The Operation of the Doctrine of Part Performance, in Particular to Action for Damages

A. Introduction

"Indeed it has been said that there is no decision on any point arising under the *Statute of Frauds* as to which it is not possible to find a contrary decision", remarked Griffith, C.J. in *Bognall* v. *White.*[1] Certain contradictory *obiter* by Bray C.J. and Wells J. in the recent South Australian case of *Ellul and Ellul* v. *Oakes*[2] have provided yet a further illustration of the diversity of judicial opinion which surrounds the operation of this Statute.

This case concerned, *inter alia,* an action for damages for breach of warranty by the purchasers of a house against their vendor. The Court held that there was a sufficient memorandum in writing, evidencing an oral promise made to the purchasers that the house was sewered, to enable the purchaser to obtain damages on finding, after the completion of settlement, transfer, and registration, that the house was served by only a septic tank. However, the Court had considerable difficulty in holding that there was sufficient written evidence to allow this common law action to succeed and, on the surface, one might have thought that an argument based on the equitable doctrine of part performance would have provided the plaintiff with an easier method of defeating the vendor's defence based on the *Statute of Frauds.* The Chief Justice (Bray, C.J.) however, made it quite clear in his judgment that, in his opinion, such an argument would have been futile, when he said:

> "Nor will it do to say that contract, even if oral, has been partly performed, or in one sense totally performed, by the payment of the money and the transfer of the land, and that the doctrine of part performance would defeat any defence based on the statute. For that doctrine provides an equitable defence only, and is only relevant in actions of specific performance. It cannot be invoked in aid of a common law claim for damages which the Statute of Frauds would otherwise defeat . . . There could have been no claim for specific performance here, everything performable was performed; a warranty like this one is not something to be performed in the future, but a guarantee of the present existence of something."[3]

With this analysis, however, Wells, J. did not agree. Although he agreed with the decision reached by the rest of the Court, and for much the same reasons, he was of the opinion that, even in the absense of the written evidence, the plaintiff would have been entitled to his damages.

"I have carefully considered what Bray, C.J. has had to say about the right to bring an action upon a contract for proof of which recourse must be had to the doctrine of part performance. If he is right in saying that part performance can be invoked to overcome the effect of the Statute of Frauds only where the claim is for specific performance, then I am prepared to agree with him that a sufficient memorandum exists to satisfy the requirements of that Statute. But with the greatest respect, I cannot agree that a purchaser's rights are so narrowly confined. It seems to me, on principle, that since the passing of the Judicature Acts, if a contract is enforceable in equity, in particular, if it is sufficiently proved to meet the demands of equity so that a claim for specific performance would succeed, that contract is also proved for the purpose of founding an action for damages . . . It would, moreover, be ludicrous in the extreme if part

1. [1906] 6 S.R. (N.S.W.) 67 at 96 (H.C.).
2. [1972] 3 S.A.S.R. 377.
3. *Ibid.,* pp. 382–3.

performance were enough but full performance were not. The plaintiffs were allowed into possession paid the purchase price, and received a transfer in registrable form. In my opinion, they were, at least upon receipt of the transfer, entitled to a decree of specific performance if anything remained to be done by the vendor that was not done, and accordingly the contract was clearly one in which a decree of specific performance could then have been obtained. It follows that that claim could not have been defeated by the Statute, and the action for damages on the contract is maintainable".[4]

The primary object of this article is to attempt to resolve this conflict of opinion. However, in so doing, a fairly thorough investigation of certain aspects of the doctrine of part performance will, of necessity, have to be carried out. In particular, it will be necessary to consider the following matters:

(1) To what extent, if any, did the passing of the *Judicature Act* effect the scope of operation of the doctrine of part performance;

(2) To what extent, if any, is *Lord Cairns' Act, 1858* relevant to the matter under examination;

(3) The distinction between common law and equitable damages; and

(4) In respect of what types of contracts is the doctrine of part performance applicable?

B. The effect of the Judicature Act

With all respect to Wells J., it is difficult to see in what way the passing of the Judicature Act can have effected the operative scope of the equitable doctrine of part performance. True it is that prior to this Act the Courts of Equity had no power, except under *Lord Cairns' Act*[5] (about which a little more later), to grant relief by way of damages. It is also true that, prior to the passing of this Act, the Common Law Courts had no power to grant such forms of equitable relief as a decree of specific performance or an injunction. Further, since the coming into force of that Act, the superior courts of the various Australian States in which it, or similar legislation, operates now have *concurrent* equitable and common law *jurisdiction;* so that, for example, claims for an injunction to restrain breaches of contract and damages for breach of contract may now be brought in the one action before a court having *jurisdiction* to order either remedy. However, what the *Judicature Act* did not do was to alter the nature of the legal and equitable rights which could, under that Act, be determined by the one superior court. And the remedies available, whether legal or equitable in nature, largely depend upon the rights in the protection of which they are sought. Thus, the situations in which (for example) a decree of specific performance may be made have not been extended by the *Judicature Act;* nor have those in which common law damages may be awarded.[6] Thus, it follows that if, prior to the passing of the *Judicature Act* and the merging of the *administration* of common law and equitable jurisdictions, an action for damages could have been defeated by a defence based on the absence of written evidence

