PIPIKOS v TRAYANS – THE HIGH COURT REVISITS PART PERFORMANCE*

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[91] Part performance is that somewhat mysterious doctrine which permits contracts for the sale of land to be enforced, notwithstanding their non-compliance with the *Statute of Frauds 1677* (Imp). The relationship between part performance and statute over more than four centuries is deeply intertwined. Originally (so it seems) the doctrine was created notwithstanding, and perhaps in defiance of, the *Statute of Frauds*.[1] It then became recognised by statute and was reformulated in the nineteenth century, notably by Lord Selborne in *Maddison v Alderson*.[2] A century later, the Australian and English law diverged. The English relaxation of the doctrine in *Steadman v Steadman*[3] was largely resisted by Australian courts, and indeed the Law Commission recommended the abolition of the doctrine,[4] which has occurred.[5] The High Court constituted by seven Justices has now, in *Pipikos v Trayans*,[6] reviewed the doctrine, maintaining Lord Selborne's requirement that the acts relied on be unequivocally, and in their own nature, referable to an agreement of the kind alleged, and rejecting an assimilation to estoppel.

Background

It will be convenient to simplify the facts slightly, and to refer to the four actors giving rise to this litigation by their given names. The respondent Velika was married to the appellant's (Leon's) brother, George. Velika was the sole registered proprietor of a property on Clark Road, Virginia, north of Adelaide, on which the couple had built a home. In 2004, a separate parcel of land on Penfield Road, Virginia, was purchased by Leon and his wife Sophie, and George and Velika, each

* This comment was published at (2019) 93 *Australian Law Journal* 91.

1 See A W B Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (1987), p 614, and see further below.

2 (1883) 8 App Cas 467.

3 [1976] AC 536.

4 Law Commission, *Transfer of Land: Formalities for Contracts for Sale etc of Land Law,* Com No 164 (1987).

5 *Law of Property (Miscellaneous Provisions) Act 1989* (UK).

6 [2018] HCA 39.

couple as joint tenants of one undivided moiety of the property.

At trial, Leon maintained that there had been an oral agreement whereby a half interest in the Clark Road property would be sold to Leon to support the funding of George and Velika's interest in the Penfield Road property. The terms of the agreement said to have been reached were:

- Penfield Road would be purchased jointly by the two couples;
- Velika would sell half of her interest in Clark Road to Leon for $45,000;
- Leon was to pay the $45,000 by paying the whole of the 'owners' contribution' [ie, excluding the component borrowed from a financier] on the purchase of Penfield Road plus a further sum of $8,000 to George and Velika;
- Leon's half share in Clark Road was not to include the value of the improvements made by George and Velika.

Some five years later, in 2009, Velika signed a document in her handwriting acknowledging that Leon was the owner of half the Clark Road property "via an agreement between George Pipikos and Leon Pipikos of [sic] the purchase of Penfield Road, Virginia property".

George and Velika separated and in October 2013 consented to a matrimonial property settlement in the Family Court of Australia whereby George surrendered his interests in, inter alia, the Clark Road and Penfield Road properties to Velika, who assumed his liabilities in relation to those properties.

[92] Leon lodged a caveat on the Clark Road property, claiming a half interest, enforceable in equity, in the "unimproved land". He commenced proceedings in the District Court of South Australia, seeking relief including that the Clark Road property was held in trust by Velika for him in respect of one half of her interest. Velika's defence included that the agreement alleged by Leon was void or unenforceable pursuant to s 26 of the *Law of Property Act 1936* (SA), which is the local equivalent of the Statute of Frauds,[7] and which provides:

7 There are counterparts throughout Australia: *Conveyancing Act 1919* (NSW), s 54A; *Property Law Act 1974* (Qld), s 59; *Conveyancing and Law of Property Act 1884* (Tas), s 36; *Instruments Act 1958* (Vic), s 126; *Law Reform (Statute of Frauds) Act 1962* (WA), s 2; *Civil Law (Property) Act 2006* (ACT), s 204; *Law of Property Act* (NT), s 62, although the exception for part performance in s 26(2) is only found in New South Wales, Tasmania and the Australian Capital Territory.

> "(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 …"

The trial judge rejected the claim that there was an agreement,[8] but the Full Court overturned that finding, concluding that there was an agreement as alleged.[9] However, the Full Court did not disturb the finding at first instance that neither the purchase of the Penfield Road property, nor the payments of George and Velika's share of the purchase price or of some $8,000 to George, was unequivocally referable to the agreement alleged by Leon. The handwritten note was insufficient: it did not refer to the amount agreed for the sale of the half interest or the special terms excluding the value of improvements, and it referred to an agreement as opposed to a document recording the terms of an agreement.[10] Accordingly, Leon failed to bring himself within the doctrine of part performance.

Leon appealed by grant of special leave to the High Court, while Velika's (defensive) cross-appeal seeking to reinstate the trial judge's finding of no agreement was dismissed at the hearing.

