PART PERFORMANCE OF CONTRACTS

- RECENT AUSTRALIAN DEVELOPMENTS

by Ken Mackie *

I. Prior to the decision of the House of Lords in *Steadman v Steadman*[1] the law relating to equitable part performance in Australia was well settled. In *McBride v Sandland*[2] and *Cooney v Burns*[3] the High Court of Australia endorsed the principles relating to the doctrine established in *Maddison v Alderson*[4], and in particular, held that the acts relied on must be unequivocally and of their own nature referable to some such agreement as that alleged. In a series of cases decided since *Steadman v Steadman*[5], Australian courts, though not being bound by that decision, have, however, considered the implications of the principles expounded in the case, and their relevance to the established High Court authority. It is the purpose of this article to examine these developments.

Much has already been written on *Steadman*, and it is not intended to subject the decision in that case to detailed analysis. On the one hand, Professor Wade[6] has argued that the decision represents a radical extension of the doctrine of part performance and Sir Anthony Mason, writing extra-judicially[7], has described the case as 'remarkable' and decided contrary to previous authority. Conversely, the authors of the leading Australian text on Equity[8] have disputed this view, contending that the majority decision cannot be accepted as deviating from the principles stated by Lord Selborne in *Maddison v Alderson*.[9] Unfortunately, this divergence of opinion is sometimes reflected in the case law, with resultant uncertainty and, indeed, some confusion.

Two issues will be considered. The first, and major, issue concerns the referability of the plaintiff's acts to the contract alleged; whether, and on what basis, the inference of a contract can be drawn from those acts. The

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1 [1976] AC 536.

2 (1918) 25 CLR 69.

3 (1922) 30 CLR 216.

4 (1883) 8 App Cas 467.

5 *Op cit* n 1.

6 HWR Wade, 'Part Performance: Back to Square One', (1974) 90 LQR 433.

7 A Mason, 'Declarations, Injunctions and Constructive Trusts: Divergent Developments in England and Australia' (1980) 11 UQLJ 121, 131.

8 Meagher, Gummow and Lehane, *Equity: Doctrines and Remedies*, 2nd Ed (Butterworths, 1984) at p 493 *et seq.*

9 (1883) 8 App Cas 467, 479.

second involves a consideration of the nature of the acts relied upon to constitute part performance, the question being whether the acts done must be required or authorised by the contract. Both issues have received considerable discussion in the post-*Steadman* Australian case law.

II. The classic statement relating to referability is that of Lord Selborne LC in *Maddison v Alderson*[10]: 'All the authorities shew 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 phrase 'some such agreement as that alleged' has been interpreted by the High Court of Australia as meaning some contract of the general nature of that alleged, and 'unequivocally' as meaning that the act must be such as could be done with no other view than to perform the agreement.[11] No Australian court has adopted the strict view, taken in such cases as *Chaproniere v Lambert*[12], that the acts must not only be referable to a contract as that alleged but to no other title. There has, however, been an insistence upon the contract being of the same general nature of that alleged, and not to any contract, as appears to have been decided by a majority of their Lordships in *Steadman v Steadman.*[13]

The New South Wales Court of Appeal briefly considered this conflict in *Millett v Regent*[14], although that case was more concerned with the nature of the acts required to constitute part performance and will be discussed in that context below. Glass JA stated, however, that the Court was bound by the High Court authority and was not 'at liberty to apply the revised statement of principle promulgated by the House of Lords in *Steadman v Steadman*'.[15] On appeal, the High Court of Australia found in unnecessary to deal with the question.[16]

In *Ogilvie v Ryan*[17] Holland J of the Supreme Court of New South Wales, was, however, directly faced with the issue in considering facts not dissimilar to those which occurred in the English case of *Wakeham v Mackenzie.*[18] Ogilvie, whose wife had died, lived as a boarder with the female defendant for a number of years and after the defendant's mother died, Ogilvie and the defendant lived together as man and wife. The premises in which they lived were contracted to be sold and the defendant

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[10] (1883) 8 App Cas 467, 479.

