HIGH COURT OF AUSTRALIA

KIEFEL CJ,
BELL, GAGELER, KEANE, NETTLE, GORDON AND EDELMAN JJ

LEON PIPIKOS APPELLANT

AND

VELIKA TRAYANS RESPONDENT

Pipikos v Trayans
[2018] HCA 39
12 September 2018
A30/2017

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of South Australia

Representation

G O'L Reynolds SC with M J O'Meara and P A R Scragg for the appellant (instructed by Peter Scragg & Associates)

D M J Bennett QC, A L Tokley SC and S J White for the respondent (instructed by Aujard Lawyers)

CATCHWORDS

Pipikos v Trayans

Equity – Doctrine of part performance – Where respondent sole registered proprietor of property purchased by respondent and her husband – Where respondent and her husband made improvements to property – Where appellant claimed agreement between appellant and respondent entitled appellant to half-interest in unimproved land – Where alleged agreement did not meet formality requirements of s 26(1) of *Law of Property Act* 1936 (SA) – Where s 26(2) of *Law of Property Act* provides that s 26 does not affect law relating to part performance – Whether acts of part performance entitled appellant to specific performance of alleged agreement – Whether acts of part performance must be unequivocally, and in their own nature, referable to agreement of kind alleged – Whether sufficient for purposes of doctrine of part performance to establish that contracting party has knowingly been induced or allowed by counterparty to alter his or her position on faith of contract.

Words and phrases – "enforcement of equities", "equitable estoppel", "equitable fraud", "equity of the statute", "fraud", "parol contract", "part performance", "specific performance", "Statute of Frauds", "unequivocally referable".

Law of Property Act 1936 (SA), s 26.

1 KIEFEL CJ, BELL, GAGELER AND KEANE JJ. South Australia, in common with the other States and the Territories[1], requires that contracts for the sale of land meet certain formal requirements if they are to be enforceable. Section 26(1) of the *Law of Property Act* 1936 (SA) ("the Act"), the modern iteration of s 4 of the *Statute of Frauds* 1677[2], relevantly provides that:

> "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 Section 26(2) of the Act provides relevantly that the section does not "affect the law relating to part performance".

3 In *Cooney v Burns*[3], Isaacs J summarised the law relating to part performance as being that a "bargain in fact made, though devoid of an enforceability either at law or in equity, has been so acted upon by *partly performing it* that for the defendant to recede from it at that stage would be a fraud on the plaintiff." (emphasis in original)

4 In *Maddison v Alderson*, the Earl of Selborne LC said[4] 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 appellant submitted that it is unduly demanding of a party seeking specific performance of a parol contract for the sale of land to require that the acts of part performance be "unequivocally, and in their own nature, referable" to a contract of the kind asserted by the party seeking specific performance; and that in this case the courts below erred in adhering to this requirement.

5 The appellant urged the adoption of a more relaxed approach, akin to the approach taken in the context of equitable estoppel, said to have been

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1 *Conveyancing Act* 1919 (NSW), s 54A; *Property Law Act* 1974 (Q), 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.

2 29 Car II c 3.

3 (1922) 30 CLR 216 at 233; [1922] HCA 8. See also at 226 per Knox CJ.

4 (1883) 8 App Cas 467 at 479. See also at 491 per Lord FitzGerald.

adumbrated by Lord Cranworth LC in *Caton v Caton*[5]. On the appellant's argument, the question a court must ask is whether a contracting party has knowingly been induced or allowed by the counterparty to alter his or her position on the faith of the contract. The resolution of this argument is the principal issue in this Court.

6 The appellant's argument that the requirement of unequivocal referability stated by Lord Selborne in *Maddison v Alderson* should be relaxed must be rejected for the reasons which follow. Accordingly, the appeal must be dismissed.

7 Against the possibility that the appeal might succeed, the respondent sought special leave to argue by way of cross-appeal that the Full Court of the Supreme Court of South Australia erred in overturning the trial judge's conclusion that no contract had been concluded between the appellant and the respondent. It was conceded on behalf of the respondent that special leave to cross-appeal should be granted only if this Court were disposed to allow the appeal. That concession was correctly made. The proposed cross-appeal would involve an extensive review of the evidence and of the particular findings of fact made by the courts below rather than the consideration of an issue of principle of general importance. Only if the appeal were to be allowed without resolution of the issue raised by the cross-appeal would the interests of justice warrant this Court entertaining the cross-appeal.

8 There being no sufficient basis to warrant the grant of special leave to permit the cross-appeal to proceed, the application for leave to cross-appeal was dismissed at the conclusion of the argument of the appeal.

Background

9 The appellant is the former brother-in-law of the respondent. In 2002, the respondent and her then husband ("George"), who is the appellant's brother, purchased a property at Clark Road, Virginia, South Australia. George and the respondent built a house on, and made other improvements to, the land. The

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5 (1866) LR 1 Ch App 137 at 148.

respondent was the sole registered proprietor of the property[6]. The property was subject to a registered mortgage to a financier[7].

10 In February 2004, George signed a contract to purchase a parcel of land at Taylors Road, Virginia for $299,500. The brothers agreed to purchase the property together. The purchase was largely financed by way of a loan from Suncorp, with the appellant, his wife ("Sophie"), George and the respondent contributing equally to the balance of the purchase price and to the transaction costs. The appellant and Sophie jointly held a half-interest in the property, whereas George held the other half in his name alone[8].

11 In July 2004, the appellant, Sophie, George and the respondent acquired a parcel of land at Penfield Road, Virginia for $260,000. George signed the contract, which named him or his nominee as purchasers. The memorandum of transfer provided that the property be transferred to the appellant, Sophie, George and the respondent as tenants in common, with each couple holding a half-share as joint tenants. The purchase was financed in part by way of a loan from a financier to the appellant, Sophie, George and the respondent secured by a mortgage. The appellant and Sophie paid the deposit and the balance of the purchase price, which together totalled $74,883.62[9].

12 George and the respondent continued to live at Clark Road after 2004. They paid the mortgage on the property, as well as all other outgoings. They did not pay any rent or otherwise account to the appellant for their occupation of the property[10].

13 In 2008, the mortgagee served default notices in respect of the mortgages on both the Clark Road and the Penfield Road properties. The appellant paid the

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6 *Pipikos v Trayans* [2015] SADC 149 at [24]; *Pipikos v Trayans* (2016) 126 SASR 436 at 438 [1], 439 [10]-[11].

7 *Pipikos v Trayans* [2015] SADC 149 at [25].

8 *Pipikos v Trayans* [2015] SADC 149 at [27]-[28]; *Pipikos v Trayans* (2016) 126 SASR 436 at 439-440 [11].

9 *Pipikos v Trayans* [2015] SADC 149 at [29]; *Pipikos v Trayans* (2016) 126 SASR 436 at 440 [12]-[13].

10 *Pipikos v Trayans* [2015] SADC 149 at [31]; *Pipikos v Trayans* (2016) 126 SASR 436 at 440 [15].

arrears on each mortgage in late 2009. When the loans fell into arrears again in 2012, the mortgagee instituted proceedings for the possession and sale of the properties. Those proceedings were discontinued when the arrears were discharged[11].

14 On 3 August 2009, the respondent signed, at the appellant's request, a handwritten note agreeing that the appellant was "the owner of half of the [Clark Road] land … via an agreement between George Pipikos and Leon Pipikos of [sic] the purchase of Penfield Road, Virginia property"[12].

15 In July 2012, the appellant lodged a caveat on the Clark Road property, claiming a half-interest, enforceable in equity, in the "unimproved land".

