



LAW·COMMISSION
TE·AKA·MATUA·O·TE·TURE

Preliminary Paper 30

REPEAL OF THE
CONTRACTS ENFORCEMENT
ACT 1956

A discussion paper

*The Law Commission welcomes your comments on this paper
and seeks your response to the questions raised.*

These should be forwarded to:
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The Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its purpose is to help achieve law that is just, principled, and accessible, and that reflects the heritage and aspirations of the peoples of New Zealand.

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Contents

	<i>Para</i>	<i>Page</i>
Preface		v
Repeal of the Contracts Enforcement Act 1956	1	1
THE PROBLEM	1	1
THE EXISTING LAW AND ITS ORIGINS	2	1
<i>The Statute of Frauds 1677 (UK)</i>	2	1
<i>The doctrine of part performance</i>	7	2
<i>The New Zealand history and 1956 Act</i>	10	3
WHAT DOES THIS PAPER DO?	12	3
GUARANTEES	13	4
CONTRACTS DISPOSING OF INTERESTS IN LAND	14	5
The main arguments outlined	15	5
The existing law should be abolished because . . .	17	5
. . . <i>it is unjust in its operation, . . .</i>	17	5
. . . <i>it is inconsistent, illogical, and partial, . . .</i>	22	7
. . . <i>it is complex and uncertain, . . .</i>	25	7
. . . <i>and it is a distraction from the real issue.</i>	27	8
The existing law should be retained because . . .	28	8
. . . <i>it helps to prove a concluded contract</i>		
<i>(the evidentiary function), . . .</i>	28	8
. . . <i>it protects parties from hasty and ill-considered conduct</i>		
<i>(the cautionary function), . . .</i>	30	9
. . . <i>it provides a formality that eliminates uncertainty</i>		
<i>(the channelling function), . . .</i>	33	10
. . . <i>and it is traditional and should not be upset</i>		
<i>(the argument from conservatism).</i>	34	10
CONCLUSION – BEFORE A NEW PROPERTY LAW ACT IS ENACTED, YOUR VIEWS?	40	12
Statute of Frauds 1677 (UK)		13
Sale of Goods Act 1895 (NZ) ss 1–6		16
Contracts Enforcement Act 1956 (NZ)		21

Preface

THIS DISCUSSION PAPER raises a question about a discrete aspect of the law of contract: whether or not to repeal the rules in the Contracts Enforcement Act 1956 that to be enforceable land contracts and guarantees must be in writing that is signed by the parties against whom they are sought to be enforced.

Other commercial law currently under review by the Law Commission includes:

- aspects of the law of contracts of insurance,
- *A Personal Property Securities Act for New Zealand* (NZLC R8, 1989) – which the Commission is assisting the Ministry of Commerce to have enacted,
- the law concerning shared ownership of land, and
- the law for domestic and international commerce done electronically.

Submissions or comments on this paper should be sent by **28 February 1998** to the Director, Law Commission, PO Box 2590, DX SP 23534, Wellington, or by email to Director@lawcom.govt.nz. We prefer to receive submissions by email where possible. Any initial inquiries or informal comments can be directed to Nick Russell, Researcher (Telephone: (04) 473 3453; fax: (04) 471 0959; E-mail: NRussell@lawcom.govt.nz).

Repeal of the Contracts Enforcement Act 1956

THE PROBLEM

- 1 REVIEW, REFORM, AND DEVELOPMENT OF THE LAW is often considered to be a process that is only creative, requiring recommendations to be formulated that are a monument to the legal or political innovation of reformers. But an equally important aspect of reform of the law is cutting away the dead wood. This paper discusses what continuing need there might be for the Contracts Enforcement Act 1956, which has the effect that some contracts are enforceable only if proved by signed writing.