4. *Ibid.*, pp. 394–5.
5. I.e. the *Chancery Amendment Act 1858.*
6. See Keeton: *An Introduction to Equity*, Pitman, London, 6th ed. pp. 43–4, where he says, *inter alia;* "From these provisions (i.e. of the *Judicature Act*) it might perhaps be assumed that there has at length been a fusion of law and equity. This, however, is not the case. The two systems still preserve their distinct identities, but there has been a union of formerly distinct administrations . . .
"Although there has been no fusion of the two systems, there has been a fusion of the administration of them . . . (T)he *Judicature Acts* did not in any way alter the nature of legal and equitable rights. They remained as distinct conceptions as before 1873". (i.e. the year of the passing of the *Judicature Act.*)

as required by the *Statute of Frauds,* then the position will not have been altered by that Act. Neither before nor after the passing of that Act could the equitable doctrine of part performance be set up so as to defeat a defence based on the absence of writing. Authority in support of this allegation can be found specifically in *Lavery* v. *Pursell*[7] (where Chitty, J. said: "But since the various amendments which have taken place in the law with regard to equitable doctrines, it has never been decided, so far as I am aware, that the equitable doctrine of part performance can be made use of for the purpose of obtaining damages on a contract at law"[8]), *In re Northumberland Avenue Hotel Company,*[9] and in *J.C. Williamson Ltd.* v. *Luckey and Mulholland*[10] (where Starke, J. said: "It is clear that the *Statute of Frauds* is a complete answer at law to any action for damages arising from breach of the agreement",[11] and Dixon, J. said: "An action of damages could not but fail, because, when a common law remedy is sought, part performance never did and does not now afford an answer to the *Statute of Frauds*".[12]) For a case denying the application of the doctrine of part performance in a common law action prior to the Judicature Act, see *McLean* v. *Cooper.*[13]

It would thus follow that even if an action for common law damages concerned a contract of a type to which, had equitable relief been sought, the doctrine of part performance could properly have been applied, that factor would not avail the plaintiff so as to defeat a defence based on the *Statute of Frauds.* This is, in effect, to reject the opinion of Wells, J. to the contrary, quoted above. Before turning to examine the type of contracts to which the doctrine of part performance may, in some circumstances, relate, however, mention should be made of a case (viz. *Sinclair* v. *Schildt*),[14] the head note of which might tend to suggest support for Wells, J.

The facts of this case may be briefly stated. The defendant held a bill of sale over the cafe fixtures of the plaintiff who was also his tenant. Instead, however, of exercising his rights of seizure under this bill of sale, the defendant entered into an oral agreement with the plaintiff. Under this agreement the defendant was to sell the freehold of the cafe to a third party, and the plaintiff was to assign the remainder of his lease to any such purchaser. In return, the defendant promised to pay the plaintiff "a substantial sum" out of the proceeds of the sale. The free hold of the cafe was duly sold and the lease assigned by the plaintiff but he received no payment from the defendant. According to the report of the case, the plaintiff brought an action for "damages for breach of contract". The Court hearing the appeal held that, although the contract concerned an interest in land and fell within the scope of the *Statute of Frauds,* and although there was no written evidence of the agreement between the two parties to satisfy the requirements of the Statute, the plaintiff could rely on his acts of part-performance in assigning the remainder of his lease to the purchaser of the freehold. However, when the respective judgments of Burnside A.C.J., and Rooth and Northmore JJ. are each read, it will be seen that the court, in fact, did not award common law damages for breach by the defendant of this contract but, rather, decreed that it be specifically enforced, the question being left for

7. 39 Ch.D. 508.
8. *Ibid.,* p. 518.
9. 33 Ch.D. 16.
10. (1931) C.L.R. 146.
11. *Ibid.,* p. 293.
12. *Ibid.,* p. 297.
13. (1862) 1 S.C.R. (N.S.W.) 186.
14. (1914) 16 W.A.L.R. 100.