[11] *McBride v Sandland* (1918) 25 CLR 69, 78. *Cooney v Burns* (1922) 30 CLR 216, 222.

[12] [1917] 2 Ch 356. See particularly the judgment of Warrington LJ at p 361. See also *Rawlinson v Ames* [1925] Ch 92. As has often been pointed out, such a strict view would be almost impossible to satisfy, and would leave no scope for the operation of the doctrine of part performance.

[13] *Op cit* n 1.

[14] [1975] 1 NSWLR 62.

[15] *Ibid* at p 72. Hutley and Mahoney JJA expressed no concluded views on the matter.

[16] *Regent v Millett* (1976) 10 ALR 496.

[17] [1976] 2 NSWLR 504.

[18] [1968] 1 WLR 1175.

alleged that Ogilvie had proposed that he should buy a house and, should she live with him and look after him for the rest of his life, the house would be hers as long as she lived. She stated that she had agreed to this arrangement. Ogilvie purchased a house and they in fact lived together for a period of two years before Ogilvie's death. Ogilvie's will made no mention of the defendant. The action was by the executor of the will for possession against the defendant.

In the event, the judge found for the defendant on the basis of a constructive trust[19], but also considered an alternative cross-claim for specific performance. This directly raised the issue of part performance, as there was clearly no memorandum in writing to support the contract alleged. Holland J was of the opinion that if the views expressed in *Kingswood Estate Co. Ltd v Anderson*[20], *Wakeham v Mackenzie*[21], and *Steadman v Steadman*[22] were to be applied to the present facts, there could be no doubt of the sufficiency of the acts pleaded, stating ' ... the giving up of her former residence, the going to live with the deceased, and the performance of housekeeping and nursing services for the deceased without pay until he died, were such as to postulate the existence of some contract and are consistent with the contract alleged'.[23] His Honour held, however, that he was bound to follow the view of Glass JA in *Millett v Regent*[24], and therefore the acts relied on by the defendant were not unequivocally referable to a promise to give her an interest in the deceased's property. The deceased's acts could well be explicable on the basis of a voluntary association with the deceased and general love and affection.[25] The claim on part performance thus failed.

Ogilvie v Ryan[26] neatly illustrates the divergent views taken by the English and Australian courts on this question. More recent decisions agree with the approach taken in that case. In *Thwaites v Ryan*[27] Fullager J of the Full Court of the Supreme Court of Victoria adopted the traditional view, and that case itself was followed by single judges of the same court in *Riley v Osborne*[28] and *Butler v Craine*.[29] The Full Court of the Supreme Court of Queensland also had occasion to consider the

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[19] This aspect of the decision is fully discussed by Frank Bates, 'Trusts and Extra-Marital Cohabitation: An Australian Perspective' [1980] Conv 124. See also MA Neave, 'The Constructive Trust as a Remedial Device' (1978) 11 Melbourne ULR 343, 361 *et seq.*

[20] [1963] 2 QB 169.

[21] *Op cit* n 18.

[22] *Op cit* n 1.

[23] [1976] 2 NSWLR 504, 523.

[24] *Op cit* n 14.

[25] [1976] 2 NSWLR 504, 524.

[26] *Op cit* n 17.

[27] [1984] VR 65.

[28] [1986] VR 193.

[29] [1986] VR 274.

matter in *Riches v Hogben*[30] and upheld the trial judges finding[31] that the decision in *Steadman v Steadman*[32] was not to be followed in Australia.

Despite this clear line of authority, Australian courts have disagreed on the appropriate course to be followed when determining the sufficiency of the acts relied upon to constitute part performance. The approach taken by the High Court of Australia in *McBride v Sandland*[33] and followed in *Thwaites v Ryan*[34], is that 'it is wrong first to postulate the contract pleaded and then to ask if the alleged acts were a part performance of it, or of a contract of its general nature ... One must first seek to find such a performance as must imply a contract, and then proceed to ascertain the general nature of such contract as the performance implies, and then to compare that result, if one gets to it, with the general nature of the contract pleaded."[35] An opposite view was taken by Glass JA in *Millett v Regent*.[36] As pointed out above, his Honour declined to follow the more liberal view of the House of Lords on the question of referability, but was quite prepared to adopt the approach taken by Viscount Dilhorne in *Steadman v Steadman*[37] on this matter, holding that the application of the part performance doctrine necessitates a prior finding as to the general nature of the oral agreement, so that the court could then determine whether or not the acts of part performance point unequivocally to an agreement of the same general nature as that alleged.

