10 **IN THE HIGH COURT OF AUSTRALIA**
ADELAIDE REGISTRY

No A30 of 2017

BETWEEN: **LEON PIPIKOS**
Appellant

AND: **VELIKA TRAYANS**
20 Respondent

APPELLANT'S WRITTEN SUBMISSIONS

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10 **Part I: Publication on the internet**

1. The appellant certifies that these submissions are in a form suitable for publication on the internet.

Part II: Statement of issues

2. First, what is the correct test (or tests) of "part performance" within the meaning of s.26(2) of the Law of Property Act 1936 (SA) (and other equivalent provisions of the *Statute of Frauds*)?

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3. Secondly, what is the correct juridical basis of the doctrine of part performance and, in particular, is it based on "equities" outside the alleged contract and/or on the notion of fraud and, if so, what matters constitute equities and fraud?

4. Thirdly, was there part performance in the present case?

5. Fourthly, is the appellant otherwise entitled to an equitable remedy?

Part III: *Judiciary Act* s.78B

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6. There are no constitutional issues in this case and s.78B notices are therefore unnecessary.

Part IV: Judgment citations

7. The decision of the primary judge is not reported: *Pipikos v Trayans* [2015] SADC 149.

8. The judgment of the Full Court (hereafter "FC") of South Australia (*Pipikos v Trayans* [2016] SASCFC 138) is reported: (2016) 126 SASR 436.

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10 **Part V: Statement of relevant facts**

9. This case involves four members of the Adelaide Greek community: Leon Pipikos, Sophie Pipikos, Velika Trayans and George Pipikos. All of these people are referred to by their Christian names in the Full Court. It is convenient to continue with those references.

10. George and Leon are brothers. At all relevant times, George was married to Velika and Leon was married to Sophie.

20 11. The case centres on two properties in Adelaide. The first is Lot 2, 119 Clark Road, Virginia ("Clark Road") which was purchased by Velika in 2002. At all relevant times Velika has been the sole registered proprietor of this Torrens system land.

12. The other property is Lot 200 Penfield Road, Virginia ("Penfield Road") which was purchased in July 2004 by the two couples jointly.

13. In the middle of 2004 George and Leon had a discussion concerning the prospective purchase of Penfield Road in the joint names of both couples. George told Leon that he and Velika did not have enough money to make any contribution to the purchase

30 price: FC [58] at p.16.7. In this discussion George and Leon "reached a concluded agreement" (FC [68], [5], [59]) that:

(i) Penfield Road would be purchased jointly by the two couples for $260,000: FC [5];

(ii) Velika would sell half of her interest in Clark Road to Leon for $45,000: FC [73], [80], [2];

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(iii) Leon was to pay the $45,000 by paying the whole of the "owners' contribution"[1] on the purchase of Penfield Road plus a further sum of $8,000 to George and Velika: FC [5], [7];

(iv) Leon's half share in Clark Road was not to include the value of the improvements – "in the accounting of their respective interests George and Velika would be credited with the value of the improvements": FC [30], [73].

14. On 13 June 2004 a contract of sale was entered into in relation to Penfield Road with the purchaser described as "George Pipikos & or nominees": FC [2]. The purchase price was $260,000. On 20 June Leon paid the deposit of $2,000: FC [2], [12].

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15. On 30 July 2004 the two couples executed a memorandum of transfer as the transferees of Penfield Road with their interests described as follows:

> "LEON PIPIKOS and SOPHIA PIPIKOS as joint tenants as regards one undivided moiety and GEORGE PIPIKOS and VELIKA TRAYANS as joint tenants as regards the remaining undivided moiety".

16. Velika was well aware of the agreement between George and Leon: FC [68], [65], [6], [66], [80]; J [93], [94]. And Velika "by her knowledge of the agreement made by Leon and George, and her subsequent conduct in taking an interest in the Penfield Road property, ... contracted to sell on a half interest in the Clark Road property to George": FC [80], [4]. Thus "Velika bound herself in contract by accepting a legal interest in the Penfield Road property in the knowledge of the agreement made between George and Leon": FC [80].