THE EXISTING LAW AND ITS ORIGINS

The Statute of Frauds 1677 (UK)

- 2 The Statute of Frauds and Perjuries (29 Car II, c.3) was enacted in the United Kingdom in 1677. The Preamble describes the 1677 Statute as an Act
For [the] prevention of many fraudulent practices which are commonly endeavoured to be upheld by Perjury and Subornation of Perjury.
- 3 This prevention was to be achieved by making six classes of contract enforceable only if they satisfied certain formalities. The six classes (the first five listed in s 4 and the last mentioned in s 17) of the 1677 Statute were:
- agreements by executors to accept personal liability for the debts of estates they were administering;
 - guarantees;
 - agreements made in consideration of a marriage;
 - “any contract or Sale of Lands, Tenements or Hereditaments, or any Interest in or concerning them”;
 - agreements to be performed later than within a year from their making; and
 - agreements for the sale of goods worth more than £10 where there had been neither delivery nor payment in whole or in part.
- 4 In *The Rise and Fall of Freedom of Contract*, Professor Atiyah suggested that some of these six classes reflected the undeveloped state of the law of executory contracts in an economy where the common mode of trading was by immediate exchange.¹ The formality required was that either the contract, or a note or memorandum of the contract, be in writing signed either by the party against whom enforcement was sought or by that party’s duly authorised agent.
- 5 The 1677 Statute was enacted at a time of both political upheaval and legal flux. Charles II had been restored to the throne less than 2 decades earlier. It was an extremely litigious age. In actions to enforce contracts the immediate

¹ Reprinted ed, Clarendon Press, Oxford, 1985, 205–208.

parties were not competent witnesses. Decisions of fact were made by jurors who (particularly in cases involving land claims) were not restricted to evidence but were entitled to take into account their own local knowledge. These factors could lead to verdicts that were of startling perversity but unassailable in law. Dissatisfaction with the state of the law was, understandably, widespread. Sir Matthew Hale, Chief Justice of the King's Bench, observed in a 1671 case:

It is come to that pass now, that everything is made an action on the case, and actions on the case are become one of the great grievances of the nation; for two men cannot talk together but one fellow or other, who stands in a corner, swears a promise and cause of action. These catching promises must not be encouraged. It were well if a law were made whereby some ceremony, as striking hands, etc were required to every promise that should bind.²

- 6 The formality chosen to overcome the procedural inadequacy of the then law was the requirement that these contracts be proved by signed writing.

The doctrine of part performance

- 7 Courts of equity seem from the start to have considered that if applied to contracts performed in part the Statute would in effect assist the frauds it was designed to prevent. Views differ on the origin of the doctrine of part performance. On the one hand it could have derived from contemporary acceptance that Parliament intended the exception for contracts performed in part, which in the case of contracts for the sale of goods was express, to apply also implicitly to contracts for the sale of land.³ On the other hand, it could simply have been an evasion or defiance of the Statute.
- 8 The broad purpose of the doctrine has been clear enough, but its precise formulation has not been free from controversy and, even now, may remain unsettled. The most difficult question⁴ is whether the acts and omissions relied on as constituting part performance
 - must have been merely consistent with the existence of the oral contract alleged, or
 - in addition, must have been done or omitted pursuant to the oral contract alleged.
- 9 The different views on this question reflect confusion about whether the doctrine of part performance is justified because part performance
 - provides an alternative mode of proof to that which the Statute requires, or
 - creates equities which it would be unconscionable not to enforce.

² *Buckridge v Shirley*, unreported but quoted in Simpson, *A History of the Common Law of Contract* (Clarendon Press, Oxford, 1987), 603 (chapter XIII contains the best account of the genesis of the Statute).

³ Simpson, 615–616.

⁴ This question divided the House of Lords in 1976 (*Steadman v Steadman* [1976] AC 536), and in New Zealand resulted in divergent opinions in the High Court (*Boviard v Brown* [1975] 2 NZLR 694; *Boutique Balmoral Ltd v Retail Holdings Ltd* [1976] 2 NZLR 222; *Hinterleitner v Heenan* (1989) 1 NZ ConvC 190,111 and *TA Dellaca Ltd v PDL Industries Ltd* [1992] 3 NZLR 88). Although the Court of Appeal ruled in favour of the more stringent test in 1994 (*Mahoe Buildings Ltd v Fair Investments Ltd* [1994] 1 NZLR 281; *Fleming v Beevers* [1994] 1 NZLR 385), it is not clear that the Court of Appeal's formulation is the last word on the subject.