With respect, the latter approach comes very close to the position taken in *Steadman v Steadman*[38] on referability, in that if the alleged contract is first examined, the acts alleged to support part performance may, when considered with reference to *that* contract, be unequivocally referable thereto. Yet, if those very same acts are considered without reference to the contract, they may be so equivocal as to deprive them of qualification as acts of part performance. This is particularly so in cases involving close family or *de facto* relationships, where the acts of the party alleging the contract may be explicable, as in *Ogilvie v Ryan*[39], on the basis of normal or voluntary associations and general love and affection. For this reason perhaps, both Marks J in *Butler v Craine*[40] and Kaye J in *Riley v Osborne*[41] preferred to follow the approach taken in *Thwaites v Ryan*[42],

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30 [1986] 1 QdR 315. The case is discussed by K Nicholson, 'Riches v Hogben: Part Performance and the Doctrines of Equitable and Proprietary Estoppel', (1986) 60 ALJ 345.

31 [1985] 2 QdR 292. (McPherson J)

32 *Op cit* n 1.

33 (1918) 25 CLR 69, 77-79 (per Isaacs and Rich JJ.)

34 *Op cit* n 27.

35 Per Fullagar J in *Thwaites v Ryan* [1984] VR 65, 77.

36 [1975] 1 NSWLR 62, 73.

37 [1976] AC 536, 556.

38 *Op cit* n 1.

39 *Op cit* n 17.

40 *Op cit* n 29.

41 *Op cit* n 28.

the latter however with some reluctance.[43] On the facts of both cases, however, there was no doubt that the acts of the party alleging the contract pointed unequivocally to the agreement alleged.

III. The second issue concerns the nature, rather than the sufficiency, of the acts required to be established to constitute part performance. Again, the High Court of Australia in *McBride v Sandland*[44] held, though *obiter*, that the act or acts must be done under the term of the agreement and by force of that agreement. This aspect of the decision was not followed by the New South Wales Court of Appeal in *Millett v Regent*[45], though the judges in that case adopted diverse views on whether the acts in question needed to be done in execution of the contract. There, the plaintiffs, husband and wife, alleged an oral contract with the defendants, the parents of the plaintiff wife, that the plaintiffs were to be allowed to live in a house being purchased by the defendants, and provided that the plaintiffs paid the mortgage instalments and a sum of $1,000 to the defendants, the title would be transferred to the plaintiffs. The plaintiffs brought an action for specific performance of the agreement, which was granted, there being sufficient acts of part performance.

One argument put by counsel for the defendants, was that the acts relied upon must be done in performance of actual obligations imposed by the agreement. The act of taking possession and also effecting repairs, extensions and renovations were not required to be done under the alleged contract ie, were not obligatory acts and therefore could not be considered as acts of part performance.

Hutley JA held that provided the acts unequivocally pointed to a contract, those acts were sufficient if they were performed in consequence of the contract alleged, though neither required nor expressly authorized by it.[46] A contrary view was taken by Glass JA, holding that acts done in consequence of the contract were not sufficient, but those in execution of it were - acts either authorized or required by the contract were carried out in execution of it.[47] Finally, Mahoney JA held that as all the acts done in the present case were done in execution of the contract, it was

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[42] *Op cit* n 27.

[43] His Honour stated: 'If it were not for Fullagar J's expressed understanding of the law in this State, I would approach this case in the manner indicated by both Viscount Dilhorne in *Steadman v Steadman* and Glass JA in *Millett v Regent*, not only because of the weight of their respective authority, but also because the course indicated commends itself to me as a more practical one for deciding this particular issue. However, I shall follow the course described by Fullagar J' [1986] VR 193, 199.

