

# TALBOT SAYER NOTEPOOL

## LAWS1701 – Contract I – Formalities



Certain types of contracts must be evidenced in writing to be enforceable. This requirement for this formality originated from the Statute of Frauds 1677 (English), to protect parties from fraud. However, its provisions have since been re-enacted within State and Territory legislation.

Property Law Act 1974 (Qld) s 59	Contracts for sale etc. of land to be in writing  No action may be brought upon any contract for the sale or other disposition of land or any interest in land unless the contract upon which such action is brought, or some memorandum or note of the contract, is in writing, and signed by the party to be charged, or by some person the party lawfully authorized.
Fauzi Elias v George Sahely & Co (Barbados) Ltd [1983]	Therefore, an oral contract evidenced in writing by memorandum or note is enforceable.
Haydon v McLeod [1901]	The memorandum or note must come into existence after the contract has been made. (A memorandum or note made earlier cannot establish that a contract was made, only indicate a probability that a contract would be made.)
Popiw v Popiw [1959]	The memorandum or note must come into existence before commencement of action.

Haydon v McLeod [1901]	A written offer by the defendant accepted orally by the plaintiff constitutes an enforceable contract (in writing).
---------------------------	---

Disposition means any other transaction involving the transfer of land to the possession or care of another e.g. mortgage of land, lease of land, declaration of trust in relation to land. The party to be charged is the defendant.

The contract, memorandum or note:

Pirie v Saunders [1961]	Needs to contain all the essential terms of the agreement: parties, consideration (price), and subject matter described with sufficient specificity.
Timmins v Moreland Street Property Co Ltd [1958]	Joinder of documents: All the essential terms need not be contained in the one document. If the document signed by the party to be charged refers expressly or impliedly to another document or transaction which defines material terms of the agreement, they may be read together.
Timmins v Moreland Street Property Co Ltd [1958]	The other document or transaction must already be in existence or be executed contemporaneously with the signed document.
Pirie v Saunders [1961]	Authenticated signature fiction: A person may be taken to have signed a document although he or she has not put a signature

	to it, if their name is placed on the document with the express or implied recognition that it indicates an authenticated expression of the contract.
--	---

The contract is unenforceable by action, but not void. The contract cannot be relied on to provide a defence against a claim if the effect would be to enforce the contract.

Therefore, under common law, action cannot be taken to enforce the contract (specific performance) or for damages for breach.

However, under the law of restitution, where someone has paid money or transferred goods to, or performed services for, the other party, an action to recover the money or a reasonable sum for the goods or services may be available (*Pavey & Matthews Pty Ltd v Paul* [1987]). This is based on the principle of unjust enrichment: when one person is enriched at the expense of another under circumstances that are unjust, the recipient is obliged to make restitution. \*Action for quantum meruit.

Under the equitable doctrine of part performance, a court may order specific performance of a contract even though it was not evidenced in writing if the plaintiff has at least partially performed their contractual obligations under the belief that the contract was enforceable. To obtain such equitable relief:

<i>Maddison v Alderson</i> [1883]	The acts performed by the plaintiff which are alleged to constitute the part performance must be unequivocally referable
--------------------------------------	--

Regent v Millett [1976]  Ogilvie v Ryan [1976]	to the contract. (The conduct cannot be explained on any other basis.)*
Regent v Millett [1976]	They need not be acts required by the contract.
Regent v Millett [1976]	Taking possession of land in exchange for payment of money is a sufficient act of part performance.
	Payment of money alone is not as a sufficient act of part performance.

\*In England, this test was relaxed in *Steadman v Steadman* [1976]: “the rule must be that you take the whole circumstances, leaving aside evidence about the oral contract, to see whether it is proved that the acts relied on were done in reliance on a contract: that will be proved if it is shown to be more probable than not.” Australian courts have not adopted this approach, as seen in *Ogilvie v Ryan* [1976].

A court will typically award equitable remedies where (common law) legal remedies are inappropriate or inadequate, in order to achieve natural justice.

