.7 at 192.

67 (1870) R.O. 5 E.Q. 131; see Lyall, *supra*, n.15 at 274; Lyall II, *supra*, n.15, p.1018.

agreement. Prior to completion, the vendor agreed to sell the property to the second defendant for a larger sum. The plaintiff subsequently proffered the purchase money and when the first defendant refused to accept it, executing instead a conveyance in favour of the second defendant, the plaintiff sought specific performance of the contract, joining the second defendant in the action. The arguments of Christopher Palles, counsel for the second defendant, are of particular interest: he did not assert that the plaintiff, who had not paid any money, had no equitable interest but, rather, that his client was a *bona fide* purchaser for value without notice of that equitable interest. If his client did not have any notice at the time of the contract that was sufficient to protect his own interest even though he had acquired it prior to the execution of the conveyance. Palles pointed out that "as soon as [the plaintiff] entered into the contract to purchase, his position was the same as if he had got a conveyance of the equitable interest." To this Lyall adds:

"Arguments of counsel, even of Palles are not authority in themselves but the fact that it was not challenged by the other side indicates the understanding which applied at the time about the doctrine."⁶⁸

2.36 This view coincides with that of the English Court of Appeal in *Lysaght v. Edwards*,⁶⁹ delivered soon thereafter. Lord Cranworth's *dictum* in *Lysaght* is often taken as a classic statement of the law on this topic. As we have already seen, the Court in this case concluded that the purchaser acquires the beneficial ownership of the land upon entry into a contract, regardless of the payment of any of the purchase money. The contract must, it was submitted, be a *valid* one - taken there to mean one capable of specific performance.⁷⁰ In the same year the House of Lords, in *Shaw v. Foster*⁷¹, again adopted this line of reasoning.⁷²

2.37 Conflicting judicial opinion, therefore, runs throughout English caselaw on this topic. It is, however, true to say that the weight of such caselaw tilts in favour of the *Lysaght* approach and has done so in more recent English decisions also: see, for example, how Waters comfortably asserts that

"since 1881 the courts have been prepared to state, simply, as an established fact, that the constructive trust arises when the parties contract, but that the trust only exists if specific performance would be granted."⁷³

2.38 The preponderance of Irish caselaw dealing with the interests of the vendor and purchaser to a contract for the sale of land have arisen since that

68 Lyall, *supra*, n.15 at 274; Lyall II, *supra*, n.15, p.1018.

69 *Supra*, n.7.

70 See pages 8-9.

71 *Supra*, n.7. See the *dictum* of Lord Cairns, quoted on page 6.

72 The Court of Appeal would, however, soon divide again on the issue in *Raynor v. Preston*, (1881) Ch. D. 1. Each of the judges took a different view on the preliminary question of the nature and the extent of the trust created between vendor and purchaser.

73 Waters, *Constructive Trust - Vendor and Purchaser* 14 C.L.P. 76 (1961). See also *Hillingdon Estates Co. v. Stonefield Estates Ltd.* [1952] 1 All E.R. 853.

date. Most of these cases have also been concerned with the attachment of judgment mortgages to land in the period between contract and completion.

2.39 **Judgment Mortgages:** Provision for the creation of judgment mortgages is made in the *Judgment Mortgage (Ireland) Acts, 1850 and 1858*. These statutes empower a creditor who has obtained a judgment in court against a debtor to secure his or her right to recover the debt in the form of a mortgage over land owned by the debtor. Under Section 6 of the Act of 1850, a judgment creditor must register an affidavit in the Registry of Deeds, describing the land in question and the debtor's estate in that land. This registration

".. shall operate to transfer to and vest in the creditor registering such affidavit all the lands, tenements, and hereditaments mentioned therein, for all the estate and interest of which the debtor mentioned in such affidavit shall at the time of such registration be seized or possessed at law or in equity"⁷⁴

2.40 This mortgage differs from other forms of mortgage in that it is imposed on the debtor and does not arise out of any form of agreement between the parties. Nevertheless, the judgment mortgagee is a secured creditor and may apply to a court for an order for the sale of the land.

2.41 In the case of unregistered land, the judgment mortgagee must take the land as he or she finds it. The judgment mortgage is subject to all equities, registered or unregistered, which affect the land, at the date of registration of the mortgage.⁷⁵ It does not matter that the judgment mortgagee may have had no notice of any such unregistered equities.

2.42 The position with regard to registered land is essentially the same. Pursuant to section 71(4) of the *Registration of Title Act, 1964*,⁷⁶ the charge created by the judgment mortgage takes effect subject to:

74 *Judgment Mortgage (Ireland) Act, 1850*, section 7.

75 *Eyre v. McDowell* (1861) H.L.C. 819. There are two exceptions to this general rule. Section 8 of the 1850 Act provides for an exception with regard to equities made after the judgment is handed down and before the judgment mortgage is registered, which would amount to a deliberate attempt to defraud the creditor. In addition, should the judgment mortgagee later take a conveyance of the property, his or her newly acquired interest will defeat any previous unregistered equities with which the judgment mortgage might conflict: *Murtagh v. Tisdall* (1840) 3 Ir. Eq. 85 at 98.

76 A judgment mortgage is classified by the Act as a burden which may be registered as affecting registered land. Section 71 provides:

- (1) The registration of the affidavit required by section 6 of the *Judgment Mortgage (Ireland) Act, 1850*, for the purpose of registering a judgment as a mortgage shall, in the case of registered land, be made in the prescribed manner and with such entries as may be prescribed.
- (2) In an affidavit registered after the commencement of this Act, the land shall be sufficiently described by reference to the number of the folio of the register and the county in which the land is situate.
- (3) The affidavit shall be expressed to be made by the creditor specified in section 6 of the said Act of 1850 or by a person authorised to make it by section 3 of the *Judgment Mortgage (Ireland) Act, 1858*.

- "(a) the burdens, if any, registered as affecting that interest,
- (b) the burdens to which, though not so registered, that interest is subject by virtue of section 72,⁷⁷ and
- (c) all unregistered rights subject to which the judgment debtor held that interest at the time of registration of the affidavit."

2.43 It is, therefore, evident that the interest of the purchaser under a binding contract must be clearly identified in order to determine if it represents an equity, in the case of unregistered land, or an unregistered right charged against the vendor-debtor's interest, in the event of registered land, capable of taking priority over a subsequently registered judgment mortgage. Whatever interest remains in the vendor may be captured by the judgment creditor.

2.44 In *Pim v. Coyle*,⁷⁸ the Irish Court of Appeal held that a judgment mortgage, registered against the land of a registered owner after that owner has contracted to sell the land but before the purchaser has registered his or her title, takes priority over the transfer to the purchaser. The Court concluded from a reading of section 35 of the *Local Registration of Title (Ireland) Act, 1891*, that the purchaser only acquires title upon registration as owner. Since no estate, legal or equitable, vested in the purchaser until this time, the vendor retained a beneficial interest which could properly be the subject of a judgment mortgage. The subsequent registration of the purchaser as owner would not affect the priority of the previously registered judgment mortgage.

2.45 The case could also have been decided on the basis that the unregistered transfer was a gift which, whether incomplete or otherwise, will not raise a trust in equity.⁷⁹

2.46 The issue of the interests of the parties to a contract prior to completion next arose before the Irish courts in *Tench v. Molyneux*,⁸⁰ a case concerned with priority between the competing claims of a purchaser and an equitable chargee. Here a tenant of lands acquired the interest of his landlord pursuant to the Land Purchase Acts, and immediately sold a portion thereof on to the defendants. On the date of the sale to the defendants, the tenant-vendor was registered as full owner, subject to the Land Commission's annuity and to equities. Pending the redemption of that annuity, the Land Commission was entitled to retain the relevant land certificate. The conditions of sale fraudulently stated that the original land certificate had not been issued owing to a block in the Registration of Title Office and provided that the purchaser should nonetheless pay the purchase price. The defendant-purchasers complied and went into possession. Upon redemption of the land certificate, the vendor deposited same with the

⁷⁷ Section 72 deals with those burdens which affect registered land without registration.

⁷⁸ (1907) I.R. 330.

⁷⁹ *Milroy v. Lord*, De. G.F. and J. 264; see also the dictum of Wylie J. in *Re Murphy and McCormack* (1928) I.R. 479, quoted at page 20.

⁸⁰ 1914 I.L.T. 48.

plaintiff as security for an advance made. The plaintiff subsequently sought to have the amount of the loan declared well charged.

2.47 The Court relied upon the *dictum* of Cranworth L.J. in *Rose v. Watson*⁸¹ and concluded, the full purchase price having been paid, that the tenant-vendor was a trustee for the purchasers: and that as between the purchasers and the deposittee of the land certificate, the equity of the purchasers should prevail because it pre-dated the deposittee's. The three judges in the Court of Appeal apparently concurred in this approach: the judgment of Cherry L.C.J. is, however, not reported. In *Re Kissock and Currie's Contract*⁸² which followed soon thereafter, he dissented from the *Rose v. Watson* approach, holding instead that the equitable estate passed to a purchaser upon entry into a contract *simpliciter*.

2.48 In *Re Kissock and Currie's Contract*,⁸³ a judgment mortgage had been registered after the registration of a purchase agreement between the initial vendor and the initial purchaser but prior to the conveyance. Upon conducting a search in the Registry of Deeds, the sub-purchaser discovered the fact of the judgment mortgage and sought its release. The initial purchaser denied that such mortgage affected the property and, therefore, refused to comply. Lord O'Brien L.C., however, expressing the view of the majority of the Court of Appeal, held that it did:

"I think that, from the point of view of the judgment-creditor, as regulated by statute, his debtor had an interest in land after the date of the contract for sale and until completion, capable of being affected by the judgment ... If the contract of sale should not have been carried out, the estate of the vendor will be the same as before the contract; no doubt if the purchase-money is paid and the sale is completed he loses that estate, but meanwhile it is to my mind clearly an interest in land and as such it is capable of being affected by a registered judgment. It makes no difference to my mind whether the interest is legal or equitable'.

2.49 In his dissent, Cherry L.C.J. commented that:

"it is argued that until the purchaser is paid, some shadow of an interest remains vested in the vendor, which may be affected by the judgment mortgage, but I do not think that this is so. The most that the vendor could retain would be a lien for unpaid purchase money and that has never, so far as I am aware, been held to be an estate or interest in the lands which can be captured by a judgment mortgage."

2.50 The facts of this case were, however, somewhat unusual. The purchaser

81 See page 15.
82 (1916) 1 I.R. 393.
83 *Id.*

did not, in fact, have to tender any purchase money; he was simply obliged to pay off encumbrances on the property and to forfeit a debt owed to him. The question of the payment of purchase money did not, strictly, arise. Keane points out that:

"it seems unthinkable that in these circumstances, if no conveyance had ever been executed the purchaser would have been treated as anything but the owner of the lands in equity subject to the mortgages."⁸⁴

2.51 The matter next came before the High Court in *Re Murphy and McCormack*.⁸⁵ A judgment mortgage was registered against registered lands after the lands had been transferred in accordance with a binding contract but before the purchaser was registered as owner. The purchaser subsequently registered his title. Wylie J. held that at the date of registration of the judgment mortgage, the vendor had no beneficial interest in the lands. The purchaser had an unregistered right which could be enforced against the vendor and anyone claiming under him, other than for value, including a judgment mortgagee. When the purchaser's title was completed by registration, he was entitled to take the lands freed and discharged from any burden which had not been on the register at the date of the sale to him. It followed that the purchaser had priority over the judgment mortgagee. Referring to the decision in *Pim v. Coyle*,⁸⁶ Wylie J. stated:

"some of the observations in *Pim v. Coyle* always seemed to me to go further than was intended by the decision. In that case the transferee claimed under a voluntary transfer executed before, but not registered until after, the registration of the affidavit of judgment. At the date of its registration, the voluntary transferee had no estate in the lands; and he had no equitable claim to them enforceable against the registered owner or volunteers claiming under her; he had only a document by means of which he could perfect a then imperfect gift by procuring its own registration. He had therefore no equity against the judgment mortgagee in whom the lands were vested by the registration of the affidavit of judgment."⁸⁷

2.52 The purchaser in *Re Murphy and McCormack* was not a volunteer, but a purchaser for valuable consideration. Wylie J. concluded that the registered owner, as vendor, held the land as trustee for the purchaser until completion of the transfer by registration.

2.53 Wylie J.'s decision was followed by Johnston J. in the High Court in *Quinn v. McCool and Merritt*,⁸⁸ a case based on similar facts. The following

⁸⁴ Keane, *supra*, n.5, para. 5.16.

⁸⁵ (1928) I.R. 479.

⁸⁶ *Supra*, n.78.

⁸⁷ *Id.* at 485.

⁸⁸ (1929) I.R. 620.

year, *Re Murphy and McCormack* reached the Supreme Court on appeal.⁸⁹ The decision of Wylie J. was affirmed on a different ground. On the question of whether the purchaser had priority, the Supreme Court was divided. Kennedy C.J. was of the opinion that the purchaser's interest had priority. He declared that a judgment mortgage "is an innocent conveyance, a process of execution ... and the judgment debt is not in the nature of a valuable consideration."⁹⁰ The transfer to the purchaser thus had priority over the previously registered judgment mortgage. In contrast, Murnaghan J. took the view that a judgment mortgagee is not merely a voluntary transferee.⁹¹ the judgment mortgage was a burden registered before the transfer to the purchaser and it, therefore, had priority. Fitzgibbon J. expressed no view on the matter.