No relaxation of Lord Selborne's "unequivocally referable" test

Famously, in *Maddison v Alderson,* Lord Selborne had said that "the acts relied upon as part performance must be unequivocally, and in their own nature, referable to some such agreement as that alleged".[11] Leon ultimately accepted in the High Court that the appeal would be dismissed if the "unequivocally referable" test were not relaxed,[12] and contended that it was sufficient that the party had been knowingly induced or allowed by the counterparty to alter his or her position on the faith of the contract. Hence all three judgments (of Kiefel CJ, Bell, Gageler and Keane JJ, of Nettle and Gordon JJ, and of Edelman J) focussed on principle.

Leon prayed in aid (a) the fact that a more relaxed test had been adopted by the Supreme Court of Canada and some jurisdictions in the United States of America, (b) the proposition that Gibbs CJ in

8 *Pipikos v Trayans* [2015] SADC 149.
9 *Pipikos v Trayans* (2016) 126 SASR 436; [2016] SASCFC 138.
10 See *Pipikos v Trayans* (2016) 126 SASR 436; [2016] SASCFC 138 at [88].
11 (1883) 8 App Cas 467 at 489.
12 See at [77] and [159]. Leon's payments could have been referable to a range of dealings between the two couples, falling short of a promise to convey one half of the "unimproved land".

Regent v Miller[13] had favoured such a test, which found support in some speeches in the House of Lords in *Steadman v Steadman* and in particular by Lord Cranworth LC in *Caton v Caton*,[14] and (c) an appeal to the simplicity of assimilating the test to one squarely based on an underlying theme of fraud as sustained estoppel. Faced with a body of contrary dicta, he contended that a series of High Court decisions including *McBride v Sandland*[15] and *Cooney v Burns*[16] had not in terms endorsed Lord Selborne's formulation, while the nineteenth century cases had gone awry. It was said that those decisions had confused early rules relating to proof [93] of contract with the "engines of fraud" doctrine, and that the "unequivocally referable" test was a vestige of the former which should be discarded, leaving a single more relaxed test based on equitable fraud. As a matter of advocacy, Leon's submissions had the attraction of grappling with the formidable weight of authority he faced, as well as providing a rationale for what would, if they had been accepted, have amounted to a large break with the past.

The High Court unanimously rejected Leon's challenge. All save Edelman J upheld the approach adopted by Lord Selborne, justified on the basis of statutory construction: the Statute of Frauds was not to be construed as applying to prevent the enforcement of the *equities* resulting from acts done in execution of the agreement. Edelman J reached the same conclusion by looking back to the "equity of the statute" doctrine prevalent when the Statute of Frauds was enacted in the 17th century, which although it was preserved by the modern South Australian statute, should not be extended.

The way in which Leon's various submissions were rejected repays careful reading, but goes beyond the limitations of this note. The concerns which have regularly been expressed as to the weight to be given in Australia to the difficult and controversial decision of the House of Lords in *Steadman v Steadman*[17] have now been resolved. The law remains as it has long been thought to be, and the body of law identifying acts which are sufficient acts of part performance remains of utility. Further, the distinction between part performance and estoppel remains; conduct may fall short of amounting to part performance, but may (if accompanied by knowledge of detrimental reliance) satisfy the latter.[18]

13 (1976) 133 CLR 679.
14 (1866) LR 1 Ch App 137.
15 (1918) 25 CLR 69.
16 (1922) 30 CLR 216.
17 See *Millett v Regent* [1975] 1 NSWLR 62 at 72 (NSW Court of Appeal not at liberty to apply *Steadman v Steadman*) and see also at 65-68, and see *McMahon v Ambrose* [1987] VR 817 at 847 (court bound by the orthodox interpretation of *Maddison v Alderson* adopted in *McBride* and *Cooney*); cf *Australia and New Zealand Banking Group Ltd v Widin* (1990) 26 FCR 21 at 37 ("while there is much to be said for the adoption in Australia of *Steadman*, these are matters for the High Court rather than an intermediate Court of Appeal").
18 See Lord Cranworth's contrast in *Nunn v Fabian* (1865) LR 1 Ch App 35 at 40, and the discussion of that case in

Equity and statute

This note seeks to draw readers' attention to some points of more general application which might otherwise pass unnoticed. For, as Justice Gummow once wrote, extra-judicially:[19]

> "The general considerations involved in Lord Selborne's reasoning in *Maddison v Alderson* as to the equities upon which the defendant may be charged are of some general significance."

First, the legislative recognition (in for example s 26(2) of the South Australian Act) that the prohibition was subject to the doctrine of part performance is an express acknowledgement of the doctrine developed by courts. It means, as Edelman J noted at [125], that the doctrine cannot be abolished judicially. It also reflects the Windeyer J's adage that there is no glib distinction between judge-made law and statute.[20] Part performance pre-dates s 26(2) and its various counterparts by some centuries, yet its legislative recognition plays an important part in the ongoing development of the doctrine. For s 26(2) was directly relevant to an important element in the reasoning of the joint judgment of Kiefel CJ, Bell, Gageler and Keane JJ at [73]-[74]:

