SUPREME COURT OF QUEENSLAND

CITATION:	*Duff v Blinco & Anor* [2006] QCA 497
PARTIES:	**MICHAEL GAVAN DUFF** (plaintiff/respondent) **v** **JEFFREY LIONEL BLINCO** **MAVIS JEAN BLINCO** (defendants/applicants)
FILE NO/S:	Appeal No 5121 of 2006 DC No 93 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Civil)
ORIGINATING COURT:	District Court at Dalby
DELIVERED ON:	1 December 2006
DELIVERED AT:	Brisbane
HEARING DATE:	30 October 2006
JUDGES:	McMurdo P, Keane JA and Fryberg J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Application for leave to appeal allowed** **2. Appeal dismissed** **3. Defendants to pay the plaintiff's costs of the application and of the appeal**
CATCHWORDS:	GENERAL CONTRACTUAL PRINCIPLES - OFFER AND ACCEPTANCE - AGREEMENTS CONTEMPLATING EXECUTION OF FORMAL DOCUMENT - whether concluded contract - whether primary judge erred in giving clause contractual effect GENERAL CONTRACTUAL PRINCIPLES - OFFER AND ACCEPTANCE - AGREEMENTS CONTEMPLATING EXECUTION OF FORMAL DOCUMENT - whether reference in clause is a sufficient note or memorandum so as to satisfy the requirements of s 59 *Property Law Act 1974* (Qld) - whether the agreement is a contract for the sale or other disposition of the interest in land within the meaning of s 59 *Property Law Act 1974* (Qld) *Property Law Act 1974* (Qld), s 11, s 59

Allen & Sons v Kirk [1927] St R Qd 85, considered
Baloglow v Konstantinidis & Ors [2001] NSWCA 451, cited
Connolly v Noone and Cairns Timber Ltd [1912] St R Qd 70, considered
Elias v George Sahely & Co (Barbados) Ltd [1983] 1 AC 646, cited
Ellison v Vukicevic (1986) 7 NSWLR 104, cited
FCA v Commissioner of Stamp Duties [1981] Qd R 493, cited
Grimwade v FCT (1949) 78 CLR 199, cited
Littlewoods Mail Order Stores Ltd v IRC [1963] AC 135, cited
One Stop Lighting (Queensland) Pty Ltd v Lifestyle Property Developments Pty Ltd (1999) Q ConvR 54-527, cited
Ord Forrest Pty Ltd v FCT (1974) 130 CLR 124, cited
Reid v Moreland Timber Co Pty Ltd (1946) 73 CLR 1, cited
S.C.N. Pty Ltd v Smith [2006] QCA 360; Appeal No 6215 of 2006, 22 September 2006, cited
Theodore v Mistford Pty Ltd [2003] QCA 580; Appeal No 11225 of 2002, 24 December 2003, cited
Theodore v Mistford Pty Ltd (2005) 221 CLR 612, followed

COUNSEL: S A Lynch for the plaintiff/respondent
A J Greinke for the defendants/applicants

SOLICITORS: Michael Mason for the plaintiff/respondent
Shannon Donaldson Province Lawyers for the defendants/applicants

[1] **McMURDO P:** I agree with Keane JA's reasons for granting the application for leave to appeal but dismissing the appeal with costs.

[2] **KEANE JA:** The plaintiff brought an action to recover money alleged to be payable to him by the defendants under a contract between the parties. Pursuant to r 483 of the *Uniform Civil Procedure Rules 1999* (Qld) ("the UCPR"), a preliminary question - whether the defendants were under any liability to the plaintiff at all - was the subject of determination separately from the other issues in the proceedings. This question was determined against the defendants.

[3] The defendants' application for leave to appeal arises from that determination. Because the decision of the learned primary judge was not a "final judgment", an appeal to this Court lies only by leave pursuant to s 118(3) of the *District Court of Queensland Act 1967* (Qld).

Leave to appeal

[4] The decision of the learned primary judge is determinative of the parties' rights, subject to the quantification of the sum payable to the plaintiff. It is said on behalf of the applicants that considerable complexity, time and expense will attend the quantification of the plaintiff's entitlement. Expense and inconvenience may be saved by this Court dealing with the question of liability now. A foreshadowed challenge to the learned primary judge's findings of fact was abandoned by counsel for the defendants at the hearing of the application for leave to appeal. As a result, the issues which are said to bear upon that question do not involve any attempt to

open his Honour's findings of primary fact, and, accordingly, are within relatively short compass.