2.54 In *Re Strong*,⁹² the Supreme Court was again required to address this problem. By a majority, it held that a purchaser for value of registered land is entitled to have cancelled from the register a judgment mortgage registered against the vendor's interest in the land before the execution of the purchaser's deed of transfer but after payment of the purchase money due under the contract of sale. Relying on *Rose v. Watson*, O'Byrne J. stated:

"under the general rules of law and equity, apart from the provisions of the *Local Registration of Title (Ireland) Act, 1891*, the position, as between a purchaser of lands who has paid his purchase money but has not obtained a conveyance, and a judgment debtor who has registered his judgment as a mortgage affecting such lands, seems to be quite clear. Where a contract is entered into for the sale and purchase of lands the vendor becomes a trustee for the purchaser and the latter becomes owner in equity of the lands subject to certain rights of the vendor to secure payment of the balance of the purchase money and to regain possession of the land should the contract not be completed."⁹³

2.55 The Supreme Court also took the view, reaffirming a decision of the Court in *Devoy v. Hanlon*⁹⁴ that the interest of a purchaser who has entered into a contract for the sale of registered land and who has paid his or her purchase money, amounts to a "right" within the meaning of section 44 of the *Local Registration of Title (Ireland) Act, 1891*, now section 68(2) of the Act of 1964: such "rights", which may include estates, interests, equities and powers, may affect registered land although they do not appear on the register.⁹⁵ Section 44(2) of the Act of 1891 provides that these "rights" shall not affect a

89 (1930) I.R. 322.

90 *Id.* at 327.

91 *Id.* at 329.

92 (1940) I.R. 382.

93 *Id.* at 401-402.

94 (1929) I.R. 246.

95 This approach, which is now well established, is in contrast with that of Irish Court of Appeal in *Pim v Coyle*, *supra*, n.78, a decision which is often taken as authority for the proposition that no rights, estates, interests, equity or powers may be vested in or over registered land other than by registered disposition: see the decision of the Northern Ireland Court of Appeal in *Re Scarlett* [1958] N.I. 28 in which the Court preferred the approach adopted in *Devoy v Hanon*, and *Re Strong*. The Northern Irish courts had previously expressed a preference for the *Re Strong* approach in *Miscampbell v McAlister* [1930] N.I. 74 and *McParland v Conlon* [1930] N.I. 188.

registered owner of a charge for valuable consideration. The Supreme Court concluded, however, that a judgment mortgage represented a process of execution and was not a charge for valuable consideration. In those circumstances, the purchaser's "right" took priority.

2.56 In *Re Strong*, the purchase money had been paid by the purchaser by the time that the judgment mortgage was registered. The question remained open, therefore, as to the position in cases where none of the purchase money or only part thereof has been paid. The facts of *Tempany v. Hynes* brought this question before the Supreme Court.

3. *Tempany v. Hynes*

2.57 *Tempany v. Hynes* centred on the conflicting interests of purchaser and judgment creditor: like all of the other Irish cases concerned with the competing claims of these two parties, it dealt with registered land. It is arguable, therefore, that the effects of this judgment may be confined to registered land, although the *dicta* of Kenny J. concerning the moment at which the constructive trust arises are clearly capable of general application.

2.58 In this case, a company was the registered owner of certain lands which, as part of the company's assets, were subject to a floating charge. The plaintiff-receiver contracted to sell this land to the defendant. Two judgment mortgages were registered against the land after the appointment of the receiver but before the contract for sale had been signed. A further two judgment mortgages were charged against the land after the contract had been entered into but before the purchaser was registered as owner. The plaintiff contended that he was not obliged to discharge the latter two judgment mortgages and sought an order for specific performance of the contract against the defendant-purchaser. The order was refused in the High Court on the ground that the title shown by the plaintiff might involve the defendant in litigation with the post-contract judgment mortgagees.

2.59 On appeal, the Supreme Court granted the order for specific performance. The Court held that the floating charge created by the debenture had crystallised into a fixed charge on the appointment of the plaintiff as receiver. At that time, there was an equitable assignment to the debenture holder of the company's estate in its lands upon the terms contained in the debenture. When the judgment mortgages were charged against the lands, the company held those lands subject to the rights of the debenture holder. Since the receiver appointed by the debenture holder had contracted to sell the company's lands in exercise of his power of sale, the registration of the judgment mortgages could only charge the interest of the company in its lands subject to the unregistered rights of the debenture holder and subject to the derivative rights of the purchaser.

2.60 The Supreme Court held that the plaintiff-vendor retained an interest in the land after the contract was signed capable of being charged by judgment

mortgage. However, in reaching this conclusion, Kenny J. with whom O'Higgins C.J. concurred, adopted an entirely different rationale to Henchy J..

2.61 Kenny J. was of the opinion that

"a vendor who signs a contract with a purchaser for the sale of land becomes a trustee in the sense that he is bound to take reasonable care of the property until the sale is completed, but he becomes a trustee of the beneficial interest to the extent only to which the purchase price is paid. He is not a trustee of the beneficial interest merely because he signs a contract ... Until the whole of the purchase money is paid, the vendor has in my opinion a beneficial interest in the land which may be charged by a judgment mortgage."⁹⁶

Kenny J. relied primarily on the *dictum* of Lord Cranworth in *Rose v. Watson*⁹⁷ as authority for his approach. In doing so he rejected as incorrect statements by judges and text-book writers to the effect that the purchaser was owner of the entire beneficial interest in the land from the date of contract. Particular reference was made to the text-book writers Cheshire, and Megarry and Wade, and the dicta in *Shaw v. Foster*,⁹⁸ in *Lysaght v. Edwards*⁹⁹ and *Re Strong*.¹⁰⁰ In addition, Kenny J. relied on *Re Kissonock and Currie's Contract*.¹⁰¹ The value of this case as a precedent is, however, somewhat devalued by its unusual facts. As we saw,¹⁰² there was no question of the payment of money by the purchaser to the vendor in that case.

2.62 Henchy J., on the other hand, adhered to the view which has prevailed in the English courts. He stated:

"when a binding contract for the sale of land has been made, whether the purchase money has been paid or not, the law (at least in cases where the parties proceed to the stage of conveyance) treats the beneficial ownership as having passed to the purchaser from the time the contract was made. From then until the time of completion, regardless of whether the purchase money has been paid or not, the vendor in whom the legal estate is still vested, is treated for certain purposes (such as the preservation of the property from damage by trespassers) as a trustee for the purchaser. But, coupled with this trusteeship, there is vested in the vendor a substantial interest in the property pending completion. Save where the contract provides otherwise, he is entitled to remain in possession until the purchase money is paid and, as such possessor, he has a common-law lien on the property for the purchase

96 *Supra*, n.12 at 114.

97 *Supra*, n.7.

98 *Supra*, n.7.

99 *Supra*, n.7.

100 *Supra*, n.92.

101 *Supra*, n.82.

102 See pages 19-20.

money; even if he parts with possession of the property, he has an equitable lien on it for the unpaid purchase money; and he is entitled to take and keep for his own use the rents and profits up to the date fixed for completion."¹⁰³

In Henchy J.'s view, expressed in the context of registered land, this "transient beneficial interest" which the vendor as registered owner has in the period between contract and completion, is capable of being charged by a judgment mortgage.¹⁰⁴ Once the sale has been completed, the purchase money paid and the purchaser registered as full owner, the legal estate and any remaining interest in the vendor passes. It follows that upon completion and the registration of the purchaser as full owner, the post-contract judgment mortgages will no longer affect the land since there is no interest in the vendor to which they may attach.

2.63 In the present case, a deposit which represented 25% of the purchase price had been paid by the purchaser by the time the judgment mortgages were registered. According to the majority view, then, the vendor retained a 75% beneficial interest in the land which could properly be the subject of the two judgment mortgages. On the facts, however, the crystallisation of the floating charge on the appointment of the receiver had created an equitable charge which took priority over the judgment mortgage and hence the purchaser was obliged to complete.

2.64 It would not appear to be appropriate that the contract lands ought to pass to a *bona fide* purchaser encumbered by a subsequently-registered judgment mortgage. If a purchaser proceeds to conveyance, he or she ought to take the lands without the judgment mortgage. It is only if the contract falls through, that a judgment mortgage ought to be maintainable after completion. It is clear then, that the approach adopted by Henchy J. in *Tempany* produces the most satisfactory results.

4. *The Impact Of Tempany v. Hynes*

(a) General

2.65 The impact of Kenny J.'s *dictum* has been felt in diverse areas, from planning law to taxation law. For example, in *Re The Matter of Grange Developments Ltd*,¹⁰⁵ Murphy J. sought to determine whether, *inter alia*, a claimant property developer had, at the relevant date, an interest in lands the subject matter of a planning permission application: if so, the claimant was statutorily entitled to compensation upon the rejection of the application. Claimants had paid $\frac{3}{8}$ of the purchase price and Murphy J., relying on *Tempany v. Hynes*, held that they had a compensatable interest "at least to the extent to which they had paid the purchase price."¹⁰⁶

¹⁰³ *Supra*, n.12 at 109.

¹⁰⁴ *Id.*

¹⁰⁵ 1987 I.L.R.M. 733.

¹⁰⁶ *Id.* at 737.

2.66 In *Murnaghan Brothers v. O'Maoldomhnaigh*,¹⁰⁷ Murphy J. again relied on the *Tempany dicta* when concluding that the appellant property developer could not include the full purchase price of the land in the computation of its stock value when claiming tax relief pursuant to the *Finance Act, 1975*.¹⁰⁸ the appellants had merely paid $\frac{1}{3}$ of the purchase price to the vendor and consequently were entitled to $\frac{1}{3}$ of the beneficial interest. They could not, in such circumstances, treat all of the land as their stock in trade.

2.67 The courts have, however, recognised limits on the domain of application of the *Tempany dicta*. In *Re Hamilton v. Hamilton*,¹⁰⁹ the first defendant contracted to sell property consisting of a house and land to the second defendant. He paid a deposit representing 10% of the purchase price. When the vendor failed to complete, the purchaser successfully sued for specific performance of the contract. Upon the introduction of the *Family Home Protection Act, 1976* the plaintiff, the wife of the vendor, became aware of her power as a spouse to refuse to consent to the conveyance of the family home.¹¹⁰ She sought a declaration in the High Court that any conveyance of the property comprised in the contract of sale, without her consent, was void. The trial judge issued the declaration but on appeal the Supreme Court held that the contractual rights in question were not affected retrospectively by the Act.

2.68 O'Higgins C.J. stated:

"under the contract for sale of the 25th January, 1973, Frank Dunne acquired a contractual right to have the sale completed by Major Hamilton alone conveying the legal estate to him. Not only was this so but, by order of the High Court made in an action commenced by Frank Dunne before the Act of 1976 came into operation, he was declared entitled to the specific performance of that contract by the execution of such a conveyance. Being at all times a willing purchaser endeavouring to complete the contract by the payment of the purchase money and the acceptance of a conveyance, and having been entitled to specific performance of the contract, there can be no doubt that he was the beneficial owner of the lands contracted to be sold.

In my view *Tempany v. Hynes*, which was cited in argument, has no application to a case of this nature. That case deals only with the transient interest of a vendor, pending the due completion of a sale by the payment of the purchase money, in the property contracted to be sold. It has no application to a case such as this where the vendor defaulted and was liable to a decree of specific performance."¹¹¹

O'Higgins C.J. is herein, then, limiting the application of *Tempany* to certain

107 1991 1 I.R. 455.

108 Section 31.

109 *Supra*, n.57.

110 Pursuant to section 3 of the 1976 Act; discussed *supra*, n.24.

111 *Supra*, n.57 at 476.

types of rights as between vendor and purchaser. Lyall comments:

"[The Chief Justice] appears to be saying that while *Tempany* applies to some kinds of rights as between vendor and purchaser, it has no application to others, namely it has no application where specific performance is in issue. This is certainly not in dispute. Where the issue is specific performance the result must be that either the contract is ordered to be performed, and the whole of the land contracted to be sold is to be conveyed, or it is not, and no land will be conveyed. Whether the purchaser, for some purposes, has a lien on the land representing, let us assume 10% of the beneficial interest, cannot be relevant for this purpose."¹¹²

2.69 Nonetheless, Henchy J. took the opportunity that *Hamilton* provided to refer to the *dicta* of the majority in *Tempany* from which he dissented. The language of his judgment carefully avoids any concession that his view was wrong in substance. Referring to the absence of judicial unanimity on the extent of the purchaser's estate upon entry into a contract, Henchy J. recognises that the *Kenny* approach must be taken to be law unless and until a different conclusion is reached by a full court.

2.70 Henchy J. again made an *obiter* reference to *Tempany* in the Supreme Court decision of *Hoban v. Bute Investments Ltd.*¹¹³ This case involved an application for the specific performance of a contract in which the defendant agreed to convey land to the plaintiff and on foot of which the plaintiff paid a deposit representing a quarter of the purchase price. Because there had been an earlier uncompleted sale of the property, the contract provided that the parties to the previous sale would join in the conveyance to the plaintiff. Allied Suppliers Ltd., the purchaser in the original sale, had agreed to sell the whole of the beneficial interest in the premises to the defendant for a nominal fee, both companies being controlled by the same individual. However, in the subsequent winding up of Allied Suppliers Ltd., the liquidator repudiated that agreement. The Supreme Court held that the agreement was a nullity as a fraud on the creditors of Allied Suppliers Ltd. It followed that the defendant never had any estate or interest in the premises which it could lawfully convey to the plaintiff. Henchy J. stated:

"In accordance with the majority judgment of this court in *Tempany v. Hynes*, when the plaintiff paid a quarter of the purchase money, Bute became trustees for him of a quarter of the legal estate, that is, of course, to the extent that Bute had the legal estate. But, as is clear from the evidence and as was found by the trial judge, Bute had no interest, legal or equitable, in the premises ... therefore it is not open to the plaintiff to say that, under the contract with Bute, he acquired any estate

¹¹² *Supra*, n.15 at 275; Lyall II, *supra*, n.15, p.1020.