16 In September 2012, after the respondent applied to have the caveat removed, the appellant instituted proceedings in the District Court of South Australia in which he sought a declaration that the respondent holds a half-interest in the Clark Road property on trust for him or, alternatively, an order that he be registered as a joint proprietor of "one undivided moiety" of the Clark Road property[13].

17 Before summarising the course of the proceedings instituted by the appellant, it is necessary to mention some other matters of background.

18 George and the respondent separated and, in October 2013, consented to the making of a matrimonial property settlement in the Family Court of Australia. In that settlement, George surrendered his interests in the Clark Road, Taylors Road and Penfield Road properties to the respondent, who assumed his liabilities in relation to those properties[14].

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11 *Pipikos v Trayans* [2015] SADC 149 at [33], [35]-[37]; *Pipikos v Trayans* (2016) 126 SASR 436 at 440 [17].

12 *Pipikos v Trayans* [2015] SADC 149 at [34]; *Pipikos v Trayans* (2016) 126 SASR 436 at 444 [33].

13 *Pipikos v Trayans* [2015] SADC 149 at [38], [46]; *Pipikos v Trayans* (2016) 126 SASR 436 at 440 [18].

14 *Pipikos v Trayans* [2015] SADC 149 at [23], [39]; *Pipikos v Trayans* (2016) 126 SASR 436 at 440 [16], [19].

19 The Taylors Road and Penfield Road properties were rented out, with George initially collecting the rent and making the payments on the mortgages and outgoings. A dispute arose when George appropriated some of the rent for his own purposes. By 2014, the appellant had taken over the rent collection on the Taylors Road property. In about July 2014, the appellant stopped applying the rent to the Taylors Road mortgage[15].

20 In February 2014, the appellant, Sophie and the respondent consented to the sale of all three properties. As at the date of the judgment of the court below, the Clark Road property had not yet been sold[16].

The trial

21 At trial in the District Court of South Australia, the first issue was whether an agreement was concluded between the appellant and the respondent, pursuant to which the appellant was entitled to a half-interest in the unimproved land at Clark Road. The appellant claimed that in July 2004 he and George had agreed that the appellant would acquire half of the respondent's interest in the Clark Road property (but not the improvements) for $45,000, to be paid largely by way of funding of George and the respondent's share in the purchase of the Penfield Road property.

22 The appellant gave evidence that an oral agreement was made during an inspection of the Penfield Road property, and then in a discussion at Clark Road immediately after the inspection. He said that he and Sophie had decided to purchase the property, and that George said that he wanted to be partners on the property. The appellant said that he told George that he would have to contribute between $35,000 and $40,000 upfront if he wanted to purchase a half-interest in the property. He said that George responded that he did not have sufficient funds available but suggested that they could do a deal whereby a half-interest in the Clark Road property could be sold to the appellant and then the brothers together with their respective spouses would each own a half-share in all three properties. The appellant said that he and George agreed that the value of the unimproved land of the Clark Road property was approximately $80,000 to $90,000, and therefore settled on a purchase price of $45,000. The appellant relied on the note

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15 *Pipikos v Trayans* [2015] SADC 149 at [30], [40]; *Pipikos v Trayans* (2016) 126 SASR 436 at 440 [14], 441 [20].

16 *Pipikos v Trayans* [2015] SADC 149 at [41], [43]; *Pipikos v Trayans* (2016) 126 SASR 436 at 441 [21].

signed by the respondent on 3 August 2009 as supporting his evidence of the making of the agreement.

23 The second issue at trial was whether, despite the circumstance that the agreement did not meet the formalities required by s 26(1) of the Act, the doctrine of part performance entitled the appellant to a decree of specific performance of the agreement. In this regard, the appellant contended that, by operation of the doctrine of part performance, he was entitled to a decree of specific performance requiring the respondent to convey a half-interest in Clark Road to him, subject to an obligation that he account to George and the respondent for the value of any improvements.

24 The appellant relied upon the following acts of part performance: the payment of the deposit and the balance of the purchase price for the Penfield Road property; the payment of $7,500 to $8,000 to George; the payment in December 2009 of $2,500 on the Clark Road mortgage; and the attempts to document or enforce the agreement by way of the respondent's signed note of 3 August 2009, the lodging of a caveat and the institution of the proceedings.

25 The trial judge determined both questions in the negative. As to the first issue, her Honour noted that there was no contemporaneous record of the alleged agreement, nor any subsequent attempt to register or record the interest alleged by the appellant. The trial judge observed, too, that there was a degree of uncertainty in relation to the terms of the alleged agreement, including a failure to identify with precision either the parties to the agreement or its precise terms[17]. Further, the judge noted that the appellant's alleged interest in the land, but not the improvements on the land, was not one that was recognised by the law: the fixtures on land are subsumed within the estate in fee simple[18]. The appellant had attempted to overcome this difficulty by arguing that his interest would crystallise only upon sale of the Clark Road property, but the trial judge said that the appellant's own evidence about his discussions with the respondent and George did not suggest that the agreement had been framed in this way, and that this term was itself inconsistent with the appellant being entitled to a present interest in the land[19].

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17 *Pipikos v Trayans* [2015] SADC 149 at [95], [98]; see also at [61], [116].

18 *Pipikos v Trayans* [2015] SADC 149 at [112].

19 *Pipikos v Trayans* [2015] SADC 149 at [109]-[113].

26 The trial judge found that the circumstance that the appellant and Sophie paid the entire owners' contribution to the purchase price of the Penfield Road property, together with the transaction costs, was not compelling evidence of an agreement between the appellant and the respondent as to the sale of an interest in Clark Road, particularly in light of the appellant and George's substantial history of business transactions[20].

27 The trial judge, despite concluding that no contract in the terms asserted by the appellant was binding upon the respondent, proceeded to deal with whether the appellant would have been entitled to a decree of specific performance vindicating his asserted interest in the Clark Road property.

28 The trial judge quoted Lord Selborne's speech in *Maddison v Alderson* in support of the proposition that the acts of part performance had to be "unequivocally, and in their own nature, referable to some such agreement as that alleged"[21]; and proceeded to hold that the acts said by the appellant to constitute part performance were not unequivocally referable to a contract of the kind asserted by him. In particular, the trial judge held that the payment of the deposit and the balance of the price for the Penfield Road property was consistent with a loan to the respondent and George, or an unequal contribution to the brothers' partnership that, either way, would eventually be brought to account between them; that the payment to George of $7,500 to $8,000 had not been proved; that the payment on the Clark Road mortgage was consistent with a loan to be repaid; and that the attempts at documentation, including obtaining the note signed by the respondent on 3 August 2009, were not acts of performance of any agreement but attempts by the appellant to enforce his claim[22].

The Full Court

29 The Full Court overturned the trial judge's conclusion that the alleged agreement had not been established, but held that the requirements of the doctrine of part performance were not satisfied. On that basis, the appellant's appeal was dismissed.

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20 *Pipikos v Trayans* [2015] SADC 149 at [96].

21 (1883) 8 App Cas 467 at 479, quoted in *Pipikos v Trayans* [2015] SADC 149 at [106].

22 *Pipikos v Trayans* [2015] SADC 149 at [108].

30 As to part performance, Kourakis CJ, with whom Kelly and Hinton JJ agreed, held that acts of part performance must be unequivocally referable to a contract whose terms are consistent with those of the asserted contract[23]; and that although the House of Lords had taken a more liberal approach in *Steadman v Steadman*[24], Australian courts had not followed suit[25].

31 Kourakis CJ held that the purchase of the Penfield Road property was not unequivocally referable to an agreement of the kind asserted, because the purchase of the Penfield Road property was "complete in itself", and the payment by the appellant and Sophie of George and the respondent's share of the owners' contribution to the purchase price could be "the manifestation of any number of arrangements and contracts"[26].

