

The Statute of Frauds revisited

by Daniel Khoury

The Statute of Frauds, which was enacted in England over 300 years ago, has been a part of Victoria's law since its establishment as a separate colony. The Statute's requirement that certain promises, agreements and contracts be evidenced in writing to be enforceable in a court of law remained unchanged until 1987 when the Victorian Parliament enacted the *Sale of Goods (Vienna Convention) Act*. This article discusses the effect that legislation has had on the operation of the Statute of Frauds in Victoria.

When the Statute of Frauds¹ (the Statute) was enacted in 1677, its main purpose was to make various types of fraud more difficult to perpetrate. This is clearly stated in the preamble to the Statute which provides that it is an Act "(for) prevention of many fraudulent practices, which are commonly endeavoured to be upheld by perjury and subornation of perjury".

One area of fraudulent behaviour which the Statute sought to eradicate involved persons making false claims about contractual promises purportedly made to them. To prevent such behaviour, the Statute requires that for several types of promises (all of which are listed), certain formalities must be complied with for the promise to be enforceable in a court of law.² The main formality required is the existence of written evidence of the promise.

A close examination of the Statute's

provisions indicates that they apply only to the following six promises, agreements and contracts:

- (1) a special promise by an executor or administrator of an estate to personally meet the liabilities of the deceased person;
- (2) a special promise to answer for the debt, default or miscarriage of another person (i.e. a promise of guarantee);
- (3) agreements made in consideration of marriage;
- (4) contracts for the sale or other disposition of land or any interest in land;
- (5) agreements not to be performed within the space of one year from the making thereof; and
- (6) contracts for the sale of goods for the price of ten pounds sterling³ or more.

For categories (1) to (5), s.4 of the Statute provides that the alleged promise, agreement or contract is unenforceable unless it is in writing or at least evidenced in writing by a note or memorandum. In either case, the written evidence must be signed by the party being sued or by his or her authorised agent.

For category (6), s.17 of the Statute provides that the alleged contract will be unenforceable unless:

- (a) the purchaser accepts part of the goods and actually receives them; or
- (b) the purchaser gives something in earnest or part payment to bind the contract; or
- (c) there exists a written note or memorandum of the alleged contract, signed by the party to be sued (or his or her agent).

As was noted previously, where the Statute has not been complied with, the promise, agreement or contract cannot be enforced in a court of law. In such circumstances, where the aggrieved promisee has already performed some of his or her obligations under the arrangement, the promisee may be in a position to ask the court to invoke the equitable *doctrine of part performance*, whereby the promisor will be compelled to carry out his or her promise. This doctrine will only be invoked if:

- (1) the promisee's acts constituting the part performance are referable to the alleged contract and explicable on no other basis;
- (2) the acts performed are of such a nature as to render it fraudulent in the promisor to allow him or her to plead the Statute;
- (3) the contract alleged by the promisee is one that the court will enforce; and

(4) there is sufficient parol evidence of the alleged contract.

If all of these conditions are met, the court may grant the promisee an order for specific performance, thus overcoming the difficulties caused by the failure to comply with the requirements of the Statute.⁴

THE STATUTE IN VICTORIA

The Statute was received into the colonies as a part of the inherited law of England. However, in Victoria, the above provisions were subsequently re-enacted, in essentially the same terms, in other legislation: s.4 of the Statute became s.126 of the *Instruments Act* 1958 and s.17 became s.9 of the *Goods Act* 1958.

These provisions applied in Victoria, unchanged, until they were significantly amended as a result of the enactment of the *Sale of Goods (Vienna Convention) Act* (Vic.) in 1987, more than 300 years after the enactment of the Statute.

THE SALE OF GOODS (VIENNA CONVENTION) ACT

The primary purpose of the *Sale of Goods (Vienna Convention) Act* 1987 is to give effect within Victoria to the United Nations Convention on Contracts for the International Sale of Goods, which was adopted in Vienna, Austria, on 10 April 1980. The Convention itself is found in Schedule 1 of the Act.

A detailed discussion of the Convention is beyond the scope of this article.⁵ However, it is worth noting that it applies only to contracts for the sale of goods between parties whose places of business are in different countries, and where either both of those countries are parties to the Convention (i.e. they are Contracting States) or the rules of private international law lead to the application of the law of a Contracting State.

It is important to note that for such contracts, the Convention differs significantly from existing Australian law. For example, there is no concept of consideration in the Convention, so that it is possible to have a binding contract for the sale of goods without the need for the parties to have exchanged something of value. Furthermore, in the context of the present discussion, it is interesting to note that Article 11 of the Convention provides that for contracts of sale covered by the Convention, no writing or written evidence of the contract is necessary



Daniel Khoury B. Juris, LL.M., Dip. Ed., Grad. Dip. Taxation Law is a member of the Victorian Bar.