¹¹³ Supreme Court, unreported, 17 December 1982.

or interest in the premises."¹¹⁴

2.71 In another case, *In the matter of Lynch, Monahan and O'Brien Ltd.*,¹¹⁵ Costello J. relied on the decision of the former Supreme Court in *Re Strong*,¹¹⁶ without making any reference to *Tempany v Hynes*. Here the Court considered, *inter alia*, whether an agreement by the registered owner of land to sell that land to a company, accompanied by the payment of consideration (albeit a nominal one of £1), created an equitable estate in those lands in favour of the company. This represented a preliminary question which had to be answered in order to then determine if the company enjoyed any estate in lands which could be the subject of a charge created in favour of the company's bank. Costello J. stated that:

"The principle [is] well established as regards non-registered lands. When the owner of an estate contracts with a purchaser for the immediate sale of it the ownership of the estate is in equity transferred by that contract. When the purchaser has paid his purchase money though he has got no conveyance the vendor becomes a trustee for him of the legal estate and he is in equity considered the owner of the estate."¹¹⁷

It appears that, in the first sentence of this extract, Costello J. has borrowed heavily from the *dictum* of Lord Westbury in *Rose v Watson*¹¹⁸ and, in the second sentence, from the much-quoted passage of Lord Cranworth's judgment in the same case.¹¹⁹ The two sentences appear to point in different directions as far as the event which triggers the passage of the equitable estate to the purchaser of unregistered land is concerned. The learned judge then continued:

"The question now for decision is the application of this principle in the case of registered land; a question considered and authoritatively decided by the Supreme Court in *Re Strong*."¹²⁰

2.72 That judgment, as we saw, pointed out that, one of the rights which, pursuant to section 44 of the *Registration of Title Act, 1891* - now section 68(2) of the *Local Registration of Title (Ireland) Act, 1964*¹²¹ - can be created in registered land is the interest of a person who has entered into a contract for the purchase of registered land and has paid his or her purchase price. Applying this to the facts of the case before him, Costello J. concluded that when the registered owner of the land contracted with the company to sell it for £1 and was paid the agreed purchase price, an equitable estate was created in the lands in favour of the company. This equitable estate immediately became subject to

114 *Id.* at 2.

115 High Court, Costello J., unreported, 14 October 1986.

116 *Supra*, n.92.

117 *Supra*, n.115 at 5.

118 *Supra*, page 15.

119 *Id.*

120 *Supra*, n.115 at 5.

121 In this regard, see also *Coffey v. Brunel Construction Co. Ltd.*, n.122.

the charge in favour of the bank. The same conclusion would, in fact, have been reached had reliance been placed on the judgments of Kenny J. or of Henchy J. in *Tempany v. Hynes*.

(b) Priorities

2.73 *Tempany v. Hynes* itself is a decision about priorities - in this instance between a purchaser in whom a percentage of the equitable ownership had vested and a judgment creditor. Its potential for impact on priorities between parties with competing interests in land, as yet essentially untested, is quite extensive.

2.74 The Supreme Court in *Coffey v. Brunel Construction Co. Ltd.*¹²² sought to determine whether the interest of the plaintiff, a purchaser of registered land, who had paid the full purchase price, took priority over a *lis pendens* registered by the defendant prior to completion of the sale of land.

2.75 The first issue to be dealt with was the nature of the plaintiff-purchaser's interest in the land. Section 68(1) of the *Registration of Title Act, 1964*, provides that only the registered owner may transfer the land or charge registered under his or her name, but section 68(2) adds that nothing shall prevent the creation of any right in that land or charge. The estate of the registered owner shall be subject to such "rights" if those rights themselves are registered or if they come within the ambit of section 72 of the Act which lists a specified number of burdens which shall affect the land without registration.¹²³ In *Devoy v. Hanlon*¹²⁴, as we saw, the former Supreme Court noted that certain rights are not capable of registration and concluded that those rights may affect the estate of the registered owner without registration. The Supreme Court in *Coffey* approved this finding, pointing out that the Act "clearly recognises the creation of rights in registered land which do not appear on the register."¹²⁵ The Court, relying on the judgment of the former Supreme Court in *Re Strong*¹²⁶ concluded that the plaintiff-purchaser's interest - "the interest of a person who has entered into a contract and paid his purchase money" - constituted one such unregistrable right. In other words, the land held by the registered owner, the vendor, was subject to the plaintiff's right.

122 [1983] I.R. 36.

123 Section 52(1) provides that on registration of a transferee of freehold land as full owner with an absolute title, he or she shall acquire an estate in fee simple which is

"subject to -

(a) the burdens, if any, registered as affecting the land,

(b) the burdens to which, though not so registered, the land is subject by virtue of section 72,

but shall be free from all other rights, including rights of the State."

124 *Supra*, n.94.

125 *Per* Griffin J. at 44.

126 *Supra*, n.92; see pages 21-22.

2.76 The next matter to be decided was whether this right was superior to the defendant's *lis pendens*? It would not prevail over the interest of a registered transferee of the land, but the *lis pendens* was not such an interest. Section 68(3) provides that an "unregistered right in or over registered land (other than those to which the land is subject by virtue of section 72) shall not affect the registered owner of a charge for valuable consideration". This provision did not resolve the matter, however, as the *lis pendens* did not constitute a charge for valuable consideration either.

2.77 Section 69(1) provides that a *lis pendens* may operate as a registered burden affecting registered land. Such registered burdens take priority, under section 74, over unregistered burdens, regardless of the dates of creation. The Court, however, noted that this rule applied only in respect of those burdens capable of registration. As the purchaser's equitable interest could not be registered, this rule did not secure priority for the *lis pendens* in this case. Accordingly, priority was determined by reference to the date of creation of the competing interests and, thus, the plaintiff's interest, being first in time, took precedence.

2.78 In response to this case, it has been noted that:

"The position of a later registered *lis pendens* is essentially the same as that of a later judgment mortgage, which was the interest in *Tempany*. The only real difference between the two cases is that in *Coffey* the full purchase money had been paid and this served to obscure the logical problems in the *Tempany* doctrine."¹²⁷

2.79 The decision of the Supreme Court in *Tempany* would indeed appear to pose problems with regard to the just determination of competing interests in land. A purchaser who has not yet paid any portion of the purchase price to the vendor does not have any equity; his or her ability to compete fairly with the interests of other parties for priority is thus hampered. It is undoubtedly common practice to forward a deposit upon entry into a contract for the sale of land. Deposits may also, of course, be paid prior to the conclusion of a contract or subsequent thereto: in the case of a deposit paid post-contract, a third party may have obtained an interest in the land prior to its payment. It is, therefore, necessary to develop a rule which satisfactorily governs all situations, whether in accordance with common practice or not. In any event, if part of the purchase money has indeed been paid by the purchaser, the vendor retains a portion of the beneficial interest, which, as *Tempany* itself shows, may be captured after contract and before completion by the interests of third parties, with the result that the purchaser may, upon completion, obtain the land encumbered by the third party's interest.

2.80 Consider, then, the position of a purchaser of registered land who has

not as yet forwarded any money. The priority which he or she once enjoyed, by virtue of the purchaser's equity over a registered owner by voluntary transfer, is denied. The judgment mortgage represents one example of a voluntary transfer.¹²⁸ As always, his or her claim is subordinated to that of a registered transferee for value and, in accordance with section 68(3) of the *Registration of Title Act, 1964*, to the claim of the owner of a registered charge for valuable consideration. If a vendor purports to contract with a third party prior to the conveyance of the property to the purchaser, the claim of a third party who has forwarded the purchase price will, despite accruing later in time, take priority over that of the purchaser who has not so forwarded.¹²⁹ A purchaser may register a caution¹³⁰ - preventing any dealing with land on the part of the registered owner until notice has been given to the cautioner - or an inhibition, which prevents such dealing pending the occurrence of an event named therein or except with the consent of, or after notice to, named persons.¹³¹ But a purchaser who has not paid any of the purchase money, being, in view of *Tempany v. Hynes* without any equitable interest, has nothing to register as a caution or an inhibition.

2.81 It is difficult to discern any policy justification for this result which leaves the party who has entered into a contract to purchase land in such a vulnerable position. It would indeed be preferable if the purchaser could register a caution or an inhibition and, thereby, effectively prevent the land being sold to another purchaser in breach of the contract, as such registration would put a subsequent purchaser on notice of the earlier contract.

2.82 It is equally difficult to justify the vulnerable position of the purchaser of unregistered lands who has not yet forwarded any of the contract price against a third party to whom the vendor subsequently conveyed the land, where such third party had notice of the first contract. As we saw in *Waldron v. Jacob and Millie*,¹³² the courts have traditionally protected the initial purchaser's equitable interest against the legal weight of the interest of a subsequent purchaser with notice. The effect of *Tempany*, then, is that the initial purchaser's priority is forfeited; the subsequent purchaser with notice may obtain a stronger position against a purchaser, who, having paid none of the purchase money, has no equitable interest upon which he or she may rely in order to enforce his or her interest against that subsequent purchaser.¹³³ The position of the purchaser who has not paid any money is equally weak where the vendor merely contracts to sell the land with a party who then forwards at least some of the purchase price. Following *Tempany*, the latter but not the former acquires an equitable interest and consequently acquires priority.

128 *Re Strong, supra*, n.92, *Devoy v. Hanlon, supra*, n.94.

129 *Re Strong, id.*, and *Coffey v Brunel Construction Co. Ltd.*, n.122, in which the Irish courts concluded that the interest of a person who has entered into a contract and paid his or her purchase money constitutes a right which is capable of affecting land without registration.

130 Pursuant to section 97 of the *Registration of Title Act, 1964*.

131 Pursuant to section 98 of the 1964 Act.

132 *Supra*, n.67.

133 See Lyall, n.15 at 278, Lyall II, n.15, pp.1028-1029.

(c) **Rights and duties of the vendor and purchaser**

2.83 The doctrine of conversion has traditionally had a large impact upon the exact nature of many of the pre-completion rights and duties of the parties to a contract for the sale of land.¹³⁴ Certain rights and duties have been deemed to accrue to both parties upon the acquisition by the purchaser of the equitable estate in the land. The potentially large impact of *Tempany v. Hynes* may, therefore, be assessed by comparing and contrasting Irish law on the rights and duties of vendor and purchaser in its wake with those statements expressing the law on such rights and duties as stated in text-books, which tend to proceed on the basis that the *Lysaght* approach (or the Henchy J. approach in *Tempany*) represents the law.¹³⁵ There have, in fact, been few cases in Ireland, either prior to or after *Tempany* in which the rights and duties of the parties were at issue. Those aspects of the relationship upon which the doctrine of conversion has a bearing may be affected by this decision, whereas numerous other areas remain untouched. We must now consider the difficult issues of rights and duties which are potentially "apportioned" in accordance with the purchase money paid.

2.84 (1) **Duty of Care:** Keane in *Equity and the Law of Trusts in the Republic of Ireland* notes that the major practical significance attaching to the use of the constructive trust model to describe the relationship between the purchaser and vendor between contract and completion is the fact that the vendor is thereby placed under a duty to take reasonable care of the property.¹³⁶ The vendor as trustee is under a duty to the purchaser to use reasonable care to maintain the property, the subject matter of the sale, in a reasonable state of preservation during this period. The vendor-trustee is not, however, a mere dormant trustee; he or she is a trustee with "a personal and substantial interest in the property, indeed, a right to protect that interest, and an active right to assert it should anything be done in derogation of it."¹³⁷ Thus, he or she is both obliged to maintain the property on behalf of the purchaser and well advised to do so on his or her own account as the sale may fall through and the vendor may be left with the property.¹³⁸ This duty may subsist even after the period fixed for completion, if the vendor remains in occupation through no fault of the purchaser.¹³⁹

2.85 This duty of care may extend in, for example, the case of a business property, to preventing the loss of goodwill.¹⁴⁰ The purchaser shall have to bear the risk of any losses incurred in so doing, at least where the vendor informs him or her of the losses being incurred and presents the purchaser with the

134 Although as we shall see, the contractual basis of these rights and duties - regardless of the acquisition by the purchaser of any equitable estate - has become somewhat more evident in a number of more recent cases: see pages 44-46.

135 Wylie, *supra*, n.3; Farrand, n.21; Williams on Title, n.21.

136 *Supra*, n.5, p.182.

137 Per Lord Cairns in *Shaw v. Foster*, *supra*, n.7 at 388.

138 *Ecclesiastical Commissioners v. Pinney* [1899] 2 Ch. 729 at 735-6, (per Byrne J.); *Re Watford Corporations and Wares Contract* [1943] Ch. 82 at 85, (per Simonds J.).

139 *Phillips v. Silvester* (1872) 8 Ar. App. 173; *Clarke v. Ramuz* (1891) 2 Q.B. 456.

140 *Golden Bread Co. Ltd. v. Hemmings* [1922] 1 Ch. 162 at 172.

option of discontinuing the business.¹⁴¹

2.86 The purchaser may waive his or her right to claim in the event of a breach of the vendor's duty to maintain the property. Such a waiver will be implied, for example, where a purchaser accepts the conveyance and takes up possession knowing of the existence of damage to the property.¹⁴²

2.87 If, however, the beneficial interest in the property passes between vendor and purchaser in accordance with the payment of the purchase price, the vendor becomes trustee of the property only to the extent to which such has been transferred. Thus, in a standard sale in which a deposit of 10% is transferred, the awkward issue of a duty of care of 10% of the property arises.

2.88 The *dictum* of Kenny J. in *Tempany*, however, avoids this result by "postponing" the use of the constructive trust model as the device by which the relationship between the parties to the contract is governed. It is worth quoting this essential *dictum* again:

"A vendor *who signs a contract* with a purchaser for the sale of land *becomes a trustee in the sense* that he is bound to take reasonable care of the property until the sale is completed, but he becomes *a trustee of the beneficial interest* to the extent only to which the purchase price is made." (italics inserted)¹⁴³

2.89 Henchy J. in *Tempany*, when asserting that the beneficial interest passed to the purchaser once a binding contract is made, concluded that the vendor is from that moment treated as a trustee for certain purposes, such as the preservation of property from damage by trespassers.¹⁴⁴

2.90 Looking closely at Kenny J.'s *dictum*, it seems that he recognised the existence of two levels of "trusteeship". One which arises when the vendor enters into a contract with the purchaser, exists regardless of the payment of the purchase price and is limited to the duty to take reasonable care of the property. A second form of trust begins to emerge when the purchaser transfers the purchase money to the vendor: it is a more "true" form of trust in that it entails the separation of the equitable and legal title between the parties to the contract. The first level of his or her "trusteeship" does not involve a trust properly so called at all, in that there is no division of the equitable and the legal ownership. Kenny J. has, it appears, used the word in a loose sense to convey the fact that a vendor becomes "caretaker" of the property whilst it is in his or her possession, prior to completion.