32 The appellant now appeals against the Full Court's conclusion that the doctrine of part performance was not engaged.

The appellant's submissions

33 The appellant submitted that underlying the doctrine of part performance is the concern of equity to prevent unconscientious or fraudulent reliance on the Statute of Frauds to avoid enforcement of a contract on which a party has been allowed or induced to rely to his or her detriment[27]. The appellant argued that he had relied on the contract in relation to the Clark Road property in agreeing to finance George and the respondent's portion of the owners' contribution to the Penfield Road property, so that it would be unconscientious or fraudulent to deny enforcement of the Clark Road contract.

34 The appellant argued that the approach of Lord Selborne in *Maddison v Alderson* was flawed in that it focused upon a concern about the evidence required to prove the parol contract. The true basis of the doctrine, the appellant submitted, is the concern, discussed by Lord Cranworth LC in *Caton v Caton*, to prevent unconscientious conduct.

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23 *Pipikos v Trayans* (2016) 126 SASR 436 at 460-461 [94]-[95].

24 [1976] AC 536.

25 *Pipikos v Trayans* (2016) 126 SASR 436 at 462 [98].

26 *Pipikos v Trayans* (2016) 126 SASR 436 at 462 [100].

27 Citing *Regent v Millett* (1976) 133 CLR 679 at 682; [1976] HCA 40.

35 It was also said that the doctrine of part performance should be extended to the circumstances of the present case consistently with liberalising trends in the development of the law of equitable estoppel.

36 The appellant argued that the course of authority in Australia did not preclude acceptance of his argument. In particular, he argued that the "unequivocal referability" test had never formed part of the ratio decidendi of a decision of this Court. It is convenient to address this aspect of the appellant's argument immediately and then to discuss the issues of principle agitated in the course of argument.

The Australian authorities

37 At the forefront of the appellant's argument in this Court was the contention that in *Regent v Millett*[28] Gibbs J, with whom Stephen, Mason, Jacobs and Murphy JJ agreed, expressed a preference for a more liberal approach to the availability of part performance as a basis for the enforcement of a parol contract for the sale of land than that stated by Lord Selborne in *Maddison v Alderson*. This contention was based on the circumstance that Gibbs J said[29] that "[t]he principle upon which the doctrine of part performance rests was stated by Lord Cranworth, Lord Chancellor in *Caton v Caton*[30] in words which appear to have a direct application to the present case". The passage then cited by Gibbs J was in the following terms[31]:

> "[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, as for instance by taking possession of land, and expending money in building or other like acts, 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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28 (1976) 133 CLR 679.

29 (1976) 133 CLR 679 at 682.

30 (1866) LR 1 Ch App 137.

31 (1866) LR 1 Ch App 137 at 148.

38 It is apparent that Gibbs J regarded this statement as having a direct application to the case before him because it supported the proposition that[32]:

> "the entry into possession alone, or the taking of possession coupled with the expenditure of money by one party on the improvement of property, with the cognizance of the other party to the contract, may amount to part performance".

39 On this basis, Gibbs J held that, in the case before him, "the giving and taking of possession by itself was sufficient part performance of the contract"[33].

40 Nothing in the use made of *Caton v Caton* by Gibbs J in *Regent v Millett* gives any support for the relaxation of the approach of Lord Selborne in *Maddison v Alderson*. On the contrary, Gibbs J went on to say[34]:

> "the test suggested by the Earl of Selborne LC in [*Maddison v Alderson*][35], that the acts relied upon as part performance 'must be unequivocally, and in their own nature, referable to some such agreement as that alleged', has been consistently accepted as a correct statement of the law. It is enough that the acts are unequivocally and in their own nature referable to some contract of the general nature of that alleged (see *McBride v Sandland*[36])."

41 It is simply not possible to understand these observations as expressing reservation or doubt about the correctness of Lord Selborne's statement.

42 It is also noteworthy that Gibbs J went on to say[37] that the taking of possession was unequivocally referable to the contract even though the contract permitted, but did not require, the plaintiffs to take possession of the land. In other words, his Honour's judgment rejected the suggestion that only an act to the detriment of a plaintiff on the faith of the contract would suffice as an act of part

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32 (1976) 133 CLR 679 at 682.

33 (1976) 133 CLR 679 at 683.

34 (1976) 133 CLR 679 at 683.

35 (1883) 8 App Cas 467 at 479.

36 (1918) 25 CLR 69 at 78; [1918] HCA 32.

37 (1976) 133 CLR 679 at 683-684.

performance. As will be seen, the decision in *Regent v Millett* differs, in this respect, from the approach of Lord Reid in *Steadman v Steadman*[38].

43 Earlier decisions of the High Court also support the view that Lord Selborne's requirement of unequivocal referability is to be taken as a correct statement of the law. In *McBride v Sandland*[39], Isaacs, Rich and Powers JJ accepted Lord Selborne's statement of the law; and in *Cooney v Burns*[40], Knox CJ, Isaacs, Higgins, Gavan Duffy and Starke JJ did likewise.

44 It is true that, in *McBride v Sandland*[41], Isaacs and Rich JJ accepted that an act of part performance must be done "by the party relying on it on the faith of the agreement, and … the other party must have permitted it to be done on that footing" if the moral turpitude that is the "ground of jurisdiction" is to be established. That view may not accord with what Lord Selborne actually said or with the decision in *Regent v Millett*. But otherwise there can be no doubt that in Australia Lord Selborne's statement of the law in *Maddison v Alderson* is unshaken by the course of authority in this Court.

45 As to the appellant's contention that Lord Selborne's unequivocal referability requirement has not been the reason for the decision of any case in this Court, it would be difficult, to say the least, to reconcile a decision in the appellant's favour in this case with this Court's decision in *Cooney v Burns*. In that case, the defendant agreed to sell to the plaintiff the lease of a hotel of which the defendant was the lessee. After the contract was made, the lease of the hotel was handed to the plaintiff's solicitors for the purpose of having an assignment of the lease prepared together with notices of an application for the transfer of the associated liquor licence. The plaintiff's solicitors proceeded to prepare an assignment of the lease and the notices of application. An inventory of the furniture included in the sale was also taken. The plaintiff incurred expense in relation to these steps. These acts on the part of the plaintiff were held to be insufficient as acts of part performance in that they did not alter the relative positions of the parties in relation to the land the subject of the contract in terms

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38 [1976] AC 536 at 540.

39 (1918) 25 CLR 69 at 77-79, 98-99.

40 (1922) 30 CLR 216 at 223, 229-231, 239, 243, 243-244.

41 (1918) 25 CLR 69 at 79.

of the title to, or possession of, or use of that land[42]. The same may be said of the acts of part performance relied upon in this case by the appellant.

A rule of evidence or a principle of substance?

46 It was common ground between the parties in the present case that the rationale of the doctrine of part performance is not concerned with the proof of the contract but with the enforcement of equities arising from the partial performance of the contract. On the appellant's behalf, it was argued that the requirement of unequivocal referability is a vestige of the tenacious heresy that the doctrine of part performance is concerned with the proof of the parol contract by a process of inference from the acts of part performance. It was said that Lord Selborne had erred by applying rules of Chancery procedure that had, by the time of *Maddison v Alderson*, been repealed, and that this had led to courts treating the requirement of unequivocal referability as a substantive rule when, in truth, it was an erroneously invoked rule of evidence.

47 It is true that some statements in the cases are far from clear as to the rationale of the doctrine of part performance. In some of the cases, the basal principle is stated in terms of a concern to enforce the equities that have arisen by reason of the performance of obligations under the parol contract in order to prevent the equitable fraud that would occur if the defendant were allowed to resile from a partly completed transaction[43]. On this view, as *Pomeroy* says[44], the ground of equitable intervention is "a fraud inhering in the consequence of setting up the statute as a defense".