[5] In these circumstances, it is convenient to grant leave to appeal, and to turn immediately to a consideration of the merits of the appeal.[1]

The contract

[6] The parties entered into an agreement in writing dated 9 May 1990 ("the agreement"). Originally, the plaintiff's brother was also a party to the agreement, but the plaintiff bought his brother out of his rights. Nothing is said to turn on these arrangements.

[7] The agreement conferred on the defendants the right to harvest timber from the plaintiff's property, Di Di. The agreement relevantly provided as follows:

> "1. The Vendor agrees to sell and the Purchaser agrees to purchase the rights to timber (as hereinafter defined) standing on the Vendor's land … for the sum nominated as the price and on the terms stated in the Schedule hereto together with the right to cut and remove the timber from the said land during the term nominated in the Schedule …
>
> …
>
> 3. For the consideration herein mentioned the Vendor will permit and allow the Purchaser and/or its duly appointed servants … and agents to enter upon the said land and to cut and remove the said timber … during the term …
>
> …
>
> 16. The Parties acknowledge this Agreement constitutes an extension of an oral Agreement entered into between the Parties prior to 1st July 1979.
>
> …
>
> THE SCHEDULE HEREINBEFORE REFERRED TO
>
> ...
>
> PRICE:- The purchase price of the said timber rights shall be the sum of SEVENTY THOUSAND DOLLARS ($70,000.00), payable as follows:
>
> (a) $35,000.00 payable on 30/06/90
>
> (b) $17,500.00 payable on 30/06/91
>
> (c) $17,500.00 payable on 30/06/92
>
> TERM:- The term of this Agreement shall be for the period commencing from the first day of May, 1990 and expiring the on the thirtyfirst day of April, 2000."

The decision of the learned primary judge

[8] The learned primary judge found that, in 1990, during a conversation at a dinner party at Jandowae, the parties reached an oral agreement in relation to timber rights, which was to be reduced to writing. The agreement was subsequently reduced to writing by solicitors acting upon the instructions of the plaintiff's brother.

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[1] For the sake of completeness, I note that on 18 July 2006 I made an order declaring the application for leave to appeal to be competent: see *Duff v Blinco(No 1)* [2006] 2 Qd R 528.

[9] The plaintiff's evidence of the discussion at Jandowae was that a holding fee or deposit was to be paid, and after timber to the value of that holding fee or deposit was cut out, timber cut out of Di Di would be valued at the ruling rate of royalty at the time of cutting. The defendants' evidence was that the "amount of $70,000 was not discussed as a deposit but a lump sum" being the only consideration payable by the defendants for timber taken by them from Di Di. His Honour rejected that evidence.

[10] The learned primary judge accepted the plaintiff's version of the discussion at Jandowae, but rejected the plaintiff's contention that the oral agreement was collateral to the written agreement of 9 May 1990. His Honour concluded that the parties intended that their agreement and all its terms should be reduced to writing.[2]

[11] His Honour concluded that the reference to the "oral Agreement entered into between the Parties prior to 1st July 1979" in cl 16 of the agreement is:[3]

> "the same agreement that was in existence between the plaintiff's father and Mr Blinco and others prior and up to the execution of the written agreement of May 1990. I am satisfied that, objectively, by their execution of the written agreement in May 1990 the parties intended that the prior oral agreement have some contractual effect. I am also satisfied on Mr Blinco's evidence that the agreement required Mr Blinco and others to pay royalties to Mr Duff's father according to the amount of timber cut and removed from the property."

[12] The learned primary judge thus held that cl 16 of the agreement referred to an earlier oral agreement entered into between the plaintiff's father and the firm, R W Blinco & Sons, a partnership that included one of the defendants. This earlier agreement was found to have included an obligation on the part of R W Blinco & Sons to pay royalties based upon the amount of timber removed from the property.

