MERGER IN THE CONVEYANCE AND THE EFFECT OF SETTLEMENT

Does settlement of a conveyancing transaction and registration of the transfer extinguish all rights and obligations under the contract? This article discusses situations where the contract may survive for some purposes.

Introduction

The principle is well-established that where the parties to a simple contract (whether oral or written) later execute a deed for the purpose of carrying out their agreement, the simple contract is thereby discharged and becomes merged in the deed. This is the doctrine of merger which, when it applies, precludes the parties from invoking their previous agreement for the purpose of modifying the contract expressed in the deed. The principle was stated by James L. J. in *Leggott* v. *Barrett*[1] as follows:

> . . . it is very important, according to my view of the law of contracts, both at Common Law and in Equity, that if parties have made an executory contract which is to be carried out by a deed afterwards executed, the real completed contract between the parties is to be found in the deed, and that you have no right whatever to look at the contract, although it is recited in the deed, except for the purpose of construing the deed itself. You have no right to look at the contract either for the purpose of enlarging or diminishing or modifying the contract which is to be found in the deed itself.

To what extent does this principle apply to contracts for the sale of land? The view taken by some practitioners is that the handing over of a conveyance on settlement discharges automatically the rights and obligations of the parties under the prior written contract so that, in the absence of a special agreement at the time, neither party can sue for breach of terms not contained in the conveyance. In this article it is proposed to consider whether this commonly held belief is supported by the authorities. The writer's sole concern is with the extent to which actions for breach of contract survive conveyance. In particular, the question as to when a conveyance can be set aside on the ground of mistake will not be considered.[2]

Merger and The Parol Evidence Rule

It is often overlooked that the doctrine of merger as expressed above is merely one aspect of the parol evidence rule. This rule, as

1. (1880) 15 Ch. D. 306, 309.
2. See *Svanosio* v. *McNamara* (1956) 96 C.L.R. 186 and *Montgomery and Rennie* v. *Continental Bags (N.Z.) Ltd.* [1972] N.Z.L.R. 884.

usually stated, provides that parol evidence is inadmissible to add to, vary or contradict the terms of a written contract. The word "parol" does not include just *oral* evidence. It extends to all extrinsic matter including not only written drafts and letters passing between the parties in the course of negotiations, but also preliminary *written contracts* which are later embodied in formal *deeds*. In the latter case, when the rule applies, the parties' real contract is to be found in the deed and the prior written contract cannot be invoked for the purpose of modifying the agreement expressed therein, since it is evidence extrinsic to the deed.

That the doctrine of merger should not be regarded as separate and distinct from the operation of the parol evidence rule can be seen from the following statement of the doctrine by Brett, L. J. in *Leggott* v. *Barrett* which, in his view, included oral contracts reduced into *writing*, the usual subject of the operation of the parol evidence rule:[3]

> . . . where there is a preliminary contract in words which is afterwards reduced into writing, or where there is a preliminary contract in writing which is afterwards reduced into a deed, the rights of the parties are governed in the first case entirely by the writing, and in the second case entirely by the deed; and if there be any difference between the words and the written document in the first case, or between the written agreement and the deed in the other case, the rights of the parties are entirely governed by the superior document . . .

It follows that the so-called doctrine of merger is subject to the same restrictions upon its initial application as is the parol evidence rule. There must be a contract which has been *reduced into a deed*. Just as whether an oral contract has been reduced into writing depends upon whether the written document was *intended* to record the whole of the parties agreement,[4] so also whether a written contract has been reduced into a deed must also depend upon the intention of the parties. Thus, in *Barclay's Bank Ltd.* v. *Beck*[5] it was held that whether there was a merger of a simple contract debt into a specialty debt necessitated a preliminary inquiry into the intention of the parties.

Accordingly, in the context of contracts for the sale of land, the only provisions which merge are those which the parties *intend* should be performed by the conveyance. Apart altogether from the availability of the equitable remedy of rectification where the conveyance contains a mistake,[6] any term of the contract which is not contained in the conveyance, but which was intended to survive it, does not merge and therefore damages are recoverable for its breach. Rescission might also

3. (1880) 15 Ch. D. 306, 311.
4. See, e.g., *Harrison* v. *Knowles & Foster* [1917] 2 K.B. 606, 608-609; *Hoyt's Proprietary Ltd.* v. *Spencer* (1919) 27 C.L.R. 133, 143; *Hawke* v. *Edwards* (1948) 48 S.R. (N.S.W.) 21, 23.
5. [1952] 2 Q.B. 47.
6. See *Taitapu Gold Estates Ltd.* v. *Prouse* [1916] N.Z.L.R. 825.

be available where the breach was sufficiently serious, for example, breach of a term that the fill has been compacted which subsequently causes irreparable damage to the house.

