No relaxation of the doctrine of part performance

David Smith reports on *Pipikos v Trayans* [2018] HCA 39

Introduction

The High Court considered a written agreement in relation to land that did not accord with statutory requirements.
The court confirmed that where an agreement in relation to land does not satisfy statutory writing requirements, a decree of specific performance based on part performance will be made only where there are acts of part performance that are unequivocally, and in their own nature, referable to the alleged agreement. In so doing, the High Court declined to relax the requirement of 'unequivocal referability' established by Lord Selborne in Maddison v Alderson (1883) 8 App Cas 467.

Facts

In 2002, the respondent (Trayans) and her then husband (George) bought a property in South Australia (Clark Road property). Trayans became the sole registered owner.

In July 2004 another property in South Australia was purchased (Penfield Road property). This property was registered as being owned in two half shares: the appellant (Pipikos) and his wife as owners of one half share as joint tenants and Trayans and her husband George as owners of the other half share as joint tenants. Pipikos and George are brothers. Trayans and George continued to live at the Clark Road property.

Pipikos alleged that when he and his wife were considering purchasing the Penfield Road property, Trayans and George wished to take a half interest in the property but did not have available funds. Pipikos said that he and his brother George agreed that George's wife Trayans would sell a half interest in the Clark Road property to Pipikos in return for Trayans and George taking a half interest in the Penfield Road property.

On 3 August 2009, at Pipikos' request, Trayans signed a handwritten note agreeing that Pipikos was 'the owner of half of the [Clark Road property] … via an agreement between George ... and [Pipikos] of the purchase of the [Penfield Road property]".

Appellant's claim

Section 26 of the *Law of Property Act 1936* (SA) (Act) provides:

> (1) No action shall be brought upon any contract for the sale or other disposition of land or of any interest in land, unless an agreement upon which such action is brought, or some memorandum or note thereof, is in writing, and signed by, the party to be charged.
>
> (2) This section does not affect the law relating to part performance.

This is a modern iteration of s 4 of the *Statute of Frauds* 1677. The equivalent provision in NSW is s 54A of the *Conveyancing Act 1919* (NSW).

The note made on 3 August 2009 did not satisfy the requirements of s 26(1) of the Act. However, it was relied on as evidence of the agreement the appellant said was made in July 2004. The appellant claimed that the doctrine of part performance entitled him to a decree of specific performance requiring the respondent to convey him a half interest in the Clark Road property.
The following acts of part performance were relied on by the appellant (at [24]):

> The payment by the appellant of the deposit and the balance of the purchase price for the Penfield Road property;
>
> The payment by the appellant of $7,500 to $8,000 to the respondent's husband.
>
> The payment by the appellant of $2,500 towards the mortgage of the Clark Road property in December 2009; and
>
> The appellant's attempts to document or enforce the agreement by the signed note dated 3 August 2009, the lodging of a caveat and the commencement of the proceedings.

The trial judge concluded that no contract in the terms asserted by the appellant was binding on the respondent and held further that the acts said by the appellant to constitute part performance were not unequivocally referable to a contract of the kind asserted by him: *Pipikos v Trayans* [2015] SADC 149.

The Full Court overturned the trial judge's conclusion that the alleged agreement had not been established, but held that the requirements of the doctrine of part performance were not satisfied and, therefore, dismissed the appellant's appeal: *Pipikos v Trayans* (2016) 126 SASR 436.

Appeal to the High Court

The appellant's further appeal to the High Court was dismissed.

The primary judgment was given by Kiefel CJ, Bell, Gageler and Keane JJ. Their Honours referred (at [3]) to the test for whether a contract for the disposition of land, or an interest in land, has been partly performed as that formulated by Lord Selborne in *Maddison v Alderson* at 497, namely that 'the acts relied upon as part performance must be unequivocally, and in their own nature, referable to some such agreement as that alleged'.

The appellant conceded in oral argument

that the acts set out above which were relied upon to support the part performance were insufficient to satisfy the requirement of 'unequivocal referability' (at [77]).

The appellant however urged the adoption of a more relaxed approach, akin to the approach taken in the context of equitable estoppel. On the appellant's argument, the question a court must ask is whether a contracting party has knowingly been induced or allowed by the counterparty to alter his or her position on the faith of the contract (at [5]). That proposition was rejected.

The appellant argued that Lord Selborne's unequivocal referability test could be traced to repealed rules of Chancery procedure which were in fact concerned with acceptable evidence of the parol contract in place of the writing required by the *Statute of Frauds* (at [46]). It followed that the test developed from requirements concerning proof of the contract rather than enforcement of the equities and was therefore ill-founded, it being accepted by both parties that the doctrine is properly understood as concerned with enforcing the equities arising from partial performance.

Kiefel CJ, Bell, Gageler and Keane JJ rejected this submission, holding that the unequivocal referability requirement 'is not concerned with proof of the particular contract in question, but with dealings between the parties which in their nature establish that the parties are in the midst of an uncompleted contract' (at [50]). Unequivocal referability is required because the equity to have the transaction completed arises where acts are proved that are consistent only with partial performance of a transaction of the same nature as that which the plaintiff seeks to have performed (at [54]).

The appellant invited the High Court to subsume part performance within the development of equitable estoppel on the basis that equity's desire to prevent unconscientious conduct is the common root of both equitable estoppel and part performance. Kiefel CJ, Bell, Gageler and Keane JJ held that although there might be a common root, part performance and equitable estoppel were different and do not 'cover the same ground' (at [58]).

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Their Honours also said that the nature of the equity enforced by part performance is different from that enforced by equitable estoppel. Unlike equitable estoppel, part performance does not involve an analysis of the extent to which the defendant's attempt to resile from completion of the transaction would result in detriment to the plaintiff, and the relief granted does not need to be tailored to prevent the detriment to the plaintiff (at [61]).

Their Honours concluded on this issue that the equity of the plaintiff in cases of part performance has been regarded as sufficiently strong, without more, to support an order for specific performance. Lord Selborne's requirement that acts of part performance be unequivocally referable to a contract of the kind asserted by the plaintiff should be understood as being necessary to give rise to this peculiarly strong equity (at [65]).

Kiefel CJ, Bell, Gageler and Keane JJ also considered *Steadman v Steadman* [1976] AC 536, noting that to the extent the disparate judgments in *Steadman* signalled a broadening of the doctrine of part performance before its abolition in the United Kingdom, *Steadman* was not a basis for departing from *Maddison v Alderson* (at [66]).

Nettle and Gordon JJ delivered a concurring judgment in which their Honours made additional remarks.

Edelman J agreed in the result but for different reasons. His Honour held that courts do not enforce the equities arising from acts of part performance. The courts enforce the contract itself. His Honour said that part performance is derived from the doctrine of 'equity of the statute' which permitted the imposition of an 'external morality' despite the terms of the statute (at [125]). In His Honour's view, part performance involves 'the imposition of a moral principle despite the terms of the statute' (at [125]). His Honour held that the doctrine of equity of the statute had fallen into disfavour (at [155]) and it followed that part performance should not be extended by the formulation of a more relaxed test.