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17. Velika's later testimony was treated as "independent evidence, by way of an admission, of [the] existence" of "the agreement": FC [70], [6]. In that evidence, Velika agreed that when she went to the bank to sign the papers to buy Penfield Road she was aware that there was an arrangement whereby Leon had bought half of Clark Road: FC [58] at p.17.3.

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[1] That is, the balance of the purchase price and the transaction costs (FC [2]) which amounted to $74,883.67 for both couples – i.e. $37,441.83 for each couple.

10 18. The purchase of the Penfield Road property for $260,000 was initially financed as to $197,261 through Perpetual Mortgagees the loan being in the names of all four purchasers: FC [2], DCJ [29]. The "owners' contribution" of $74,883.67 (i.e. both Leon's and Sophie's portion plus Velika's and George's portion) was paid wholly by Leon, this amount being "both the balance of the purchase price and the transaction costs": FC [2].

19. Leon later alleged that a cash sum in the amount of about $8,000 (i.e. the balance of the $45,000 purchase price) had been paid to George in cash. However, this was rejected at first instance (DCJ at [97]) and by the Full Court on appeal (FC [69]-[70]).
20 These findings are not challenged in this court.

20. At no stage has Velika (or George) ever reimbursed Leon for the extra $37,441.83 that he contributed to the purchase of Penfield Road.

21. On 3 August 2009 Velika signed a document (in her handwriting) which reads as follows:

> "I Velika Trayans of Lot 2 – 119 Clark Road, Virginia SA 5120, agree that Leon Pipikos, is the owner of half the land, on the above stated property via
> 30 an agreement between George Pipikos and Leon Pipikos of the purchase of Penfield Road, Virginia property"

22. This document was dated "3/8/09".

23. At no stage was any transfer executed in favour of Leon by Velika in relation to the Clark Road property: FC [67].

24. In 2014 the Penfield Road property was sold. The proceeds of sale were placed in the Court Suitors Fund: DCJ [42].

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25. On 7 September 2012 Leon Pipikos instituted proceedings against Velika in the District Court of South Australia by filing a summons. A statement of claim was later filed on 5 August 2014. The orders sought by Leon included a declaration that the Clark Road property was held on trust by Velika for him in respect of one half of her

10 interest. An initial defence was filed by Velika with a second defence being filed on 24 December 2014. The second defence contained an averment (at [3.4.2]) that the alleged agreement was "void or unenforceable pursuant to s.26 of the *Law of Property Act*".

26. Although no reply was ever filed, the submissions by both parties at first instance dealt with "part performance" of the alleged agreement focusing principally upon the circumstances surrounding the purchase of Penfield Road and the payment by Leon of all of the "owners' contribution" on that purchase. There was also extensive reference in those submissions to whether it was a fraud for Velika to deny Leon's half interest

20 and to whether there was a trust in relation to Clark Road.

27. The hearing at first instance occurred in March and April 2015. Judge McIntyre delivered judgment on 3 November 2015 and held (*inter alia*) that there was no contract between Leon and Velika, that there was no written memorandum within the meaning of s.26(1) and that there was no "part performance" within the meaning of s.26(2).

28. Leon then brought an appeal to the Full Court of South Australia upon three principal grounds: that there was a contract, that there was a sufficient memorandum of it in

30 writing so as to comply with s.26(1) and that there were sufficient acts of "part performance" within the meaning of s.26(2).

29. The appeal to the Full Court was heard on 5 September 2016. Judgment was delivered on 16 December 2016. The leading judgment was delivered by Kourakis CJ; Kelly and Hinton JJ concurring. The Full Court held (*inter alia*) that there was a contract (see [13]-[17] above) but that there was no written memorandum of it sufficient to comply with s.26(1) and no part performance within the meaning of s.26(2).