141 *Id.* This, as Keane, *supra*, n.5, notes at p.183 is consistent with the general principle that the purchaser must bear the risk of loss. See pages 33-35.

142 *Connelly v. Keating* (No. 2) (1993) 1 I.R. 356.

143 *Supra*, n.12 at 144; see also page 23.

144 *Supra*, n.12 at 109.

2.91 Thus, Kenny J. is of the opinion that the vendor's position as "caretaker" i.e. his or her duty to take reasonable care of the property pre-completion, derives from contract. It is, therefore, an implied term of every such contract that the person in possession of the property, the subject matter of the contract, is under a duty to take reasonable care thereof.

2.92 Thus, the Irish Supreme Court has endorsed the contract model as the basis upon which the duty to take reasonable care of the property attaches to the vendor, and a constructive trust which is dependant upon the payment of money as the device by which other aspects of the interests of vendor and purchaser prior to completion are determined.

2.93 In the subsequent High Court decision of *Lyons v. Thomas*,¹⁴⁵ Murphy J., commenting on the different approaches taken by Kenny J. for the majority and by Henchy J. in *Tempany v. Hynes* concludes:

"It would seem, therefore, that there is, superficially at any rate, a conflict between the authorities as to whether the duty to preserve imposed upon the vendor derives from the fact that he is a trustee for the purchaser or whether indeed the status of the vendor as trustee arises from the fact that such a duty is imposed upon him by law."¹⁴⁶

The learned judge then notes that both lines of authority recognise a duty upon the vendor to take reasonable care of the property the subject matter of the sale *whether any purchase money is paid by the purchaser or not*. The first line of authority is consistent with the Henchy approach and the latter with the Kenny *dictum* in *Tempany*: in other words, a term, to the effect that the duty of care attaches to the vendor upon contract, is implied by law into every contract (unless, of course, that implied term is overridden by an express term to the contrary in a specific contract).

2.94 The *dictum* of Kenny J. renders the constructive trust model superfluous to the imposition of the vendor's duty of care. The "postponed" use of the trust, therefore, bypasses what Keane saw as the primary effect of this model. Irish law concerning the vendor's duty of care is thus consistent now with the approach advocated in England by Pettit. Commenting that it was firmly established that the vendor's duty of care derives from his or her position as trustee, he, nonetheless, remarks that it is perhaps unfortunate that the duty of the vendor is based upon such position: "it is submitted that it would have been as easy and rather more satisfactory to have put the duty upon an implied term in the contract."¹⁴⁷

2.95 (2) **Risk:** The *prima facie* rule is that the risk of destruction of property attaches to ownership:

145 (1986) I.R. 666.

146 *Id.* at 675.

147 *Supra*, n.16, pp.50-51.

"*Res perit domino*, the old civil law maxim is the maxim of our law and when you show that the property passed, the risk of the loss *prime facie* is in the person in whom the property is."¹⁴⁸

This principle is so well established that, since the earliest cases, the issue of risk seems never to have been raised or discussed separately from that of property: everything turned on the question of whether property had passed.¹⁴⁹ It extends to all forms of property, finding statutory expression, as far as goods are concerned, in section 20 of the *Sale of Goods Act*, 1893.

2.96 Following, then, the *Lysaght* line of authority, the risk of damage - in the case of land - other than damage caused by the vendor's failure to take reasonable care of the property, passes to the purchaser upon entry into a contract (albeit traditionally limited to those contracts capable of specific performance). As Sugden L.C. explained in *Vesey v. Elwood*:¹⁵⁰

"It is settled, but not without much previous conflict of opinion, that a purchaser in common cases is the owner of the estate from the time of the contract, and from that period must bear any loss, and is entitled to any benefit; and this applies as well to damage to the property, e.g., by fire, as to the interest in the property, for example, the death of the life for which it was holden."

2.97 However, the *Tempany* dictum postpones the operation of the doctrine of conversion by virtue of which the beneficial ownership in realty converts to the purchaser. The portion of risk which the purchaser must bear should correspond with his or her beneficial interest. Parties are thus faced with the awkward task of apportioning, on the basis of the purchase price paid, the burden to be borne; the risk is divided, for example, on a 90%-10% basis between vendor and purchaser respectively upon payment of a standard 10% deposit.

2.98 This difficulty is avoided when the parties to the contract avail of the Incorporated Law Society's General Conditions of Sale (1991 edition). Condition 43 provides that:

"Subject as hereinafter provided, the Vendor shall be liable for any loss or damage howsoever occasioned (other than by the Purchaser or his Agent) to the subject property (and the purchase chattels) between the date of sale and the actual completion of the sale BUT any such liability (including liability for consequential or resulting loss) shall not as to the amount thereof exceed the purchase price."

The effect of this provision is to separate the passing of the risk and of the beneficial property to the purchaser. Whether the Irish Courts adhere to the law

¹⁴⁸ *Martineau v. Kitching* (1872) L.R. 7 Q.B. 436 at 453-454.

¹⁴⁹ Williston on Sales, §300, citing *Noy's Maxims* and *Rugge Minett* (1809) 11 East 210.

¹⁵⁰ (1843) 3 Dr. War. 74.

as set out in *Tempamy v. Hynes* or, in time, adopt the view that equitable ownership does indeed pass on contract, the risk between the parties to a contract incorporating the Incorporated Law Society's General Conditions of Sale remains with the vendor until completion. The Law Reform Commission has previously endorsed Condition 43¹⁵¹ but, being of the view that to deal with this matter by contractual provision alone would be insufficient, has recommended that a statutory provision be enacted providing that the risk of destruction shall transfer to the purchaser from the vendor when the sale is completed or upon entry into possession, whichever is the earlier.¹⁵²

2.99 As the law stands, however, on those relatively rare occasions when the parties to a sale of land do not use the Incorporated Law Society's General Conditions of Sale, the parties must, it seems, bear the cost of destruction of property between them in direct proportion to the percentage of the purchase price which has passed from the purchaser to the vendor at the pre-completion date of destruction. The Law Commission of England and Wales when considering this matter commented:¹⁵³

"It seems to us that apportioning liability where only part of the purchase price has been paid could give rise to unnecessary complexity. It would not prevent the need for both parties to insure."

2.100 (3) **Benefits:** As the *dictum* of Sugden J. in *Vesey v. Elwood*¹⁵⁴ indicates, the acquisition of the beneficial ownership transfers to the purchaser not only the burden of risk but also all benefits which accrue to the property in the period between contract and completion. The effect of *Tempamy*, however, is such that the purchaser may now acquire such portion of the benefit as corresponds to the percentage of the purchase price paid; the rest attaching to the vendor. The potential for confusion which this approach presents may, however, be less than initially appears; at least if the Irish courts, when the matter comes before them, adopt the limited and logical definition of such capital benefits as has been endorsed by the English courts. In England, the courts have held that the purchaser is entitled only to benefits *to the land*, in other words, physical improvements.

2.101 The decision of the English Court of Appeal in *Re Hamilton-Snowball's Conveyance*¹⁵⁵ is one example of this approach. In this case the defendant bought a house, which had been requisitioned by the relevant borough council pursuant to certain war-time emergency provisions,¹⁵⁶ and purported

151 *Report on Land Law and Conveyancing Law: (3) The Passing of Risk from Vendor to Purchaser*, LRC 39-1991, p.4.

152 *Id.*, p.19.

153 Working Paper No. 109, *Transfer of Land: Passing of Risk from Vendor to Purchaser*, 1988, para. 3.10.

154 *Supra*, n.133.

155 [1959] Ch. 308, following *Raynor v. Preston* n.71, and *Re Lyne-Stephens and Scott-Miller's Contract* [1920] 1 Ch. 472.

156 The *Compensation (Defence) Act, 1939* enabled borough councils to deem houses "requisitioned" where necessary in the exercise of emergency powers. The Act also made provision for payment of compensation upon derequisitioning.

immediately to resell it for a much higher price without any reference to the requisitioning. The house was then derequisitioned prior to the conveyance to the plaintiff-purchaser and a large sum became payable to the defendant as the owner under the relevant legislation. The purchaser sought to obtain this sum, claiming that the vendor held it merely as trustee. The Court rejected this argument, Upjohn J. commenting that:

"The contract of sale did not, in my judgment, include or comprehend this compensation money. Had that been intended then, in my view, it should have been expressly put in as part of the subject-matter of the sale. I cannot see how it is possible to say in the circumstances of this case, that [the vendor], who is entitled to receive it under the terms of the Act, becomes in some way a constructive trustee of that sum which he has not contracted to sell to the purchaser."¹⁵⁷

2.102 In truth, then, if this approach is adopted, the notion of benefits attaching to the purchaser because of his or her equitable ownership is somewhat deceptive. The purchaser is in fact acquiring improved land. Regardless of whether he or she is treated as equitable owner or not, he or she will ultimately, i.e. upon completion, become entitled to such improved land in the sense that the vendor cannot resile from the contract on that basis.¹⁵⁸

2.103 In the event, therefore, that the purchaser has not forwarded the purchase money and consequently has no or merely partial equitable ownership, his or her entitlement to those capital benefits accruing to the land between contract and completion are merely "postponed" until completion. Such purchaser would appear, however, to have no right - or in the case of a purchaser who has paid a portion of the purchase price, only a limited right - to the capital benefits in the period between contract and completion. When the sale is completed, however, he or she obtains those capital benefits. A purchaser, however, owning the full equitable estate could avail of this benefit prior to completion.

2.104 In any event, where the vendor has made the improvements to the land,

¹⁵⁷ *Supra*, n.155 at 14-15.

¹⁵⁸ Under general law, the vendor could not, in these circumstances allege a misdescription of the property, thereby avoiding the contract: *Wylie, supra*, n.3, p.442 *et seq.* Again, where a contract is one to which the Incorporated Law Society's General Conditions of Sale (1991 Edition) apply, it seems doubtful that the courts would interpret General Condition 33(a)(i) to permit the vendor to obtain this result. The condition provides that:

"33 (a) Nothing in the Memorandum, the Particulars or the Conditions shall:

(i) entitle the Vendor to require the Purchaser to accept, or entitle the Purchaser to require the Vendor to assure (with or without compensation) property which differs substantially from the property agreed to be sold whether in quantity, quality tenure or otherwise, if the Purchaser or the Vendor (as the case may be) would be prejudiced materially by reason of any such difference."

Assuming that a vendor could show substantial difference, it is surely unlikely that the courts would interpret the words "prejudiced materially" to encompass the lower purchase price fixed by the vendor prior to the improvements.

the notion of the purchaser's *entitlement* to the benefits has been rendered somewhat illusory by certain English *dicta* which suggest that he or she must reimburse the vendor for those permanent improvements undertaken at a cost exceeding such income as was expended in maintaining the property in a reasonable state, in accordance with the vendor's duty of care.¹⁵⁹ The Irish courts have not considered this matter.

2.105 (4) **Sub-Sales:** The purchaser's right to sell on once a contract is entered into is firmly established by case-law.¹⁶⁰ As Lord Chelmsford noted in *Shaw v. Foster*:

"... the purchaser being the real and beneficial owner, I apprehend that there cannot be any doubt of his rights with regard to the property of which he had thus become the beneficial owner. He has a right to devise it; he has a right to alienate it; he has a right to charge it"¹⁶¹

Consider, however, in the light of *Tempany v. Hynes*, the effect of the payment by the purchaser of a standard 10% deposit to the vendor: should the sub-purchaser then forward a 10% deposit to the original purchaser, he or she would thereupon acquire merely a 1% beneficial interest, being 10% of 10%. It is not inconceivable that a chain of sub-sales might follow, with each successive purchaser acquiring only such fraction of the preceding vendor's equitable interest as represented the purchase price transferred.

2.106 (5) **Liens:** Save where the contract provides otherwise, the vendor has a right to remain in occupation of the premises until the full purchase price has been paid.¹⁶² Where he or she is already in possession, this right amounts, as Henchy J. noted in *Tempany*,¹⁶³ to a common-law lien on the land for the unpaid purchase money. In the unlikely event that he or she has handed over possession, the vendor retains an equitable lien on the land for the amount of the purchase money still outstanding.¹⁶⁴ This equitable lien entitles the vendor to apply to the court for an order for the sale of the land, so that he or she can recover the balance of the purchase price out of the proceeds of sale.

2.107 The Irish Court of Appeal decision of in *Re Kissock and Currie's Contract*¹⁶⁵ bears many similarities with the *Tempany* case: the Court was therein concerned with the attachment of a judgment mortgage to property the subject matter of a contract for sale of land in the period between contract and completion. In a three man court, Cherry L.C.J. dissented from the majority's

159 *Phillips v. Silvester*, *supra*, n.139 at 176 (*per* Lord Selbourne); *Bolton Partners v. Lambert* (1888) 41 Ch. D. 295 at 302 (*per* Kekewich J.).

160 *Gordan Hill Trust v. Segall*, *supra*, n.33 ; *Shaw v. Foster*, *supra*, n.7; LRC 30-1989, p.11.

161 *Supra*, n.7 at 328.

162 *Lysaght v. Edwards*, *supra*, n.7; *Phillips v. Silvester*, *supra*, n.139, *Re Kissock and Currie's Contract*, *supra* n.82; *Tempany and Hynes*, *supra*, n.12.

163 *Supra*, n.12 at 109.

164 *Id.*; *Williamson Title*, p.716. If the contract stipulates that the vendor should part with possession on a particular date, there is a presumption that this is subject to a good title being shown: *Tilley v. Thomas* (1876) 3 Ch. App. 61; J.T. Farrand, *Emmet on Title*, (Longman Professional, 19th ed.), para. 6.004.

