

COMMERCIAL CPD SEMINARS

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Ground Floor Auditorium, Monash University Law Chambers  
555 Lonsdale Street, Melbourne VIC 3000

Session One

WILLS AND ESTATES - PRESENT ISSUES AND PRACTICAL TIPS

**The Settled Land Act: Practical Tips**



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**The Settled Land Act:**  
**Practical Tips**  
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**Foley's List**

**What is it?**

1. The *Settled Land Act* 1958 governs interests in land which are less than absolute, including life interests. A settlement may be created either by deed or will, and may involve a series of successive interests created by a single gift. A common example of a settlement of land to which the Act applies is a life interest created by will.

**Why is it important?**

2. The Act is important because if it is ignored or overlooked or ignored in drafting of Wills or other instruments, a breach of trust and professional negligence claim may later arise. Life interests are still useful and are becoming more common as testators in second marriages make wills leaving a life interest in the family home to their current spouse and the remainder to the children of a previous marriage.<sup>1</sup>

**Overview**

3. The history of English law is in large part the history of property law. Our act is descended from the English Acts. Ironically, settled land was abolished in England in 1997. All settlements of land have automatically become trusts for sale. The desirability of this course is discussed below.
4. The English *Settled Land Act* of 1882 was passed following a period of agricultural depression in England. The Act had as its paramount object liberation of life tenants and other beneficiaries of settled land from the restrictions imposed by the common law. Those restrictions had resulted in the

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<sup>1</sup> The term “remainderman” is customary and is adopted here. No gender neutral term has yet replaced it.

deterioration of land and buildings due to impoverished life tenants being unable to deal with their land.<sup>2</sup>

### **The Victorian Act**

5. First introduced in 1909, the Victorian Act remains essentially unchanged since the 1928 consolidation of the Victorian statutes under the leadership of Sir Leo Cussen.<sup>3</sup> The 1958 consolidation of the Act was taken from that of 1928.
6. A key distinction between Victorian Act and the former English Act was that any improper transaction concerning the settled land could be set aside as void under s. 13 of the English Act. There is no such provision in the Victorian Act which was a significant and unfortunate omission, the reason for which was unclear. This is problem is revealed by the discussion scenario which follows.
7. A key requirement of the Act is that two trustees of the settlement must be appointed. However, the Act appears all too often ignored in drafting wills. A failure to comply with the Act will create a ticking time bomb, which may lead to a professional negligence claim against a solicitor and deprive beneficiaries of their entitlements.

### **Scenario**

8. A testatrix knows her only son has a gambling problem. Her will leaves her house to the son for his lifetime and upon his death, to her three grandchildren in equal shares. Out of caution, she also appoints several alternative executors, including a firm of solicitors.
9. Following her death the son persuaded all of the executors renounce probate. As such, there is no executor of the Will and an administrator must be appointed. The son applies with the help of a local solicitor who unquestioningly does so.

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<sup>2</sup> See Megarry and Wade *The Law of Real Property* (2<sup>nd</sup> ed, 1959) Stevens & Sons, London ("*Megarry & Wade*") p. 281 which contains a detailed account of the history of the Act and the many statutes which once surrounded it.

<sup>3</sup> Sir Leo Finn Bernard Cussen (1859-1933) also undertook consolidations in 1915 and 1928 and performed these whilst sitting as a judge of the Supreme Court. He was knighted for his services to the law and a vote of thanks was given in Parliament. The last consolidation of the Statutes of Victoria was in 1958 and reduced all of the statutes of Victoria to fewer than 20 principal Acts.

The deceased's house then becomes registered in the son's name as administrator of the estate.

10. The son decides his mother's house is too small and sells it. He is able to do that because he is registered proprietor as sole administrator of his mother's estate. The son's solicitor acts in the sale and conveyance and does not see recognise any problem. The purchaser was not to know, nor need know, that the son held the property for life only, subject to the interests of the deceased's grandchildren as remaindermen.
11. The son uses the proceeds to purchase another house which he registers in the joint names of his girlfriend and himself, without reference to his capacity as administrator of his mother's estate. In addition to the proceeds of sale, the house is mortgaged. The son's trusty solicitor acts again.
12. The mortgage is drawn down to feed the gambling habits of the prodigal son and his willing girlfriend. Eventually, due to gambling debts, the couple decide to sell and a contract is executed. At that point the remainder beneficiaries discover the sale and preceding transactions and their solicitor immediately lodges a caveat over the property. It will be for the son's solicitor to compensate the unfortunate grandchildren.

### **The Act and its Application**

13. In the scenario, the mother's life interest by will to the son created a settlement of land for the purposes of s 8 of the Act, being an interest in land which is limited or less than absolute created by deed, will or other instrument.
14. The son in the scenario was obliged to appoint a second trustee of the settlement to act with him pursuant to s.30(3) of the Act. The son's solicitor was negligent in failing to advise him to do so. Until the son appointed a second trustee, he could not exercise any of the powers of a tenant for life under the Act without obtaining a court order (s. 20).<sup>4</sup> The sale of the property by the son and the purchase of the further property were thus in breach of the powers of sale of a tenant for life contained in s. 38.

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<sup>4</sup> "Court" is defined by s.3 as the Supreme Court or County Court.

15. Part II of the Act regulates the manner in which settled land may be sold or let and the trustee's powers in dealing with the land. In selling his mother's house, the son was obliged as a matter of law to only deal with the settlement in accordance with the Act.
16. A tenant for life may purchase the settled land subject to the limitations of the settlement, notwithstanding that he or she is a trustee of it, but only with an order of the Court (s. 68(4)). The solicitor above completely ignored these requirements and those of the Act generally.
17. The son was not entitled to mortgage the settled land for his own use. Section 71 of the Act empowers the tenant for life to raise monies by mortgage, but only for limited purposes.
18. Any land acquired or exchanged using capital monies arising under the Act is deemed to be settled land and subject to the original settlement (s.82). In other words, any proceeds of sale or dealings with that land are subject to the same settlement. The proceeds of sale of the mother's house in the scenario were "capital monies arising under the Act" and subject to the settlement.
19. A tenant for life is impeachable of waste unless there is some express provision to the contrary in the instrument creating the settlement.<sup>5</sup> Waste, in strictest sense, consists of any alteration to the nature the land, such as the conversion of arable land into crops or vice versa. It may take the form of ameliorating waste, permissive waste or voluntary waste as well as equitable waste.<sup>6</sup>
20. The golden rule is to always appoint two trustees of settlement where a life interest is concerned. Should any questions arise during the term of the life tenancy they are thus more likely to be dealt with in accordance with the Act.

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<sup>5</sup> *Megarry & Wade Op.Cit.* p. 334.

<sup>6</sup> *Ibid*, p.104 et seq.