Victoria, only one type of promise was to be retained in the amended s.126, namely, promises of guarantee. The Attorney-General noted that "this requirement does serve a useful purpose as it gives guarantors the opportunity of considering and digesting the obligations imposed by a guarantee before the guarantee is signed"⁶ In relation to the other promises listed in s.126, the Attorney-General stated that "the requirements of the *Instruments Act* . . . no longer serve a useful purpose. They are, on the whole, either superfluous, because they appear elsewhere, or anachronistic. They are also open to abuse by unscrupulous defendants who want to avoid obligations under a contract by relying on minor technical defects."⁷

During the debate on the Second Reading of the Bill, the then leader of the Opposition in the Legislative Council, the Hon. A. Chamberlain, indicated that while the Opposition did not oppose the Vienna Convention being adopted by the legislation, it was, however, "concerned about the ancillary provisions that have been tacked on"⁸ He referred to a submission of the Law Institute of Victoria which argued that s.126 of the *Instruments Act* as it relates to the sale or other disposition of an interest in land be retained.⁹

The Government eventually agreed to the Law Institute's submission, but indicated that the Attorney-General had asked the Law Reform Commission of Victoria "to report about whether the writing requirements in the *Property Law Act* make the writing requirements in the *Instruments Act* as they relate to land superfluous"¹⁰ It thus became part of the Law Reform Commission's Land Law Reference.

Interestingly, in its discussion paper on the Sale of Land, issued in May 1988, the Law Reform Commission recommended the repeal of s.126.¹¹ Subsequently, this became Recommendation 4 of its report, issued in June 1989.¹² However, Recommendation 4 also provides that "[s]ection 53 of the *Property Law Act* should be amended to ensure that a contract for the sale of land must be in writing to be enforceable". At the time of writing, the Government has not enacted legislation to implement the recommendation.

CONCLUSION

Following the enactment of the *Sale of Goods (Vienna Convention) Act* (Vic.), the importance of the requirement of the Statute that particular promises, agreements and contracts be in writing or at least evidenced in writing for them to be enforceable in a court of law has significantly diminished. From 12 May 1987, only two types of contracts remain within its ambit: contracts of guarantee and contracts for the sale or other disposition of an interest in land, and it appears that the latter will be removed in the near future.

Clearly, after 300 years, the Statute of Frauds has become less relevant. Not only is the protection it offered seen as being less important these days, but its major objective

is met by alternative legislation which is more effective. □

Footnotes

1. *Act of 29 Car.2.c.3.*
2. Although a promise that does not comply with the Statute may be unenforceable, it remains valid. In other words, failure to comply with the Statute does not render the promise void.
3. In Victoria, the amount is \$20: see s.9 *Goods Act* 1958.
4. For recent Victorian cases on the application of the doctrine of part performance, see *Rojain Pty. Ltd. v. Ambrose; McMahon, Third Party* [1986] VR 449; *Thwaites v. Ryan* [1984] VR 65.
5. For a detailed discussion of the Convention and its application in Australia see Govey, I. and Staker, C., "Vienna Sales Convention takes effect in Australia next year," *Australian Law News*, Vol.23, No 5, June 1988, p.19; Bailey D, *The Vienna Sales Convention*, (1989) 63 *L.I.J.* 644.
6. *Victorian Hansard*, Vol. 386, Legislative Council, 3 March 1987, p. 172.
7. *Ibid.*
8. *Victorian Hansard*, Vol. 386, Legislative Council, 17 March 1987, p. 306.
9. The Attorney-General argued that this part of s.126 was superfluous because it was covered by ss.51-55 of the *Property Law Act* 1958 (Vic.). The Law Institute submitted, however, that on the basis of the dissenting judgment in *Adamson v. Hyde* (1973) ALJR 201, it could be argued that those provisions do not apply to equitable interests in land. Consequently, the Law Institute was of the view that s.126 as it relates to the sale or other disposition of an interest in land should be retained at least until ss.51-55 are amended to remove the doubts raised by *Adamson v. Hyde*.
10. *Victorian Hansard*, Vol. 387, Legislative Assembly, 14 April 1987, p. 1221, per Mr C.R.T. Mathews.
11. Law Reform Commission of Victoria, *Discussion Paper No.8: Sale of Land*, May 1988. The Commission was of the view that s.126 of the *Instruments Act* overlaps with ss.52 and 53(1)(a) of the *Property Law Act*, and is therefore no longer necessary.
12. Law Reform Commission of Victoria, *Report No.20: Sale of Land*, June 1989.

for it to be enforceable. Thus, s.9 of the *Goods Act* 1958 cannot apply to such contracts.

However, it appears that the Victorian Government took the opportunity presented by the need to enact the *Sale of Goods (Vienna Convention) Act* to make more far-reaching changes to the operation of the Statute in Victoria. Consequently, the *Sale of Goods (Vienna Convention) Act* was given a second purpose, namely, "to amend the *Instruments Act* 1958 and the *Goods Act* 1958 to repeal certain requirements for contracts to be in writing".

Section 8 of the *Sale of Goods (Vienna Convention) Act* amended s.126 of the *Instruments Act* by removing from the list of promises, agreements and contracts that require written evidence to be enforceable all but promises of guarantee and contracts for the sale or other disposition of interests in land.

Section 9 of the *Sale of Goods (Vienna Convention) Act* repealed s.9 of the *Goods Act* in its entirety. Consequently, contracts for the sale of goods of whatever value cannot now be challenged as being unenforceable because, on the facts, the contract is not evidenced in writing.

Both of the above amendments became effective on 12 May 1987.

It is worth noting that when the Sale of Goods (Vienna Convention) Bill was first introduced into the Legislative Council by Mr J. Kennan, the then Attorney-General of

Wanted: Brain Surgeon (or butcher)

You wouldn't get a butcher to do a brain surgeon's work. Likewise with party-party costings - you should always use an expert. A specialist with fast, accurate, authoritative skills. Someone who'll cut your losses and stitch together a good deal every time.

Someone like Mahlab Costing
- the smart operators.

03 629 3456 or 02 241 1199

Mahlab
COSTING