determination by a jury as to how much, in the circumstances, the "substantial sum" should be. Thus, Burnside A.C.J. observed: "It is contended that as the sum to be paid was not an ascertained sum, equity would not decree specific performance of the agreement . . . (but) this objection is not a sound one . . . (T)he price is to be 'a substantial sum', and I see no difficulty in referring that question . . . to a jury to determine".[15] While Rooth J. expressed the opinion that "the term damages . . . in the present case . . . is used in the sense of something agreed upon, but the amount requires ascertainment".[16] He went to hold that the terms of the agreement before him were not so vague as to be unenforceable, since, when a contract has been partially performed by one party, a court should be reluctant to refuse a decree of specific performance on such somewhat technical grounds. In support, he relied on the following passage from the judgment of Kay J. in *Hart* v. *Hart*[17]: "And I feel considerably impressed by the consideration . . . that when an agreement for valuable consideration between two parties has been partially performed, the Court ought to do its utmost to carry out that agreement by a decree of specific performance, . . . although it may be such an agreement as the court would hesitate to decree specific performance of, if there had not been part performance . . . (W)hen there has been part performance the Court is bound to struggle against the difficulty arising from the vagueness". Finally, Northmore J. held in *Sinclair's* case that "the contract alleged in the present case is one in which a court of equity would entertain a decree of specific performance".[18] But whether he actually so decreed himself, or whether he was of the opinion that, therefore, damages could be awarded, it is not clear. To the extent that damages could have been legitimately awarded, they could only have been in the nature of equitable damages *in lieu* of specific performance, not common law damages. To the extent, if any, that Northmore J. is to the contrary, it is respectfully submitted that he is wrong.

It may be noted that doubts were cast on the *"dicta"* of Rooth and Northmore JJ. in this case by McMillan CJ. and Burnside J. almost immediately afterwards in *Riley* v. *The Melrose Advertiser.*[19] A case, wrongly decided it is submitted, which, however, does support the view expressed by Wells J. in *Ullul's* case is the Irish case of *Crowley* v. *O'Sullivan.*[20]

C. The Effect of Lord Cairns' Act[21]

Before undertaking an examination of the types of contracts to which the doctrine of part performance can legitimately operate, some brief comment should be made about the operative effect of *Lord Cairns' Act,* under which the Courts of Equity, in 1858, were given certain limited jurisdiction to award damages in lieu of, or in addition to, a decree of specific performance or the issuing of an injunction. Since all this is established law, little time will here by spent in analysing the relevant cases. Suffice it to say that it has been consistently held, in such cases as *Lavery* v. *Pursell,*[22] *Aynsley* v. *Glover,*[23]

15. *Ibid.*, p. 106.
16. *Ibid.*, p. 109.
17. 18 Ch.D. 685.
18. (1914) 16 W.A.L.R. 100 at 113.
19. (1915) 18 W.A.L.R. 127.
20. [1900] L.R. 2 Ir. 478.
21. Although the *Equity Act of 1867* (Qld.), this State's local enactment of *Lord Cairns' Act,* has, like the English Act itself, been repealed, the principles flowing from it have survived, as is also the case in England. See *Sayers* v. *Collyer,* 28 Ch.D. 183 at p. 101 and *Conroy* v. *Lowndes,* [1958] Qd. R. 375 at p. 383.
22. (1888) 39 Ch.D. 508.
23. (1874) L.R. 18 Eq. 544.

Ferguson v. *Wilson,*[24] *Elmore* v. *Pirrie,*[25] *Proctor* v. *Bayley,*[26] *Douglas* v. *Hill,*[27] *J.C. Williamson* v. *Luckey and Mulholland,*[28] *Conroy* v. *Lowndes*[29] and *Ella* v. *Wenham,*[30] that equitable damages under this Act could only be awarded if, at the time the action was commenced, it would have been possible for the court to have issued an injunction or to have made a decree for specific performance. Thus, equitable damages in lieu of these other equitable remedies could not be awarded when the specific performance of the contract, at the time the action was commenced, had been rendered impossible, (e.g.) by the disposal for value to innocent third parties of the property in question by the defendant, (as in *Ferguson* v. *Wilson* and *Ella* v. *Wenham*), or when the contract was one for services (as in *Elliot* v. *Roberts*), or when constant supervision of the contract by the court would be required if the decree were to be enforced, (as in the *J.C. Williamson* case), or when the court was of the opinion that there was no case for an injunction, there being no evidence that the defendant had any intention to infringe the plaintiff's patent rights in the future (as in *Proctor* v. *Bayley*), or on an application for an interlocutory injunction only and before a hearing of the merits of the case in favour of granting a permanent injunction (as in *Anysley* v. *Glover*).

D. The Purpose of Equitable Damages

Applying this principle to the facts of *Ellul and Ellul* v. *Oakes,* it would seem that, since, at the time the action was commenced, everything had been performed which had to be performed by either party, no equitable damages could have been awarded. A petition for specific performance must surely have failed, for there was nothing which the Court could have ordered to be performed. This, however, Wells J. found anomalys. To him, it would be absurd to deny to a party the right to damages he would have had if some part of the contract had been left unperformed, merely because everything had been performed. That, he seemed to argue, was to make part performance more beneficial to the plaintiff that full performance of the contract.