[13] In 1995, the defendants gave the plaintiff invoices which set out the timber taken from Di Di between May 1990 and October 1995. These invoices totalled $74,000. Subsequently, the defendants made the following payments for what were described on the defendants' cheque butts as "logs":

(a)	15 December 1995	$20,000
(b)	4 June 1997	$10,000
(c)	24 April 1998	$15,000

[14] In December 1997, the defendants made a further payment of $2,199.87 to the plaintiff in respect of timber cleared from Di Di for an easement required by Powerlink.

[15] The defendants contended that the payments referred to in the two preceding paragraphs were made by way of advance payments for timber to be obtained after the agreement had expired. The learned primary judge rejected the defendants' explanations of their conduct as unconvincing. That view of the evidence was clearly open to his Honour.[4]

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2 *Duff v Blinco*, unreported, DC No 93 of 2001, 29 May 2006 at [21] – [23].
3 *Duff v Blinco*, unreported, DC No 93 of 2001, 29 May 2006 at [27].
4 *Duff v Blinco*, unreported, DC No 93 of 2001, 29 May 2006 at [14] – [15].

[16] His Honour held that the oral agreement referred to in cl 16 of the agreement obliged the defendants' predecessor in title to pay to the plaintiff's predecessor in title royalties according to the amount of timber cut and removed from the property, Di Di. His Honour regarded cl 16 as incorporating the terms of that oral agreement as terms of the agreement.[5]

[17] His Honour, therefore, concluded that the reference to the earlier oral agreement in cl 16 obliged the defendants to pay royalties in respect of timber removed from Di Di calculated on the same basis as the earlier oral agreement between the plaintiff's father and R W Blinco & Sons.

[18] The learned primary judge went on to conclude that, insofar as the oral agreement referred to by cl 16 of the agreement of 9 May 1990 provided for the disposition of an interest in land, the requirements of s 59 of the *Property Law Act 1974* (Qld) were met by the terms of the written agreement of 9 May 1990 and, in particular, by cl 16 thereof. In this regard, his Honour said:[6]

> "… if I am right in my conclusion that on the proper construction of clause 16 of the written agreement the defendants are obliged to pay royalties to the plaintiff, then in my view the contract for the disposition of the interest in land or at least some memorandum or note of the contract, is in writing and signed by the defendants. In my view s 59 is no answer to the plaintiff's claim.
>
> If I am wrong in my view about s 59 I would be prepared to consider an application by the plaintiff to amend his reply to plead part performance …"

The defendants' contentions on the appeal

[19] The defendants contend that the agreement, properly construed, does not have the effect attributed to it by the learned primary judge; and, if it does, the obligation to pay royalties is unenforceable by reason of s 59 of the *Property Law Act*.

The effect of the agreement

[20] The defendants' first contention is that the learned primary judge erred in giving cl 16 contractual effect. The defendants' contention is that the language of cl 16 is not promissory. But, although the language of cl 16 is not promissory, it expressly acknowledges another agreement. As a matter of fact, as his Honour found, that other agreement consisted, as agreements commonly do, of promises.

[21] It is important that cl 16 provides that the agreement is an "extension" of that oral agreement. To the extent that the oral agreement contained a promise to pay royalties for timber taken from Di Di, it may readily be concluded that an extension of that agreement would effect a continuation of that promise.

[22] It may be accepted that the laconic expression of the intention which informs cl 16 does present a challenge to a court required to interpret the agreement. The interpretation of any contract must, of course, be approached on the footing that all of its provisions should be read, if possible, as elements of one coherent whole. The problem with the argument advanced by the defendants is that it does not even begin to address this challenge: the defendant seeks to treat cl 16 as a dead letter,

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5 *Duff v Blinco*, unreported, DC No 93 of 2001, 29 May 2006 at [27] – [29].

6 *Duff v Blinco*, unreported, DC No 93 of 2001, 29 May 2006 at [30] – [31].

explicable only perhaps as an historical declaration directed to the Commissioner of Taxation, but having no continuing operative effect between the parties.