48 In other cases, the principle has been stated in terms of a concern that evidence is necessary to satisfy a peculiarly high standard of proof to establish the fact of the making of a parol contract for the sale of land[45]. In *Corbin on*

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42 (1922) 30 CLR 216 at 235, 241-242, 243, 244-245.

43 *Caton v Caton* (1866) LR 1 Ch App 137 at 148; *Maddison v Alderson* (1883) 8 App Cas 467 at 475-476, 489; *Steadman v Steadman* [1976] AC 536 at 540, 542-543, 558, 568; *Regent v Millett* (1976) 133 CLR 679 at 682.

44 Symons, *Pomeroy's Equity Jurisprudence*, 5th ed (1941), vol 4, §1409. See also Story, *Commentaries on Equity Jurisprudence, as Administered in England and America*, 13th ed (1886), vol 2, §§754 and 758.

45 *Morphett v Jones* (1818) 1 Swans 172 at 181 [36 ER 344 at 348]; *Maddison v Alderson* (1883) 8 App Cas 467 at 479, 485; *Thomas v The Crown* (1904) 2 CLR 127 at 138; [1904] HCA 29; *Maiden v Maiden* (1909) 7 CLR 727 at 737-738;

(Footnote continues on next page)

Contracts[46], in relation to the requirement that the acts of part performance be unequivocally referable to some such contract as that alleged by the plaintiff, it is said that the "principal idea that is struggling for expression is that the part performance must be clearly evidential of the existence of a contract".

49 The view that the court enforces the equities arising from partial performance, rather than the rights conferred by the parol contract itself, while attended with a degree of subtlety, has the powerful merit of being consistent with the Statute of Frauds. The view that part performance is concerned with matters of proof of the parol contract cannot stand with the Statute of Frauds, the evident purpose of which is to prevent the enforcement of a parol contract, however clear may be the proof of its making.

50 It is not correct to say that Lord Selborne's statement of principle evinces the view that part performance operates as acceptable evidence of the parol contract in question in place of the writing required by the statute. When Lord Selborne spoke of acts "unequivocally … referable" to "some such agreement"[47], his Lordship was not speaking of the particular contract in question. The very circumstance that Lord Selborne spoke of referability to "some such agreement" itself suggests that the requirement is not concerned with proof of the particular contract in question, but with dealings between the parties which in their nature establish that the parties are in the midst of an uncompleted contract for the sale or other disposition of land. Given that part performance is relevant only in relation to contracts for the sale or other disposition of land[48], it is not difficult to appreciate that the acts described by Lord Selborne are acts unequivocally and inherently referable to a transaction for the sale or other disposition of the land. Lord Selborne was clear that unequivocal referability is concerned with the proof of acts partially executing a transaction that remains uncompleted, and that proof of the agreement that had been made was not required to show the equity to have the transaction completed.

[1909] HCA 16; *Chaproniere v Lambert* [1917] 2 Ch 356 esp at 361; *Kingswood Estate Co Ltd v Anderson* [1963] 2 QB 169 at 189. See also *Actionstrength Ltd v International Glass Engineering IN.GL.EN SpA* [2003] 2 AC 541 at 549-550 [22]-[23].

46 Brown, *Corbin on Contracts*, rev ed (1997), vol 4 at 521.

47 *Maddison v Alderson* (1883) 8 App Cas 467 at 479.

48 cf Heydon, Leeming and Turner, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies*, 5th ed (2015) at 684.

51 It is significant in this respect that Lord Selborne expressly adopted[49] the statement of Sir James Wigram V-C in *Dale v Hamilton*[50] that it is in general of the essence of an act of part performance:

> "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." (emphasis added)

52 In a case where the parties are found, as a matter of fact, to be in that position, equity requires that the transaction be completed notwithstanding the objection of the defendant that the contract itself cannot be enforced by reason of non-compliance with the Statute of Frauds. The requirement for unequivocal referability is essential to Lord Selborne's thesis that the court is not enforcing the contract – that would be contrary to the Statute of Frauds – but the equities generated by its partial performance. It is only where the acts of part performance are inherently and unequivocally referable to such a contract that it cannot be objected that, in truth, and contrary to the legislation, it is the parol contract that is being enforced.

53 In *Burns v McCormick*[51], Cardozo J explained the essential requirement this way:

> "There must be performance 'unequivocally referable' to the agreement, performance which alone and without the aid of words of promise is unintelligible or at least extraordinary unless as an incident of ownership, assured, if not existing.
>
> 'An act which admits of explanation without reference to the alleged oral contract or a contract of the same general nature and purpose is not, in general, admitted to constitute a part performance.' …
>
> What is done must itself supply the key to what is promised. It is not enough that what is promised may give significance to what is done."

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49 *Maddison v Alderson* (1883) 8 App Cas 467 at 479.

50 (1846) 5 Hare 369 at 381 [67 ER 955 at 960].

51 135 NE 273 at 273 (NY 1922), quoting *Woolley v Stewart* 118 NE 847 at 848 (NY 1918).

54 The equity to have the transaction completed arises where the acts that are proved are consistent only with partial performance of a transaction of the same nature as that which the plaintiff seeks to have completed by specific performance. At that point, regard may be had to the terms of the oral contract in order to ascertain the appropriate orders by way of specific performance. So, in *Maddison v Alderson*, Lord Selborne stated[52] that the terms of the parol contract may be taken into account only when the equity to have the transaction carried to completion has been established and it becomes necessary to establish the terms of the order to be made. At that point[53]:

> "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."

55 In *McBride v Sandland*, Isaacs and Rich JJ explained[54] that the logical order in which the issues in a case such as the present should be addressed is first to determine whether the acts performed establish the equity and then, and only then, to refer to the terms of the parol agreement in order to ascertain the terms in which the equity is to be enforced.

56 Applying that reasoning to the present case, because the acts of part performance relied upon by the appellant are consistent with some transaction other than a sale of the Clark Road property, he was not able to show a partially completed sale of the Clark Road property that he was entitled in equity to have fully executed by means of a decree of specific performance.

57 It also follows from the above that the appellant's contention that Lord Selborne erroneously applied repealed rules of Chancery procedure is incorrect, and must be rejected. On the contrary, his Lordship was expounding a rule of substance calculated to avoid Chancery acting in a manner repugnant to the Statute of Frauds.

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52 (1883) 8 App Cas 467 at 475-476.

53 (1883) 8 App Cas 467 at 476.

54 (1918) 25 CLR 69 at 77-78.

Part performance and equitable estoppel

58 It has been suggested[55] that "the modern and divergent rules of proprietary and equitable estoppel … secret trusts … and part performance sprang from [the] common root" that a person may not rely on his or her strict legal rights where to do so is against the conscience of equity. But the appellant's invitation to subsume part performance within the development of equitable estoppel fails to appreciate that, while in some cases the doctrines may have an overlapping operation, they do not cover the same ground. While it may well be that equity's concern to prevent unconscientious conduct is the common root of equitable estoppel and part performance, there are discernible differences in the scope and operation of these doctrines as each has developed in Australia.

59 The first such difference is that part performance may be invoked by a vendor of land to enforce a parol contract[56], whereas equitable estoppel is available only against a vendor of land to vindicate the interests of a prospective purchaser[57].

