



**THE LAW REFORM COMMISSION  
OF WESTERN AUSTRALIA**

**Project No 1 – Part I**

**Protection to Defaulting Purchasers**

**WORKING PAPER**

**OCTOBER 1968**

## INTRODUCTION

As part of its first programme the Law Reform Committee has been asked to consider the need for legislation to protect the rights of purchasers who default under terms contracts for the sale of land and to look at the possibility of modernising and consolidating certain statutes relating to the sale of land.

The Committee having completed its first consideration of the matter now issues this working paper. The paper does not represent the final views of the Committee. Comments and criticism on the paper are invited. The Committee requests that they be submitted by the 16th December 1968.

Copies of the paper are being forwarded to –

The Chief Justice and Judges of the Supreme Court of Western Australia

The Law Society of Western Australia

The Law Society of New South Wales

The Law Institute of Victoria

The Law Society of New Zealand

The Law School, University of Western Australia

C.P. Hutchinson, Q.C., Auckland

K.W. Hatfield, Q.C.

J.L. Toohey, Q.C.

M. Kott

The Commissioner of Titles

The Real Estate Institute

Other Law Reform Commissions and Committees with which this Committee is in correspondence.

The Committee may add to the above list.

The research material on which this paper is based is at the offices of the Committee and may be made available on request.

# WORKING PAPER

## TERMS OF REFERENCE

1. The original terms of reference were:

"To consider the law applicable to a defaulting purchaser under a terms contract for the sale of land and to report whether there is need for reform and the extent of such reform".

2. In considering this project it became apparent that the statute law on the subject was in need of revision and approval was obtained to the extension of the terms of reference to include a consideration of the provisions of the *Vendor and Purchaser Act 1878* (as amended), the *Sale of Land (Vendors' Obligation) Act 1940*, and *Purchasers' Protection Act 1933-1948*, to see whether they can be modernised and consolidated into one statute.

## TERMS CONTRACTS

3. By a terms contract we mean a contract for the sale of land under which the purchase price is paid by instalments over a period and the purchaser is not given title until all or some specified part of the instalments are paid.

4. Dealings at the Land Titles Office Perth indicate that many sales are effected by way of transfer with a mortgage back to the vendor, or to a lending institution, but that there are still a significant number of dealings by way of terms contracts which are frequently protected by caveat. We believe that many transactions involving the sale of farming and residential properties, and of sub-divisional land are still given effect to under terms contracts.

## THE PRESENT LAW IN WESTERN AUSTRALIA

5. In terms contracts the vendor retains title but becomes in equity a trustee of the land for the purchaser, though in a "qualified sense" and the beneficial ownership passes to the purchaser and remains with him so long as he continues to meet his obligations under the contract. The vendor has only a lien on the property as security for the payment of purchase

money (Voumard: Sale of Land 2nd ed.97). This relationship persists only while the contract remains on foot.

6. Even though a contract does not give the vendor an express right to rescind, he still has a common law right to rescind in the event of a breach of a material term in the contract by the purchaser.

7. Once the vendor exercises his right to rescind the purchaser loses his beneficial interest in the property and his rights and liabilities then depend either on the express terms contained in the contract or on the common law.

8. Where the contract contains no express default provisions, it is well established that on default at common law the deposit is forfeited to the vendor (*Howe v Smith* [1884] 27 Ch.D. 89) and any instalments paid (which are regarded as pre-payments of the consideration for the ultimate conveyance) belong at law to the purchaser on the basis that the consideration for the conveyance has failed and accordingly can be recovered at law by him subject to the vendor's right to counterclaim for damages. (*McDonald v Dennys Lascelles Ltd.* (1933) 48 C.L.R. 457) and also *Cowan v Stanhill Properties* [1967] V.L.R. 461).

9. In the English case of *Stockloser v Johnson* 1954 Q.B. 476 it is suggested that the courts should make no distinction between cases in which the contract expressly provides for the forfeiture of instalments and those in which the contract is silent on this matter. However, such a distinction should be made, with the purchaser being in the one case, entitled to equitable relief, and, in the other, having the right, at law, to repayment of the instalments subject to any set off for damage suffered by the vendor (*McDonald v Dennys Lascelles Ltd.*).