That a deed of conveyance does not discharge the parties' previous written agreement unless it was intended to contain the whole of their contractual obligations was first clearly stated in *Palmer* v. *Johnson*.[7] A written contract for sale of land provided that "if any error, misstatement, or omission in the particulars be discovered, the same shall not annul the sale but compensation shall be allowed by the vendor or purchaser as the case may require." This is a clause still commonly found in modern printed forms of agreement for sale and purchase. Although the subsequent conveyance did not repeat this clause, it was held that the purchaser was entitled to compensation for a misstatement by the vendor. Bowen L. J. regarded the situation as analogous to that where parties agree upon a contract partly in writing and partly oral:[8]

> Now it is commonly said, that where there is a preliminary contract for sale which has afterwards ended in the execution of a formal deed, you must look to the deed only for the terms of the contract, but it seems to me one cannot lay down any rule which is to apply to all such cases, but must endeavour to see what was the contract according to the true intention of the parties. Suppose the parties should make a parol contract, with the intention that it should afterwards be reduced into writing; and that that which is reduced into writing shall be the only contract, then, of course, one cannot go beyond it; but if they intend, as they might, that there should be something outside such contract, they might agree that that should exist, notwithstanding it was not in the contract which was put into writing. In the same way, when one is dealing with a deed by which the property has been conveyed, one must see if it covers the whole ground of the preliminary contract. One must construe the preliminary contract by itself, and see whether it was intended to go on to any, and what, extent after the formal deed had been executed.

Fry L. J. also thought that there must be a preliminary inquiry into the intention of the parties:[9]

> In *Leggott* v. *Barrett*, Lord Justice James and the present Master of the Rolls laid down what is indubitably the law, that when a preliminary contract is afterwards reduced into a deed, and there is any difference between them, the mere written contract is entirely governed by the deed, but that has no application here, for this contract for compensation was never reduced into a deed by the deed of conveyance. There was no merger, for the deed, in this case, was intended to cover

7. (1884) 13 Q.B.D. 351.
8. Ibid., 357.
9. Ibid., 359.

only a portion of the ground covered by the contract of purchase.

The requirement of intention was repeated some years later by Bowen L. J. in *Clarke* v. *Ramuz*[10] and has since been adopted on numerous occasions by the Commonwealth courts.[11] It now remains to determine what intention the courts have attributed to the parties in these cases.

The Intention of the Parties

In most of the cases where the test of intention has been recognised, the courts have held that terms of the written contract dealing with matters collateral to the transfer of title and therefore not normally contained in the conveyance, are not merged in and extinguished by the conveyance. The latter is only conclusive as to matters of title and covenants running with the land, i.e., those aspects of the transaction to be performed by the conveyance. It is for this reason that the contract provision merged in *Knight Sugar Co. Ltd.* v. *Alberta Railway & Irrigation Co.*[12] In this case, there was a disparity between the reservation of mining rights in the contract and the reservation in the memorandum of transfer, and it was held by the Privy Council that the latter prevailed. The Court was careful to point out that there had been no claim to rectify the transfer on the ground of common mistake.

It is respectfully suggested that the above is the correct approach. A deed of conveyance, or a memorandum of transfer under the Torrens system, is not ordinarily intended as a complete expression of the parties' agreement, nor is it intended to discharge the previous written contract. The conveyance is prepared for the purpose of enabling *title* to be transferred, not to replace the previous contractual obligations. It is a performance of *part* of what the written contract requires and only that part ought to be merged in the conveyance.