60 Next, equitable intervention by way of equitable estoppel to prevent a defendant resiling from a promise that is not enforceable at law is justified, not by the existence of an unperformed or partially performed promise, but by a concern that the plaintiff should not be left to suffer a detriment by the defendant's so resiling[58]. So, in *Waltons Stores (Interstate) Ltd v Maher*[59] Mason CJ and Wilson J noted that, as a general rule, a "failure to fulfil a promise does not of itself amount to unconscionable conduct" and so "mere reliance on an executory promise to do something, resulting in the promisee changing his

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55 Heydon, Gummow and Austin, *Cases and Materials on Equity and Trusts*, 3rd ed (1989) at 1042.

56 *Turner v Bladin* (1951) 82 CLR 463 at 473; [1951] HCA 13.

57 Cf *Dillwyn v Llewelyn* (1862) 4 De G F & J 517 [45 ER 1285]; *Ramsden v Dyson* (1866) LR 1 HL 129.

58 *Giumelli v Giumelli* (1999) 196 CLR 101 at 121-122 [35]; [1999] HCA 10; *Sidhu v Van Dyke* (2014) 251 CLR 505 at 522-523 [58]; [2014] HCA 19.

59 (1988) 164 CLR 387 at 406; [1988] HCA 7.

position or suffering detriment, does not bring promissory estoppel into play." In the same case[60], Brennan J explained:

> "The protection which equity extends is analogous to the protection given by estoppel in pais to which Dixon J referred in *Grundt v Great Boulder*[61], ie, protection against the detriment which would flow from a party's change of position if the assumption (or expectation) that led to it were deserted."

61 Thirdly, the nature of the equity enforced by part performance differs from that enforced by equitable estoppel. In some cases of equitable estoppel, the relief granted may require the taking of active steps by the defendant to meet the expectations generated by the transaction[62], but in other cases the requirements of good conscience may mean that such an order would not reflect the measure of relief required to protect the plaintiff against the apprehended detriment[63]. If the doctrine of part performance covered the same ground as equitable or promissory estoppel, one might have expected that there would need to be, in each case where part performance is invoked, an analysis of the extent to which a defendant's attempt to resile from completion of the transaction would result in detriment to the plaintiff, and that the relief granted would be moulded accordingly to prevent that detriment[64]. But that has not been the case. Indeed, in the case of part performance, as is apparent from this Court's decision in *Regent v Millett*, there is not even an insistence that there be detrimental reliance on the part of the plaintiff to establish an equity to relief. A defendant's act in putting a plaintiff into possession might not of itself be a detriment to the plaintiff, but there can be no doubt that it is a sufficient act of part performance[65]. Where part performance is established the plaintiff will be entitled to a decree of specific performance without needing to establish that a lesser form of relief

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60 (1988) 164 CLR 387 at 418-419.

61 (1937) 59 CLR 641; [1937] HCA 58.

62 *Dillwyn v Llewelyn* (1862) 4 De G F & J 517 [45 ER 1285]; *Ramsden v Dyson* (1866) LR 1 HL 129; *Sidhu v Van Dyke* (2014) 251 CLR 505 at 529 [82].

63 *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 441; [1990] HCA 39; *Sidhu v Van Dyke* (2014) 251 CLR 505 at 529 [83].

64 Cf *Crabb v Arun District Council* [1976] Ch 179 at 198.

65 *Regent v Millett* (1976) 133 CLR 679 at 682.

would be inadequate. In this respect, the operation of part performance may be contrasted with equitable estoppel, where, as Mason CJ and Wilson J noted in *Waltons Stores (Interstate) Ltd v Maher*[66], the plaintiff's equity may be enforced by the grant of relief falling short of an order for the satisfaction of the plaintiff's expectation interest[67].

62 In *Maddison v Alderson*[68], Lord Selborne illustrated his thesis that the defendant "is really 'charged' upon the equities resulting from the acts done in execution of the contract" by the example of:

> "a parol contract to sell land, completely performed on both sides, as to everything except conveyance; the whole purchase-money paid; the purchaser put into possession; expenditure by him (say in costly buildings) upon the property; leases granted by him to tenants. The contract is not a nullity … All the acts done must be referred to the actual contract, which is the measure and test of their legal and equitable character and consequences."

63 His Lordship went on to say[69]:

> "The choice is between undoing what has 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."

64 In the example offered by Lord Selborne it is readily apparent, having regard to the acts performed on the strength of the contract, that a court of equity would regard specific performance of the contract – which, ex hypothesi, would involve only an order for the transfer of the legal title – as the only remedy

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66 (1988) 164 CLR 387 at 405.

67 See also *Sidhu v Van Dyke* (2014) 251 CLR 505 at 528-530 [79]-[86].

68 (1883) 8 App Cas 467 at 475.

69 (1883) 8 App Cas 467 at 476.

sufficient to do justice. A contract or other arrangement which remains largely unperformed on both sides may not always have the same claim on the conscience of equity in terms of the remedies provided by the court as a contract which has been performed to the extent of that hypothesised by Lord Selborne[70]. And so it can be seen that it is something peculiar to part performance that the equity of the plaintiff that arises in reliance upon the partial performance of the contract has been regarded as sufficiently strong, without more, save a readiness, willingness and ability to do equity[71], to support an order for specific performance in order to vindicate the equity of the plaintiff that arises from the part performance of the contract. In *J C Williamson Ltd v Lukey and Mulholland*[72], Dixon J, with whom Gavan Duffy CJ agreed, explained why this is so:

> "The acts of part performance 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. But in such a case the equity which so arises is to have the entire contract carried into execution by both sides. Because the acts done upon the faith of the contract could not have taken place if it had not been made, and the contract is of a kind which it is considered equitable to enforce in specie, a party who has so acted in partial execution of the contract obtains an equity to its complete performance."

65 Lord Selborne's requirement that the acts of part performance relied upon be unequivocally referable to a contract of the kind asserted by the plaintiff is best understood as being necessary to give rise to this peculiarly strong equity. His Lordship said[73]:

> "the rule … requires some evidentia rei to connect the alleged part performance with the alleged agreement. There is not otherwise enough in the situation in which the parties are found to raise questions which

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70 Cf *In re Cuming* (1869) LR 5 Ch App 72; *Chang v Registrar of Titles* (1976) 137 CLR 177 at 184-185, 189-190; [1976] HCA 1.

71 *Mehmet v Benson* (1965) 113 CLR 295 at 307-308, 314-315; [1965] HCA 18. Cf *Langman v Handover* (1929) 43 CLR 334 at 345, 356; [1929] HCA 42; *Mayfair Trading Co Pty Ltd v Dreyer* (1958) 101 CLR 428 at 452-453; [1958] HCA 55.

72 (1931) 45 CLR 282 at 300; [1931] HCA 15.

73 *Maddison v Alderson* (1883) 8 App Cas 467 at 478.

> may not be solved without recourse to equity. 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."

Steadman v Steadman

66 In the appellant's written submissions in this Court, reliance was placed on the decision of the House of Lords in *Steadman v Steadman*[74]. In *Steadman*, it was held[75] that acts of part performance were sufficient if they pointed to the existence of some contract between the parties and either showed the nature of, or were consistent with, the parol agreement alleged by the plaintiff. To the extent that the decision in *Steadman* points to a broadening of the doctrine of part performance, it is not to be followed in preference to the position established by *Maddison v Alderson* and the earlier decisions of this Court to which reference has been made.

67 It is noteworthy that in *Steadman*, none of their Lordships suggested that the decision involved a departure from the approach of Lord Selborne in *Maddison v Alderson*. Nevertheless, Lord Reid justified his conclusion by reasoning in terms of estoppel[76]:

> "If 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 he will not then be allowed to turn round and assert that the agreement is unenforceable."

68 Two things may be said about Lord Reid's statement of principle. First, to the extent that it speaks of the avoidance of detriment as an essential condition of the operation of the doctrine of part performance, it differs from both Lord Selborne's reasoning and this Court's decision in *Regent v Millett*; and secondly, it does not explain how it is that the doctrine supports an order for specific performance of a contract rather than an order limited to remedying the detriment to the plaintiff.