40 30. The Full Court dealt with the question of part performance at [91]-[100]. The key paragraph is [100]:

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> "The purchase of the Penfield Road property, in itself, is not unequivocally referable to, and does not manifest the existence of, an agreement of any kind between the purchasers. It is certainly not unequivocally referable to, or indicative of a contract for the purchase by Leon of an interest in the Clark Road property. The purchase of the Penfield Road property is complete in itself. Importantly, the payment of the whole of the owner's contribution by Leon might be the manifestation of any number of arrangements and contracts of a very different kind to the one Leon alleges."

31. On 18 August 2017 Nettle and Gordon JJ granted special leave to appeal to this Court.[2]

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Part VI: Appellant's argument

32. Before dealing with the specifics of the present case it is necessary to discuss some of the principal cases on part performance and particularly the tests of part performance adopted in those decisions.

Maddison v Alderson

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33. *Maddison v Alderson* (1883) 8 App Cas 467, a decision of the House of Lords, has been very influential on the Australian case law on part performance – particularly the speech of Lord Selborne.

34. A number of passages in that speech are important. At 475 his Lordship stated that:

> "In a suit founded on such part performance, the defendant is really "charged" upon the equities resulting from the acts done in execution of the contract, and not (within the meaning of the statute) upon the contract itself. If such equities were excluded, injustice of a kind which the statute cannot be thought to have had in contemplation would follow."

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35. His Lordship then gave an example and continued:

> "The matter has advanced beyond the stage of contract; and the equities which arise out of the stage which it has reached cannot be administered unless the contract is regarded. The choice is between undoing what has

[2] At transcript lines 185-190 Nettle J asked counsel for Leon whether he had "anything to say about the way in which the English judges have adapted proprietary estoppel or constructive trust to overcome the injustice and why that would not work here".

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> been done (which is not always possible, or, if possible, just) and completing what has been left undone. The line may not always be capable of being so clearly drawn as in the case which I have supposed; but it is not arbitrary or unreasonable to hold that when the statute says that no action is to be brought to charge any person upon a contract concerning land, it has in view the simple case in which he is charged upon the contract only, and not that in which there are equities resulting from *res gestae* subsequent to and arising out of the contract. So long as the connection of those *res gestae* with the alleged contract does not depend upon mere parol testimony, but is reasonably to be inferred from the *res gestae* themselves, justice seems to require some such limitation of the scope of the statute, which might otherwise interpose an obstacle even to the rectification of material errors, however clearly proved, in an executed conveyance, founded upon an unsigned agreement."

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36. At 479 Lord Selborne added that "the acts relied upon as part performance must be unequivocally, and in their own nature, referable to some such agreement as that alleged".

37. In *Cooney v Burns* (1922) 30 CLR 216, at 239 Higgins J described Lord Selborne's speech as "a heroic effort ... to bring order to the chaos, to give system to the unsystematic". In *Steadman v Steadman* [1976] AC 536 Lord Salmon (at 567) described it as "perhaps somewhat Delphic".

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High Court case law

38. The traditional tests of part performance have been variously stated in this Court. There are four principal decisions: *McBride v Sandland* (1918) 25 CLR 69; *Cooney v Burns* (1922) 30 CLR 216; *J.C. Williamson Ltd v Lukey and Mulholland* (1931) 45 CLR 282; *Regent v Millett* (1976) 133 CLR 679.