The New Zealand history and 1956 Act

- 10 Section 17 of the 1677 (UK) Statute was replaced by s 6 of the Sale of Goods Act 1895 (NZ), which was itself replaced by s 6 of the Sale of Goods Act 1908. Section 4 of the 1677 Statute and s 6 of the 1908 Act remained in force in New Zealand until the passing of the Contracts Enforcement Act 1956.⁵ Section 4(1) of the 1956 Act repealed s 6 of the Sale of Goods Act 1908. Section 2(6) of the 1956 Act declared that, except in respect of contracts made before the 1956 Act was passed, s 4 of the 1677 Statute was no longer part of New Zealand law. The 1956 Act re-enacted the requirement of a signed writing for only two of the five classes listed in s 4 of the 1677 Statute; contracts concerning dispositions of land, and guarantees. The key provisions of the 1956 Act, ss 2(1)–(2), read:

2 Proof of contracts relating to land and to guarantees

- (1) This section applies to:
- (a) Every contract for the sale of land;
 - (b) Every contract to enter into any disposition of land, being a disposition that is required by any enactment to be made by deed or instrument or in writing or to be proved by writing;
 - (c) Every contract to enter into any mortgage or charge on land;
 - (d) Every contract by any person to answer to another person for the debt, default, or liability of a third person.
- (2) No contract to which this section applies shall be enforceable by action unless the contract or some memorandum or note thereof is in writing and is signed by the party to be charged therewith or by some other person lawfully authorised by him.
- 11 The 1956 Act also provides carefully (in s 2(3)(c)) that nothing in it affects the operation of the law of part performance.

WHAT DOES THIS PAPER DO?

- 12 In this paper the Commission sets out for consideration and comment arguments for and against repealing the Contracts Enforcement Act 1956. Before doing so, however, we make three preliminary points:
- First, we emphasise the distinction between a contract and a conveyance. This distinction means that we can gain little help from a comparative study of the laws of countries other than common law countries.⁶ The 1956 Act concerns contracts, not conveyances of interests in land. The Law Commission does not suggest the repeal of the requirements of s 49A of the Property Law Act 1952.⁷
 - Second, the deficiencies of the law in the reign of Charles II that triggered the enactment of the 1677 Statute have plainly long since ceased. *Nous avons changé tout cela*. Parties to contracts or alleged contracts are permitted

⁵ On the background to, and terms of, the 1956 Act, see [1956] 32 NZLJ 305 and 321.

⁶ On which see Law Commission (England and Wales), *Transfer of Land: Formalities for Contracts for Sale etc. of Land* (LAW COM No 164, 1987), para 2.15, appendix C.

⁷ Inserted by s 2 of the Property Law Amendment Act 1980 and amended in certain respects by s 2 of the Property Law Amendment Act 1982. See too the would-be replacement provisions (in s 39) of *A New Property Law Act* (NZLC R29, 1994), 62.

to give evidence. The relevant issues are not in practice determined by juries. The question whether or not to preserve a requirement of writing should be examined in the light of contemporary needs. Having noted this difference between New Zealand in 1997 and the England of more than three centuries earlier, we consider it conducive to clarity of thought therefore to disregard as no longer relevant the mischief that prompted the 1677 Statute.

- Third, we are discussing a *requirement* that certain classes of contract, to be enforceable, be in writing. The Commission does not doubt that a signed written record of the terms of any contract will be advantageous, for example, in avoiding misunderstanding and argument. Careful people will clearly continue to ensure, just as they do now, that their contracts are recorded. The subject of this paper, however, is the distinct and separate question whether certain classes of contract, if not evidenced by writing, should remain unenforceable. It is reasonable to suppose that repeal of the Contracts Enforcement Act 1956 will not result in any change to the common practice of recording in writing land contracts and guarantees. The difference repeal would make is that in the occasional cases where there is no writing or writing insufficient to satisfy the requirements of the Act (paras 18–20 contain examples) the provisions in the Act will no longer prevent courts from doing justice.

GUARANTEES

- 13 The different treatment of guarantees and indemnities under the existing law seems so anomalous that we propose immediately that the requirement of writing for guarantees be abolished.⁸ In practice, to avoid issues of consideration, most guarantees are in any event likely to be made by deed. But the effect of the 1956 Act is that, to be enforceable, a guarantee *must be* in writing. By contrast an indemnity is enforceable even though not evidenced in writing. Take as an example the uxorious X who, while shopping with his wife, realises that she wants to take home a purchase but has no means of immediate payment. If X says to the shopkeeper, “I will be responsible for paying you”, then X has given an indemnity enforceable even if not in writing. If, however, X says, “I will make sure that my wife pays what is due”, then X has given a guarantee enforceable only if in signed writing. Such technical distinctions do the law no credit. The requirement of writing for guarantees has been abolished without apparent ill effect in New South Wales,⁹ South Australia,¹⁰ and the Australian Capital Territory.¹¹ It should be abolished as well in New Zealand. Such an abolition would also assist the growing use of electronic communication in the creation of legal documents – including guarantees.