It is submitted, however, that the result is not as anomalous as it may first appear. It is the writer's opinion, based on the reasoning of Philp J. in *Conroy* v. *Lowndes,*[31] that equitable damages are not menat necessarily to take the place

24. (1866) 2 Ch. App. 77.
25. (1887) 47 L.T. (N.S.) 333.
26. (1889) 42 Ch.D. 390.
27. (1909) S.A.L.R. 28.
28. (1931) 45 C.L.R. 282.
29. [1958] Qd.R. 375.
30. [1971] Q.W.N. 31.
31. [1958] Qd. R. 375 at 380–3. Note particularly p. 380 where Philp J. says: "Upon the purchaser's default the vendor may sue for specific performance (with ancillary damages) or for damages at common law ... The Vendor's suit for specific performance is really although not technically an action to recover the contract price and in that suit the market price of the subject property is normally irrelevant; the vendor's common law action for damages is to recover the difference between the market value and the contract price. It is very important for a defendant purchaser to know whether common law damages are being claimed against him for if they are he must come to trial armed with evidence of market price. The form of claim is of real importance." Since they had not been claimed in the statement of claim common law damages could not be awarded. (He so held for other reasons, too.) In *Dell* v. *Beasley,* [1959] N.Z.L.R. 89, at 93, McCarthy J. was of the opinion however, that where specific performance had been sought equitable damages could be awarded although they had not been claimed in the pleadings. If both cases are correct, this shows a difference between the two types of damages. To the contrary is *Fry, op. cit.,* p. 583, 1302, but little authority is given and the author merely says that "it is apprehended" that such is the position. The one authority that is given by *Fry* is *Rock Portland Cement Co. Ltd.* v. *Wilson,* 31 W.R. 193, where Kay, J. held that *Lord Cairns' Act*

of common law damages, but are intended to put the plaintiff into a position equivalent to that which he would have been in if the contract had been specifically performed. In some situations, for example, where the plaintiff has suffered loss as a result of an unjustifiable delay on the part of the defendant in carrying out his obligations under the contract, equitable damages may be awarded in addition to the decree of specific performance – so that the plaintiff will be placed as nearly as is possible in the position he would have been in had the defendant carried out his side of the bargain according to the terms of the contract. In most cases, the decree itself may not be made, but equitable damages awarded to the plaintiff instead. Again, however, the aim will be to place him as nearly as possible into the position he would have been in had the other party performed his side of the contract.

If this argument is accepted, it follows that equitable damages cannot be awarded when both parties have completely and promptly performed their respective sides of the agreement. The plaintiff will already be in the position for which equitable damages in lieu of or in addition to specific performance are designed to put him. Remarks to the effect that this result means that part performance of the contract is more beneficial to the plaintiff than complete performance are, then, erroneous. For, if by this it is meant that the plaintiff would have been better off if he had refrained from performing some of his own obligations under the agreement, the answer is that such conduct would probably have prevented him from obtaining a decree of specific performance even if there was something under the contract left undone by the defendant. On the other hand, if what is meant is that the plaintiff would have been better off (i.e. that he would be able to seek equitable damages) if the defendant had not in fact completed his side of the agreement, then there are two answers to be made to the observation. One is that the doctrine of part performance, when relied on by a plaintiff, depends on his acts in performing the contract, not those of the defendant. The other, and for present purposes the more important, reply is that, in such a case, any equitable damages awarded to him would not have (or ought not to have) placed him in a better position than he would have been in had the defendant promptly performed his side of the contract. Thus, nothing is gained by the plaintiff by such a failure on the part of the defendant to perform his side of the bargain. It would only be if equitable damages took the place of common law damages that such a curious result would be reached. It is submitted, however, that equitable damages were not intended to replace common law damages, and it is this type of damages which is payable to compensate a purchaser for the breach by his vendor of warrantees in the contract of sale. Such an action virtually presupposes that the sale has been "completed". It was this type of damages that the plaintiffs sought (and

did not allow damages to be obtained in lieu of specific performance unless they would have been obtainable at common law, as that Act had created no new right to damages. However, the learned judge based this conclusion on the erroneous reasoning that that Act was designed to allow damages to be given to a plaintiff who, although having failed to obtain equitable relief before a Court of Equity, had a right to damages at common law to be awarded his damages by the Court of Equity, and prevent his being "bandied about" (p. 194) from one court to another. In the light of the numerous authorities already referred to, it is obvious that damages under the Act could not be awarded if the plaintiff had no right to either an injunction or a decree of specific performance. Little weight, it is submitted, should, therefore, be given to this case. In any event, it is clearly contrary to *Conroy* v. *Lowndes*. In another case, *Elmore* v. *Pirrie*, (1887) 57 L.T. (N.S.) 333, Kay J., it is submitted again evidenced some misunderstanding of the combined import of *Lord Cairns' Act* and the *Judicature Act*.

obtained) in *Ellul and Ellul* v. *Oakes.* The recovery of such damages, however, is no way effected by the doctrine of part performance or the overall enforceability in equity of the contract upon which the common law action for damages for breach of warrantee is brought.