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39. *McBride v Sandland* (1918) 25 CLR 69 contains relevant statements by three justices. Isaacs and Rich JJ stated (pages 78-79) that so far as the case before them was concerned, "certain elements of part performance [are] essential to raise the equity", and then set out seven matters:

(i) the act relied on must be unequivocally and in its own nature referable to "some such agreement as that alleged"; that is, it must be such as could be

10 done with no other view than to perform such an agreement (citing *Maddison* at page 479);

(ii) by "some such agreement as that alleged" is meant some contract of the general nature of that alleged (citing *Maddison* at page 485);

(iii) the proved circumstances in which the "act" was done must be considered in order to judge whether it refers unequivocally to such an agreement as is alleged;

20 (iv) the act must have been in fact done by the party relying on the faith of the agreement, and further the other party must have permitted it to be done on that footing – otherwise there would not be fraud in refusing to carry out the agreement and fraud (i.e. moral turpitude) is the ground of jurisdiction;

(v) it must be done by a party to the agreement;

(vi) there must be a completed agreement;

(vii) the act must be done under the terms of that agreement by force of that
30 agreement.

40. Powers J (at p.99) agreed with his brethren that "the acts relied on as part performance are not unequivocally referable to some such agreement as that alleged", that "the acts done were not in fact done on the faith of any contract", and that "in any case, if they were done on the faith of any contract, the appellant did not permit them to be done on that footing".

41. *Cooney v Burns* (1922) 30 CLR 216 followed four years after *McBride*. Knox CJ stated five propositions at page 222:

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(i) the acts relied on must be unequivocally and in their own nature referable to some such agreement as that alleged (citing *Maddison* at page 467), noting that that meant "that the Court shall, by reason of the act itself, without

10 knowing whether there was an agreement or not, find the parties unequivocally in a position different from that which, according to their legal rights, they would be in if there were no contract", adding further that the words "some such agreement as that alleged" meant "some agreement for the disposition of some estate or interest in the land in question";

(ii) the acts proved must be such as to render it a fraud in the defendant to take advantage of the contract not being in writing;

(iii) when acts fulfilling those conditions have been proved, evidence becomes

20 admissible to prove a parol agreement;

(iv) in order that the plaintiff may succeed he must establish by clear evidence the agreement alleged by him and it must appear that the acts relied on as acts of part performance were done for the purpose and in the course of performing that agreement and with no other view or desire than to perform it;

(v) the agreement sued on must be of such a nature that the Court would have jurisdiction to enforce it specifically if it had been in writing.

30 42. Isaacs J re-adopted the propositions he had stated in *McBride*: page 231. At page 232 he stated that "part performance" means, on its face, partial, but not complete, performance of the contract between the vendor to sell and the purchaser to purchase the land.

43. Higgins J (with whom Gavan Duffy J agreed) at page 241 noted that "the acts of part performance must be such as would involve a fraud on the party performing unless the agreement be fully performed", noting a similarity with the doctrine of estoppel by representation.

40 44. Starke J at pages 243-244 adopted the following propositions from the speech of Lord Selborne in *Maddison*:

(i) the acts relied upon as part performance must be unequivocally and in their own nature referable to some such agreement as that alleged;

(ii) it is not enough that an act done should be a condition of, or good consideration for a contract, unless it is, as between the parties, such a part-execution as to change their relative positions as to the subject matter of the contract;

(iii) if the relative positions of the parties are changed as to the subject matter of the contract, then the defendant is charged upon the equities resulting from the acts done in execution of the contract and not upon the contract itself;

(iv) acts relative to the possession, use or tenure of the land are the type of acts which establish a change in the relative positions of the parties as to the subject matter of the contract.

45. *J C Williamson Ltd v Lukey and Mulholland* (1931) 45 CLR 282 is a complex case but it contains some relevant statements. Starke J referred with approval to the requirement that the acts must be unequivocally and in their own nature referable to some such agreement as that alleged, adding "in other words, the acts were such as could not have been done with any other view or desire than to perform some such agreement" (pages 291-292).

46. Dixon J (with whom Gavan Duffy CJ agreed) referred at page 297 to "a party who in pursuance of his contract has done acts of performance consistent only with some such contract subsisting". At page 300 he referred to the requirement that the acts "must be such as to be consistent only with the existence of a contract between the parties, and to have been done in actual performance of that which in fact existed", adding that the party is charged upon the equities arising out of the acts of part performance and not merely upon the contract.