⁸ We note, however, that British Columbia has resolved this anomaly the other way by (since s 5 of the Statute of Frauds 1958) requiring writing for indemnities as well as guarantees: s 54(6) of the Law and Equity Act RSCB 1979 c 224 (as enacted by s 7 of SBC 1985, c 10).

⁹ Imperial Acts Application Act 1969 (NSW), s 8(1).

¹⁰ Statutes Amendment (Enforcement of Contracts) Act 1982 (SA), s 3.

¹¹ Imperial Acts (Substituted Provisions) Ordinance 1986 (ACT), s 3(1).

CONTRACTS DISPOSING OF INTERESTS IN LAND

- 14 Over the last century much has been published (including by law reform bodies) on whether to retain or abolish the requirement of writing for contracts disposing of interests in land.¹²

The main arguments outlined

- 15 While the same arguments can be put in different ways, the rest of this paper outlines the main arguments for and against the requirement of writing for contracts disposing of interests in land.
- 16 Arguments for abolition of the existing requirement of a signed writing are that it
- is unjust in its operation,
 - is inconsistent, illogical, and partial,
 - is complex and uncertain (so causing needless delay and expense), and
 - is a distraction from the real issue.

Arguments in favour of retaining the existing requirement of a signed writing are that it

- helps to prove a concluded contract (the evidentiary function),
- protects parties from hasty and ill-considered conduct (the cautionary function),
- provides a formality that eliminates uncertainty (the channelling function), and
- is traditional and should not be upset (the argument from conservatism).

The existing law should be abolished because . . .

. . . *it is unjust in its operation*, . . .

- 17 The premise of the requirement of writing is that contracts of the particular class need to be proved with the degree of certainty that writing provides. But there is an injustice where a contract able to be proved in some other way cannot be enforced simply because the requirement of writing cannot also be satisfied. In these cases the statutory requirement provides only a technical defence to what, substantively, is a meritorious claim. Three New Zealand examples illustrate this point.

- 18 NEW LYNN BOROUGH V AUCKLAND BUS COMPANY
[1964] NZLR 511, [1965] NZLR 542.

New Lynn Borough and Auckland Bus Company Ltd had, for many years, been in dispute over Borough plans affecting the company's land. At a long meeting attended by the owner of the company and his counsel, Mr Beattie, an agreement was negotiated under which certain land would be transferred

¹² We have found these references to have been the most helpful: Law Reform Commission of British Columbia, *Report on the Statute of Frauds* (LRC 33, 1977); Fridman, "The Necessity for Writing in Contracts Within the Statute of Frauds" [1985] UTLJ 43; Bridge, "The Statute of Frauds and Sale of Land Contracts" (1986) 64 Can Bar Rev 58; Ontario Law Reform Commission, *Report on Amendment of the Law of Contract* (1987), chapter 5; Newfoundland Law Reform Commission, *Discussion Paper on the Statute of Frauds 1677* (NLRC-WP 4, 1991).

between the company and the Borough Council. The terms of the contract made were not in any doubt. Mr Beattie read them out to the assembled Borough councillors. On behalf of the Council a note of them was made immediately, read back, and orally confirmed. The terms were then confirmed by a formal Council resolution, recorded in a letter to Mr Beattie from the Council's solicitor, and acknowledged by Mr Beattie. But because of the absence of the necessary signed writing (it was held that as barrister Mr Beattie's authority for this purpose did not extend so far) the Borough was unable by specific performance to compel the company to purchase the land as the company had agreed to do.

- 19 D'OYLY DOWNS V GALLOWAY
[1970] NZLR 1077.

A signed offer by a purchaser was prepared by the vendor's agent. Following the bankruptcy of the governing director and main shareholder of the vendor company, the sale was being conducted by the Official Assignee, who had been duly appointed governing director in the place of the bankrupt. The real estate agent who prepared the written offer, not knowing these particulars, left the name of the vendor in the written offer blank. The court held that the precise identity of the vendor was not material to the purchaser. Even so when, the vendor having accepted orally the purchaser's offer, the purchaser changed his mind, it was held that the contract could not be enforced against the purchaser because of the omission from the writing of the vendor's name.