10. It should be noted that in any claim by the vendor for damages he must credit the purchaser with any increase in the value of the property. This provides a defaulting purchaser with a set off or shield: it serves only to reduce a claim for damage made by a vendor but does not give the purchaser an independent claim to the increased value of the property either at law or in equity.

11. Where the contract provides expressly for the forfeiture of the deposit *and* instalments, equity may grant relief against forfeiture of the deposit if penal and will generally hold that

forfeiture of instalments is penal and may give relief on equitable grounds. (*Coates v Sarich* 1964 W.A.R. 2 and *McDonald v Dennys Lascelles Ltd.*).

## **THE NEED FOR REFORM**

12. The purchaser under a terms contract is in the vast majority of cases sufficiently protected by the present law but it has been contended that if in default he may and does sometimes suffer injustice because the vendor may deprive him of –

- (a) the benefit of the bargain, and
- (b) any increase in the value of the property resulting from a rising market or improvements effected to it by the purchaser (except to the extent to which the purchaser may set off such increase against a claim by the vendor for damages).

13. This contention may be posed in another way: What justification is there for a Vendor obtaining more than he was entitled to by the original bargain? Should he not be satisfied if, on the purchaser's default, he recovers the amount contracted to be paid together with compensation for any damage suffered by him by virtue of the default? Why should he get the benefit of the improvements effected by the purchaser and why should he get the benefit of any increase in the value of the land?

14. It has been suggested that terms contracts usually do contain severe purchaser default clauses because the contracts have been drawn by solicitors acting for vendors; that though the parties may be said to have agreed to the terms, the clauses in fact are frequently included as a matter of course from earlier precedents, are seldom read and, if read, probably not understood; and that in such dealings the parties are not really at arms length, the purchaser usually being at a disadvantage. In particular it would seem to be the almost invariable rule to include in such contracts a clause making time of the essence.

15. We have been informed that during the depression many defaulting purchasers were the victims of harsh dealing.

16. However, we have not been told of any recent cases (i.e. within the last twenty years or so) of hardship or injustice and we assume that in the present times of increasing land prices the purchaser is generally able to protect his position (e.g. by raising finance on the land, or even arranging to sell) and should be able to do so provided he has reasonable notice before the default provisions are invoked against him.

17. Nevertheless, there could well be hardship if a purchaser through no real fault of his own or even through inadvertence fails to pay an instalment under a contract in which there is a "time of the essence" clause, and has the default provisions invoked against him immediately.

18. It has been suggested by the Law Society that purchasers under terms contracts could be protected by making provision by statute that on default the vendor should be permitted to exercise only those powers available to a mortgagee on default by a mortgagor under the *Transfer of Land Act*.

19. This could also be done by giving the purchaser a statutory right to call for the conveyance of the legal estate on condition that he give back to the vendor a mortgage on terms as to repayment no less favourable to the vendor than those contained in the contract.

## **STATUTORY PROVISIONS IN OTHER JURISDICTIONS**

20. We have considered legislation in Queensland, Victoria, New South Wales and New Zealand which in various ways deals with the relationship of vendor and purchaser.

21. Queensland appears to be the only jurisdiction amongst those mentioned which has set out with the expressed intention of granting relief to purchasers in default under terms contracts.

22. The legislation in that State gave rise to the severest criticism by the High Court (*Petrie v Dwyer* (1954) 91 C.L.R. 99) and should be looked at very carefully before it is used as a guide.

23. Victoria's *Sale of Land Act 1962* deals with the sale of land on terms, mortgages of land and the sale of land in subdivision. It was enacted mainly to meet the problem which had been created (during the land boom and credit squeeze) by intermediate vendors, who were themselves purchasers under terms contracts, defaulting and leaving purchasers at the end of the line without title. The Act provides that no person may sell land unless he is registered or immediately entitled to be registered as the proprietor. However it also provides that either a purchaser or a vendor under a terms sale may insist on the property being transferred to the purchaser subject to his giving a mortgage back to the vendor on terms equivalent to those contained in the original contract (and see Appendix A page 1). We have been informed that this has had the effect of overcoming the immediate problem in Victoria and has tended to replace terms contracts by transfers with mortgages back.