[23] On the other hand, it might, for example, have been argued on behalf of the plaintiff that, in the agreement, said by cl 16 to be an extension of the earlier oral agreement, the price for which the agreement provided should be regarded as the price of the grant only, ie that the $70,000 was the consideration for the grant of the exclusive right to take timber from Di Di, for a period of 10 years. So viewed, the $70,000 was not part of the consideration for the timber actually taken over time in the exercise of those rights. This view of the provision was not advanced by the plaintiff, and, accordingly, was not addressed by his Honour.

[24] The learned primary judge accepted a more modest claim by the plaintiff. His Honour regarded cl 16 as having the effect of extending the obligation in the earlier oral agreement to the present defendants to pay royalties for timber actually taken. On his Honour's view, the $70,000 was payable, both for the extension of the right to take timber for 10 years (whether or not any timber was taken by the exercise of that right), and on account for timber which might actually be taken in the exercise of that right. It was an interpretation which was open to the learned primary judge. The terms of cl 3 of the agreement speak of the "consideration herein mentioned" as the consideration for the actual removal of timber. This suggests that all the forms of consideration mentioned in the agreement (including cl 16) as moving from the defendants to the plaintiff were consideration for the actual removal of the timber by the defendants. In this way, the "price" referred to in cl 1 could be treated as part of the consideration for timber actually removed by the defendants.

[25] The defendants argued that the construction of the agreement adopted by the primary judge allows cl 16 to override cl 1 and cl 3. In my respectful opinion, that is not so. First, in cl 1, the price of $70,000 is expressed to be the purchase price of the "rights to timber … standing on" Di Di. The price is not related in the same way to the "right to cut and remove the timber", a phrase used elsewhere in cl 1.

[26] Further, in cl 3, the expression "consideration herein mentioned" is used, rather than the expression "price" which is used in cl 1. The "consideration" referred to in cl 3 is a more expansive term than "the price", and is defined as the price for the "rights to timber" granted by cl 1. The former expression distinctly refers to the entirety of the consideration in the agreement from the defendants in return for the plaintiff's agreement to allow the defendants to "cut and remove" the timber.

[27] In my view, the more capacious concept, "consideration", used in cl 3 is well capable of including the plaintiff's rights incorporated by reference in cl 16. It is, therefore, possible to accept that the "price" of $70,000 is referable to the grant of the exclusive right to take timber from Di Di for the duration of the agreement, as well as payment on account of timber actually taken. This interpretation of the agreement accords more closely with the language of the agreement than the interpretation advanced by the defendants in which the "price" as defined by cl 1 is to be understood as an exhaustive statement of the entire consideration receivable by the plaintiff under the agreement.

[28] The defendants' argument on this point gives virtually no effect to the parties' affirmation in cl 16 of the agreement that the agreement is an "extension" of the earlier oral agreement. The defendants say that this language may be explicable as

an attempt to "label" the transaction for tax purposes; but to say even this is necessarily to accept that recourse to the evidence is necessary to understand cl 16. Once it is accepted that reference to the evidence is necessary to explain the meaning of cl 16, then the defendants' argument falls foul of his Honour's conclusion that, as a matter of fact, the oral agreement referred to in cl 16 provided for the payment of royalties for timber taken from Di Di.

[29] To the extent that the learned trial judge relied on the subsequent conduct of the parties to establish the terms of the oral agreement of which the agreement was expressed to be an extension, in my respectful opinion, his Honour's approach was an orthodox application of the well-established principle that conduct of the parties subsequent to the making of a contract can be relied upon to establish that an agreement in particular terms has been concluded. The defendants' first contention must be rejected.

Section 59 of the *Property Law Act*

[30] The defendants' second contention was that the learned primary judge erred in treating the reference in cl 16 of the agreement as a sufficient note or memorandum of the contract on which the plaintiff relies so as to satisfy the requirements of s 59 of the *Property Law Act*. That provision is in the following terms:

> "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 by the party lawfully authorised."

[31] The defendants argue that the mere reference in cl 16 of the agreement to an earlier oral agreement does not provide written evidence of the terms of the oral agreement to which it refers. To the extent that the agreement refers to, and operates by reference to, the earlier oral agreement, the defendants argue that the agreement does not contain a written specification of the consideration payable by the defendants by virtue of the oral agreement. Accordingly, so it is said, the agreement does not comply with s 59 of the *Property Law Act*, and is, therefore, unenforceable.[7] In my respectful opinion, this submission is founded upon the erroneous assumption that the agreement, including the oral agreement referred to in cl 16, is a contract for the sale or other disposition of land or an interest in land.