Dual Nature Contracts

The most obvious instance where the conveyance is not intended to discharge all the parties' contractual obligations is where the written contract is of a dual nature, providing for the sale of land *and* the erection or completion of a dwelling thereon. Thus, in *Lawrence* v. *Cassel*[13] the defendant agreed to sell to the plaintiff certain land with

10. [1891] 2 Q.B. 456, 461.
11. See *Lawrence* v. *Cassel* [1930] 2 K.B. 83, 88; *Gaut* v. *Patterson* (1931) 31 S.R. (N.S.W.) 612, 615; *Knight Sugar Co. Ltd.* v. *Alberta Railway & Irrigation Co.* [1938] 1 All E.R. 266, 269 (J.C.); *Hammond* v. *Commissioner of Inland Revenue* [1956] N.Z.L.R. 690, 694; *Dean* v. *Gibson* [1958] V.R. 563, 572; *Hancock v. B. W. Brazier (Anerly) Ltd.* [1966] 1 W.L.R. 1317, 1324 and 1333; *Hissett v. Reading Roofing Co. Ltd.* [1969] 1 W.L.R. 1757, 1763; *Pallos* v. *Munro* (1970) 72 S.R. (N.S.W.) 507, 511; *Hashman, Riback and Bel-Aire Estates Ltd v. Anjulin Farms Ltd.* [1973] 2 W.W.R. 361.
12. [1938] 1 All E.R. 266.
13. [1930] 2 K.B. 83.

a house thereon in the course of erection. The written contract contained certain terms as to how the house was to be completed. A deed of conveyance was subsequently executed by the parties which contained no reference to the building of the house or the work to be done by the defendant in completing it. The plaintiff brought an action seeking damages for the defendant's failure to complete the house in accordance with the written contract. The defendant's argument that the terms of the written contract had merged in the conveyance was rejected by the Court of Appeal on the ground that the deed was intended to cover only part of the ground covered by the written contract. Scrutton L. J. stated that[14]

> the contract contained a stipulation which was collateral to the conveyance and was therefore not merged on the execution of the deed of conveyance which said nothing about the subject of the stipulation.

This decision has since been followed, on very similar facts, by the English Court of Appeal in *Hancock* v. *B. W. Brazier (Anerley) Ltd.*[15] It was also followed by the Australian courts in *Gaut* v. *Patterson*[16] and *Dean v. Gibson.*[17]

In *Gaut* v. *Patterson* the defendant agreed to sell to the plaintiff land upon which buildings were being erected. The written contract provided that the vendor was to complete the buildings in a proper and workmanlike manner. The contract was subsequently completed, the purchase money paid and a conveyance of the property executed. Although the conveyance did not repeat the above term, it was held by the Supreme Court of New South Wales that the plaintiff could still recover damages for defects which had appeared in the buildings, on the ground that the conveyance was merely intended to effect a transfer of title so that collateral terms of the written contract were not extinguished by it.

In *Dean* v. *Gibson* the defendant agreed with the plaintiffs to sell to them certain land and also to erect a dwelling thereon "in conformity with local government regulations". The defendant failed to obtain the permit required by the local town and country planning scheme, with the result that the building of the dwelling was unlawful. It was held by the Supreme Court of Victoria the above term was not extinguished by the transfer of the land so that the plaintiffs could recover damages for loss resulting from its breach. Monahan J. formulated the following test:[18]

> Was it, in the contemplation of the parties, one of the things which was to be extinguished by the conveyance?

Since the term concerned a matter collateral to the transfer of title, this question was answered in the negative.

14. Ibid., 89.
15. [1966] 1 W.L.R. 1317.
16. (1931) 31 S.R. (N.S.W.) 612.
17. [1958] V.R. 563.
18. Ibid., 572.

Contracts For the Sale of Existing Dwellings or Vacant Sections

Although many of the cases in which it was held that the written contract did not merge in the conveyance concerned contracts for the sale of land *and* for the erection of a dwelling thereon, the principle is not confined to written contracts of this dual nature. In the case of an ordinary agreement for sale and purchase of a residential property or vacant section also, the conveyance does not extinguish collateral terms of the written contract. This view is supported by *Palmer v. Johnson*[19] and also the more recent case of *Hissett v. Reading Roofing Co. Ltd.*[20]

In the latter case, the defendants by a written contract agreed to sell certain premises to the plaintiff, and it was a term of the contract that vacant possession be given on completion. After settlement, the plaintiff was unable to get vacant possession of the whole property, since part of it was occupied by a protected tenant. He sued for damages for breach of contract. It was argued by the defendants that the plaintiff's rights under the written contract were merged in the conveyance so that he could not sue on the term providing for vacant possession. However, after citing the observations of Bowen and Fry L.J.J. in *Palmer* v. *Johnson.* Stamp J. held that the conveyance was only intended to cover part of the ground covered by the contract and accordingly the defendants were liable for breach of contract.