24. There does not seem to be a similar problem in W.A. at present.

25. New South Wales *Land Vendors Act 1964* was introduced to stop malpractices connected with the sale of subdivisional land. The Act applies only to the sale on terms (four or more payments) of a lot in a subdivision comprising five or more lots. It requires the appointment of a trustee in every such sale and gives him extensive powers to safeguard the interests of the purchaser. It gives the purchaser right to call for a transfer of the legal estate when 15% of the purchase price has been paid conditional on his giving a registrable mortgage back to the vendor. We are told that in practice trustees are not appointed, vendors finding it much more convenient to proceed by way of transfer and mortgage back to avoid the rather onerous conditions imposed by the Act.

26. As between the New South Wales and Victorian schemes, the latter appears to us to be preferable though if adopted it should be made subject to the proviso that if the vendor is to be forced into the position of a mortgagee he be given all the rights of a mortgagee including particularly the right to the payment of a reasonable amount of the purchase price (say 30%) before being obliged to effect a transfer: We emphasise however (see paragraph 24 above) that in this State there does not appear to be a problem calling for such interference with freedom to contract.

27. The New Zealand *Property Act 1952* (ss.50 and 118) gives to the purchaser a right to apply for relief against forfeiture on the same basis as that available to a tenant under the Landlord and Tenant Act.

28. This tends to leave too wide an area of discretion to the Court and would consequently lead to unnecessary uncertainty in the law.

### **TENTATIVE PROPOSALS FOR REFORM**

29. The only problem calling for early legislative action appears to us to be that referred to in paragraph 17 above. A purchaser under a terms contract in the conditions at present prevailing in this State would be sufficiently protected if in addition to his rights under the existing law he was given a statutory right to reasonable notice before the vendor could act against him on his default.

30. The legislation should provide for reasonable notice, without attempting to quantify in terms of days weeks or months. An arbitrary figures of say seven, fourteen or twenty-eight days might in some circumstances be fair, but in others not. The common law rule of reasonable notice seems to work satisfactorily.

31. It may be necessary (in order to overcome astute drafting to avoid the statutory requirement for reasonable notice) to include provisions in the statute empowering the court to look behind any written documents to ascertain the true bargain.

32. Our enquiries to this stage have not disclosed a need for any more extensive or radical change in the law than that indicated in paragraphs 29-31 above.

33. We are also of opinion at this stage that the existing legislation dealing with the vendor and purchaser relationship, namely the *Vendor and Purchaser Act 1878* (as amended) , the *Sale of Land (Vendors Obligations) Act 1940*, and the *Purchasers Protection Act 1933-1948*, should be consolidated, any obsolete or unnecessary parts being repealed: Notes on the three statutes appear as Appendix A to this paper.

34. The statutory provisions suggested in paragraphs 29-31 may well be included in the consolidated statute suggested in paragraph 33. A suggested outline for a consolidated statute appears as Appendix B.

## **APPENDIX A**

### **NOTES ON SALE OF LAND (VENDORS' OBLIGATIONS) ACT 1940 PURCHASERS' PROTECTION ACT 1933-1948 and VENDOR AND PURCHASER ACT 1878 (AS AMENDED)**

#### **I. THE SALE OF LAND (VENDORS' OBLIGATIONS) ACT 1940**

This Act was introduced to protect those who purchased land without checking to see that the land was unencumbered and who did not lodge caveats to protect their interests. It appears from the second reading speeches that the Bill was introduced as a result of one or two so called hard cases.

The Act makes it necessary for a vendor to notify the purchaser of any mortgage or encumbrance registered on the title before the purchaser executes the contract of sale and it then provides that the vendor shall not subsequently mortgage or encumber the land without an order of the court unless:

- (a) a caveat protecting the purchaser has been lodged and the subsequent transaction is subject to the caveat, or
- (b) the purchaser consents in writing.

In the event of default by the vendor, the Act simply provides for a fine or imprisonment; it does not relieve the purchaser.

The Victorian *Sale of Land Act 1962* goes considerably further in its protection of the purchaser. Section 7 of this Act provides that a vendor under a terms contract defined in the Act shall not mortgage land which is the subject of such a contract. It gives the vendor the right to call on the purchaser to take a transfer of the land and to give a mortgage back to the vendor on terms no less favourable than those in the contract. In practice the vendor can then raise finance on the security of the mortgage. Subsection 4 provides that when land is mortgaged in contravention of the section –

- (a) the terms contract is voidable by the purchaser at any time before completion;
- (b) the vendor is liable to a penalty of \$400.00;
- (c) if the mortgagee had actual or constructive notice of the purchaser's interest he shall not exercise his remedies under the mortgage and shall execute and register a discharge of the mortgage and then recover any moneys paid from the vendor.