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74 [1976] AC 536.

75 [1976] AC 536 at 541-542, 553-554, 564.

76 [1976] AC 536 at 540.

69 In *Steadman*, Viscount Dilhorne and Lord Salmon seem, at least to some extent, to have justified their conclusions on the basis that the acts relied upon were sufficient proof of a parol contract in the absence of the writing required by the Statute of Frauds[77].

70 In oral argument, senior counsel for the appellant, acknowledging the disparate reasoning of the members of the majority of the House of Lords in *Steadman*, rightly did not press this Court to follow that decision. Given the absence from their Lordships' reasons of analysis critical of Lord Selborne's reasoning, and given further that, in point of principle, the doctrine of part performance is neither a species of equitable estoppel nor a mode of proof of a parol contract, *Steadman* does not provide a sound basis for departing from the position established by the course of authority in this Court.

71 In *Cooney v Burns*[78], Higgins J, writing in 1922, observed:

> "The cases on the subject cannot be all reconciled. Lord Selborne made an heroic effort in 1883, in the case of *Maddison v Alderson*[79], to bring order to the chaos, to give system to the unsystematic; and perhaps for practical purposes, it would be well to treat that case as being, at all events *primâ facie*, a complete exposition of the law."

72 The importance of the reconciliation achieved by Lord Selborne should not be discounted. It should not be thought, as the submissions advanced on behalf of the appellant appear to assume, that part performance is, like equitable estoppel, the original and unconstrained creation of the courts of equity, the elements of which can be reformulated at large to "do justice against a defaulting defendant"[80]. In particular, the argument advanced on the appellant's behalf fails to appreciate that Lord Selborne's articulation of the law of part performance was driven by the conscious need to reconcile the decisions of the courts of equity with the clear words of s 4 of the Statute of Frauds[81].

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77 [1976] AC 536 at 553-554, 567-569.

78 (1922) 30 CLR 216 at 239.

79 (1883) 8 App Cas 467.

80 *Cooney v Burns* (1922) 30 CLR 216 at 239.

81 *Maddison v Alderson* (1883) 8 App Cas 467 at 474-475.

73 It may be that the Chancery judges of the late 17th century did not regard the Statute of Frauds as applying to proceedings in equity[82], but by the time *Maddison v Alderson* came to be decided the idea that a court of equity could regard itself as outside the prescriptions of the Parliament had become, as it remains, unacceptable[83]. 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.

74 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[84]. 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, 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 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.

75 In this regard, it may be noted that the decision in *Steadman* was followed by the legislative abolition in the United Kingdom of the doctrine of part performance by the *Law of Property (Miscellaneous Provisions) Act* 1989 (UK), which provided that s 40 of the *Law of Property Act* 1925 (UK) shall cease to have effect and which, by s 2(1), provided:

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82 Heydon, Gummow and Austin, *Cases and Materials on Equity and Trusts*, 3rd ed (1989) at 1040.

83 *Maddison v Alderson* (1883) 8 App Cas 467 at 474, 482-483; *Cooney v Burns* (1922) 30 CLR 216 at 229.

84 Corbin, *Corbin on Contracts*, (1950), vol 2, §430.

> "A contract for the sale or other disposition of an interest in land can only be made in writing and only by incorporating all the terms which the parties have expressly agreed in one document or, where contracts are exchanged, in each."

76 This legislative response to *Steadman* was recommended by the Law Commission of England and Wales[85]. The decision in *Steadman* contributed to the conclusion of the Law Commission that the doctrine of part performance was so confused[86] that its abrogation by the legislature was desirable. The Law Commission considered that the most common example of injustice arising from undocumented dealings is the case of a plaintiff who incurs expenditure in effecting improvements to land to the knowledge of the owner and in the expectation generated by the owner of a transfer of the land; and that that injustice would be remedied by equitable estoppel. But as noted above, the "coverage" provided by equitable estoppel is not the same as that provided by part performance. And the law of part performance, as explained by Lord Selborne and in decisions of this Court, does not create the confusion that the Law Commission perceived in *Steadman*.

The result in the present case

77 It was argued in the written submissions made on the appellant's behalf that even if the unequivocal referability requirement were applied he should succeed on the appeal; but in the course of oral argument, it was conceded that, if Lord Selborne's approach were applied to the circumstances of this case, the acts on which the appellant relied at trial and before the Full Court would not suffice as acts of part performance. That concession was rightly made.

78 In *Cooney v Burns*[87], Starke J fixed upon the statement of Lord Selborne that an act is not a sufficient act of part performance "unless it is, as between the parties, such a part execution as to change their relative positions as to the

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85 Law Commission, *Transfer of Land: Formalities for Contracts for Sale etc of Land*, Law Com No 164, (1987) at 23 [6.4].

86 Law Commission, *Transfer of Land: Formalities for Contracts for Sale etc of Land*, Law Com No 164, (1987) at 3 [1.9]. See also Law Commission, *Transfer of Land: Formalities for Contracts for Sale etc of Land*, Working Paper No 92, (1985) at 22-24 [3.23]-[3.26].

87 (1922) 30 CLR 216 at 244.

subject-matter of the contract."[88] Starke J went on to conclude[89] that the act relied on in the case before him by way of part performance was not sufficient to support an order for specific performance because it did not "change the relative positions of the parties as to the subject matter of the contract, namely, the land"; in particular, the acts in question did not "alter the title in the land … affect the possession or the right to possession of the land, [or] … affect the use of the land or touch or concern the land in any way whatever."

79 Similar observations may be made in the present case. Here, neither party performed any act that was unequivocally referable to the Clark Road property. There was no giving or taking of possession of that land. There were no other acts indicative of a change in the respective positions of the parties in relation to the land. The Full Court was therefore correct to conclude that the acts on which the appellant relied were not sufficient to engage the doctrine of part performance.

Conclusion and orders

80 Considerations of authority and principle combine to require that the appellant's contention be rejected.

81 Accordingly, the appeal should be dismissed with costs.

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88 *Maddison v Alderson* (1883) 8 App Cas 467 at 478.

89 (1922) 30 CLR 216 at 244. See also at 236-238 per Isaacs J, 240-241 per Higgins J.

82 NETTLE AND GORDON JJ. We agree with the judgment of Kiefel CJ, Bell, Gageler and Keane JJ, for the reasons their Honours give, that the appeal should be dismissed but we wish to add the following.

83 The essential question which arises in this appeal is whether this Court should now relax the conditions of the doctrine of part performance to allow for application of the doctrine to cases in which the acts of part performance relied upon are not unequivocally referable to the kind of contract alleged. For the reasons which follow, in addition to those stated in the judgment of Kiefel CJ, Bell, Gageler and Keane JJ, the question should be answered, no.

Origins of the equitable doctrine of part performance

84 The equitable doctrine of part performance has been described as a mystery[90] and an anomaly[91]. As Stramignoni has written[92], the mystery is twofold: when was the doctrine of part performance first employed and why was it not mentioned in s 4 of the *Statute of Frauds* 1677[93]? As to the first, legal historians are now largely agreed[94] that the doctrine was first employed by Lord Nottingham in the Court of Chancery during the latter half of the 17th century. Its origins lay in the established equitable precept that part performance on one side required as a matter of conscience, *civilis et politica*, that performance should be ordered on the other side[95]. Why the doctrine was

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90 Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit*, (1987) at 614.

91 Pound, "The Progress of the Law, 1918-1919: Equity", (1920) 33 *Harvard Law Review* 929 at 935.

92 Stramignoni, "At the Dawn of Part Performance: A Hypothesis", (1997) 18(2) *Journal of Legal History* 32 at 32.

93 29 Car II c 3.