It is to be noted that in this case the written contract contained the following clause:

> "Notwithstanding the completion of the purchase any general or special condition or any part or parts thereof to which effect is not given by the conveyance and which is capable of taking effect after completion . . . shall remain in full force and effect."

This non-merger clause was a clear indication of the parties' intention in relation to the conveyance. However, Stamp J. held that, even apart from its effect,[21]

> the provision in the contract regarding vacant possession on completion was not . . . a provision which was covered by the conveyance but a matter with which the conveyance was not concerned.

He seems to have regarded the purpose of the conveyance as being merely to transfer title and not as a document intended as a final statement of the parties' agreement. The conveyance was a partial performance, and not a replacement, of the written contract.

The Memorandum of Transfer

The above argument applies with even greater force in the New Zealand context. Whereas, under the deeds system of conveyancing,

19. See text following footnote 7.
20. [1969] 1 W.L.R. 1757. See also *Hashman, Riback and Bel-Aire Estates Ltd.* v. *Anjulin Farms Ltd.* [1973] 2 W.W.R. 361.
21. [1969] 1 W.L.R. 1757, 1763-1764.

there seems to be no difficulty in the way of the parties repeating in the deed of conveyance the terms of their written contract,[22] it is inappropriate to do so in a memorandum of transfer, in view of the form prescribed by s.90 of the Land Transfer Act 1952. The memorandum of transfer is nowadays a one page standard form document which merely provides space for the insertion of the names of the parties, the legal description of the land, the purchase price and any special covenants running with the land; it contains the barest details for registration purposes. The fact that it is usually signed by the transferor alone indicates that it is designed merely for the purpose of enabling *title* to be transferred. It is even common in practice not to specify the whole of the purchase price in the transfer. The value of the chattels is usually excluded because it is not part of the purchase price for stamp duty purposes. Accordingly, it is difficult to see how such a document can be regarded as intended by the parties to supersede entirely their previous written contract.

The form of the memorandum of transfer was regarded as a significant factor in *Pallos* v. *Munro*[23]. The defendant entered into a written contract with the plaintiff to sell him a certain property. Clause 13 of the contract provided that the requirements existing at the date of the contract of any notice given by any competent authority necessitating the doing of work or expenditure of money on the property should be complied with by the defendant prior to completion. After completion the plaintiff complied with such a notice and sued the defendant to recover the cost. It was held by the New South Wales Court of Appeal that the above term had not merged in the transfer. One of the factors taken into account in determining the intention of the parties was the form of the memorandum of transfer:[24]

> There is no part of the memorandum of transfer in a Real Property Act transaction which deals with the subject matter of a clause such as cl. 13. *The transfer in no way performs the obligations of that clause.*[25]

It is therefore suggested that a memorandum of transfer should not be regarded as completely extinguishing the parties' written contract. All terms collateral to the transfer of title remain enforceable. Suppose that a written contract contains a warranty by the vendor that the plumbing and drains are in good order. Whether such a warranty has been complied with will usually not be discovered until after the purchaser has gone into posession. It is not common practice in New Zealand for purchasers to employ tradesmen to check such matters out. Indeed, it would be impractical to check the drains, since that might well involve digging them up! It would be an unjust result if the vendor could hide behind his memorandum of transfer in the event of the purchaser bringing an action for breach of warranty.

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22. Although, as the cases indicate, this is not usually done.
23. (1970) 72 S.R. (N.S.W.) 507.
24. Ibid., 511.
25. Emphasis added.

Intention A Question of Fact

There are dicta in *Palmer* v. *Johnson*[26] and also in *Pallos* v. *Munro* which suggest that the intention of the parties is to be determined from a *construction* of the written contract. This overlooks that "intention" is a question of fact and therefore cannot be solely a question of construction. Intention in the law of contract is judged objectively, i.e. in the absence of a clear indication of the parties' actual intentions, the court has to decide what two reasonable persons in their position would have intended. All relevant surrounding circumstances must be taken into account and, in the context of merger, the contents of the written contract is merely one, albeit important, such circumstance.[27] Probably the court in *Pallos* v. *Munro* was using the word "construction" in a loose sense anyway. Otherwise, the form of the memorandum of transfer would have been an irrelevant consideration.