47. Evatt J referred at page 309 to the "vital necessity, in the interests of justice, of ordering completion of an agreement which had been performed by one party to such

10 an extent that a substantial alteration of position had resulted". McTiernan J at page 319 quoted page 475 of *Maddison* with evident approval.

48. *Regent v Millett* (1976) 133 CLR 679 was decided after the decision of the House of Lords in *Steadman v Steadman* [1976] AC 536 (discussed below). Gibbs J (with whom the other justices agreed) referred to Lord Selborne's statement in *Maddison* at page 479 that the acts relied upon as part performance "must be unequivocally, and in their nature, referable to some such agreement as that alleged" and, having noted that that statement had been "consistently accepted as a correct statement of the law", stated further that it was "*enough* [emphasis added] that the acts are unequivocally
20 and in their own nature referable to some contract of the general nature of that alleged" (citing *McBride* at page 78). Gibbs J added that it was unnecessary in the present case to consider the questions raised by the House of Lords in *Steadman v Steadman*. Gibbs J also noted (at pages 683-684) that it was not "necessary that the acts of part performance should have been done in compliance with a requirement of the contract" because otherwise "the utility of the equitable doctrine would be reduced to vanishing point and many cases would have been wrongly decided".

49. The following comments may be made about the High Court case law. First, there is no decision in which a majority has laid down an authoritative and binding test of part
30 performance. Second, this Court is therefore free to consider those principles as a matter of principle and without having to consider any overruling of an earlier High Court decision. Third, many of the statements quoted above are arguably obiter. Fourth, the approach in *Maddison* has clearly been highly influential in this Court (particularly the speech of Lord Selborne). Fifth, adoption by many justices of Lord Selborne's approach has militated against any fundamental appraisal (or reappraisal) of the relevant principles (seen, for example, in *Steadman v Steadman* [1976] AC 536). Sixth, this Court has not decided definitively the basis of part performance: estoppel (and similar notions), fraud and "the equities" are all referred to.

40 ***Steadman v Steadman***

50. The decision of the House of Lords in *Steadman v Steadman* [1976] AC 536 arose out of matrimonial proceedings after a marriage had been dissolved. The wife sought a

10 declaration that the matrimonial home was jointly owned and should be sold. The husband owed her £194 in maintenance and wished to vary the existing maintenance order. Outside the Magistrates' Court the parties reached an oral compromise agreement and agreed: (i) that she should surrender her interest in the home to him in return for a payment of £1,500; (ii) that the existing maintenance order against the husband should be discharged; (iii) that the maintenance order for the child should continue; (iv) that the arrears of maintenance owed to the wife should be waived save for £100 (which was to be paid by the husband by a specific date). The justices were told of the agreement, discharged the maintenance order and waived the arrears of maintenance save for the £100. The husband duly paid the £100 and his solicitors
20 prepared a deed of transfer in relation to the home and sent it to the wife. The wife refused to sign the transfer. The husband relied on the oral compromise. The wife, however, asserted that that agreement of compromise was not enforceable by reason of the *Statute of Frauds* because it involved a transfer of an interest in land. The husband asserted that specific performance of the oral compromise should be decreed because that agreement had been partly performed.

51. The House of Lords held (Lord Morris dissenting) that there had been part performance and that there should be a decree of specific performance.

30 52. The majority speeches contain much of significance. They constitute the most detailed reappraisal of the doctrine of part performance since *Maddison v Alderson.*

53. The speeches are significant on a number of issues relevant to the present case.

54. First, the approaches taken by the majority make it easier to establish part performance than the traditional *Maddison* approach.

55. Secondly and importantly, the majority articulate tests of specific performance which are significantly broader than the traditional approach. See particularly 540G, 541H-
40 542Z, 555D, 555F-H, 558E-H, 562D, 565F-H.

