Enforceability of Contracts to Create a Proprietary Interest: A “Common Law Approach?”

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A contract between two parties to create a proprietary interest in an identifiable asset may not necessarily create an immediate proprietary interest. This is often the case where the assets do not exist or where the party disposing of the asset does not have the power to so dispose at the time of the contract. Proprietary interests range from the transfer of ownership in a contract of sale to creation of a new proprietary interest in an asset, such as a lease or a secured transaction. Enforceability of contracts to create proprietary interests is particularly crucial to one party when the other becomes insolvent (or bankrupt). In US (under US Bankruptcy Code) and Canada (under Bankruptcy and Insolvency Act and Companies’ Creditors Arrangement Act) the approach is overtly policy-based and rather nuanced whilst English law relies on formal distinctions. This paper asks whether, despite these differences, we can say that there exists “a common law approach” to enforceability of contracts to create proprietary interests, particularly security interests and leases; if so, what this approach is and whether it could be contrasted with the civil law approach.

In civil law jurisdictions the question whether a proprietary interest has been created is resolved in a formalistic way by looking at the effect of promise to dispose of property. In French law the parties’ consensus is sufficient to dispose of the property as soon as it comes into existence whilst German law requires a conceptually separate act of transfer (or disposition), based on the promise to transfer. The approach in English law is that only specifically enforceable contracts can create proprietary interests due to equity treating as done an act that ought to be done. Despite the long history, the workings of specific enforceability in English law are uncertain, which this paper must clarify before the discussion on the presence or absence of a “common law approach” can take place.

In English law equity does not operate to specifically enforce every promise to create a proprietary interest but only such contracts where damages would be an inadequate remedy should the transferor breach the promise to transfer. Thus, a contract of sale of land is likely to be specifically enforceable due to the unique nature of the asset, which damages cannot replace. This paper does not consider specific enforceability in relation to particular types of assets. Instead, it asks whether the traditional approach remains appropriate in relation to contracts to create leases and security interests. Careful examination of *Holroyd v Marshall* and *Tailby v Official Receiver* reveals that creation of proprietary interests cannot be explained, contrary to the prevailing view, by equity’s treating as done what ought to be done. An alternative analysis is suggested. The paper then explores to what extent this re-conceptualised English law position on enforcing contracts to create leases and security interests can be said to converge with the approach in other common law jurisdictions.