If, however, the distinction made by the present writer between common law and equitable damages is not a sound one, it is difficult to deny the force of Wells J's. inference that, for the purposes of obtaining damages, a plaintiff may be better off if he has obtained only part performance and not full performance of his contract. Such a situation, if it does exist, is, of course, little short of ludicrous. There is, too, even if the above argument as to the difference between these two types of damages is accepted, this anomally, that, had the contract in *Oakes'* case not been wholly performed by the vendor, the purchaser may well have been able to obtain a decree of specific performance, together with a reduction of the contract purchase price because of the non-existence of the promised sewerage nor with an award of compensation. In the Privy Council case of *Rutherford* v. *Acton-Adams,*[31a] it was stated that, where a vendor finds it impossible to convey to the purchaser property exactly corresponding to that which he had contracted to convey, because of *(inter alia)* a misdescription by him as to the quality of the said property in the contract of sale, a decree of specific with money compensation may be made by the court to the purchaser. This sum is awarded to the purchaser to compensate him for the loss he has sustained because of the misdescription. Thus, in *Ellul's case,* has the contract not been wholly performed at the time of the trial, then, assuming the acts of part performance to have been sufficient to have enabled a decree of specific performance to have been granted, it is arguable that such a decree could have been accompanied by an award of compensation, to cover the costs to the purchaser of having the land sewered. But since it had been fully executed, this sum was recoverable, if at all, only by bringing an action for damages. A curious result.

E. The Types of Contracts to which the Doctrine of Part Performance may apply

There have been, during the past hundred years, three major lines of opinion as to the types of contracts to which the doctrine of part performance, when all the other requirements of the doctrine have been satisfied, may be applicable. The first, supported primarily by the decision of the Court of Appeal in *Britain* v. *Rossiter,*[32] would restrict its application to contracts "concerning land",[33] while the second would allow it to operate with respect to any contracts which are capable of being enforced by a decree of specific performance. The third view is that it applies in all "cases in which a Court of Equity would (have) entertained a suit (whether for specific performance or other equitable relief), if the alleged contract had been evidenced by writing".[34] This last view was approved of by *Fry* in the 6th Edition of his *Treatise on the Specific Performance of Contracts,* at p. 283, but was rejected by *Williams* in his book on section four of the *Statute of Frauds.*[35] It is the second interpretation which has, as shall be seen, the majority of judicial opinion behind it.

31a. [1915] A.C. 866.
32. (1879) 91 Q.B.D. 123.
33. *Ibid.,* per Brett L.J. at p. 129.
34. *Williams: The Statute of Frauds, Section Four, in the Light of its Judicial Interpretation,* Cambridge University Press, 1932, pp. 241–242.
35. *Ibid.,* p. 243.

(i) Contracts "concerning land"

The only real authority for this view comes from *Britain* v. *Rossiter,* and even in that case it is not entirely clear that the court was unanimous in so restricting the scope of the doctrine of part performance. There, an action for damages for breach of contract was brought upon a contract for services, which was to continue in operation for more than one year "from the making thereof". As there was no written evidence of the agreement, it was unenforceable at common law by virtue of the *Statute of Frauds.* It was argued that, since the passing of the *Judicature Act,* the Court could enforce the contract under the doctrine of part performance. This submission was unanimously rejected by the Court of Appial; however, not, as the writer has already argued is the basic ground for rejecting such an argument, because the equitable doctrine was held to have no application in actions for damages at common law, but on the narrower ground that the contract in question was not one with respect to which a Court of Equity, before the passing of the *Judicature Act,* would have applied the doctrine of part performance. Since the *Judicature Act* had in no way extended the scope of existing equitable rights and had created no new rights, the contract continued to remain, after the *Judicature Act,* one to which the doctrine of part performance still did not apply.[36]

The reason seemingly given by all three judges in this case for holding that the contract was not one to which the doctrine of part performance could apply was that that doctrine only applied to contracts "concerning land",[37] per Brett L.J., or "relating to land",[38] per Cotton L.J., or relating to "sales of land",[39] per Thesiger L.J. However, the reason given by at least Brett L.J. for so confining the scope of application of the doctrine was that it was only contracts which were specifically enforceable which, prior to the *Judicature Act,* would have come before a court having the equitable jurisdiction to apply the doctrine. Since contracts for services are not specifically enforceable, such contracts could not have come before the Courts of Equity, and, thus, the doctrine could not have applied to them, either before or after the passing of the *Judicature Act.* Contracts concerning land, on the other hand, are prime examples of contracts which are specifically enforceable. So, *Williams* "explains" the narrow confinement of the doctrine to contracts concerning land by Brett L.J. as being "merely an approximation of the true position",[40] (i.e. that it applied only to those contracts which were specifically enforceable by the Courts of Equity). The entire decision was similarly interpreted by Lush J. in *Elliot* v. *Roberts.*[41] Only minor support for this narrow view, as exemplified by a literal reading of the judgments in *Britain* v. *Rossiter,* is available from Australian authorities, of which the judgment of Burnside A.C.J. in *Sinclair* v. *Schildt*[42] and that of Herron J. in *Carter* v. *Smith*[43] might be mentioned.

