

CONTRACT—STATUTE OF FRAUDS—PART  
PERFORMANCE—LANDLORD AND TENANT—LEASE OF  
PREMISES—GOODWILL OF BUSINESS INCLUDED—LAND-  
LORD AND TENANT ACT 1948 ss. 23 (2), 31

*Commonwealth Oil Refineries Ltd. v. Hollins*<sup>1</sup>

The plaintiff oil company sought an order for the specific performance of an alleged agreement by the defendants for the taking of lease of garage premises and the goodwill of a service station business conducted thereon, and also sued for moneys alleged to be owing under the agreement. The agreement failed to satisfy s. 128 of the Instruments Act 1928. Sholl J. held that the equitable doctrine of part performance applied to the agreement, and, notwithstanding the fact that a fair rent of four pounds five shillings per week had been determined in respect of the premises by the Fair Rents Court, permitted the plaintiff company to recover rent for the lease of the premises and the goodwill of the business at the rate of twenty-five pounds per week.

Counsel for the defendant argued on the basis of dicta in *Britain v. Rossiter*<sup>2</sup> that the scope of the equitable doctrine of part performance was confined to cases concerning land, and that, accordingly, the order sought in connection with the goodwill of the service station ought not to be made. Mr Justice Sholl was unimpressed by this argument and said that the doctrine was applicable whenever the contract was one of which equity would grant specific performance.<sup>3</sup> The well-known cases of *McManus v. Cooke*<sup>4</sup> and *J. C. Williamson Ltd. v. Lukey and Mulholland*<sup>5</sup> appear to have settled the law in Victoria on this matter, and it is doubted if in future the point will be worth raising in argument. It was unfortunate that the Lords Justices who decided *Britain v. Rossiter* should have chosen to deliver their judgments in such wide terms as they did, because the case concerned a contract of employment not to be performed within a year, a type of contract which will not be specifically enforced by a Court of Equity in any circumstances.

Sholl J. was satisfied that the defendants' entering into possession of the premises and the enjoyment of the goodwill of the business and their making periodical payments to the person who had hitherto been the owner of both were clearly referable to the contract alleged by the plaintiff. However, His Honour continued:

<sup>1</sup> [1956] V.L.R. 169. Supreme Court of Victoria; Sholl J.

<sup>2</sup> [1879] 11 Q.B.D. 123, 129 per Brett L.J., 131 per Cotton L.J. These observations were repeated by Lord Selborne L.C. in *Maddison v. Alderson* (1883) 8 App. Cas. 467, 475.

<sup>3</sup> [1956] V.L.R. 169, 178.

<sup>4</sup> (1887) 35 Ch. D. 681, esp. 697 per Kay J.

<sup>5</sup> (1931) 45 C.L.R. 282.

In *Francis v. Francis* [1952] V.L.R. 321, at p. 332. I suggested that 'unequivocal reference', within the meaning of long-established authorities upon the doctrine of part performance, was 'clear reference according to normal probabilities', and I ventured to reject any supposed need for proof of 'necessary reference'.<sup>6</sup>

While there can be no doubt that upon the facts in *C.O.R. Ltd. v. Hollins* the conduct of the defendants could be referable only to the contract alleged, it is respectfully suggested that the introduction of matters of 'normal probability' into this field is not supported by authority and could be misleading. The test suggested by Lord Justice Fry, that 'the acts of part performance must be such as not only to be referable to a contract such as that alleged, but *to be referable to no other title*'<sup>7</sup> sets a much more exacting standard than Mr Justice Sholl's rule.

It was also necessary to consider whether the plaintiff was prevented from recovering the agreed rate of twenty-five pounds per week for the lease of the premises and the goodwill of the service station business by a Fair Rents Court determination fixing rent for the premises at four pounds five shillings per week. The defendants pleaded s. 23(2) of the Landlord and Tenant Act 1948.<sup>8</sup> Two cases in which the facts were similar to the present case were cited: *Crundell v. Bertrand*,<sup>9</sup> and *Loder v. Tokoly*,<sup>10</sup> the latter case having been decided in New South Wales before the publication of the report of *Crundwell v. Bertrand*. In *Crundwell's* case it was held by Gavan Duffy and Dean JJ. that where a single weekly payment was expressed as being payable in respect of a lease of both premises and business goodwill it was not a 'bonus, premium or sum of money (other than rent)' payable in association with the lease within the terms of s. 31 of the Landlord and Tenant Act 1948, and was outside the 'rent-determination' provisions of the Act. This case was followed by Sholl J., the ground of his decision being that the inclusion of an element not affected by the Landlord and Tenant Act in a sum expressed to be 'rent' takes the whole sum outside the Act, 'even if some unascertained portion of it be for a consideration which, if it were the sole consideration, would bring it within the Act.'<sup>11</sup> His Honour regarded *Loder's* case, in which a majority of the