165 *Supra*, n.82.

conclusion that the beneficial interest passed between the vendor and purchaser in proportion to the transfer of the purchase price. The Lord Chief Justice concluded that, "no shadow of an interest remained vested in the vendor, which may be affected by the mortgage." The most that the vendor could retain would be a lien for the unpaid purchase money which did not, in his opinion, constitute an interest in the lands which could be captured by a judgment mortgage.¹⁶⁶ It is at this point that the dissenting judgments of Cherry L.C.J. and Henchy J. diverge, as Henchy J. was of the opinion that the vendor's common-law lien - or if, although unlikely, the vendor parts with possession prior to completion, his or her equitable lien for the unpaid purchase money - represented a "transient beneficial interest" in the property capable of being charged by a judgment mortgage.

2.108 Purchaser's Lien: The purchaser may also have an equitable lien over the property in the interim period for any of the purchase money paid to the vendor. This lien, as a rule, relates to the deposit on the purchase money, paid by the purchaser. Should the vendor default and the sale fall through, the purchaser is entitled to the return of the deposit and the recovery of costs such as the expense of investigating a defective title.¹⁶⁷

2.109 A great deal of confusion permeates the case-law, however, regarding the relationship between a constructive trust and the purchaser's lien. The decision in *Rose v. Watson*¹⁶⁸ highlights, and greatly adds to, this confusion. The facts of this case have been described earlier.¹⁶⁹ For present purposes, it is sufficient to note that the purchaser under a contract deemed incapable of specific performance was nonetheless found to be entitled to an equitable lien on the estate for the purpose of recovering the money paid under the contract. As far as the relationship between the equitable lien and the constructive trust is concerned, it is clear that the Court viewed the two as interdependant. In this regard, it is worth quoting the passage from Lord Cranworth's judgment once more:

"When, instead of paying the whole of his purchase money, the purchaser pays a part of it, it would seem to follow, as a necessary corollary, that, to the extent to which he has paid his purchase money, to that extent the vendor is a trustee for him; in other words, that he acquires a lien, exactly in the same way as if upon the payment of part of the purchase money the vendor had executed a mortgage to him of the estate to that extent."

2.110 It is clear that in Lord Cranworth's view the purchaser's lien and the constructive trust necessarily coincide. The accrual of a lien is, by definition, dependent upon the payment of money. Adhering to Lord Cranworth's logic, the

¹⁶⁶ *Id.* at 399.

¹⁶⁷ *Turner v. Marriott* (1887) L.R. 3 Eq. 744; *Re Yielding and Westbrook* (1876) 31 Ch. D. 344.

¹⁶⁸ *Supra*, n.7.

¹⁶⁹ See page 10.

trust must also be. As Lyall notes:

"it takes only a moment's thought to realise that if the purchaser has any species of interest or remedy which protects his recovery of a deposit, it is one which can only exist if a deposit has in fact been paid. Lord Cranworth seems to believe that the lien has to be derived from the purchaser's equity based upon a valid and enforceable contract. If the lien comes into existence after money has been paid, then, the reasoning seems to go, it must be because the purchaser's equity to enforce begins only after money has been paid. But the lien has this limitation because it necessarily must do. It is not a logical interference from some other doctrine. This is the flaw. The judge on the one hand attempts to derive the lien from the equity, but then argues back again to impose a limitation on the equity derived from the lien. Yet what made sense for the lien makes no sense at all for the equity."¹⁷⁰

2.111 Thus the House of Lords failed to distinguish between the concepts of trust and of lien. Lord Cranworth's *dictum* may be treated as establishing two "rules". The first is that the purchaser's equitable lien and his or her equitable estate are interdependent. Secondly, such lien and equitable estate may be available to the purchaser who is party to a contract *incapable of specific performance*. It may, alternatively, be possible to treat this aspect of the *dictum* as limited to the particular facts of the case. Keane, in *Equity and the Law of Trusts in the Republic of Ireland*¹⁷¹ appears to suggest that it is a rule which may be generalised. Whichever approach is adopted, it follows from the first rule that if a lien exists, irrespective of the availability of specific performance, an equitable estate exists also: conversely, according to *Rose v. Watson*, if the availability of specific performance is a prerequisite for a purchaser's lien, a purchaser's estate must also depend upon its availability.

2.112 A majority of the Supreme Court endorsed *Rose v. Watson* and, in so doing, gave rise to the problems associated with *Tempany v. Hynes*. The concept of the lien is, obviously, intrinsically bound up with money, whereas the constructive trust between vendor and purchaser should operate irrespective of the transfer of money. If linked to the payment of money, the use of the trust concept may cause problems, as we have seen, in the area of apportionment of certain rights and duties¹⁷² and in the proper determination of competing interests in the land the subject matter of the contract for sale.¹⁷³

2.113 Lyall has recently commented upon the failure inherent in the *Tempany* approach to distinguish between the constructive trust and the equitable lien. The judgment of the Supreme Court in that case has, he notes:

¹⁷⁰ *Supra*, n.15 at 272-273; Lyall II, *supra*, n.15, p.1014.

¹⁷¹ *Supra*, n.5.

¹⁷² E.g., see the impact of this judgment upon the law of risk, considered at pages 33-35.

¹⁷³ See page 28 *et seq.*

"unfortunately given rise to the idea that ... there is only one form of purchaser's equity and that that form comes into existence not upon the formation of the contract whereby the purchaser agrees to buy the property from the vendor, but only upon the purchaser paying part of the consideration."

In Lyall's view, one equitable interest arises immediately a purchaser enters into a contract to buy the vendor's land. The learned author's terminology is unconventional: he calls this interest an "equity of enforcement", in the sense that it gives the purchaser the right to enforce the contract by specific performance against certain third parties who, subsequent to the purchaser, acquire an interest in the land. The other interest, in Lyall's words, is an "equity of restitution", and it arises when the purchaser begins to pay the purchase price. This is more conventionally called the purchaser's equitable lien.

2.114 The Supreme Court has had occasion since *Tempamy v. Hynes* to consider the purported relationship between the trust and the lien. The central issue in *Re Barrett Apartments Ltd.*¹⁷⁴ was the standing of pre-contractual booking deposits: this case, however, did provide an occasion for a discussion on deposits in general and on the nature of the purchaser's lien. Barrett Apartments Ltd., a building company, proposed to build a block of flats and received deposits from fourteen prospective purchasers of the proposed apartments. Only two of these individuals signed a building contract; in the case of the other twelve, no binding contract was entered into and the deposits were described as booking deposits. Barrett Apartments Ltd. subsequently went into liquidation and the assets of the company were insufficient to meet the claims of unsecured creditors. Thus a question arose as to the status of those persons who had paid their deposits.

2.115 In the High Court, Keane J. held that each of the 14 depositors was entitled to rank as a secured creditor, by virtue of his or her entitlement to a lien on the property arising from the money forwarded. Regarding the cases where a building contract had been signed, the Judge stated:

"...it seems clear to me that where there is a contract in existence the payment by the purchaser of part of the purchase price entitles him to a lien on the property in respect of the money so paid. There may be many reasons why a purchaser who has paid part of the purchase money may be precluded from specifically enforcing a contract in circumstances which are no fault of his; and his right to recover the purchase money actually paid by him and the existence of an equitable lien to secure the payment, cannot depend on the availability to him of such a remedy."¹⁷⁵

Keane J. and, on appeal to the Supreme Court, McCarthy J. regarded this

174 (1985) I.R. 350

175 *Id.* at 354.

proposition as deriving from the decision of the House of Lords in *Rose v. Watson*, the principles laid down in which were accepted by the majority of the Supreme Court in *Tempany v. Hynes*.

2.116 The Judge then turned to consider whether those who had forwarded merely a booking deposit could also claim a lien. In these circumstances the first "rule" of *Rose v. Watson* which prescribes that the purchaser's lien necessarily coincides with an equitable estate was inapplicable: the payer was not yet a purchaser i.e. no contract had been entered into. In the absence of a contract, the question of the transfer of an equitable estate and, thus, -adopting Lord Cranworth's approach - the accrual of a lien did not arise.

2.117 Lord Cranworth's *dictum* is, however, confined to the application of the purchaser's lien. This is only one species of the equitable lien, a limited equitable security which should serve to prevent unjust enrichment. Keane J. relied upon the *dictum* of Vaughan-Williams L.J. in *Whitbread and Co. Ltd v. Watt*.¹⁷⁶

"The lien which a purchaser has for his deposit is not the result of any express contract; it is a right which may be said to have been invented for the purpose of doing justice. It is a fiction of a kind which is sometimes resorted to at law as well as in equity."

2.118 On this basis, Keane J. concluded that those who had forwarded a booking deposit had a lien which did "not arise from the existence of any contract but from the right of the prospective purchaser to recover his deposit in circumstances where it would be unjust for the prospective vendor to retain it."¹⁷⁷

2.119 On appeal to the Supreme Court, the question of the availability of specific performance as a prerequisite for the purchaser's equitable estate and lien did not arise for discussion as the claim of the contracting depositors had been settled in the interim. The Court¹⁷⁸ was, however, concerned with the axiomatic link between the equitable estate and the lien. The Court unanimously endorsed this link. According to Henchy J.:

"the rationale behind allowing a purchaser a lien on the purchased property in respect of a deposit paid to the purchaser is that, by paying the deposit in pursuance of the contract, the purchaser acquires an equitable estate or interest in the property and therefore should be allowed to follow that estate or interest by being accorded a lien on it. See *Rose v. Watson* and *Tempany v. Hynes* ...

Where, as is the case here, no contract of purchase was entered into by

176 [1902] 1 Ch. 835 at 838.

177 *Supra*, n.174 at 355.

178 Comprising Henchy, Hederman and McCarthy JJ.

the depositors, and the only payment was what was called a booking deposit ... the payment of the booking deposit did not give the payer any estate or interest, legal or equitable, in the property - as would have been the case if a written contract had been entered into and the booking deposit paid on foot of the contract. There is no basis in law or equity, therefore, for treating the depositors as having, on payment of the deposit acquired a purchaser's lien on the property.

We have not been referred to any case in which a purchaser's lien was allowed to anyone who was not a purchaser i.e. anyone who had not entered into a contract to purchase."¹⁷⁹

2.120 The Court thus rejected the extension by Keane J. in the High Court of the equitable lien as a remedial device designed to ensure justice *inter partes* regardless of the presence of a contract. McCarthy J. saw Keane J.'s understanding of Vaughan-Williams L.J. in *Whitbread and Co. Ltd. v. Watt* as a misinterpretation: it may be, he noted, that as the Lord Justice said, the lien is not the result of any express contract, in the sense that it is not expressly provided for in the contract, but it is, however, dependent on there being a contract, "meaning what had originally been a legally enforceable contract."¹⁸⁰

2.121 As it stands, therefore, the law demands that a contract exist before a lien may be deemed to arise. The Supreme Court did not, however, insist upon a *specifically performable* contract. McCarthy J. spoke instead of "legal enforceability".¹⁸¹ In these circumstances, then, the conclusion drawn by Keane J. in the High Court has not been disturbed: the link between the purchaser's

179 *Supra*, n.171 at 357.

180 *Id.*, at 360.

181 *Id.* For a discussion on the criteria needed in order to secure a legally enforceable contract, see n.24.

lien and specific performance has been broken.¹⁸² It appears also, then, that the traditional link between constructive trust and specific performance, more trenchantly established in the case law, is also dissolved.

2.122 (6) The vendor is entitled to retain for himself or herself the **rents and profits** - i.e. income benefits - deriving from the land in the period between contract and completion. It is an entitlement which has simply been stated in the case-law¹⁸³ as a given fact, regardless of the separation of the equitable and the legal interests. It is, therefore, not affected by the decision in *Tempany*.¹⁸⁴ So long as the vendor is entitled to the receipt of rents and profits, he or she is accordingly obliged to pay for rates, taxes and other charges of this nature.

2.123 (7) **Death or Bankruptcy:** Another matter which is unaffected by the *Tempany* decision is the position of the parties to a contract upon the occurrence of a death or bankruptcy prior to completion. The death or bankruptcy of the vendor after the contract has been entered into will generally not prevent its completion.¹⁸⁵ Neither should the death of the purchaser in the period pending completion affect the natural course of the sale. The purchaser's devisee, or his or her personal representatives effectively stand in his or her shoes and the vendor is entitled to enforce the contract or to rely on a lien over the property.¹⁸⁶

2.124 Section 44 of the Bankruptcy Act, 1988 provides that where a person is

182 Coughlan endorses the view that it would be arbitrary and inequitable to treat the availability of specific performance as a prerequisite for an equitable lien "because the circumstances in which an innocent purchaser may be denied the discretionary remedy (e.g. the likelihood of undue hardship being experienced by the vendor) [have] nothing to do with the issue whether the purchaser should have security for the return of purchase money paid to the vendor. Specific performance and equitable lien [are] not connected because the former functions as to bring about the operation of the contract whereas the latter only appears in the event of the contract going off and logically the factors which guide the court's discretion to decree specific performance (which may change with time) could hardly be relevant to a principle which operates without such a decree."

He then refers to the judgment of Deane J. of the Australian High Court in *Hewett v. Court* (1983) 57 A.W.R. 211; See I.J. Hardingham, *Equitable Liens for the Recovery of Purchase Money* (1985) 15 M.U.L.R. 65. The Judge states: "[I]n my view, is there [not] any valid reason in principle why the mere existence of any one of the recognised grounds for refusing specific performance of, for example, a contract for the sale of land should automatically preclude a lien over that land to secure the purchaser's price of that property. The basis of specific performance lies in the equitable doctrine that personal obligations under a contract should be enforced where damages would be an inadequate remedy. The basis of an equitable lien between parties to a contract lies in an equitable doctrine that the circumstances are such that the property is bound by the contract so that a sale may be ordered not in performance of the contract but to secure the payment or repayment of money. In the ordinary case of a purchaser who desires the actual performance of his contract with a defaulting vendor, an equitable lien to secure payment of instalments of purchase price is only of real value if specific performance of the contract would not be decreed.