Subsection 5 protects and aids the vendor in the event of the purchaser refusing to comply with the section. Subsection 7 sets out the circumstances in which the mortgagee shall be deemed to have constructive notice of the interest of the purchaser.

### **Possible reforms**

Additional legislative safeguards to protect ignorant and careless purchasers could make unwarranted inroads in the indefeasibility of title concept of the *Transfer of Land Act*. Possible reform however could include-

- (a) increase existing penalties for breach of vendor;
- (b) give the purchaser the right to avoid the contract prior to completion as has been done in Victoria.

## **2. THE PURCHASERS' PROTECTION ACT, 1938-1948**

This Act was introduced in 1933 as the result of a report of the Royal Commissioner appointed to enquire into the affairs of Land and Homes Limited, a land and estate agent. The company was purchasing large tracts of land in the metropolitan area under a contract which gave it the right of sub-sale of the whole or part. It subdivided the land and resold the lots by private sale using means which the Commissioner called "intensive selling". He said –

"The chief characteristic of this method is the employment of a large number of canvassers, a house to house canvass and liberal commission for securing buyers. The object is to sell a subdivision quickly by large scale methods. The chief factor inducing persons to become buyers is in my opinion inculcating a belief in the probability of being able to resell at a substantial profit in the future and I consider the creation of such a belief is part of the system mentioned." (See para J. Royal Commissioner's Report dated 19 November 1931).

The Royal Commissioner indicated that this type of selling should be discouraged mainly because the properties were sold at prices far and above over their real value. He said (in Schedule C to the report part 2) -

"As a result of the financial depression it is likely that a considerable proportion will be unable to fulfil their contracts and in the majority of cases the amount of outstanding instalments is far in excess of any probable value of the land for many years."

Complaints he found ranged from claims that documents were altered (though incidentally, he found that this was generally not the case) down to deceptive statements relating to the construction of roads, communications and provision for essential services etc. Complaints were also made that on default the vendors were obtaining judgments against defaulting purchasers for damages and executing against homes and personal property of the defaulters.

The Royal Commissioner recommended legislation and these recommendations were given effect to in the *Purchasers' Protection Act 1933*. There appeared to have been some hysteria engendered during second reading debates on the Bill. This Act only applies to the sale of subdivisional land as defined, i.e. land sold privately and not by auction. The following is an outline of its main provisions.

*Section 4* - Any representations relating to the land are deemed to induce the sale and if untrue are deemed to be made with knowledge and any representations of actual or proposed public utilities etc. are to be deemed representations that the public utilities etc. have been authorised by necessary authority.

*Section 5* - If land is not inspected a condition is implied in the contract that the purchaser may inspect within seven days and if not satisfied replicate within a further four days and recover his deposit.

*Section 6* - Gives the purchaser time to inspect the title and enables him to repudiate the contract if any defects are not rectified in a specified time.

*Section 7* - Makes it necessary for a deposit to be paid.

- Section 8* - The signature of the purchaser to the contract must be witnessed by an independent witness, who is qualified to witness documents for registration under the *Transfer of Land Act*.
- Section 9* - Contracts by married women, unless ratified by the husband, may be repudiated before completion, with the vendor being liable to refund all monies paid.
- Section 10* - On enforcement proceedings before a Court by the vendor or on a threat of such proceedings the Court is given very wide power to give relief to a purchaser where enforcement would cause hardship, or where the contract price is unreasonably high.
- Section 11* - Limits the operation of s.10 to contracts entered into within seven years of the commencement of the Act.
- Section 12* - The Court has power to protect a defaulting purchaser's house and furniture from execution after judgment.
- Section 13* - Prohibits contracting out.
- Section 14* - Excludes sales by auction and sales by persons who have not created the subdivision for the purpose of sale or acquired the same for that purpose.
- Section 15* - Prohibits offers of resale being made by a vendor or his agent.
- Section 16*- Prohibits house to house canvassing.