> "Lord Selborne's reconciliation of the tension between the older cases and the Statute of Frauds has, for well over a century, provided an acceptable balance between parliamentary insistence on certainty in dealings in land and curial insistence on the prevention of unconscionable conduct in relation to such dealings.
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> To detach the practical operation of the doctrine from this reconciliation, of which the unequivocal referability requirement is an integral part, is to make a case for the abolition of the doctrine as "a direct and inexcusable nullification" of the *Statute of Frauds*. To say that the notion of unequivocal referability is unduly stringent is not to make a cogent argument for a more expansive operation for the doctrine of part performance but to demonstrate that the doctrine of part performance cannot satisfactorily be reconciled with the text of the statute and so should be discarded altogether. The enactment of s 26, [94] including sub-s (2), after the evident approval by the High Court in *McBride v Sandland* and *Cooney v Burns* of Lord Selborne's reconciliation confirms the strength of this consideration. **It is**

Lighting by Design (Aust) Pty Ltd v Cannington Nominees Pty Ltd [2008] WASCA 23 at [184]-[187].

19 W Gummow, *Change and Continuity*, Oxford University Press 1999, p 69.

20 *Gammage v The Queen* (1969) 122 CLR 444 at 462.

> **hardly to be supposed that the enactment of s 26(2) of the Act left room for judicial development of the law relating to part performance that would upset the balance effected by Lord Selborne's reconciliation** [emphasis added]."

That recalls the statement earlier in 2018 in *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd*[21] that it "would have been a strong thing" for an intermediate court of appeal or indeed for the High Court not to have followed earlier decisions when the legislation had been revisited by Parliament without making any amendments to alter the effect of the earlier decision. Although statutes are presumed to be "always speaking",[22] whenever statutes enact judge-made law, they generally have something of an anchoring effect, tending against the ordinary processes of incremental change. The judicial task in statutory construction differs from that in distilling the common law from past decisions.[23]

Secondly, the judgment of Nettle and Gordon JJ contains a lucid exposition of the history of the doctrine. It is far from history for its own sake. Their Honours make two powerful points. The first is that while an underlying theme of "all-encompassing theory" of equitable fraud explains part performance at a high level of abstraction, it is also "in significant respects jurisprudentially simplistic", and cannot of itself sustain a further development of expansion of the doctrine: at [93]. The resemblance to similar statements about the deficiencies of all-embracing theories of unjust enrichment will be clear.[24] The second is that the formulations in the nineteenth century read in context were attempts to explain and indeed to confine the state of authority, in circumstances where if the courts were conscious of anything, it was that it was important that the exception created by the doctrine not be permitted to lead to the mischief sought to be redressed by the statute. Lord Cranworth's statement is illustrative of the attitude: "I should yield to no Judge of a Court of equity in my desire to refrain from extending the cases in which the Court gets over the Statute of Frauds; but there being an established rule on this subject, a Judge ought not to depart from it."[25] Hence those formulations of principle provided no support for any relaxation of the doctrine.

Thirdly, Edelman J reached the same conclusion, but rather than accepting the authoritativeness of

21 (2018) 92 ALJR 248; [2018] HCA 4 at [52].
22 See *Aubrey v The Queen* (2017) 260 CLR 305; [2017] HCA 17 and D Meagher, "Two Reflections on Retrospectivity in Statutory Interpretation" (2018) 29 *PLR* 224 at 235-239 and J Edelman, "Uncommon Statutory Interpretation" (2012) 11 *TJR* 71.
23 *McNamara v Consumer Trader and Tenancy Tribunal* (2005) 221 CLR 646; [2005] HCA 55 at [40].
24 See for example *Bofinger v Kingsway Group Ltd* (2009) 239 CLR 269; [2009] HCA 44 at [90]-[93].
25 *Nunn v Fabian* (1865) LR 1 Ch App 35 at 39; see also *Lindsay v Lynch* (1804) 2 Sch & Lef 1 at 5 (Lord Redesdale).

Lord Selborne's synthesis in *Maddison v Alderson*, he looked back to how the 17th century Chancellors had construed the Statute of Frauds. He considered that the application of the test might "ultimately depend on evaluative conclusions based upon all the circumstances surrounding the act or acts", and that "[t]hose conclusions should be drawn with regard to the nature and rationale of the doctrine of part performance and the need to keep the doctrine within narrow limits."[26] In *Pipikos v Trayans*, the different historical perspective – the 17th rather than the 19th century – made no difference to the result, but it may not always be thus.

Finally, *Pipikos v Trayans* is another instance of litigation involving relatively small amounts of money continuing to prompt the development of equitable principle. Perhaps the most familiar instance is that other South Australian appeal, *Byrnes v Kendle*,[27] which is important not merely for clarifying the status of *Commissioner of Stamp Duties (Q) v Jolliffe*[28] as to establishing certainty of intention of a private trust, but also for what was held as to the obligations of trustees and the defence of acquiescence. This is a good thing, and not merely for the junior Bar, but also for the continued vibrancy of equity throughout the Australian legal system.

26 At [158].

27 *Byrnes v Kendle* (2011) 243 CLR 253; [2011] HCA 26 (another South Australian appeal, coincidentally involving the same two successful counsel).

28 (1920) 28 CLR 178.