(ii) Contracts specifically enforceable

This narrow interpretation of the scope of operation of the doctrine of part performance by the Court of Appeal was criticized by Lord Selborne in

36. As it was decided on this narrow ground, the present writer did not find it of assistance in the earlier discussions in this article on the "Effect of the *Judicature Act*". Accordingly, it was not cited at that stage.
37. (1879) 11 Q.B.D. 123 at 129.
38. *Ibid.,* p. 131.
39. *Ibid.,* p. 133.
40. *Williams; op. cit.,* p. 238.
41. 28 T.L.R. 436 at 437–438.
42. (1914) 16 W.A.L.R. 100 at 105.
43. 52 S.R. (N.S.W.) 290, at 294–295.

Maddison and *Alderson*[44] and was expressly rejected by Kay J. in *McManus* v. *Cooke*,[45] where he held that the doctrine of part performance "applies to all cases in which a Court of Equity would entertain a suit for specific performance if the alleged contract had been in writing".[46]

Since *McManus* v. *Cooke*, the overwhelming weight of English authority is in support of Kay J. In the Australian States, too, there is no lack of judicial opinion to the same effect. To cite just some of the Australian cases in which the view has been expressed that the doctrine applies to (and probably only to) contracts which are specifically enforceable in equity, mention could be made of *Gannon* v. *Barter*,[47] *Riley* v. *The Melrose Advertiser*,[48] *McLean* v. *Cooper*,[49] *Carter* v. *Smith*,[50] *Moxhay* v. *Lawrence*,[51] *Marsh* v. *Mackay*,[52] *Douglas* v. *Hill*,[53] and *Commonwealth Oil Refineries Ltd.* v. *Hollins*.[54] Furthermore, the High Court's decision in *J.C. Williamson Ltd.* v. *Luckey and Mulholland*,[55] although not conclusively holding that the doctrine *only* applies to cases in which specific performance is possible, did, it is submitted, reject the narrower view as expressed in *Britain* v. *Rossiter*. The High Court decision at least established that the doctrine of part performance is capable of application in relation to contracts, whether concerning land or otherwise, which are specifically enforceable.[56] Thus, the narrower view can have no operation in Australia.

In this regard, the decision of the House of Lords in *Beswick* v. *Beswick*,[57] to the effect that a decree of specific performance may be granted in situations in which an award of damages would be an inadequate remedy, is of importance. Both it and the reasoning of Windeyer J. in *Coulls* v. *Bagot's Executive and Trustee Co. Ltd.*[58] demonstrate that the doctrine of part performance applies to many more types of contracts than merely those concerning land.

The case of *Douglas* v. *Hill*[59] provides an interesting (and perhaps slightly questionable), yet early, example of the application of the principle enunciated in *Beswick's* case. There, Way C.J., with whom Gordon J. agreed, was prepared to decree that a partnership agreement, providing within it for the execution of a deed of partnership, be specifically performed; to the extent that this deed should be executed. He then went on to say that, once the deed was in existence, the plaintiff would have a sufficient memorandum in writing to satisfy the *Statute of Frauds*, and this would allow him to sue at common law for breach of the covenants in the agreement. To save circuity of action, he awarded damages, under the local re-enactment of *Lord Cairns' Act*, there and then. If the distinction previously made by the present writer between equitable and common law damages is correct, however, this final step taken by Way C.J. may appear to

44. (1883) 8 App. Cas. 467 at 474.
45. (1887) 35 Ch.D. 681.
46. *Ibid.*, p. 697.
47. (1899) 1 W.A.L.R. 58.
48. (1915) 18 W.A.L.R. 127.
49. (1862) 1 S.C.R. (N.S.W.) 186.
50. 69 W.N. (N.S.W.) 326.
51. 69 W.N. (N.S.W.) 378.
52. [1948] St. R. Qd. 113, per Macrossan C.J. at p. 123.
53. [1909] S.A.L.R. 28.
54. [1956] V.L.R. 169.
55. (1931) 45 C.L.R. 282.
56. *Ibid.*, per Starke J. at p. 292, per Dixon J. (with whom Gavan Duffy C.J. agreed) at p. 297, per Evatt J. at p. 308 (expressly limiting the doctrine to such contracts), and per McTiernan J. at p. 312 and p. 318.
57. [1968] A.C. 58.
58. (1967) 40 A.L.J.R. 471 at 487.
59. [1909] S.A.L.R. 28.

be open to question. However, it is submitted, it may be accepted on the ground that it was the failure of the defendant to specifically perform the contract (i.e. to execute the deed of partnership which caused it to be impossible for the defendant to obtain damages at common law for the defendant's breaches of partnership agreement; for, if the deed had been executed, the *Statute of Frauds* would not have provided the defendant with a defence to such an action at common law. Thus, the damages as awarded to the plaintiff by Way C.J. under *Lord Cairns' Act* were, in a sense, given to compensate the plaintiff for the loss he had suffered because of the failure by the defendant to promptly perform his side of their agreement. It was thus, on the arguments already outlined as to the real nature of equitable damages, a proper award of damages under *Lord Cairns' Act,* and distinguishable from the purely common law damages sought for breaches of warrantees in otherwise wholly performed contracts. The earlier portion of the Chief Justice's reasoning is supported by *Crowley* v. *O'Sullivan.*[60] He also argued, consistently with *Beswick's* case, that "when an action for damages would be an insufficient remedy, there is jurisdiction to order specific performance" (menaing an order for the execution of a proper deed) "of a partnership agreement".[61]

(iii) Contracts in relation to which a Court of Equity would have "entertained a suit (whether for specific performance or other equitable relief)."