- 20 TA DELLACA V PDL INDUSTRIES
[1992] 3 NZLR 88.

On 22 January 1990, Mr Dellaca, representing TA Dellaca Ltd, and Mr Bainbridge, representing PDL Industries Ltd, reached an oral agreement for the sale of a warehouse, subject to Dellaca satisfying himself about the lease situation. Later the same day Dellaca faxed Bainbridge confirming that that condition had been satisfied. The next day Dellaca telephoned Bainbridge, whose secretary read him a letter of confirmation that had been dictated to her but not typed. On the strength of this Dellaca entered into possession (as subtenant of an existing short-term tenant), spent a substantial sum on improvements to the property, and surrendered the lease of Dellaca's existing premises. Then PDL changed its mind. The letter read out on 23 January had never in fact been typed or despatched and PDL was able to resist the Dellaca company's claim on the basis of the absence of a writing signed on its behalf evidencing the contract.

- 21 These examples, we consider, support entirely the minority view of Zelling J, Chairman of the Law Reform Committee of South Australia, in observing that:
The only value of this section is to aid the dishonest man who thinks after concluding his bargain that he can in fact get a higher price for his land elsewhere and so he does not wish to be bound by his word. All other objections can be met under other areas of the law.¹³

¹³ Law Reform Committee of South Australia, *Report Relating to the Repeal of the Statute of Frauds and Cognate Enactments in South Australia* (Thirty-Fourth Report, 1975), 11. Compare Justice FitzJames Stephen's observation (of s 17 of the Statute of Frauds 1677) that "[i]n the vast majority of cases its operation is simply to enable a man to break a promise with impunity, because he did not write it down with sufficient formality": (1885) 1 LQR 1.

. . . *it is inconsistent, illogical, and partial, . . .*

- 22 It seems inconsistent to single out particular classes of contracts, such as those disposing of interests in land, as requiring to be evidenced in writing, while other contracts of far greater economic significance may be wholly or partly oral:

Some might regard it as ironical that an enforceable contract for the sale of shares worth many millions of dollars in a company which owns land can be entered into orally but not a contract for the sale of a small piece of realty for only \$55,000.¹⁴

- 23 Nor is it particularly logical to prescribe by statute a requirement of a particular mode of proof and then, if the writing falls short of satisfying that requirement, permit the writing to be rectified¹⁵ in a way that precludes reliance on non-compliance with that requirement. That such a rectification is allowable is clear from the authorities,¹⁶ despite it undermining whatever purposes the legislation may be thought to have.
- 24 The operation of the requirement is also often lopsided and partial: "In a contract between A and B, if A has signed a sufficient memorandum but B has not, B can enforce the contract whereas A cannot."¹⁷

. . . *it is complex and uncertain, . . .*

- 25 Apart from anything else the existing law is not fixed, settled, or certain. We have referred already to the fact that, 3 centuries after the Statute of Frauds was first enacted, the probanda of the doctrine of part performance continue to give rise to dispute (see paras 7–9). This is by no means the only moot point. Can a memorandum or note be relied on if it came into existence after proceedings have been commenced? "No", answers the weight of authority,¹⁸ so that (if a defendant is prepared to risk the plaintiff's discontinuing and starting again relying on the admission) a statement of defence can admit the contract but still invoke the absence of writing. But "Yes", answers Hammond J, because the policy goals of the statute do not preclude such reliance.¹⁹ Corbin, in his famous treatise on the law of contract, rues the Statute of Frauds because

it has introduced an immense complexity into the law and has been in part the cause of an immense amount of litigation as to whether a promise is within the Statute or

¹⁴ *T A Dellaca Ltd v PDL Industries Ltd* [1992] 3 NZLR 88, 109, Tipping J.

¹⁵ In this context alteration of the contract by court order (adding missing particulars so that the writing, memorandum, or note, complies with the Act).

¹⁶ *Craddock Brothers v Hunt* [1923] 2 Ch 136; *United States of America v Motor Trucks Ltd* [1924] AC 196; *Samson v Butt* [1927] 1 NZLR 560; *Whiting v Diver Plumbing & Heating Ltd* [1992] 1 NZLR 560, 569, Tipping J: "Maybe it would not be such a bad thing if a horse and cart were driven through the statute, but I do not rest my judgment on that basis".