[32] It is common ground that the agreement creates an interest in land by way of a profit à prendre;[8] but that does not attract the requirements of s 59 of the *Property Law Act*. Section 11 of the *Property Law Act* provides that an interest in land may relevantly be created or disposed of "by writing signed by the person creating … the same", ie by the grantor. In this regard, s 11(1)(a) of the *Property Law Act* provides:

> "no interest in land can be created or disposed of except by writing signed by the person creating or conveying the same, or by the person's agent lawfully authorised in writing, or by will, or by operation of law."

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7 Cf *Elias v George Sahely & Co (Barbados) Ltd* [1983] 1 AC 646.

8 *Connolly v Noone and Cairns Timber Ltd* [1912] St R Qd 70 at 77; *Ellison v Vukicevic* (1986) 7 NSWLR 104 at 113 – 116.

[33] Section 11 of the *Property Law Act* imposes no requirement for a signed memorandum of the terms of any agreement relating to the grant signed by the grantee. The agreement is a sufficient "writing" signed by the plaintiff as the person creating the interest in the land to satisfy s 11(1)(a) of the *Property Law Act*. The crucial question for present purposes is whether the agreement is a "contract for the sale or other disposition" of that interest or, indeed, of any other interest in land within the meaning of s 59 of the *Property Law Act*.

[34] The *Property Law Act* observes, in its prescriptions of different formal requirements for the different transactions referred to in s 11 and s 59 respectively, a distinction between the creation or disposition of interests in land and contracts for the sale or other disposition of land. It is possible, of course, that some transactions may be regulated by both provisions,[9] but, in the present case, the agreement belongs to the former, and not to the latter, category.

[35] A disposition of an item of property usually involves the alienation of that property by a disponer to a disponee.[10] Accordingly, when one speaks of a disposition of property, or of an interest in property, one is usually referring to the transfer of the property in question. The scope of the expression "disposition of land" may, of course, be expanded by Parliament.[11] In Sch 6 of the *Property Law Act*, the term "disposition" is defined to include:

> "a conveyance, vesting instrument, declaration of trust, disclaimer, release and every other assurance of property by an instrument except a will, and also a release, devise, bequest, or an appointment of property contained in a will."

[36] There are statements in the authorities relating to the analogues of s 11 of the *Property Law Act* that the creation of an interest is not a disposition of an interest.[12] However that may be, in this case, the question is not whether the agreement effects a disposition of property. The question is whether the agreement is a **contract for** the sale or other disposition of an interest in land. Section 59 of the *Property Law Act* does not require a note or memorandum of an agreement which effects the "creation" of an interest in land, no doubt because any mischief that might arise by reason of the absence of documentary proof of the **creation** of interests in land is thought to be sufficiently addressed by s 11 of the *Property Law Act*.

[37] Section 59 of the *Property Law Act* speaks of a contract for sale, not a contract of sale. A "sale" of land is the actual transfer of land for money, as distinct from an agreement to sell land for a contract for the sale of land. A contract for sale, or an agreement to sell, consists of executory promises to transfer land for money.[13] In this regard, the agreement does not, in its terms, contain an executory promise to sell or otherwise dispose of an interest in land in the future. It purports to take effect forthwith. It purports to effect an immediate sale "of the rights to timber" and "the right to cut and remove timber". The agreement is apt immediately to create an interest in land as a profit à prendre; but to say that is only to accept that the

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9 *Theodore v Mistford Pty Ltd* [2003] QCA 580.

10 *Ord Forrest Pty Ltd v FCT* (1974) 130 CLR 124 at 142, 147 – 148.

11 *Grimwade v FCT* (1949) 78 CLR 199 at 208.

12 *Baloglow v Konstantinidis & Ors* (2001) 11 BPR 20,721, 20,750-1; [2001] NSWCA 451 at [116] – [123].