... [a]n equitable lien is quite different in character from the equitable estate or interest which passes in anticipation of the performance of a promise for valuable consideration to make a present transfer by way of sale or mortgage."

Coughlan, however, treats the availability of specific performance as a prerequisite for the purchaser's equitable estate and concludes, this, that the effect of the Supreme Court decision in *Re Barrett Apartments Ltd.* is to limit the purchaser's lien to circumstances in which specific performance is available. See Paul R. Coughlan, *Equitable Liens for the Recovery of Booking Deposits* (1988) 10 D.U.L.J. 90.

183 *Neville v. Slatery Estates Co. Ltd.*, High Court, Barrington J., unreported, 15 February 1984.

184 See Williams on Title, p. 721.

185 Wylie, *supra*, n.3, paras. 11.20-11.23.

186 *Dowdall v. McCartan* (1880) 5 L.R. Ir. 642; Wylie, *supra*, n.3, para. 11.38.

declared a bankrupt, his or her property shall vest in the official assignee for the benefit of the creditors of the bankrupt.¹⁸⁷

5. *Contract Law v. The Constructive Trust*

2.125 As we have seen, the transfer to the purchaser of an equitable estate commensurate with the amount of purchase money paid under a contract for sale, poses a number of problems as far as the relationship of the vendor and purchaser in the period between contract and completion are concerned. Many such difficulties are avoided by adopting the view taken by Henchy J. in *Tempany* that the equitable estate passes in its entirety to the purchaser upon entry into a contract subject to the requirement that it is ultimately completed.¹⁸⁸ The current law in Ireland stems from a failure to differentiate between the purchaser's lien and the constructive trust which arises between vendor and purchaser. The lien and the equitable estate represent two distinct equitable devices, designed to meet different ends. The approach adopted by Henchy J. implicitly adheres to this distinction.

2.126 Taking a step back from the case-law on the interests of the vendor and purchaser between contract and completion, we see that the courts' attentions have indeed focussed on the question as to the moment at which the trustee/beneficiary relationship arises. This is the question to which Kenny and Henchy JJ. provided different answers in *Tempany*. The preliminary question as to the utility of the constructive trust analogy as a vehicle by which the relationship of vendor and purchaser is defined has received little, if any, judicial attention. The English lawyer, Donovan Waters noted in 1962:¹⁸⁹

"... the questioning which should have concerned its essential validity, became concerned with its mode of operation and the result has been that the basic problem of the vendor/purchaser trust has been continually fought on the wrong issue."

To Waters, the trust is incompatible with the reality of the relationship of the parties in the period between contract and completion. He suggests that the relationship between the parties to a contract should be governed solely by the law of contract. To others, such as Hanbury and Martin, it is merely an anomaly,¹⁹⁰ albeit one firmly rooted over time and, hence, unlikely to be dismantled.

2.127 In its Working Paper on the law relating to the passing of risk in sales

187 Subject to the provisions of the Act. Section 3 defines 'property' as including 'money, goods, things in action, land and every description of property, whether real or personal and whether situated in the state or elsewhere; also obligations, easements, and every description of estate, interest and profit, present or future, vested or contingent, arising out of, or incidental to property as defined above.'

188 *Supra*, n.12 at 109.

189 Waters, *supra*, n.5, p.75.

190 Hanbury and Martin, *Modern Equity* (14th ed., Sweet and Maxwell Ltd., 1993), pp.319-320; Pettit, *supra*, n.11; Law Commission of England and Wales Working Paper No. 109, Transfer of Land: Passing of Risk from Vendor to Purchaser (1988) at para. 1.2.

of land,¹⁹¹ the Law Commission of England and Wales shared these doubts about the suitability of the trust concept. They expressed the view that:

"[t]he existence of this equitable principle appears to cause a great deal of complexity, in that the concept of the trust is not the most suitable means by which the rights and obligations of the parties to a contract are regulated. Accordingly, the law is more difficult to state than it need be."¹⁹²

The Law Commission then proceeded to consider, in the course of considering reforms of the law of risk, the proposal that the traditional practice of using the concept of trust as a means of regulating contracts for the sale of land be abandoned. This would effectively involve altering the time at which the equitable interest in land passes and a trust arises: according to this approach, the equitable estate may pass to the purchaser only when the legal estate does i.e. upon conveyance. The law utilised the constructive trust as a means of protecting the purchaser prior to completion: can his or her interests be adequately protected in this period without the help of the equitable estate?

2.128 It is proposed, then, to consider the rights and duties of the parties to a contract in circumstances in which there is no separation of the equitable and legal ownership.

2.129 The **duty of care** owed by the vendor to the purchaser as regards the property the subject matter of the sale derives, in the light of *Tempany v. Hynes*, from the law of contract. As indicated previously,¹⁹³ Kenny J., presenting the majority judgment, declared that the vendor was bound by such a duty of care from the moment of contract. Although in this regard he used the word "trustee" to describe the role of the vendor it is clear that in his view no separation of the equitable and legal interest occurred merely on contract and thus the obligation to care for the property represents an implied term of the contract for sale.

2.130 The use of the constructive trust *per se* - regardless of the approach adopted as to the moment of operation thereof - brings in its wake unfortunate consequences for the law of **risk**. The fundamental rule has traditionally been that ownership attracts risk: adopting, then, the Henchy J. approach to the constructive trust, risk attaches to the purchaser on contract, although the vendor as a rule retains possession prior to completion. The outcome of the Kenny J. approach seems to be that the risk transfers only in accordance with the payment of the purchase price by the purchaser to the vendor. Thus the difficult task of apportioning the burden of risk between the parties - complicated further in the event of sub-sales¹⁹⁴ - arises.

191 *Supra*, n.153.

192 *Id.* at para. 1.2.

193 See pages 32-33.

194 See page 37.

2.131 In the theoretical situation under consideration in which the purchaser acquires no equitable estate, however, the risk would, according to the rule that risk attaches to property, remain with the vendor until completion unless the contract itself provides otherwise. This represents a more satisfactory solution. The Law Reform Commission has, in fact, recommended that a statutory provision be introduced to provide that the risk shall pass to the purchaser only upon completion or when the purchaser takes possession, whichever is the earlier.¹⁹⁵

2.132 Again, the **capital benefits** which accrue to the land in the period between contract and completion would, in the theoretical "absolute" contract situation, attach to the vendor unless, of course, the contract stipulates that the purchaser should obtain same. In any event, the purchaser should, as we have seen, acquire these capital benefits when the contract is completed.¹⁹⁶

2.133 A purchaser may also enter into a contract of **sub-sale** with a sub-purchaser by virtue of which he or she agrees to convey the property, the subject matter of his or her contract to purchase, to that sub-purchaser at a later date, such as the date at which the conveyance to the purchaser is completed.

2.134 The vendor's entitlement to **rents and profits** does not derive from equitable ownership: case-law traditionally simply asserts that it rests with the vendor. Such position would remain unaltered under the contract approach unless, of course, the parties thereto decided otherwise.

2.135 **Liens:** The lien is indeed an exact description of the rights of the purchaser who has paid the vendor at least some of the purchase money, and Waters adds that "the equitable lien gains nothing as a remedy by describing it in the language of trusts."¹⁹⁷ The lien and the constructive trust are distinct remedies and the former should indeed be available to the purchaser regardless of the transfer to him or her of any equitable estate.

2.136 The range of application of the law of contract is not, however, without limitation; as, for example, when privity of contract is absent between parties. Third parties do, in reality, often enter the matrix of the contract for the sale of land and it is at this point that, without the aid of equity, the inadequacy of resolving problems by contract law principles alone truly emerges.

2.137 It is clearly established in contract law that the burden of a contract is incapable of simple assignment: a purported transfer to a third party of contractual obligations serves neither to release the transferor from the obligation to perform nor to make them enforceable directly against the party to whom they are allegedly transferred. Such transfer may be achieved only by novation, in other words, by obtaining the agreement of the other contracting party to the

¹⁹⁵ *Supra*, n.152.

¹⁹⁶ See pages 35-37.

¹⁹⁷ *Supra*, n.5, p.106.

discharge of the transferor from his or her obligations in consideration of a promise by the third party to assume those obligations. At common-law, then, it follows that if a vendor contracts to sell property to a purchaser, and, prior to completion, contracts to convey or, indeed, conveys that property to a third party who has notice of the first contract, the purchaser cannot enforce the contract against the third party. His or her only remedy is an action for damages against the original vendor.

2.138 We have considered this problem previously in the light of *Tempany v. Hynes*¹⁹⁸: a purchaser who has not forwarded any of the purchase money to the vendor is, at present, similarly placed and, as Lyall has noted, there does not appear to be any policy reason for this unfair result.¹⁹⁹ In order to obtain specific performance of the contract for sale, the purchaser must have a proprietary claim which can be enforced against the third party, despite the absence of privity of contract.

2.139 It is in these circumstances that the principles of equity become invaluable: the maxim that "equity regards as done that which ought to be" diverts, according to the Lysaght/Henchy J. line of authority, the purchaser's interest from the purchase money into the land, the subject matter of the sale. As equitable owner, then, he or she can obtain a decree of specific performance against the third party. This statement is made subject to the proviso that if a contract for sale of registered land between a vendor and a subsequent third party has proceeded to completion i.e. the latter is registered as owner, that third party shall not be affected by any equitable interest in the land, whether he or she has any notice thereof.²⁰⁰

2.140 The limits of the contractual approach have thus become evident: it is not an approach which adequately secures the interests of the purchaser. As we have seen above, the vendor can freely deal with the land to the purchaser's detriment: consider, then, the vulnerable position of a purchaser, devoid of any equitable estate in land against which another equitable interest is subsequently entered between contract and completion. Adopting a strict common law approach, the land which the purchaser acquires is unfairly encumbered by this subsequent interest. Use of the Lysaght/Henchy J. approach towards the constructive trust can ensure that this situation is avoided. The constructive trust represents a historical response by equity to the limitations of the strict contractual approach and it is suggested that to abandon the practice of transferring an equitable estate to the purchaser prior to the completion of the

198 See pages 28-30.

199 Lyall, n.15 at 278; Lyall II, n.15, p.1028.

200 If land is registered in the Land Registry, the register is conclusive evidence of the title as appearing thereon and such title shall not, pursuant to section 31(1) of the *Registration of Title Act, 1964*, "in the absence of actual fraud, be in any way affected in consequence of such owner having notice of any deed, document or matter relating to the land ...". With regard to the feasibility of the purchaser entering a caution or an inhibition, see page 30. Similarly, see page 30 on the question of transactions concerning registered land between the vendor and a third party where the matter has not yet proceeded to completion. If the contract relates to unregistered land, a third party with notice, may now, in the light of *Tempany* "happily ignore it"; per Lyall, *Supra* n.15 at 278, Lyall II, n.15, p.1029.

conveyancing process would be a disproportionate response to an analogy which, as we shall see, is, in essence, linguistically flawed.

2.141 Like the Law Commission of England and Wales, the Law Reform Commission, therefore, rejects the strict contractual approach i.e. the proposal that neither the equitable nor the legal estate, but merely contract rights, should vest in the purchaser prior to completion.²⁰¹ It has transpired to be a wholly unreal option.

2.142 But this is not what Waters in fact had in mind when he suggested that the position of the parties to a contract should be governed by the law of contract:²⁰² it was not his intention that the purchaser should not acquire any equitable interest but rather that the ill-fitting *language* of the law of trusts should not be used to distort a relationship based on *contract*, the instrument from which the purchaser's equitable estate in the first place derives.

2.143 He adheres to the view that upon entry into a contract, the equitable ownership of the property the subject matter thereof passes to the purchaser. In the eyes of equity, an agreement to sell or convey binds the conscience of the vendor with the result that such agreement is as forceful, in its eyes, as the sale itself. Thus equity thinks of the purchaser as the owner. It is useful to remind ourselves of the point, and thus bring to mind the fact that it is because of the contract that an equitable interest attaches to the purchaser. Whilst equitable ownership passes to the purchaser, the legal estate remains in the vendor, and from this separation of the interests between the two parties, comes the use of the trust device. Trusts bring certain consequences in their wake, however, and it is to such consequences in the context of the vendor and purchaser relationship that Waters objects: the contract is the primary source - it, and not the law of trusts, should determine the contours of the relationship of the contracting parties in the period between contract and completion. The law of trusts is, at times, an ill-fitting device by virtue of which to explain the reality of the relationship of the parties to the contract. For example, the law has long adopted a strict view in regard to any advantages which a trustee may derive from his or her position. As a general rule, no material benefit may be derived by a trustee from his or her position, nor may he or she be personally concerned with the trust property.²⁰³ Yet Waters notes that:

201 The rejection by the Law Commission of England and Wales of this approach was, however, based largely on the view taken by the Commission of the *terms of reference* for the study in question. It sought to review the law of risk and, bearing in mind the extent to which the trust concept influences the rights and duties of the vendor and purchaser prior to completion, concluded that "[a]ltering [such rights and duties] is unnecessary if all that is wanted is to affect the passing of risk and it would be difficult to judge what the effects of such a change might be. For all these reasons we do not recommend this option." See *supra* n.152, p.67.

202 Waters, *supra*, n.5, p.75.

203 There are a limited number of exceptions to this rule which, for example, facilitate, in certain defined situations, the payment of remuneration to a trustee for work carried out in his or her capacity as such. See Keane, *supra*, n.5, pp.120-123. Neither would it be accurate to say that a trustee may not in any circumstances be a beneficiary: life tenants, for example, are not infrequently also trustees. The *dictum* of Mayo J. in *Re Scott* [1948] S.A.S.R. 193 at 196, is commonly cited with regard to the definition of "trusts". This *dictum* recognises the possibility that a trustee, entrusted with the obligation of administering the trust property for the benefit of the beneficiaries thereunder, may himself or herself also be a beneficiary: "[a] trustee may be a beneficiary, in which case advantages will accrue in his favour to the extent of his beneficial interest."