¹⁷ Law Commission (England and Wales), *Transfer of Land: Formalities for Contracts for Sale etc. of Land* (Working Paper No 992, 1985), para 3.2(5).

¹⁸ *Lucas v Dixon* (1889) 22 QBD 357. The authorities are helpfully discussed in Greig and Davis, *The Law of Contract* (Law Book Company, Sydney, 1987), 693–695.

¹⁹ *Crest Haven Ltd v Vallis* (unreported, HC, Hamilton, 11 June 1993, CP 32/93).

can, by any remote possibility, be taken out of it. This latter fact is fully evidenced by the space necessary to be devoted to the subject in this volume and by the vast number of cases to be cited.²⁰

- 26 The law of contract does not need, and would be better without, the gratuitous uncertainties and complications that the 1956 Act imposes:

As a result of judicial attempts to prevent the Act being used as an instrument of fraud, it is virtually impossible to discern with acceptable certainty, before proceedings, whether a contract will be found to be enforceable under the statutory requirements.²¹

We should remember that “[i]n the everyday subject of vendor and purchaser it is especially important that the law should be as simple as possible.”²²

. . . and it is a distraction from the real issue.

- 27 In practice instead of (or, perhaps more often, as well as) the court considering the substantive issue between the parties (“Is there a concluded contract?”), enormous time and cost is expended on an artificial procedural issue (“Is the signed writing requirement satisfied?”). This distraction does little for the reputation of the legal system as an efficient and rational process for determining disputes.

The existing law should be retained because . . .

. . . it helps to prove a concluded contract (the evidentiary function), . . .

- 28 North American discussions of the merits and demerits of the Statute of Frauds are often structured like Harvard University Professor LL Fuller’s seminal article about the advantages of formal requirements for contracts.²³ That article classifies the functions of formal requirements as evidentiary, cautionary, and channelling.
- 29 Doubtless, on a dispute arising, signed writing provides useful evidence of the existence and terms of a contract. The truism that writing is useful evidence of a contract is one thing. But the proposition implicit in the Act – that the *only* way to establish the existence and terms of a contract for the purpose of enforcing it is by means of a signed contract – is quite another. The utility of the evidentiary function, while undoubted and the historical rationale for the requirement, does not take the matter very far. Modern courts are used to determining disputed issues of fact on the basis of oral evidence.

²⁰ 2 *Corbin on Contracts* (St Paul, Minn, 1950), 14.

²¹ (LAW COM No 164, 1987), para 1.8.

²² *Hunt v Wilson* [1978] 2 NZLR 261, 273, per Cooke J.

²³ “Consideration and Form” (1941) 41 Colum L Rev 799.

. . . it protects parties from hasty and ill-considered conduct (the cautionary function), . . .

- 30 What Fuller describes as the cautionary function of a signed writing is that of giving pause to the intended contracting party, making that party stop and appreciate that, by signing a contract, he or she will become bound to its terms. This argument is advanced in the absence of empirical evidence that a person who will enter into an improvident contract orally will be deterred from entering into it by the fact that it is in writing. In New Zealand it may be argued that there is an unusually great need for the cautionary function. Such an argument could be based on the high proportion of people who own a home that for most (not all of whom are commercially sophisticated) is their single biggest asset, and on contracts being procured by a real estate agent with a personal interest in a contract being concluded.
- 31 But this is to confer on a requirement of writing a function more properly to be performed by the requirement that for there to be a concluded contract there must be *animus contrahendi* – an intention to create legal relations. New Zealand has a developed jurisprudence on this requirement in relation to contracts disposing of interests in land.²⁴ In relation to sales of land a line of cases, starting with the Court of Appeal decision in *Carruthers v Whitaker* [1973] 2 NZLR 667, has laid down the presumption that the parties do not intend to be bound until the customary formal agreement for sale and purchase is signed by both sides. In the words of (now the Honourable Justice) Blanchard:

It would not be the understanding of the New Zealand man in the street that his verbal commitment to a real estate contract is binding upon him until the terms are recorded in writing and he has actually signed the document.²⁵