Some Contrary Authorities

There have been a few cases where the court, even though recognising the test of intention, refused to enforce a collateral term of the written contract after conveyance. In *Greswolde-Williams* v. *Barneby*[28] the written contract contained a warranty by the vendor that the house was in first-class order as to drainage. After completion the purchaser discovered serious defects in the drainage and sued for damages. It was held by Wills J. in the Queen's Bench Division that, since the conveyance had not repeated the warranty, it was merged in and extinguished by the conveyance:[29]

> If there was a stipulation containing a warranty as to the particular condition of any part of the premises, or anything in fact bearing upon the condition of the premises, and if that was intended to be carried on and continued the most natural place to find it would be in the conveyance itself. There is no reason why, if it were the intention of the parties that it should survive, it should not find its place in the conveyance.

It is suggested, for the reasons mentioned above and in view of the other authorities, that this decision cannot be supported. It was cited to Stamp J. in *Hissett v. Reading Roofing Co. Ltd.* and he found[30]

> it difficult to reconcile the decision in that case with that of the Court of Appeal in *Palmer* v. *Johnson*,

which he preferred to follow.

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26. Se text following footnote 8.
27. See *Hashman, Riback and Bel-Aire Estates Ltd.* v. *Anjulin Farms Ltd.* [1973] 2 W.W.R. 361, 370 where the Supreme Court of Canada rejected the argument that the intention of the parties should be determined only on the construction of the written contract and that extrinsic evidence was inadmissible.
28. (1900) 83 L.T. 708.
29. Ibid., 711.
30. [1969] 1 W.L.R. 1757, 1764.

Another case is *Messenger and Plimmer Ltd.* v. *Cattanach*[31] decided by Jamieson S.M. A written contract for the sale of a section contained a warranty by the vendor that the section was free of "artificial filling" and it was held that this term had merged in the memorandum of transfer. Jamieson S.M. stated:[32]

> The test is the apparent intention of the parties. That states the problem and I will be content to say that, having given the matter consideration, I conclude that the warranty should not be regarded as continuing once the memorandum of transfer had been delivered and registered. One may ask, if the warranty was to survive final settlement, for how long it was to enure? I find it difficult to believe that any vendor would consent to the matter remaining at large indefinitely, and think it was for the purchaser to satisfy himself before taking title.

Whilst the actual decision in this case may have been justified on the other grounds stated in the judgment, the reasoning on this aspect of the case is unsatisfactory. His Worship adopted the vendor's point of view from the outset. It is difficult to see why a warranty should be rendered unenforceable merely because a breach of it may not be discovered until some time after conveyance. It is inconvenient for the vendor if he cannot be certain that the transaction is at an end — if he does not know whether he can spend his money or must keep some aside in order to meet a belated claim. But this is the same problem with all warranties in *non-land contracts.* A vendor's desire for certainty and finality does not appeal to the writer as a sufficient reason for denying relief for breach of warranty in contracts for the sale of land. Why not consider the purchaser's position? He may have to spend a very considerable sum on excavations and foundations if the warranty as to "fill" is not complied with. Why should the loss, which has resulted from the vendor's breach of warranty, fall on him, especially if he had no practical opportunity to discover the breach beforehand?

His Worship placed too much attention on what the intention of the *vendor* would be, rather than what, in the circumstances of the case, would be the *parties'* intention, i.e., what would two reasonable persons in this situation have intended? Of course, a vendor out of self-interest, will always say he intended any warranties to end after conveyance. Furthermore, it is difficult to accept that whether the warranty had been complied with was a matter which the purchaser could reasonably be expected to have fully investigated before settlement. In practice, people assume that warranties have been complied with until they learn otherwise, and, in the case of a warranty as to fill, this is not usually until after building operations have begun. The purchaser could employ an engineer to obtain a compaction certificate, but why

31. (1965) 11 M.C.D. 445.
32. Ibid., 448-449.
33. Howard, "The Rule in *Seddon's* Case" (1963) 26 M.L.R. 272.

should he be *obliged* to do this, when in light of the vendor's assurance, he might not unreasonably assume that it is unnecessary?

The judgment of Jamieson S.M. in fact embodies the unsatisfactory policy reasons traditionally put forward in support of a strict merger rule. Similar reasons are also commonly invoked to justify the rule that an executed contract cannot be rescinded on the ground of innocent misrepresentation.[33] The first stems from the following statement of Malins V.C. in *Allen* v. *Richardson*:[34]

> I do not think there is a more important principle than that a purchaser investigating a title must know that when he accepts the title, takes the conveyance, pays his purchase money and is put into possession, there is an end to all as between him and the vendor on that purchase. If it were otherwise, what would be the consequence? A man sells an estate generally because he wants the money; if this were not the rule, he must keep the money at his bankers, and there never would be an end to the question . . .