The most significant distinction that exists between the two systems is based on the remedies that each offers. In the common law, decisions are made by reference to existing legal doctrines or statutes, whereas in the equity system, the emphasis is laid on fairness and flexibility, which are known as the maxims of equity. For instance, the most common remedy a court of law can award is money in lieu of damages caused. Equity, on the other hand, enters injunctions or decrees directing someone either to act or to forbear from acting, which are in practical terms more valuable to a complainant. These equitable remedies can be only be dispensed by a judge as it is a matter of law. Another important distinction between equity and common law lies in the source of the rules governing the decisions that are made in each of the systems (Suryanarayana V. 2007)

A constructive trust is a trust that arises by operation of law where it would be unconscionable for a person who holds the asset to deny the beneficial interest of another person in the asset. When parties share a common intention that the plaintiff would have some interest in the defendant's property, and it would be unconscionable for the defendant to deny the plaintiff this interest, equity may enforce that common intention by the imposition of a common intention constructive trust. (Ogilvie v Ryan [1976]). This is often argued in disputes about ownership of property occupied by cohabitees.

Propriety estoppel (Riches v Hogben [1986]) places more emphasis on inducement (unilateral) whereas constructive trust places more emphasis on common intention/agreement (bilateral). Frustrated expectation vs frustrated bargain.

### Case summaries

Fauzi Elias v George Sahely & Co (Barbados) Ltd [1983]	Oral contract for purchase of defendant's property.  Memorandum/note consisted of receipt signed by defendant which referred to the property "agreed to be sold" i.e. to the oral contract.  This is a transaction rather than a document.
---	--

Haydon v McLeod [1901]	Oral contract for purchase of defendant's property. Written correspondence was not a sufficient memorandum/note because it preceded date of oral contract.
Popiw v Popiw [1959]	Wife left husband. Husband orally promised he would put title of home in both their names if she returned. She returned but later left and sought half-share in property. Although she was not under duty to return and therefore returning was good consideration, her written evidence of contract was an affidavit that came into existence after commencement of action.
Timmins v Moreland Street Property Co Ltd [1958]	Oral contract for purchase of plaintiff's property. Buyer later refused. Plaintiff sought to rely on joining receipt signed by plaintiff (which contained all essential terms) to cheque signed by defendant (party to be charged), because the receipt was signed after the cheque.
Pirie v Saunders [1961]	Tenant sought to compel landlord to perform a shop lease by using a note written by the landlord's solicitor as written evidence of a contract. Had it demonstrated a concluded agreement, it would have been a sufficient memorandum/note because of authenticated signature fiction. However, it only demonstrated incomplete negotiations.
Regent v Millett [1976]	Oral contract for purchase of defendant's property. Defendant agreed to transfer property to the plaintiff once plaintiff had taken over and completed mortgage repayments. Plaintiff made

	improvements to premises during this time. Defendant refused to transfer. Chose not to adopt Steadman test.
Ogilvie v Ryan [1976]	Defacto partners. Defendant asked plaintiff to move into a house which he purchased, which would then be hers for life. He died and did not leave it to her in the will. Executors sought to evict her. While the defendant would have succeeded on the Steadman test of part-performance, the court adopted the Madison test.
Wakeham v Mackenzie [1968]	Defendant gave up rent-restricted flat to keep house for an elderly widower based on oral contract in which he was to will the house to her. This action was sufficient part performance.
Riches v Hogben [1986]	Son emigrated on reliance of oral contract with mother in which she was to buy a house and put it in his name. Emigration was not sufficient part performance. However, there was inducement, detrimental reliance and unconscionability. Son was granted house (specific performance).



## Remedies

Law of contract	Law of restitution	Law of equity
Contract ((monetary) damages)	Restitution ((monetary) damages)	Part-performance (specific performance)
		Common intention constructive trust (specific performance)
		Estoppel (specific performance or (monetary) compensation)

Specific performance is an equitable remedy where a court issues an order requiring a party to perform a contractual duty (act). Here, usually proprietary award.