A similar approach has been adopted for agreements to lease.²⁶

- 32 The Manitoba experience demonstrates neatly how repealing the statutory requirement of writing results in a proper shift of focus to the issue of intention to create legal relations. In 1983 the Manitoban Provincial Legislature, acting more boldly than its Law Reform Commission had recommended,²⁷ repealed the Statute of Frauds.²⁸ Our enquiries indicate that no problems have resulted from this repeal. In *Megil-Stephenson Co Ltd v Woo* (1989) 59 DLR (4th) 146, 151, Hubbard JA, giving the decision of the Manitoba Court of Appeal, held

²⁴ Though oddly not discussed under this rubric in Burrows, Finn, and Todd, *Law of Contract in New Zealand* (Butterworths, Wellington, 1997), chapter 5. The fullest discussion is that by McLauchlan, "Informal Agreements for the Sale or Lease of Land: When are they Contracts?" [1993] NZ Rec Law Rev 442. For later examples see *Spengler Management Ltd v Tan* [1995] 1 NZLR 120 and *Stirling v Maxwell* (unreported, HC, Hamilton, 23 March 1995, CP 48/93).

²⁵ Blanchard, *A Handbook on Agreements for Sale and Purchase of Land* (4th ed, Handbook Press, Auckland, 1988), 231.

²⁶ *NZ Master Builders' Federation v Data Management Ltd* (unreported, HC, Wellington, 19 March 1993, CP 1108/90); but compare: *Kooky Garments Ltd v Charlton* [1994] 1 NZLR 587.

²⁷ Manitoba Law Reform Commission, *Report on the Statute of Frauds* (Report 41, 1980).

²⁸ An Act to Repeal the Statute of Frauds 1983, SM 1983, c 34, s 1.

that the expectation that a land sale contract would be reduced to writing prevented the enforcement of an alleged oral contract:

In spite of the repeal of the Statute of Frauds, the practice in dealing with the purchase and sale of land is to have the contracts in written form, and that was the obvious expectation between the parties in this dispute.

We can anticipate the effect in New Zealand of the contemplated repeal. Where there is no signed writing and the existence of a concluded contract is challenged, a court determining whether the parties had the necessary intention to be bound will take into account that before signing a writing the parties will usually *not* intend to be bound. But, unlike under the present law, the court would also be free in proper cases to find that the intention exists despite the absence of a signed writing.²⁹

. . . it provides a formality that eliminates uncertainty (the channelling function), . . .

- 33 The formalist argument is that the requirement of writing furnishes a simple and external test of enforceability. Few would accept this as an accurate description of how the Statute of Frauds and its current New Zealand successor have actually operated over the last 3 centuries. Experience suggests that, rather than avoiding argument, the statutory requirement has created it. It is a process that has been assisted
- by the fact that non-compliance with the statute does not avoid the contract but merely makes it unenforceable,
 - by the equitable softening of the rigour of the rule (most notably of course by the doctrine of part performance and by permitting rectification),
 - by continuing uncertainty in aspects of the law, and
 - most fundamentally, by a sense, shared by courts and litigants alike, that invocation of the statute is dishonourable.³⁰

It is this feeling of repugnance that the statute can cause that has resulted in such remarkable inventions as the “authenticated signature fiction”. Under this fiction the courts pretend in certain circumstances that a document has been signed by a party when all there is on the document is that party’s name either printed or written by the party’s agent.³¹

. . . and it is traditional and should not be upset (the argument from conservatism).

- 34 A 1987 report of the Law Commission (England and Wales) led in 1989 to the repeal and replacement of the requirement of writing in the Law of Property Act 1925 s 40: Law of Property (Miscellaneous) Provisions Act 1989 (England) s 2. That Commission headed its arguments for retaining a requirement of writing with these words:

Although we consider these arguments for the repeal of section 40 without replacement persuasive, there was absolutely no support for this proposal. In fact, some on

²⁹ For an example see para 18 – the *New Lynn* case.

³⁰ For an especially clear expression of this sentiment see *Charlick v Foley Brothers Ltd* (1916) 21 CLR 249, 251–252, Isaac J.