94 See for example Viner, *A General Abridgment of Law and Equity*, 2nd ed (1792), vol 5 at 523; Roberts, *A Treatise on the Statute of Frauds*, (1807) at 130-131; Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit*, (1987) at 614; Stramignoni, "At the Dawn of Part Performance: A Hypothesis", (1997) 18(2) *Journal of Legal History* 32 at 41; Baker, *An Introduction to English Legal History*, 4th ed (2002) at 350.

95 *Cook v Fountain* (1676) 3 Swans 585 at 600 per Lord Nottingham [36 ER 984 at 990]. See also Stramignoni, "At the Dawn of Part Performance: A Hypothesis", (1997) 18(2) *Journal of Legal History* 32 at 35-36; Baker, *An Introduction to English Legal History*, 4th ed (2002) at 110.

not mentioned in the Statute remains a mystery, although it may be conjectured that its authors, including Lord Nottingham[96], the so-called "Father of Equity"[97], did not conceive of the Statute as applying to cases involving part performance.

85 Earlier editions of Megarry and Wade's *The Law of Real Property* posited[98] that the first reported case in which the doctrine of part performance was applied after the enactment of the *Statute of Frauds* was the judgment of Lord Jeffreys in *Butcher v Stapely*[99]. But as Simpson later identified[100], it is apparent from the preceding judgment of Lord Guilford in *Hollis v Edwards*[101] that the doctrine was known in some form before *Butcher v Stapely*. On the available information, it seems likely that *Hollis v Edwards* and *Butcher v Stapely* were founded on *Potts v Turvin*[102], which was decided by Lord Nottingham very shortly after the enactment of the Statute.

86 In *Potts v Turvin*[103], a parol agreement was entered into under which Potts was to assign mortgaged property to Turvin as security for a loan and upon repayment of the loan Turvin was to reconvey the property. Potts conveyed the mortgaged property to Turvin in accordance with the agreement and subsequently repaid the loan. But, in breach of the agreement, Turvin refused to execute a deed of defeasance which provided for the reconveyance of the

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96 Costigan, "The Date and Authorship of the Statute of Frauds", (1913) 26 *Harvard Law Review* 329 at 334-336, 339.

97 Story, *Commentaries on Equity Jurisprudence*, 1st Eng ed (1884) at 34-35 §52.

98 See for example Megarry and Wade, *The Law of Real Property*, (1957) at 523; Megarry and Wade, *The Law of Real Property*, 2nd ed (1959) at 555; Megarry and Wade, *The Law of Real Property*, 3rd ed (1966) at 570.

99 (1685) 1 Vern 363 [23 ER 524].

100 Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit*, (1987) at 614.

101 (1683) 1 Vern 159 [23 ER 385].

102 (1681) *Lord Nottingham's Chancery Cases, Volume II*, Selden Society vol 79 (1961), Case 1074. See also Stramignoni, "At the Dawn of Part Performance: A Hypothesis", (1997) 18(2) *Journal of Legal History* 32 at 36-40.

103 This account of the facts of *Potts v Turvin* is based on Stramignoni, "At the Dawn of Part Performance: A Hypothesis", (1997) 18(2) *Journal of Legal History* 32 at 36-40.

property to Potts and, in answer to the bill entered by Potts, Turvin pleaded the *Statute of Frauds* in bar of the claim. Despite the Statute, Lord Nottingham ordered[104] that Turvin seal a deed of defeasance, and thereby established the precedent in effect relied upon in *Hollis v Edwards* and *Butcher v Stapely* of continuing after the enactment of the Statute to apply the pre-Statute practice of the Court of Chancery of compelling execution of formal covenants agreed to be but not yet sealed[105].

87 The pre-*Statute of Frauds* Chancery practice of compelling execution of formal covenants agreed to be but not sealed was also the basis of intervention in most of the other early cases following the enactment of the Statute[106]. But the doctrine evolved rapidly. During the latter part of the 17th century and the first half of the 18th century, equity added to the category of sufficient acts of part performance the acts of entering into possession of land under a parol contract[107] (apparently by reference to mediaeval conceptions of livery of seisin that putting a purchaser into possession was of the essence of a common law conveyance of land[108]), entering into possession and incurring expenses pursuant to a lease of land[109], and paying the purchase price of land in whole or in part[110].

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104 *Potts v Turvin* (1681) *Lord Nottingham's Chancery Cases, Volume II*, Selden Society vol 79 (1961), Case 1074.

105 See generally Yale (ed), *Lord Nottingham's 'Manual of Chancery Practice' and 'Prolegomena of Chancery and Equity'*, (1965) at 75-77, 309-311; Jones, *The Elizabethan Court of Chancery*, (1967) at 446; Kerly, *An Historical Sketch of the Equitable Jurisdiction of the Court of Chancery*, (1890) at 86-88; Stramignoni, "At the Dawn of Part Performance: A Hypothesis", (1997) 18(2) *Journal of Legal History* 32 at 36, 41-42.

106 See for example *Hollis v Whiteing* (1682) 1 Vern 151 [23 ER 380]. See generally Gummow, *Change and Continuity*, (1999) at 6-11, 18-22.

107 See *Butcher v Stapely* (1685) 1 Vern 363 [23 ER 524].

108 Pound, "The Progress of the Law, 1918-1919: Equity", (1920) 33 *Harvard Law Review* 929 at 939; Moreland, "Statute of Frauds and Part Performance", (1929) 78 *University of Pennsylvania Law Review* 51 at 69-73; Yale, *Lord Nottingham's Chancery Cases, Volume I*, Selden Society vol 73 (1957) at ciii. See and contrast Kepner, "Part Performance in Relation to Parol Contracts for the Sale of Lands", (1951) 35 *Minnesota Law Review* 431 at 438.

109 See *Floyd v Buckland* (1703) 2 Freem Ch 268 [22 ER 1202].

110 See *Lacon v Mertins* (1743) 3 Atk 1 [26 ER 803].

88 At the same time, however, as Lord Selborne later observed in *Maddison v Alderson*[111], judges of the greatest authority were also endeavouring to keep the doctrine of part performance "within limits intended to prevent a recurrence of the mischief which the statute was passed to suppress": fraudulent oral transactions disposing of an interest in land commonly endeavoured to be upheld by perjury and subornation of perjury[112]. Thus developed the restrictions which today require that acts of part performance be unequivocally referable to the kind of contract alleged[113], exclude preliminary acts from the category of sufficient acts of part performance[114], and require that a parol agreement be specifically enforceable[115].

89 The requirement that acts of part performance relied upon be unequivocally referable to the kind of contract alleged first emerged in the early 18th century in *Gunter v Halsey*[116]. It took longer, however, for equity to settle the categories of acts of part performance recognised as having that quality. In *Gunter v Halsey*[117], Lord Hardwicke stated that a contract is taken out of the mischief of the *Statute of Frauds* when the acts done in part performance are such as could be done with no other view or design than to perform the agreement and it would be a prejudice to the party who has done the acts if the agreement was to be void. In *Lacon v Mertins*[118], Lord Hardwicke stated that the act of part performance relied upon must be such that it appears that it would not have been done unless on account of the agreement, and that there are several

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111 (1883) 8 App Cas 467 at 478.

112 *Statute of Frauds*, preamble. See also *Steadman v Steadman* [1976] AC 536 at 551 per Viscount Dilhorne, 558 per Lord Simon of Glaisdale, 567 per Lord Salmon; Spry, *The Principles of Equitable Remedies: Specific Performance, Injunctions, Rectification and Equitable Damages*, 9th ed (2014) at 263.