There would appear to be few cases which directly support the view of *Fry* in this regard. According to its headnote, *Sinclair* v. *Schildt*[62] (already referred to) supports *Fry's* conclusion; but, when the respective judgments of the members of the Court in that case are analysed, it is seen that only Northmore J. based his decision on this broad interpretation of the scope of application of the doctrine. And even he, in fact, held that the contract with which he was concerned was specifically endorceable. Indeed, far from accepting *Fry's* view of the matter, Burnside A.C.J., in *Sinclair's* case, was content to treat the doctrine of part performance applicable to the contract before him because it concerned "the sale of an interest in land."[63] Rooth J. applied the doctrine to the contract because it was one of which specific performance could be decreed. The head-note and *Fry,* then, are not supported by the actual reasoning of the majority in that case. The criticism of Northmore J.'s "opinion" by McMillan C.J. and Burnside J. in *Riley* v. *The Melrose Advertiser*[64] has already been mentioned.

In *J.C. Williamson Ltd.* v. *Luckey and Mulholland,*[65] the issue was squarely raised before the High Court. In the words of Evatt J., before judgment could be given to the plaintiffs, they would to have established *inter alia,* that "the equitable doctrine of part performance (was) not limited to cases directly relating to . . . suits for specific performance of contracts . . . but should be extended to every case where a Court of Equity would (have) grant (ed) an injunction to restrain a breach of a covenant within the *Statute of Frauds".*[66] In the event, however, only Evatt J. himself expressly answered this question, the other judges all finding other reasons why the plaintiffs were unable to succeed in their action. J.C. Williamson Ltd., therefore, won its appeal to the High Court against an award by Lowe J. of damages in lieu of an injunction against them. Lowe J.

60. [1900] L.R. 2 Ir. 478.
61. [1909] S.A.L.R. 28 at pp. 31–32.
62. (1914) 16 W.A.L.R. 100.
63. *Ibid.,* at p. 105.
64. (1915) 18 W.A.L.R. 127.
65. (1931) 45 C.L.R. 282.
66. *Ibid.,* p. 306.

had accepted the view of *Fry* on the question posed above by Evatt J.

In the appeal to the High Court, Starke J., accepted "the proposition" (i.e. of Fry and Lowe J.) "for the present purposes of (the) case",[67] but held that, in any case, an injunction could not be granted with respect to the negative stipulation in the agreement not to allow anyone but the plaintiffs to enter the theatre for the purpose of selling sweets, as "it would be contrary to all equitable principles to enforce part of an agreement and leave the parties without any remedy whatever as to all the other obligations of that agreement."[68] Dixon J. (with whom Gavan Duffy C.J. agreed) and McTiernan J., in separate judgments, held that, even if the doctrine of part performance could be applied to a contract itself incapable of specific performance (as it was conceded the contract in question was) so as to allow an injunction to be issued to restrain breaches of a negative stipulation in that contract, it could only apply if the alleged acts of part performance pointed unequivocally to the existence of such a negative stipulation as was alleged.[69] This the acts of part performance did not do. They simply pointed to the existence of some such overall agreement between the parties as in fact had been entered into. But it had already been pointed out that the contract itself was incapable of specific performance. For an equity to arise in favour of granting the plaintiffs the right to have the negative stipulation adhered to, acts of part performance unequivocally pointing to the existence of this stipulation would have to exist. They did not; so the plaintiffs' case failed. However, it is clear from a close reading of both of these judgments that neither judge really believed that the doctrine of part performance could (or, indeed, ought) to apply to contracts other than those which were capable of being enforced by a decree of specific performance.[70]

Indeed, Dixon J. went so far as to say that, "if the doctrine is not confined to cases in which a decree might be made for specific performance of the contract, it is at least true that the doctrine arose in the administration of that relief and has not been resorted to except for that purpose" [71]

Neither judges, therefore, found it necessary to give a concluded answer to the question as to whether the doctrine could apply to contracts not capable of enforcement by a decree of specific performance.

Evatt J., on the other hand, answered the question firmly in the negative. "I do not deem it necessary", he said[72] "to express a concluded opinion as to whether the remedy of injunction could have been obtained by the plaintiffs in the action, because I hold that the doctrine of part performance does not apply to cases where the only equitable remedy available is that of an injunction and the Court refuses to enforce the contract as a whole."