³¹ Burrows, Finn, and Todd, 253–254.

consultation went so far as to call it irresponsible. We are satisfied therefore that repeal of section 40 without replacement would not be acceptable.³²

- 35 Faced with conservative opposition to repealing completely the requirement of writing, but well aware that reform was needed, that Commission recommended that the statutory requirements for contracts for the sale or other disposition of an interest in land be changed:
- *from* the agreement (or some note or memorandum of it) having to be in writing signed by the party against whom it is sought to be enforced (or that party's duly authorised agent) for the contract to be enforceable,
 - *to* all the express terms of the agreement having to be in a single document that is signed by each party to the contract for the contract to be valid at all.

Results to date do not support the wisdom of this new legislation, which has been held

- to have abolished the former rule that deposit of title deeds creates a mortgage or charge,³³ and
- to invalidate an informally agreed variation.³⁴

- 36 So too, the Manitoba Law Reform Commission said:

The best reason for re-enactment, in our view, is that it maintains consistency in the law of real property. It is a well-established and accepted tradition in the common law world that all dealings in land must be evidenced in writing. . . . The fact that most people think that written evidence is necessary could cause serious problems should the provision be repealed. We suggest that people do not feel bound to a land transaction until they have signed a contract, and to change the law in this respect could result in an onslaught of litigation based on oral statements that were not intended to create legal relations. (Report 41 (1980), 35)

- 37 As para 32 mentions, the Legislature of the Canadian province of Manitoba (which it must be assumed is a more representative institution than that province's Law Reform Commission) elected to abolish completely the writing requirement for contracts affecting land. The "onslaught of litigation" predicted by the Manitoba Law Reform Commission has not to date resulted.

- 38 A similarly conservative view was expressed in 1987 by the members of the Ontario Law Reform Commission, who

[w]ere mindful of the degree to which contracts relating to land have received special treatment in the law, and we are not averse to retaining some elements of this tradition provided undue rigidity is avoided.³⁵

That Commission recommended that the requirement of writing for contracts relating to land be replaced by a requirement of corroboration (109).

- 39 Tradition is all very well, but we should remember too Tennyson's silvicultural metaphor:

That man's the true Conservative
Who lops the moulder'd branch away³⁶

³² (LAW COM No 164, 1987), para 2.6.

³³ *United Bank of Kuwait plc v Sahib* [1996] 3 WLR 372, [1996] 3 All ER 215.

³⁴ *McCausland v Duncan Lawrie Ltd* [1997] 1 WLR 38, [1996] 4 All ER 995.

³⁵ *Report on Amendment of the Law of Contract* (1987), 105.

³⁶ *Hands All Round* (1885), i.

No doubt the requirement of writing has a certain ludic charm. If you think of law as a game, then the provisions of the Contracts Enforcement Act 1956, like bunkers on a golf course, make the game more interesting. But on the more prosaic view, that rules of law should have a serious purpose, the continued existence of the Contracts Enforcement Act 1956 cannot be justified.

CONCLUSION – BEFORE A NEW PROPERTY LAW ACT IS ENACTED, YOUR VIEWS?

- 40 In 1994 the Law Commission recommended *A New Property Law Act* that, excepting a slight variation for guarantees, included the provisions of the Contracts Enforcement Act 1956.³⁷ In then opting to preserve the status quo the Commission stressed that its intention was not to preclude reform but to postpone it, enabling, among other things, monitoring of the English experiment and consideration of the developments in the law likely to flow from such decisions as *Waltons Stores (Interstate) Limited v Maher* (1988) 164 CLR 38. The doctrine of promissory estoppel permitting in some circumstances enforcement of a promise falling short of a concluded contract emphasises the stark anachronism of a statutory requirement that to be enforceable a concluded contract must be evidenced in a certain way.
- 41 The Commission considers that candour requires it to state clearly its present view that the time has now come for the repeal without replacement of all of the Contracts Enforcement Act 1956. We emphasise, however, that this present view is not fixed or rigid, and that we are open to persuasion that it is mistaken. To avoid this question interfering with the possible enactment of *A New Property Law Act*, we would welcome any comments that you may wish to make on this important matter by 28 February 1998.
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³⁷ NZLC R29 (1994), paras 40–42. The preliminary paper included a succinct discussion based almost entirely on a consideration of the 1989 English Act: *The Property Law Act 1952* (NZLC PP16, 1991), paras 101–125.

[Attached as appendices in the printed version of this paper are: the Statute of Frauds 1677 (UK), the Sale of Goods Act 1895, and the Contracts Enforcement Act 1956.]