10 56. Thirdly, the majority are prepared to accept that payment of money (in particular payment of the whole or part of the purchase price) may constitute part performance. See 541B, 555D, 565B-F, 570E-572B.

57. Fourthly, the notion of "unequivocal referability" is watered down substantially. See 541F-542A, 556E, 563D-564B, 566C.

58. Fifthly, the speeches exhibit a willingness to look more broadly at the surrounding circumstances to consider whether there has been part performance. See 553G-554A, 541H, 555D, 565E, 572B.

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59. Sixthly, there is emphasis on the ordinary meaning of "part performance" in common parlance as opposed to its technical meaning. See 540B, 540D, 552H.

60. Seventhly, there is substantial emphasis on the wife's admissions of the relevant agreement before the justices. See 539D, 549H-550C, 553G, 557G-558A, 563A-C, 564D, 564G, 565A, 572H-573B.

Part performance in the present case

30 61. In discussing the law of part performance, it is convenient to begin by considering it by reference to two traditional aspects (variously formulated):

(i) that there must be acts by the plaintiff in performance of the contract;

(ii) that those acts must be referable to the alleged contract.

62. *Performance.* This requirement has been discussed by a number of justices in this Court. In *Cooney* at page 222.7, Knox CJ stated that:

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> "It must appear that the acts relied on as acts of part performance were done for the purpose and in the course of performing that agreement and with no other view or design than to perform it."

10 63. See also *Cooney* at pp.233-235 per Isaacs J. In *McBride* at page 79.6 Isaacs and Rich JJ stated that the relevant act must be "done under the terms of [the] agreement by force of that agreement". However, in *Regent* at pages 683-684 Gibbs J (having referred to *McBride* at p.79) stated that "if it were necessary that the acts of part performance should have been done in compliance with a requirement of the contract, the utility of the equitable doctrine would be reduced to vanishing point, and many cases which have proceeded on the opposite view would have been wrongly decided". Gibbs J then referred to *White v Neaylon* (1886) 11 App Cas 171 (a Privy Council appeal from South Australia) noting that the Judicial Committee in that case "appears to have held that the effecting of improvement son property which were neither

20 required nor permitted by the contract may be acts of part performance".

64. In *Millett v Regent* [1975] 1 NSWLR 62 at 65-68 Hutley JA stated that an act may be sufficient part performance if permitted by the contract alleged, though neither required nor expressly authorised by it.

65. It is submitted that, if the traditional approach to part performance is adopted, the view of Hutley JA should be followed: if the act is a permissible mode of partial performance of the contract it may amount to part performance.

30 66. *Referability.* This traditional requirement has also been discussed in some detail in the cases. In *McBride* at page 78 Isaacs and Rich JJ stated that the act relied on must be unequivocally and in its own nature referable to some such agreement as that alleged and that the words "some such agreement as that alleged" meant some contract of the general nature as that alleged (citing *Maddison* at pages 479 and 485). In *McBride* at page 99 Powers J spoke of whether the relevant act was "unequivocally and in its own nature referable to any contract" but referred, on the same page, to whether the acts "relied on as part performance are ... unequivocally referable to some such agreement as that alleged".

40 67. In *Cooney* at p.222 Knox CJ had this to say about the notion of referability (citations omitted):

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> "The acts relied on must be unequivocally and in their own nature referable to some such agreement as that alleged (*Maddison v Alderson* [at 467]). I think the meaning of this statement is most clearly expressed by Wigram VC in *Dale v Hamilton* [at 381], where he says: "It is, in general, of the essence of such an act that the Court shall, by reason of the act itself, without knowing whether there was an agreement or not, find the parties unequivocally in a position different from that which, according to their legal rights, they would be in if there were no contract". By the words "some such agreement as that alleged" I understand some agreement for the disposition of some estate or interest in the land in question."