In other words, the parties, after completion, should be able to proceed on the basis that the transaction cannot be reopened. Otherwise, business dealings would be uncertain and hazardous. As suggested above, this rationale is hardly convincing. Why look at the situation entirely from the vendor's point of view? Why should the purchaser be the one to bear the loss resulting from the vendor's breach of warranty? The uncertainty arises from the vendor's election to give a warranty in the first place — the risk is of his own making. Isn't it fair that he should be the one to suffer the inconvenience if his warranty is subsequently discovered to be breached? If it is felt that a vendor ought not to be subject to too much uncertainty, a better solution of the competing interests involved would be to allow the purchaser a reasonable time to inspect the subject of the warranty.

The second policy reason is that it is the duty of the purchaser to investigate title and look at the property prior to completion. If he does not check and does not discover any defects, caveat emptor applies.[35] This reason is only acceptable in relation to title matters or covenants running with the land. They are checked out prior to settlement. Indeed, the time lapse between signing and settlement is traditionally explained as a period set aside for investigation of title. However, it is not a time for other collateral aspects of the transaction to be investigated. As Cheshire and Fifoot point out:[36]

> "A purchaser is to blame if he does not discover the existence of a restrictive covenant or a right of way before completion,

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34. (1879) 13 Ch. D. 524, 541.
35. This sentiment is echoed in such cases as *Manson v. Thacker* (1878) 7 Ch. D. 620, *Allen* v. *Richardson* supra n.34 and *Joliffe* v. *Baker* (1883) 11 Q.B.D. 255. See also *Svanosio* v. *McNamara* (1956) 96 C.L.R. 186, 199.
36. *Law of Contract* (4th N.Z. ed. 1974) 242.

> but it is much more difficult for him to discover, for instance, that the premises are damp or that the drains are defective until he has actually entered into possession".

The simple fact is that the ordinary purchaser does not make an inspection until after he has taken possession under the contract. This is perhaps partly due to the fact that there is usually no real opportunity to inspect prior to possession and also, even if there is, embarrassment or reluctance to hurt the vendor's feelings might inhibit the purchaser from checking out the warranty. Furthermore, it will be impractical to investigate the accuracy of some warranties. Obviously it cannot be suggested that a purchaser should dig up the drains in order to check a warranty that they are in good order.

The Effect of "Settlement"

There is an argument that the effect of the ceremony of "settlement" is to discharge the parties' rights and obligations under the contract, independently of any rule as to merger of contracts in the conveyance; in other words, that the whole object of the parties' solicitors getting together and handing over the purchase money in return for title is to settle the transaction between the parties once and for all. The ceremony can be regarded as if the solicitors on behalf of their clients are mutually agreeing to discharge each other's rights and liabilities under the contract.

There is no doubt that some solicitors view settlement in this manner. When acting for a purchaser, they still regard it as essential to obtain a special undertaking from the other solicitor, on behalf of his client, if the purchaser's contractual rights are to be preserved. However, this practice is now infrequently adopted. From the writer's experience, it is not very common nowadays for such undertakings to be required on settlement. This is because settlement is more often regarded merely as the handing over of the purchase price in return for the executed transfer and certificate of title to the property, and not as a discharge of the parties' contractual obligations. The only undertaking commonly required on settlement is that as to payment of rates and insurance by the vendor.

It is suggested that settlement has no legal effect independently of the operation of the doctrine of merger. The view that settlement brings the parties contractual relationship to an end has grown up largely as a result of a misunderstanding of the scope of the doctrine of merger. Indeed, it is rather surprising that this strict view of settlement has been taken since it was pointed out by a leading authority in this area of the law, as long ago as 1923, that[37]

> . . . the completion of a contract for the sale of land, by conveyance and payment of the purchase money, does not

37. Williams, *Vendor and Purchaser* (3rd ed. 1923) ii, 988-989.

> necessarily operate as a discharge of every liability arising under the parties' agreement. If the contract contain any stipulation, which is collateral to the main duties of proving title, conveyance and payment, the obligation so incurred is not discharged by the performance of those duties.

It appears that even failure to comply with the general practice of requiring an undertaking from the vendor's solicitor as to payment of rates and other outgoings, does not preclude a purchaser, after settlement, from sueing upon a clause in the contract dealing with this matter, In *Midgley* v. *Coppock*[38] the written contract provided that the vendor was to discharge "all rates, taxes and outgoings" up to the time of completion. The purchase was completed but the vendor was still held liable to pay for an outgoing incurred before settlement.