Williams,[73] as already mentioned, views this case as amounting to a rejection of the broad view of the scope of the doctrine of part performance, as advocated by *Fry*.M, The opinion of Macrossan C.J. in *Marsh* v. *Mackay* (when he says: "The doctrine that part performance of a parol contract may be relied on as a substitute for the signed note or memorandum in writing required by (the *Statute of Frauds*) is applicable exclusively to actions for specific performance (including such actions where damages are given in lieu of specific performance"[74]) is to the same effect.

67. *Ibid.*, p. 292.
68. *Ibid.*, p. 294.
69. *Ibid.*, per Dixon J. at p. 301 and per McTiernan J. at p. 318.
70. *Ibid.*, at pp. 297, 301, 317 and 320.
71. *Ibid.*, p. 297.
72. *Ibid.*, p. 308.
73. *Williams, op. cit.*, p. 243.
74. [1948] St. R. Qd. 113 at 123.

However, in a recent New South Wales case (viz. *May* v. *Gibson*),[75] Hope J. questioned the above quoted assertion of Dixon J.'s that the doctrine of part performance had only ever been applied by the Courts for the purpose of specifically enforcing a contract. He pointed to the decision of Turner and Knight-Bruce L. JJ. in *Burdon* v. *Barkus*[76] to support his criticism of Dixon J. In that case, their Lordships had to decide whether a partnership could be terminated at will by the plaintiff. The defendant alleged that it was a term of their oral partnership agreement that this could not be done; but, since the agreement fell within the terms of the *Statute of Frauds,* the plaintiff claimed that this alleged term could not be pleaded. Turner L.J., with whom Knight-Bruce L.J. agreed, rejected this submitted, saying that "whatever the agreement may have been, it has been part performed, and we are bound, therefore, as far as may be possible, to ascertain what that agreement was."[77]

Hope J., however, went on to decide the issue before him on other grounds, holding that, even "if the doctrine of part performance does not provide the defendant with an answer to the statute, the statute does not preclude the defendant from setting up and relying upon the agreement for a partnership for a term of ten years as a defence to the plaintiff's claim."[78] In so deciding, he relied heavily on the decision of the trial judge, North J., in *Miles* v. *New Zealand Alford Estate Co.*[79] and the decision of the New South Wales Full Court in *Head* v. *Kelt.*[80] He distinguished *Perpetual Executors and Trustees Association of Australia Ltd.* v. *Russell,*[81] where a majority of the High Court (viz. Gavan Duffy C.J. and Starke and McTiernan JJ.) had concluded that: "Neither at law nor in equity can a claim unenforceable by action because of the *Statute of Frauds* be enforced by counterclaim or defence".[82]

Although the topic lies beyond the immediate scope of this article, the present writer, for what it is worth, is in respectful agreement with Hope J. that this High Court case is not contrary to the decision he gave in *May* v. *Gibson.* In *Russell's* case, in order to defeat what was in fact, if not in form, an action by the plaintiff for ejectment based on its legal title to the land occupied by the defendant, it was necessary for the defendant to show that he had some rights *in rem* to the land. The only way he could show this was by relying on an oral agreement between the parties, which if specifically enforceable, would give him an equitable interest in the land. This agreement (clearly inoperative at common law) failed at equity because of the absence of any sufficient acts of part performance. The defendant, accordingly, "had no answer to the claim of the plaintiff company".[83] In *May* v. *Gibson,* however, "the defendant (did) not have to set up a right enforceable against the plaintiff; he (had) simply to deny the plaintiff's claim . . . that a partnership agreement existed between the parties which was determinable (at will) . . . the onus to establish such an agreement (lay) upon the plaintiff, and the defendant (had) to do no more than to deny or dispute that claim".[84]

Apart from this case, there seems to be little authority in support of *Fry's* opinion and, probably, the rule as to the application of the doctrine of part

75. (1970) 71 S.R. (N.S.W.) 79.
76. (1862) 4 De G.F. & J. 42; 45 E.R. 1098.
77. 45 E.R. at p. 1100.
78. (1970) 71 S.R. (N.S.W.) at p. 72.
79. (1885) 32 Ch.D. 260 at pp. 278–279.
80. [1963] S.R. (N.S.W.) 340.
81. (1931) 45 C.L.R. 146.
82. *Ibid.*, p. 153.
83. (1970) 71 S.R. (N.S.W.) at p. 89.
84. *Ibid.*, pp. 89–90.

performance is as expressed by Mansfield., quoted above.

F. Resume

From the foregoing analysis, it is concluded that the opinion expressed by Bray C.J. in *Ellul and Ellul* v. *Oakes* as to the operation generally of the doctrine of part performance and as to its specific application in cases in which damages are claimed for breach of contract is correct in virtually all respects, save that the possibility of using the doctrine as a defence to actions, in the light of *Burdon* v. *Barkus* and the "opinion" of Hope J. in *May* v. *Gibson,* cannot be completely ruled out, even though the agreement which has been partly performed may, in fact, not be enforceable by a decree or specific performance.

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