"the vendor-trustee is much concerned, and that concern endures until the purchase money is paid. Since it is usual in the case of realty for a conveyance to coincide with such payment the moment of true trust analogy, therefore, is in fact momentary."²⁰⁴

2.144 The vendor, is for example, impliedly entitled to remain in possession of the property until completion. If the vendor chooses to part with possession prior to completion, he or she may rely on an equitable lien in order to secure payment of the unpaid purchase money. He or she is also entitled to retain any rents or profits to the land, arising before the date of completion.²⁰⁵

2.145 A converse way of saying that a vendor shall not as a rule be personally interested in the trust property is that all benefits arising from the trust property adhere for the benefit of the beneficiary. Yet it is clear that this is not the case, at least in England where, unlike this jurisdiction, the matter has come on for discussion.

2.146 In the 19th century decision, *Raynor v. Preston*²⁰⁶ the English Court of Appeal considered whether collateral interests, such as a fire insurance policy, ought to pass to a purchaser along with the beneficial interest in the property the subject matter of a sale. The majority were of the opinion that the trust was not so complete as to render the vendor a trustee for the purchaser of an insurance contract made between himself or herself and a third party. In other words, the purchaser had not contracted to purchase the insurance monies and therefore equity did not regard him as the owner thereof. Brett L.J. in *Raynor* stated that, according to the law of trusts;

"all the product, all the value of the property received by the vendor from the time of the making of the contract ought, under all of the circumstances, to belong to the vendee."²⁰⁷

Yet, the Lord Chief Justice observed that this was not, in fact, the case: the law insisted that all rents and profits accruing until completion should attach to the vendor. In what way then he asked, could the vendor/purchaser relationship be described as a trust?

2.147 *Raynor v. Preston* was relied upon in the subsequent decision of *Re Hamilton-Snowball's Conveyance*.²⁰⁸ As we saw earlier,²⁰⁹ it was alleged in this case that the vendor held a sum which he had obtained when the house to be conveyed was derequisitioned following the contract and prior to completion on trust for the purchaser. The courts rejected this argument, concluding that such compensation was not included in the contract of sale: had the parties

204 *Supra*, n.5, p.75.

205 See page 43.

206 *Supra*, n.72.

207 *Id.* at 10-11.

208 *Supra*, n.155.

209 *Supra*, pages 35-36.

intended that it should constitute part of the contract subject matter, they should have expressly stated this in the contract itself.

2.148 These conclusions are not compatible with the law of trusts; a full application thereof would have ensured that the respective purchasers obtained the benefit of the insurance monies and the compensation fund. The benefits derived by the two vendors highlight the essential incompatibility between the role of a trustee and the rights of a vendor.²¹⁰ It is such cases²¹¹ which lead Waters to conclude that the courts have been clothing decisions in fact based on contract law in the constructive trust analogy: "The language employed is the language of trust but the law applied is the law of contract as evolved in the common law courts."²¹²

2.149 Thus, although it was almost inevitable that in a situation in which there is a separation of the legal and the equitable interests recourse would be had to the law of trusts, the trust has in fact shown itself to be a blunt instrument, incapable of accurately dealing with the contours put upon the relationship between vendor and purchaser by the contract itself.

2.150 In Water's opinion the true position is one embodied in the "adjusted" maxim that "equity looks on that as done which is *contracted* to be done."

2.151 He concludes that the view of the trust has not added conceptually to the relationship between the parties but has, rather, served to obscure the true - *contractual* - position. Hanbury and Martin are inclined to agree but ultimately conclude that the change advocated by Waters is unlikely to occur: They note that:

"[e]ach party is continuing to guard his own interests against the other, and does so in a way which is quite inconsistent with the existence of the relationship of trustee and beneficiary.

No doubt it is too late to say that the relationship is not that of trustee and beneficiary. The terminology must, however, be received with reserve; and the situation must, at best, be treated as anomalous.²¹³

2.152 The Commission, however, tends towards the view that the change needed to meet the concerns expressed by those who question the merits of the constructive trust analogy seems quite superficial: it is merely a question of linguistic change. *As such, it is a step which can only be undertaken by the courts and, although not a priority, it is suggested that for purposes of clarity and accuracy, it is worthy of consideration.*

210 Although as we saw, *supra*, n.203, it is not inconceivable that a trustee may, in certain circumstances not relevant for our purposes, also be a beneficiary.

211 See also *Re Lyne-Stephens and Scott Miller's Contract* [1920] 1 Ch. 472.

212 Waters, *supra*, n.5, p.75.

213 Hanbury and Martin, *supra*, n.190, pp.319-320. See also V.G. Wellings (1959) 23 Conv. (n.s.) 173.

CHAPTER 3: REMEDIES OF THE VENDOR AND PURCHASER

3.1 Subject to any variation which may have been made by express provision in the contract of sale, the remedies of the vendor and purchaser are as follows:

1. *Vendor*

3.2 If the purchaser wrongfully refuses to proceed with the contract of sale, the vendor must elect between accepting and refusing to accept the purchaser's repudiation of the contract.

3.3 (a) **Affirming the contract:** The vendor may choose to affirm the contract and simply seek damages for breach thereof. Alternatively, he or she may seek to enforce the contract by means of an order for specific performance. As we have previously discussed,¹ specific performance is a discretionary equitable remedy and the court may refuse to grant it or, indeed, may choose to grant equitable damages in lieu thereof pursuant to section 2 of the *Chancery Amendment Act, 1858* (Lord Cairn's Act). Damages may also be awarded in addition to a decree of specific performance.² If the court grants an order for specific performance and the purchaser fails to comply therewith the vendor may either apply to the court for enforcement of such order or apply to dissolve the order and "rescind" the contract. Traditionally a vendor who chose the latter option could not obtain damages for breach of contract.³ The refusal by the courts to permit such damages derives from the loose usage of the word "rescission" to describe what is, in fact, discharge by breach. The word is commonly used to cover circumstances in which the contract is negated or,

¹ See page 9.

² See, for example, *Murphy v. Quality Homes*, High Court, McWilliam J., unreported, 22 June 1978.

³ See *Henty v. Schöder* (1879) 12 Ch. D. 68; *Capital and Suburban Properties Ltd. v. Swycher* [1976] 1 All E.R. 881; *M. Albery, Mr Cyprian Williams' Great Heresy*, L.Q.R. Vol. 91, 1975 at 337.

simply, discharged.

3.4 A contract which is procured, for example, through undue influence, fraud or lack of consent may be rescinded by the innocent party. In such circumstances, the innocent party is entitled to *restitutio in integrum*, that is, to be restored in every respect to his or her pre-contractual position as far as the subject matter of the contract is concerned.

3.5 However, the term "rescission" is also used when, as above, one party refuses to accept the other party's repudiatory breach. In such circumstances the contract is, in one sense, terminated but it is not retrospectively treated as if it had never been made, as in the case of inherent invalidity. A contract existed and has been broken. The innocent party can treat himself or herself as discharged from further performance thereof. As the English Court of Appeal noted in *Buckland v. Farmar and Moody*:⁴

"The word "rescind" may be used to describe the effect of the sort of relief that is normally granted where a contract has been obtained by fraud, misrepresentation or some other ground which vitiates its character as a contract, where the court thinks it right to annul the contract in every respect so as to produce a state of affairs as though the contract had never been entered into. But it is often used to describe the consequence of acceptance by one party to a contract of a repudiation of the contract by the other party by breach of some essential term of the contract."

3.6 The courts have traditionally allowed the vendor who chooses to "rescind", in both examples, to forfeit the deposit - even though this represents a deviation from *restitutio in integrum* - but not to recover damages for breach of contract. This refusal stems from a failure to distinguish between the consequences of rescission in its strict sense and that which arises due to acceptance by the innocent party of the other party's repudiatory action. In the former instance no contract ever existed and thus no damages can be awarded for its breach.

3.7 In the event of discharge by breach, the courts in Ireland and England have, however, recently endorsed the innocent party's right to recover damages for breach of contract. Lord Wilberforce, in delivering the unanimous judgment of the House of Lords in *Johnson v. Agnew*,⁵ repeated the proposition that:

"If the order for specific performance is not complied with by the purchaser, the vendor may *either* apply to the court for an enforcement of the order, *or* may apply to the court to dissolve the order and ask the court to put an end to the contract. This proposition [is] in my opinion undoubted law, both on principle and authority. It follows, indeed,

⁴ 1979 1 W.L.R.221 at 228.

⁵ 1979 1 All E.R. 883.

automatically from the facts that the contract remains in force after the order for specific performance and that the purchaser has committed a breach of it of a repudiatory character which he has not remedied or [that] he is refusing to complete."

3.8 He continued:

"These propositions being, as I think they are, uncontrovertible, there only remains the question whether, if the vendor takes the latter course, i.e. of applying to the court to put an end to the contract, he is entitled to recover damages for breach of the contract. On principle one may ask "Why ever not?" If, as is clear, the vendor is entitled (after and notwithstanding that an order of specific performance has been made), if the purchaser still does not complete the contract, to ask the court to permit him to accept the purchaser's repudiation and to declare the contract to be terminated, why if the court accedes to this, should there not follow the ordinary consequences, undoubted under the general law of contract, that on such acceptance and termination the vendor may recover damages for breach of contract?"⁶

3.9 In *Vandeleur v. Moore and Dargan*,⁷ McWilliam J. endorsed the judgment of the House of Lords in *Johnson v. Agnew*. The contract is not, he noted, merged in the judgment for specific performance but remains in effect: if an innocent party seeks, in the event of non-compliance with the order for specific performance by the defrauding party, the dissolution of such contract by the courts, he or she is entitled to recover damages for breach of contract.

3.10 (b) **Repudiation:** The vendor may decide to accept the purchaser's repudiatory breach and treat himself or herself as discharged from any further performance of the contract. In the light of the High Court decision of *Vandeleur v. Moore and Dargan*,⁸ the vendor who adopts this approach is entitled to recover damages for breach of contract and not merely, as was previously thought, to forfeit any deposit.

2. *Purchaser*

3.11 The purchaser may avail of a similar range of remedies in the event of the vendor's default on the contract for the sale of land.

(a) the purchaser may **affirm** the contract and seek damages for breach thereof. Alternatively he or she may seek an order for specific performance. Again the court has jurisdiction to grant damages in lieu thereof or in addition thereto. The same consequences as those detailed above attach to the vendor's failure to comply with an order for specific

⁶ *Id.* at 890.

⁷ 1981 I.L.R.M. 75.

⁸ *Id.*

performance: an order for enforcement or an order to resolve may be obtained. The House of Lords made clear in *Johnson v. Agnew*⁹ that damages for breach of contract are equally available to a purchaser who seeks dissolution of an order of specific performance.

- (b) If he or she chooses to accept the vendor's repudiatory actions and rescind the contract, the purchaser is released from his or her contractual obligations. The purchaser may seek a return of his or her deposit, relying on the breach of contract or upon his or her equitable lien,¹⁰ and may now also seek damages for breach of contract.

3.12 Where a contract falls through because of failure by the vendor to show good title, the rule in *Bain v. Fothergill*¹¹ establishes that, unless the vendor was fraudulent or otherwise acted in bad faith, the purchaser may not recover damages for loss of bargain but is limited to the recovery of his or her deposit with interest plus any expenses incurred in the investigation of title.¹² While it may have formerly been a valid rule¹³ it is difficult to justify nowadays, being described as "anomalous, archaic and a peculiarity."¹⁴ It is on this basis that the Law Reform Commission has recommended the abolition of this rule.¹⁵

3. Deposits

3.13 We have seen that the vendor may forfeit a deposit if the purchaser defrauds.¹⁶ In general, the purchaser may recover a contractual deposit, interest and the cost of investigating title from a defrauding vendor. A distinction must, however, be drawn between the deposit forwarded by the purchaser upon entry into a contract and a pre-contractual "booking" deposit.

3.14 The practice of paying such booking deposits has become commonplace in Ireland: this device, which is sometimes referred to as "earnest money", appears to have been introduced initially by builders in order to assure themselves of the good faith of those parties who had evinced an interest in buying. At first, the amounts of such booking deposits were fairly modest but, in time, they increased considerably. As far as second-hand houses are concerned, the booking deposit serves, in practice, as a means of ensuring that the fees of the relevant experts, such as auctioneers, are satisfied.

9 *Supra*, n.5.

10 See *United Yeast Company Ltd. v. Cameo Investment Ltd.* (1977) 111 I.L.T.R. 13.

11 (1874) L.R. 7 H.L. 158.

12 The rule was, in fact, applied by the Irish Courts twenty years prior to *Bain v. Fothergill* in *Buckley v. Dawson* (1854) 4 I.C.L. R. 211 and has been recently applied in, for example, *Kelly v. Duffy* [1922] 1 I.R. 82; *McDonnell v. McGuinness* [1939] I.R. 223; *McQuaid v. Lynham* [1965] I.R. 564.

13 For example, prior to the passing of the *Vendor and Purchaser Act, 1874*.

14 *Report on Land Law and Conveyancing Law: (1) General Proposals* (LRC 30-1989), pp.12-13.

15 *Id.*, p.13.

16 See *International Securities Ltd. v. Portmarnock Estates Ltd.*, High Court, Hamilton J., unreported, 9th April 1979. There is some doubt as to the vendor's ability to forfeit in cases where the deposit is substantial since he or she may potentially profit from both the forfeiture and from a subsequent resale: See Wylie, *Irish Conveyancing Law* (Professional Books Ltd., 1978, reprinted 1983), paras. 12.31-12.33.

3.15 The decision of the Supreme Court in *Re Barrett Apartments Ltd.*¹⁷ highlights the precarious position of the potential purchaser who forwards such a pre-contractual deposit: he or she does not obtain any lien on the property by virtue of which he or she may seek the return of the money forwarded.

3.16 A contractual deposit serves a double purpose. On the one hand it protects the vendor by providing a form of guarantee that the contract will be performed. It follows as a general rule that if one party defaults, the other party is entitled to the deposit.