Midgley v. *Coppock* was followed in *Tubbs* v. *Wynne*[39] and approved in the recent case of *Pallos* v. *Munro*.[40] Therefore, it is suggested that the practice of taking an undertaking on settlement as to payment of outgoings, although desirable (especially since it will also bind the solicitors giving it) is not essential. If the contract contains a clause, as it usually does, which, either expressly or by necessary implication, requires the vendor to discharge all outgoings in respect of the property up until the time of settlement, and it afterwards appears that they have not all been discharged, the purchaser may sue for breach of contract and recover the cost of discharging the outgoings.

That the ceremony of settlement does not effect a discharge of the parties' contractual relationship, independently of the operation of the doctrine of merger, has recently been confirmed by Speight J. in *Montgomery and Rennie* v. *Continental Bags (N.Z.) Ltd.*[41] This case establishes that the doctrine of merger does not apply under the Torrens system of registration of title until the memorandum of transfer is registered, since it is only upon registration that legal title vests in the transferee, unlike the deeds system where legal title vests upon the handing over of the deed of conveyance. "Settlement" is not the relevant time to look at merger. Not even terms relating to title matters, let alone collateral terms, merge then. The contract of sale governs the parties' rights and obligations until the transfer is registered. Speight J. stated that "registration is completion and not the payment of money and delivery of documents at any time prior"[42] and later added[43]

> that the commonly described practice of "settlement" viz, the exchange of memorandum to enable registration to be

38. (1879) 4 Ex.D. 309.
39. [1897] 1 Q.B. 74.
40. Supra n.23.
41. [1972] N.Z.L.R. 884.
42. Ibid., 892.
43. Ibid., 893.

> effected, does not amount to a completion of the transaction or conveyance and the contract of sale still governs the relationship of the parties until registration.

His Honour relied upon the decision of the Privy Council in *Knight Sugar Co. Ltd.* v. *Alberta Railway & Irrigation Co.*[44] It was argued in that case that the doctrine of merger had no application in the case of a sale of land to which the Land Titles Act 1906 of Alberta (the equivalent of the New Zealand Land Transfer Act 1952) applied. The basis for this argument was that, in the case of registered land, there is no document which is, properly speaking, a conveyance of the property; a transfer is executed, but it is the *registration* of the purchaser as owner of the property in accordance with the terms of the transfer which operates to vest title in him. Their Lordships rejected this argument, holding that a memorandum of transfer under the Torrens System is a document prepared

> in order that, *when registered,* it should become operative according to the tenor and intent thereof, and should thereupon transfer the land mentioned therein. It is the transfer which, *when registered,* passes the estate or interest in the land, and it appears, for the purpose of the application of the doctrine in question, to differ in no relevant respect from an ordinary conveyance of unregistered land.[45]

In other words, it was held that a memorandum of transfer is not intended to replace the previous contract *until registration occurs,* since only then does legal title pass.

Conclusion

It is suggested that neither the doctrine of merger nor settlement precludes either of the parties to an agreement for the sale and purchase of land from sueing for breach of a collateral term of the agreement after completion. Where a term is of such a kind that it cannot be said that the transfer was intended to cover the whole ground of the prior contract, damages, at least, are recoverable for its breach. Of course, the safest practice will be to expressly reserve on settlement the right to enforce unfulfilled terms[46] or, if possible, to insert in the written contract at the outset a provision that such terms shall not merge in the transfer. With regard to the latter, it is interesting to note that a printed form of agreement for sale and purchase, which has been approved by the Auckland District Law Society and the New Zealand Real Estate Institute, now being used in some parts of the country, contains the following non-merger clause:

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44. [1938] 1 All E.R. 266.
45. Ibid., 270. Emphasis added.
46. This is in fact what happened in *Pallos* v. *Munro* supra n.23. Surprisingly the court did not seem to regard it as either decisive or significant.

> "That the agreements obligations and warranties of the parties hereto herein set forth insofar as the same have not been fulfilled at the time of completion of this transaction shall not merge with the giving and taking of title to the said land and with delivery of the said chattels (if any)."

It is to be hoped, if only for the reason that it contains this clause, that the form will be more widely used in the future.

D. W. McLAUCHLAN*

*Lecturer in Law, Victoria University.