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68. In *Williamson* at page 297.3 Dixon J referred to "acts of performance consistent only with some such contract subsisting" and at page 300.7 referred to acts of part performance being "consistent only with the existence of a contract between the parties".

69. The Court of Appeal in *Kingswood Estate v Anderson* [1963] 2 QB 169 accepted the formulation of Sir Edward Fry in *A Treatise on the Specific Performance of Contracts* (6th ed) (at p.278): "The true principle of the operation of acts of part performance seems only to require that the acts in question be such as must be referred to some contract and may be referred to the alleged one, that they prove the existence of some contract and are consistent with the contract alleged".

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70. In *Steadman v Steadman* [1976] AC 536 there is a number of observations which "have suggested that it is sufficient that the material acts of part performance should indicate, on the balance of probabilities, entry into a contract by the parties and should not be inconsistent with the contract in fact entered into" (Spry, *Equitable Remedies*, 9th ed at 289-290).

71. In *Millett v Regent* this court was careful not to foreclose adoption of the *Steadman* approach noting (at 683) that it was "*enough* that the acts are unequivocally and in their own nature referable to some contract of the general nature of that alleged" (emphasis added).

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72. The cases also discuss whether certain acts are referable to the alleged contract: e.g. the payment of purchase money, the taking of possession and the making of improvements and alterations. Obviously, such discussions are dependent upon the

10 test of referability adopted. The cases sometimes say that the payment of purchase money without more is not sufficient. However, *Steadman v Steadman* especially at 541, 570-571, does not sit easily with those cases. And it has been held that payment of money with other acts of performance may be sufficient: *Pejovic v Malinic* (1959) 60 SR (NSW) 184.

73. If this court maintains the traditional approach the appellant nonetheless submits that there is no need for the notion of "unequivocally" (or its equivalent). The more modern case law has generally sought to distance itself from this notion because it is so demanding as to exclude almost all acts of alleged part performance. And it did

20 not appeal to Dixon J: see [68] above. It is submitted that the less severe approach in *Steadman* has more to commend it – especially Lord Reid's substitution of a reliance test: "the rule must be that you take the whole circumstances, leaving aside evidence about the oral contract, to see whether it is proved that the acts relied on were done in reliance on a contract: that will be proved if it is shown to be more probable than not" (pp.541-542). According to Dr Spry *Equitable Remedies* (9th ed, p.272) Lord Reid's approach "has advantages in ease of application and does not appear to be inconsistent with any fundamental equitable principle". And courts today are very well acquainted with the forensic determination of issues of fact concerning reliance.

30 74. It is submitted that the facts in the present case satisfy the traditional requirements of part performance and referability. The payment of the extra $37,441.83 owners' contribution is explicable only by reference to some such contract as that alleged and was made in reliance on the agreement. The joint execution of the transfer for the Penfield Road property was also clearly referable to some such contract as that alleged and done in reliance on the agreement. And there can be little doubt that those acts were permissible under the agreement, envisaged by it, consistent with it and in compliance with it.

75. The approach in the previous paragraphs accords with the most traditional way of

40 analysing part performance. The cases (including cases in this Court) also contain repeated statements that the Court looks to the equities derived from the relevant conduct (*McBride* at 77.7; *Cooney* at 232.7; *Williamson* at 300.7, 309.1, 309.4, 309.7, 309.8, 319.1) and to whether or not there has been fraud (*McBride* at 79.2, 87.4, 87.7,

10 89.8, 90.3; *Cooney* at 225.3, 226.2, 229.4, 229.6, 232.9, 233.1, 233.8, 234.2, 234.6, 234.8, 235.6; *Williamson* at 308.7; *Regent* at 682.7).