3.17 On the other hand, a deposit also represents part-payment of the purchase price. In this regard, an interesting issue arises as to the status of a deposit received and held by a stakeholder: should a deposit in the hands of a stakeholder in fact constitute part-payment as the stakeholder acts not for one or other party but for both.¹⁸ Kenny J. in *Leemac Overseas Investments Ltd. v. Harvey*¹⁹ stated clearly, however, that a deposit held by a purchaser was indeed part-payment of the purchase price.²⁰

3.18 On this basis, Kenny J. also concluded that a vendor should bear the loss of a contractual deposit if a stakeholder defaults, disappears, or becomes a bankrupt, notwithstanding that the stakeholder does not retain the deposit on behalf of one particular party. It is also well established, both in Ireland and in England, that the vendor is responsible to the purchaser for the return of the deposit should his or her agent disappear, defraud or become bankrupt.

3.19 Although the facts of *Leemac* concerned a pre-contractual deposit, it was admitted in argument that the same law applied in such circumstances as applies to a contractual deposit. In reaching this conclusion, Kenny J. relied extensively upon a line of English authorities which has subsequently been overturned by the House of Lords: in *Sorrell v. Finch*,²¹ the Court unanimously concluded that, absent any express extension of authority to a house-agent or auctioneer to receive a pre-contractual deposit, the potential purchaser is, at all times until the contract is entered into, the only person with any claim or right to the deposit and if he or she chooses to forward such deposit then he or she must bear the loss. It remains to be seen whether the Irish courts will endorse this more recent approach.

17 1985 I.R. 350; Discussed at pages 40-43.

18 Yet condition 4(d) of the Incorporated Law Society of Ireland's General Conditions of Sale (1991 edition) provides that where the sale is by auction, "the purchaser shall forthwith pay to the vendor's solicitor as stakeholder a deposit of ten per centum [10%] of the purchase price in part payment thereof ..." Condition 5 states that "[W]here the sale is by private treaty, the purchaser shall on or before the date of the sale pay to the vendor's solicitor as stakeholder a deposit of the amount stated in the memorandum in part-payment of the purchase price."

19 1973 I.R. 160.

20 *Id.* at 167-168.

21 [1976] 2 All E.R. 371.

4. *Vendor And Purchaser Summons*

3.20 *The Vendor and Purchaser Act, 1874* provides for a special summary procedure for the settlement of certain disputes arising out of the sale of land. Section 9 of the Act states:

"A vendor or purchaser of real or leasehold estate ... may at any time or times and from time to time apply in a summary way to a judge ... in chambers in respect of any requisitions or objections, or any claim for compensation, or any other question arising out of or connected with the contract (not being a question affecting the existence or validity of the contract) and the judge shall make such order upon the application as to him shall appear just, and shall order how and by whom all or any of the costs of and incident to the application shall be borne and paid."

3.21 Section 9 is designed to deal with questions concerning the interpretation of a contract and the matters incidental to it. A court does not have the power thereunder to address the central question of the validity of a contract, nor to consider any alleged repudiation of the contract. The validity of a contract can only be determined by a full High Court action.

3.22 It has been held that a court has power under section 9 not only to answer the questions submitted to it but also to direct such things to be done as are the natural consequence of the answers given.²² It is not, however, clear whether the authority of the court under section 9, extends, for example, to ordering the return of the deposit to a purchaser.

22

Re Hargreaves and Thompsons Contract (1886) 32 Ch. D. 454.

CHAPTER 4: OPTIONS FOR REFORM

4.1 The law concerning the moment at which the beneficial interest in property the subject matter of a contract for the sale of land transfers to the purchaser is, at present, clearly unsatisfactory. An element of confusion appears to stem, in the first place, from the application of trust principles to the relationship of vendor and purchaser and secondly, and more importantly, from the conflict between the view of the majority in *Tempany v. Hynes* and the view expressed by Henchy J. in that case.

4.2 The issue may at times appear purely academic. For example in *Tempany v. Hynes* itself, this basic disparity in terms of approach did not prevent the court from reaching the unanimous conclusion that a vendor does retain an interest in the property which may be captured by a judgment mortgage in the period pending completion. Nonetheless the potential for practical as well as theoretical complexity is very much apparent. The existence of such uncertainty is grounds in itself for clarification by way of statute.

4.3 Three possible options are presented as to when a purchaser to a contract for the sale of land should acquire beneficial ownership of the property. The first option is that the beneficial interest should pass with payment of the purchase money, and the second that it should pass on completion. Clearly these options overlap in cases where the purchase price is tendered in a single instalment after all other matters have been attended to. The third option is that the beneficial interest should pass on contract.

1. The Beneficial Interest Passes With Payment Of The Purchase Money

4.4 This is the view of the majority in *Tempany v. Hynes* and represents the current position of the law in Ireland. Since the beneficial ownership of the land passes upon payment of the purchase money, the vendor accordingly becomes

trustee of the beneficial interest only to the extent to which the purchase money has been paid and he or she retains that portion of the beneficial interest which corresponds to the portion of the purchase money outstanding.

4.5 Kenny J. in *Tempany* adopted the approach of Lord Cranworth in the House of Lords decision in *Rose v. Watson*.¹ Underlying this approach was a failure adequately to distinguish between the concepts of lien and trust. The two were clearly perceived as interdependent with the result that the effectiveness of the equitable lien has been hindered: the process of recovering sums expended on foot of a contract of sale has become intrinsically linked to the task of establishing that such payment constituted a buying-over of the beneficial ownership, at least in part. This current Irish approach is somewhat out of step with much of the authority which preceded it² and appears to disturb those rights and duties of the parties to a contract for the sale upon which the transfer of an equitable estate has traditionally had a bearing. Such rights and duties may now be apportioned in accordance with the proportion of the purchase money paid.³ When the payment of the purchase money takes place by instalment over a period of time, the passing of the beneficial interest is gradual and, consequently, undesirably vague and uncertain. How do we determine in any practical way the exact rights, duties and interests of the parties over the entire property or, indeed, regarding any particular part of it at any given time?

4.6 The idea of dividing up the beneficial interest into portions is not least confusing in the context of judgment mortgages. What, for example, would be the impact of a charge registered between contract and completion against a vendor's interest in the land, where the amount of the charge exceeds the value of the interest remaining in the vendor as represented by the amount of the purchase price outstanding?

4.7 In evaluating the relationship between the parties, the emphasis has been shifted from the execution of the contract to its performance. Consequently, this approach does not afford a purchaser who has as yet not forwarded any - or has merely forwarded some - of the purchase money a desirable level of protection against the competing claims of many third parties. This approach provides that a purchaser who has not paid any of the purchase money has no interest in the land; he or she is clearly, therefore, placed in a vulnerable position against other parties who, after the contract for sale, acquire an equitable interest in the land. Thus, if a third party, subsequent to the contract, enters into a distinct contract with the vendor to acquire the same land and pays at least some of the purchase money, his or her claim to the land will be superior to that of the purchaser who, although first in time, has not paid any of the purchase money to the vendor.

4.8 A purchaser who forwards a portion of the purchase money obtains,

1 (1864) 19 H.L.C. 672.

2 *Supra*, page 15 *et seq.*

3 Although at least some of the rights and duties of the parties have recently been demarcated by the courts using a contractual law approach, without reference to the trustee/beneficiary relationship: see pages 31-44 and pages 45-46.

according to this approach, a corresponding portion of the equitable interest in the land. The rest of the equitable interest is retained by the vendor. A valid charge, such as a judgment mortgage, registered against the vendor's land after contract and prior to completion would, as we have seen, attach to that portion of the equitable interest in the land still held by the vendor. Upon completion, then, the purchaser would acquire the land in question encumbered by such post-contract charge.

4.9 It is even more difficult to determine what the position would be in cases where the agreement for the sale of land provides that the purchaser shall proffer consideration in some fashion other than the payment of money to the vendor, as for example was the case in *Re Kissock and Currie's Contract*.

4.10 In light of these considerations, the Commission rejects this option.

2. The Beneficial Interest Passes On Completion

4.11 This approach would remove the need to avail of the principles of trust, a device which appears at times incompatible with the reality of the relationship between vendor and purchaser. We have considered this option in detail and have concluded that the just determination of certain aspects of the relationship of the contracting parties with non-contracting parties is dependent upon an equitable interest vesting in the purchaser.⁴

4.12 We, therefore, rejected this option. (We did, however, treat as worthy of judicial consideration the submission that, although the equitable interest is a necessary tool for the protection of the purchaser, the *language* of the constructive trust does not always properly reflect the position of the parties to the contract prior to completion.)

3. The Beneficial Interest Passes On Contract

4.13 This appears to be the more established approach and was the method endorsed by Henchy J. in his minority judgment in *Tempany v. Hynes*. It is submitted that it is the only means by which the purchaser's interests prior to completion may be adequately protected.

4.14 This option may take two forms of expression. According to one approach,⁵ the beneficial ownership passes to the purchaser upon creation of a valid contract capable of specific performance : the doctrine of conversion operates retroactively to the date of contract once the contract is deemed to be one of which specific performance would be granted. Until that date, however, the position of the purchaser remains uncertain. This period of uncertainty can indeed be quite prolonged given that good title, a prerequisite of specific performance (unless the purchaser is prepared to accept the title shown,

⁴ *Supra*, page 45 *et seq.*

⁵ *Supra*, pages 7-10.

notwithstanding that it is not in accordance with the contract), is not finally shown under current conveyancing practice until the time of completion. Such absence of certainty, clearly heightened by the discretionary nature of the remedy of specific performance itself, clearly renders this an unacceptable option.

4.15 Adopting the other method, the beneficial interest passes once a binding contract for the sale of land is made, subject to a condition subsequent that he or she completes the sale. In other words, with the contract comes equitable ownership. If the contract ends, so too must the purchaser's equitable ownership. When a purchaser fails to complete, as we have seen, he or she gives the vendor the option of terminating the contract. If time is of the essence, failure to complete on the closing date presents the vendor with this option; otherwise he or she may do so within a reasonable time after the date fixed for completion.⁶ Should the vendor choose to "rescind" (using the word in its more loose sense),⁷ he or she regains the equitable ownership. If he or she chooses to affirm the contract, the equitable ownership remains in the purchaser's hands, until the purchaser does complete or until the vendor decides, in time, to terminate. Rescission by the vendor does not, however, operate retroactively to deprive the purchaser of the interest he or she possessed until the decision to rescind.

4.16 Is it fair that a purchaser who delays completion should nonetheless have, until the date of termination of the contract, rights which he or she can enforce against the vendor and third parties with competing claims to the land? What if the purchaser obtains the benefits of a contract which subsequently falls through? Consider the example which we have previously used: a vendor enters into a contract with a purchaser for the sale of land. Prior to completion, the vendor fraudulently contracts to sell the same land to a third party. Should the claim of a purchaser who does not complete take priority over that of the innocent third party? The situation would not, however, come to this - a purchaser seeking to obtain such priority over a third party proceeds by means of application for specific performance against the vendor and the third party: the courts exercising their equitable discretion do not grant such decrees unless satisfied that the purchaser is ready, willing and able to complete.

4.17 If a court were satisfied that the purchaser would proceed to completion and, therefore, granted the decree sought by the purchaser who nonetheless failed to complete the sale following the grant thereof, he or she would not be able to enforce the decree against the vendor and innocent third party in the courts. It would then be clearly in the vendor's interest to exercise his or her right to rescind⁸, whereupon the purchaser's equitable interest is lost, and the

⁶ Wylie, *Irish Conveyancing Law* (Professional Books Ltd., 1978, reprinted 1983), p.535 *et seq.*

⁷ See page 51 *et seq.*

⁸ Although the initial breach of contract was caused by the vendor's entry into a second contract for sale, the purchaser's decision to affirm the contract healed that breach. In the event, therefore, of a subsequent breach of contract by the purchaser the vendor has a right to rescind.

third party gains his or her rightful priority.⁹

4.18 This approach clearly represents the most satisfactory option, ensuring, to the greatest degree possible, that the courts and, more importantly, the parties to the contract themselves, can identify, at any given point in the period between contract and completion, the party in whom the equitable ownership lies. It also respects the clear and important distinction between constructive trust and lien, blurred by the approach adopted by the majority of the Supreme Court in *Tempany v. Hynes*.

4.19 *We therefore recommend that a statutory provision should be enacted providing that when a binding contract for the sale of land has been entered into, the law should treat the beneficial ownership as having passed to the purchaser from the time the contract was made, subject to the condition subsequent that he or she completes the sale. This recommendation is necessarily made on the understanding that the recommendations of the Law Reform Commission on the law concerning the passing of risk will also be adopted.*¹⁰

9 In the case of unregistered land, it would be open to the third party in the example above to register his or her contract in the Registry of Deeds. On those relatively rare occasions on which this option is availed of, registration grants priority to such contract in the absence of actual notice of the first contract on the part of the third party: see, for example, *O'Connor v. McCarthy* [1982] I.R. 161. Equally, the claim of a third party who qualifies as a *bona fide* purchaser for value of the legal estate without notice of the purchaser's equitable interest takes priority over the claim of the first purchaser. In both of these examples, the beneficial interest which, pursuant to the approach under discussion, passes to the purchaser by contract alone, reverts to the third party upon the occurrence of the event which gives priority i.e., registration in the first example and acquisition of legal title in the second. Until that moment, however, the purchaser under the first contract is clearly to be treated as the owner in equity. The appropriate remedy for such purchaser in these circumstances is damages for breach of contract by the vendor. Clearly, then, it is possible that, under this approach, a purchaser may lose his or her equitable ownership through no fault of his or her own. This applies equally, of course, to the law as it exists at present in the light of *Tempany*. But, it is submitted, that to adopt the alternative of granting priority to the purchaser under the first contract in the above examples would make it impossible to enter comfortably into contracts for the sale of land for fear that a contract of which one could not feasibly have had knowledge pre-dates one's own contract and, therefore, takes priority. In the Commission's view, then, the approach under discussion represents the most workable option, enabling the highest attainable degree of certainty as to the position of the parties.

10 See page 35.

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