13 *Littlewoods Mail Order Stores Ltd v IRC* [1963] AC 135 at 152; *FCA v Commissioner of Stamp Duties* [1981] Qd R 493 at 499, 511 – 512; *S.C.N. Pty Ltd v Smith* [2006] QCA 360 at [75].

agreement creates an immediate interest in land. It is not to say that the agreement is a contract for the sale or disposition of any interest in land.[14] In this latter regard, the agreement is not framed in the language of an executory promise to create an interest in, much less to make a transfer of, land. It is, therefore, not a **contract for** a sale or other disposition of land. In my respectful opinion, the agreement was not a "contract for the sale or other disposition" of the profit à prendre created thereby. The agreement may itself have effected a disposition of property, but it was not a **contract for** any dealing with that property at all.

[38] It was contended on behalf of the defendants that this view of the agreement is contrary to the decisions in *Connolly v Noone*[15] and *Allen & Sons v Kirk*.[16] Reference to these decisions shows, however, that they were concerned with whether an agreement gave rise to an interest in land as a profit à prendre. In this case, that issue is not controversial. The decisions to which the defendants referred were not concerned with the question presently under consideration.

[39] The agreement created an interest in land by conferring on the defendants the right to take as many trees as they might wish during the term of the agreement. The written terms of the agreement are sufficient to meet the need for writing where an interest in land is to be created. The oral agreement referred to in cl 16 of the agreement does not create an interest in land in favour of the defendants: that interest has already been created, and no fresh right to take trees, considered as standing timber and part of the land, arises under the oral agreement referred to in cl 16. The oral agreement referred to in cl 16 continues to operate, not by conferring rights on the defendants but by the continuation of an obligation to pay for trees taken by the defendants. Under that oral agreement, understood as extended (and necessarily modified) by the agreement, the defendants are obliged to pay royalties for trees taken in exercise of the profit à prendre created by the agreement where the total value of those trees has exceeded $70,000. The defendants' obligation in this regard is not to pay for an interest in land: that interest has been created by cl 1 of the agreement. Rather, the oral agreement referred to in cl 16 continues to impose on the defendants an obligation to pay for trees which have been severed from the land and taken by the defendants in the exercise of the profit à prendre so created.

[40] For these reasons, I would reject the defendants' second contention.

Conclusion and orders

[41] I would allow the application for leave to appeal.

[42] I would reject the defendants' substantive contentions and dismiss the appeal.

[43] The defendants must pay the plaintiff's costs of the application and of the appeal.

[44] **FRYBERG J:** Subject to what follows, I agree with the reasons for judgment of Keane JA.

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14 *One Stop Lighting (Queensland) Pty Ltd v Lifestyle Property Developments Pty Ltd* [1999] Q ConvR 54-527.

15 [1912] St R Qd 70.

16 [1927] St R Qd 85.

[45] In relation to s 59 of the *Property Law Act 1974*, the central submission advanced by the applicants was that there was no reason why the grant of an interest could not be included within the concept of "sale" or more particularly "disposition". That submission should be rejected. Instruments which immediately effect the creation or disposition of an interest in land are governed by s 11 of the Act. Section 59 relates to "any contract for" the sale or disposition of an interest. That distinction was recently affirmed by a unanimous High Court:

> "The appellant correctly submitted that a consequence of the respondents' fixing upon her intention to create a security immediately effective upon completion is that attention is required not to s 59 but to s 11(1)(a) of the *Property Law Act*. Section 59 is concerned with contracts, and s 11(1)(a) with dispositions."[17]

[46] The applicants conceded, indeed asserted, that in the present case, the agreement was not executory, but purported to grant the profit à prendre immediately. The profit which was granted existed only in equity, for two reasons. First, it was not in a form capable of registration under the *Land Title Act 1994* or its predecessor. Second, quite apart from statute, it was not under seal, a requirement for a grant of a profit at law.[18] In a case where the parties stipulated expressly or by implication not simply for an equitable interest, but for a registrable title, it might well be held that the agreement was executory.

[47] I agree with the orders proposed by Keane JA.

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17 *Theodore v Mistford Pty Ltd* (2005) 221 CLR 612 at 623.

18 *Reid v Moreland Timber Co. Pty Ltd* (1946) 73 CLR 1 at p 16. Of course, once registered, the appropriate instrument under the *Land Title Act* would operate as a deed: s 176.