76. The term "equities" is broad and suggests that equitable relief may be granted where the circumstances encompass any of the traditional circumstances attracting equitable jurisdiction. And in *Steadman* Viscount Dilhorne and Lord Simon interpreted this notion so as to include circumstances which were irrequitable or unjust (555F-H) or unconscionable (565G; 562D). In the present context relevant traditional equities would include estoppels and trusts (constructive or express). Moreover the circumstances of the present case would support remedies by way of estoppel or trust.
20 There was clear detrimental reliance by Leon on the faith of the arrangement; there was acquiescence by Velika in the payments being made; Velika has admitted knowledge of the agreement (including in writing); it would be unjust and inequitable for Velika to resile from what she understood to be the agreement (and which she has admitted to be the agreement). Likewise it was the clear common intention of the various parties that Leon should have a beneficial half share interest in Clark Road: cf *Lloyds Bank v Rosset* [1991] 1 AC 107. And it may fairly be said that it would be unconscionable for Velika to retain full ownership of Clark Road in circumstances in which it was clearly not intended that she should retain full beneficial ownership (cf *Baumgartner v Baumgartner* (1987) 164 CLR 137, at 148).

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77. So far as fraud is concerned, in *Regent v Millett* this Court (per Gibbs J) at p.682 adopted as correct the following statement of Lord Cranworth in *Caton v Caton* (1866) LR 1 Ch App 137, at 148:

> "[W]hen one of two contracting parties has been induced, or allowed by the other, to alter his position on the faith of the contract ... there it would be a fraud in the other party to set up the legal invalidity of the contract on the faith of which he induced, or allowed, the person contracting with him to act, and expend his money."

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78. Fraud in this context includes using the statute "to deny enforcement of the true transaction" (*Ciaglia v Ciaglia* (2010) 269 ALR 175 at [69]) and "the repudiation by any person of the terms upon which he has been entrusted with the legal title to property": *Cadd v Cadd* (1909) 9 CLR 171, at 187. In *Steadman* Lord Reid (at 540F)

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treated fraud as extending to the situation where "one party to an agreement stands by and lets the other party incur expense or prejudice his position on the faith of the agreement being valid" adding that the first party "will not then be allowed to turn around and assert that the agreement is unenforceable". Similarly, Lord Simon (at 558F) included within the notion of "fraud" the situation where "a party to a contract unenforceable under the Statute of Frauds stood by while the other party acted to his detriment in performance of his own obligations".

79. In the present case Velika has repudiated the terms of the agreement under which she agreed to purchase Penfield Road (in four equal shares) and is denying enforcement of the true transaction which is (as she herself admitted in her evidence and in writing) that she should convey half her interest in the Clark Road property to Leon. And Leon has clearly been induced (and allowed) by Velika (with knowledge) to alter his position on the faith of the arrangement and has spent his money (and purchased Penfield Road) in reliance upon getting a half share in Clark Road. As Kourakis CJ noted, but for the agreement to give him a half interest in Clark Road, Leon would not have agreed to the joint purchase of Penfield Road: FC [5].

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Part VII: Applicable statutory provisions

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80. Section 26 of the *Law of Property Act 1936* (SA) provides as follows:

> (1) No action shall be brought upon any contract for 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 or by some person thereunto by him lawfully authorised.
>
> (2) This section does not affect the law relating to part performance, or sale by Court.

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Part VIII: Orders sought

81. A declaration that the agreement made between the appellant and the respondent ought to be specifically performed and carried into execution.

10 82. An order that the respondent specifically perform and carry into execution the said agreement so far as the same remains to be performed.

83. Alternatively, a declaration of a constructive trust in relation to Clark Road.

Part IX: Estimate of oral argument

84. The appellant estimates 2.0 – 2.5 hours in chief but notes that a cross-appeal has been filed by the respondent.

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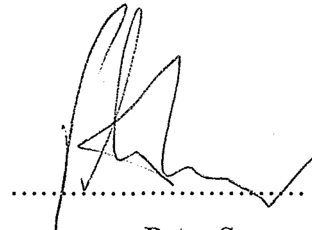

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