[44] (1918) 25 CLR 69, 79 (per Isaacs and Rich JJ). See also *Cooney v Burns* (1922) 30 CLR 216, 222 (acts 'done for the purpose of and in the course of performing' the contract: per Knox CJ). See also *Scott v White* [1928] VLR 188.

[45] *Op cit* n 14. For discussion, see J Heydon, 'Part Performance' [1975] ACLD 60.

[46] [1975] 1 NSWLR 62, 65-8.

[47] *Ibid*, at p 71.

unnecessary to decide whether acts neither obligatory nor authorized were sufficient.[48] All judges agreed that the acts, on the various tests, satisfied the requirements. On appeal, the High Court of Australia declined to fully discuss these opinions, holding in an unreserved judgment that as there had been the giving and taking of possession, that by itself was sufficient part performance. The Court did indicate, however, that if the acts were permitted or authorized by the contract alleged, rather than required or obligated, then that would be sufficient.[49]

Unfortunately, this issue has received little further attention in subsequent Australian case law, and, of course, was not directly in issue in *Steadman v Steadman*.[50] The only recent case in which the question has been raised is *Riley v Osborne*.[51] The defendant in that case had, *inter alia*, made substantial improvements to the property the subject of the alleged agreement. Kaye J held that although those acts were not done in discharge of any contractual obligation, the acts were those which the defendant was entitled to do by the agreement, citing in support the judgment of Gibbs J in *Regent v Millett*:[52] 'It is clear that if a vendor permits a purchaser to take possession to which a contract of sale entitles him, the giving and taking of that possession will amount to part performance notwithstanding that under the contract the purchaser was entitled rather than bound to take possession.' That being so, the acts were authorized by the contract, and no opportunity arose for discussion of Hutley JA's wider view expressed in *Millett v Regent*.[53]

IV. It is clear from the above discussion that the Australian case law reflects a traditional approach to the scope of the part performance doctrine, and until the High Court of Australia has the opportunity to authoritatively consider the matter, the more liberal stance taken by the House of Lords in *Steadman v Steadman*[54] on the question of referability will most likely not be followed by the State Supreme Courts. In principle, however, it may be argued that the position taken by the majority of their Lordships in that case is correct.

Historically, the principal justification for the doctrine is that the Statute of Frauds cannot be used as an instrument of fraud. As MP Thompson has ably demonstrated[55], the evidentiary character of the doctrine was a later development, and one which was effectively dispelled

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[48] *Ibid* at p 75-76. His Honour was, however, inclined to the views expressed by Hutley JA on this point.

[49] (1976) 10 ALR 496, 500.

[50] *Op cit* n 1.

[51] *Op cit* n 28.

[52] (1976) 10 ALR 496, 500.

[53] *Op cit* n 46.

[54] *Op cit* n 1.

[55] 'The Role of Evidence in Part Performance' [1979] Conv 402.

by the House of Lords in *Steadman v Steadman*.[56] If the doctrine is based upon the principle that it would be fraudulent to allow a party to a contract to rely on the Statute of Frauds to retain property which he had otherwise agreed to deal with, then there is little justification for the requirement of referability to a contract of some general nature as that alleged. The act should be sufficient if it is shown that it was done in reliance on the contract. This basic issue has yet to be fully addressed by any recent Australian decision.

The same general justification can be used to support the wide view taken by Hutley JA in *Millett v Regent*[57] on the question of the nature of the acts required to support a finding of part performance ie that an act is sufficient if it is done in consequence of the alleged contract, though neither required nor expressly authorized by it. It is submitted that it would be just as fraudulent in those circumstances for the defendant to rely on the Statute of Frauds to avoid the oral bargain. After all, the plaintiff has acted on the faith of the agreement. Indeed, there is support for this view in the decision of the Judicial Committee of the Privy Council in *White v Neaylon*[58], where the plaintiff had made voluntary improvements to the property the subject of the alleged agreement, which acts were clearly neither required nor authorized by that contract. Nevertheless, the Judicial Committee held that those acts were sufficient to constitute part performance.

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[56] *Op cit* n 1.

[57] *Op cit* n 46.

[58] (1886) 11 App Cas 171.