In 1946 it was thought that s.10 was inadequate and it was amended at the instigation of the Returned Services League to enable the Courts to interfere in more cases. The amendment was aimed at protecting servicemen's gratuities. Servicemen who returned after the war found that land they had purchased before the war was still worth considerably less than they had agreed to pay for it and yet they were being forced to payout the contract price or damages, quite often the amount to be paid being in excess of the then value of the land.

Section 10 was amended again in 1948. This was done for two reasons. First, to clarify the 1946 amendment, and secondly, to increase the scope for Court interference to counteract the effect of large scale resumptions made by the State Housing Commission. The State Housing Commission of course only compensated at the current value which was often well below the amount still owing on the contracts and most elaborate calculations were provided for in the amendment so as to give relief to purchaser owners affected.

### **Comments on the Purchasers' Protection Act**

The following comments relate to this Act viewed in the light of present conditions.

- (a) The Act is limited to the private sale of subdivisinal land. We know of no recent cases in which s.10 has been invoked.
- (b) The Act was passed to cover a situation that arose in a time of financial depression. It is doubtful whether the need for this protective legislation still exists.
- (c) Complaints of lack of roads, drains and other facilities are not now likely to arise because under the provision of the *Town Planning and Development Act* the approval of the Town Planning Board is required before any subdivision is made.
- (d) Representations that facilities exist or will be provided in the area of the subdivision will usually be upheld by the courts as collateral warranties and agreements (see *Sheppard v. Ryde Corporation* (1951-52) 85 C.L.R. 1).
- (e) It may be argued that some form of statutory protection as is contemplated by s.4 should be retained. The extent of the remedy given to a purchaser by s.4(2) is doubtful.
- (f) Sections 5, 6, 7, 8, 9, 15 and 16 are aimed at giving protection to the public from high pressure salesmen, a protection that may be usefully retained.
- (g) There has been no suggestion that the scope of the Act be widened.

### **Possible reforms**

- (a) It could be argued that the Act be repealed in toto as unnecessary because the present common and statute law provide sufficient safeguards.
- (b) Alternatively, some of the protection which the Act seeks to provide (suitably redrafted) might be retained:
  - (i) The provisions as to the effect of representations relating to the subdivision or the particular land (particularly s.4(1)).
  - (ii) The provisions giving protection against high pressure salesmanship.

### **3. THE VENDOR AND PURCHASER ACT OF 1878 (AS AMENDED)**

This Act was introduced with the object of laying down certain standard rules with regard to the establishment of title to general law land.

Section 7 was repealed by 43 Vic. No.3.

All other sections are necessary in general law conveyancing and should be retained. Section 9 is an extremely useful provision which allows ready access to the Supreme Court on questions of interpretation of contracts for the sale of land.

All save ss. 5, 6 and 8 should be retained.

## **APPENDIX B**

### **OUTLINE FOR CONSOLIDATED STATUTE SALE OF LAND ACT 1969**

#### **PART I REPEAL**

1. Repeal Vendor & Purchaser Act 1878 (as amended)  
Sale of Land (Vendors' Obligation) Act 1940  
Purchasers' Protection Act 1933-1948

(Query whether clause 6 of Table A.  
Transfer of Land Act should be repealed.)

#### **PART II GENERAL LAW LAND**

2. Take in ss.1, 2, 3 and 4 Vendor and Purchaser Act.
- 3.
- 4.
- 5.

#### **PART III VENDORS' OBLIGATION**

6. Take in existing provisions *Sale of Land (Vendors' Obligation) Act 1940*, suitably redrafted.
7. Increase penalty.
8. Add new clause enabling Purchaser to avoid contract where vendor breaches any of the provisions of this part.

**PART IV**  
**PURCHASERS' PROTECTION IN PRIVATE**  
**SALES OF SUBDIVISIONAL LAND**

9. Definitions - Private Sale  
- Subdivisional land.
  
10. Take in with appropriate redrafting the effect of ss. 6, 14, 16 and 17 of the *Purchasers' Protection Act 1933-1948*.
  
- 11.
- 12.
- 13.

**PART V**  
**TERMS CONTRACTS**

14. Define “terms contract”.
  
15. Prohibit invoking default under terms contracts without reasonable notice.

**PART VI**  
**MISCELLANEOUS**

16. Take in s.9 Vendor and Purchaser Act.
  
17. Prohibit contracting out of the provisions of Parts III, IV and V.