<sup>6</sup> *Loc. cit.* 179.

<sup>7</sup> *Fry on Specific Performance* (6th ed., 1921), p. 276. The italics are mine. Professor Hanbury, *Modern Equity* (6th ed., 1952), p. 584 expresses the opinion that it must be 'necessarily irresistible' that the facts refer to the alleged contract exclusively. Fry's rule is adopted in *Halsbury's Laws of England* (3rd ed., 1954), viii. 110.

<sup>8</sup> S. 23 (2) provides: 'Any amount by which the rent charged in respect of the premises in excess of the fair rent fixed as aforesaid shall, notwithstanding any agreement to the contrary, be irrecoverable by the lessor.'

<sup>9</sup> [1953] V.L.R. 1. Supreme Court of Victoria.

<sup>10</sup> (1952) 52 S.R. (N.S.W.) 283. Supreme Court of N.S.W.

<sup>11</sup> *Loc. cit.* 183.

Supreme Court of New South Wales held that a similar sum was 'rent' governed by the provisions of the New South Wales Act, as being either in conflict with the Victorian case or decided upon a special set of facts.<sup>12</sup>

The uncertainty revealed in *Crundwell's* case, *Loder's* case, and *C.O.R. Ltd. v. Hollins* is not surprising in view of the silence of the Victorian and New South Wales Landlord and Tenant legislation on the position of a single rent payable for the lease of premises and business goodwill. As the Landlord and Tenant Act 1953, s. 3 removed new leases of business premises for a term of more than three years from the rent-fixing provisions of the 1948 Act, and the tendency in all recent amendments to the Act has been towards the lifting of restrictions upon rents, the point is of no great practical importance today. Nevertheless, it illustrates loopholes which existed in the legislation in its heyday, and the ease by which it was possible to by-pass the provisions of the Act for the pegging of the rents of business premises. It was unfortunate that such important legislation as the Landlord and Tenant Act should have been allowed to develop in as haphazard a manner as it was.

J. D. MERRALLS

<sup>12</sup> Herron J., the dissentient in *Loder v. Tokoly*, based his judgment upon the same grounds as Gavan Duffy and Dean JJ. in *Crundwell v. Bertrand*.

#### CROWN—INCORPORATED PUBLIC AUTHORITY— LEGAL POSITION

*Wynyard Investments Pty. Ltd. v. Commissioner for Railways (N.S.W.)*<sup>1</sup>

The Commissioner for Railways in N.S.W. leased premises for a term of five years. On the expiration of that period, the Commissioner took proceedings to recover possession from the appellant, as tenant. The premises in question were 'prescribed premises' under the Landlord and Tenant (Amendment) Act 1945-52 (N.S.W.) with the provisions of which the Commissioner had not complied. The tenant asked that the information be dismissed on the ground that the Commissioner was not 'the Crown in right of the State of N.S.W.', and therefore not entitled to the privilege of exemption granted to the Crown by s. 5(a) of that Act. The Magistrate rejected this argument and directed the issue of a warrant for possession.

The tenant appealed to the High Court from an order of the Full Supreme Court of N.S.W. discharging a rule nisi for a writ of prohibition directed to the Magistrate and the Commissioner for Railways. The High Court dismissed the appeal. The majority<sup>2</sup>

<sup>1</sup> [1956] A.L.R. 49. High Court of Australia; Williams, Webb, Taylor, Fullagar and Kitto JJ.

<sup>2</sup> Williams, Webb and Taylor JJ.; Fullagar and Kitto JJ. dissented.

<sup>3</sup> [1956] A.L.R. 49, 54.