113 See *Gunter v Halsey* (1739) Amb 586 [27 ER 381]; *Maddison v Alderson* (1883) 8 App Cas 467.

114 See *Clerk v Wright* (1737) 1 Atk 12 [26 ER 9].

115 See *McManus v Cooke* (1887) 35 Ch D 681; cf *J C Williamson Ltd v Lukey and Mulholland* (1931) 45 CLR 282 at 297 per Dixon J (Gavan Duffy CJ agreeing at 290); [1931] HCA 15.

116 (1739) Amb 586 [27 ER 381].

117 (1739) Amb 586 at 586-587 [27 ER 381 at 381].

118 (1743) 3 Atk 1 at 3-4 [26 ER 803 at 805].

categories of acts of that class. His Lordship noted[119] that the delivery of possession was strong evidence of the part execution of an agreement and that the payment of money had "always" been held in the Court of Chancery to be a sufficient act of part performance. By contrast, by the 19th century, although the giving and taking of possession continued to be recognised[120] as an act unequivocally referable to the kind of contract alleged and, therefore, a sufficient act of part performance, it had come to be accepted[121] that the payment of money alone is not a sufficient act of part performance because it is an equivocal act not in itself indicative of a contract concerning land.

90 It is possible that the requirement that an act of part performance be unequivocally referable to the kind of contract alleged grew out of the subsequently discredited notion that, as a matter of construction, the *Statute of Frauds* did not apply to cases in which the circumstances precluded the possibility of perjury. Lord Blackburn essayed the idea in *Maddison v Alderson*[122]. But be that as it may, once the requirement of unequivocal referability was identified in *Gunter v Halsey* it was never questioned again until the latter part of the 20th century. As will be seen, it remained the law in England until 1974 when the decision in *Steadman v Steadman*[123] was handed down and, for the present, it remains the law in this country, as it does in a number of jurisdictions in the United States of America.

91 During the 19th century, there was a tendency on the part of some English judges to engage in what Pound later described[124] as *ex post facto* rationalisation of equitable developments that were more the product of historical accident than of an all-encompassing jurisprudential theory. Thus, for example, whereas the origins of the doctrine of part performance appear to have lain in the pre-*Statute of Frauds* practice of the Court of Chancery of compelling execution of

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119 *Lacon v Mertins* (1743) 3 Atk 1 at 4 [26 ER 803 at 805].

120 See for example *Dale v Hamilton* (1846) 5 Hare 369 at 381 [67 ER 955 at 960].

121 *Clinan v Cooke* (1802) 1 Sch & Lef 22 at 40-41; *Hughes v Morris* (1852) 2 De G M & G 349 at 356 [42 ER 907 at 910]; *Britain v Rossiter* (1879) 11 QBD 123 at 130-131 per Cotton LJ; *Maddison v Alderson* (1883) 8 App Cas 467 at 478-479 per Lord Selborne.

122 (1883) 8 App Cas 467 at 488.

123 [1976] AC 536.

124 Pound, "The Progress of the Law, 1918-1919: Equity", (1920) 33 *Harvard Law Review* 929 at 936-937, 943-944.

covenants agreed to be but not yet sealed, and the rule that the granting and taking of possession was a sufficient act of part performance may have sprung from the mediaeval notion of seisin that the granting and taking of possession was of the essence of a common law conveyance of land, in *Mundy v Jolliffe*[125] Lord Cottenham spoke more expansively of courts of equity exercising jurisdiction to decree specific performance of partly performed oral agreements for the purpose of preventing the great injustice which would arise from one party escaping from liability under an agreement after the other party has, upon the faith of the agreement, expended money or otherwise acted in execution of the agreement. Likewise, in *Caton v Caton*[126], Lord Cranworth declared that:

> "The ground on which the Court holds that part performance takes a contract out of the purview of the *Statute of Frauds* is, that when one of two contracting parties has been induced, or allowed by the other, to alter his position on the faith of the contract, as for instance by taking possession of land, and expending money in building or other like acts, 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."

92 Building on those pronouncements, and on some 50 other English and American decisions which also spoke of equitable fraud as the basis of equity's intervention in cases of part performance, Pomeroy later expounded[127] a general theory of part performance as follows:

> "The doctrine was settled at an early day in England, and has been fully adopted in nearly all the American states, that a verbal contract for the sale or leasing of land … if part performed by the party seeking the remedy, may be specifically enforced by courts of equity, notwithstanding the statute of frauds[1]. The ground upon which the remedy in such cases rests is that of equitable fraud. It would be a virtual fraud for the defendant, after permitting the acts of part performance, to interpose the statute as a bar to the plaintiff's remedial right. The acts of part performance, therefore, in order to satisfy this principle, must be done in pursuance of the contract, and must alter the relations of the parties. …

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125 (1839) 5 My & Cr 167 at 177 [41 ER 334 at 338].

126 (1866) LR 1 Ch App 137 at 148.

127 Pomeroy, *Pomeroy's Equity Jurisprudence*, 4th ed (1919), vol 4 at 3345-3347 §1409.

> [1] … *Fundamental ground of the jurisdiction*. — The ground is equitable fraud; not an antecedent fraud in entering into the contract, but a fraud inhering in the consequence of setting up the statute as a defense. If the defendant knowingly permits the plaintiff to do acts in part performance of the verbal agreement, acts done in reliance on the agreement, which change the relations of the parties and prevent a restoration to their former condition, it would be a virtual fraud for the defendant to interpose the statute as a defense, and thus to secure for himself the benefit of the acts of part performance, while the plaintiff would be left not only without adequate remedy at law, but also liable for damages as a trespasser". (footnote omitted)

93 Pomeroy's theory met with wide-ranging acceptance, particularly in the United States of America. But, at least in this country, its application is subject to qualification. As Spry observes[128], the fraud that is required to be shown in cases of part performance is a particular kind of equitable constructive fraud that arises through the presence of circumstances that are specified in the authorities. Or, as Pound put it more starkly[129], it is an historical anomaly which is to be understood only by reference to 17th century and 18th century legal institutions and modes of thought, and which, therefore, defies logically satisfactory analytical treatment. While the notion that the doctrine's constituent elements and restrictions are capable of satisfactory explanation by reference to an all-encompassing theory of equitable fraud is correct at a high level of abstraction, it is in significant respects jurisprudentially simplistic, and, unless understood as such, calculated to lead to the misconception propounded by the appellant in this case that the doctrine remains capable of principled expansion beyond established categories. As is apparent from the full text of the speeches of Lord Cottenham in *Mundy v Jolliffe* and Lord Cranworth in *Caton v Caton*, their Lordships' asseverations regarding equitable fraud were attempts to explicate the state of 19th century authority, not theses for further development or expansion of the doctrine. There is nothing in either speech, or in any of the other English decisions[130] to which Pomeroy referred[131], which runs counter to

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128 Spry, *The Principles of Equitable Remedies: Specific Performance, Injunctions, Rectification and Equitable Damages*, 9th ed (2014) at 262.

129 Pound, "The Progress of the Law, 1918-1919: Equity", (1920) 33 *Harvard Law Review* 929 at 937.

130 *Lester v Foxcroft* (1700) Colles 108 [1 ER 205]; *Clinan v Cooke* (1802) 1 Sch & Lef 22; *Bond v Hopkins* (1802) 1 Sch & Lef 413; *McCormick v Grogan* (1869) LR 4 HL 82; *Haigh v Kaye* (1872) LR 7 Ch App 469.

131 Pomeroy, *Pomeroy's Equity Jurisprudence*, 4th ed (1919), vol 4 at 3347 §1409.

the overall thrust of 19th century English authority towards restricting the reach of the doctrine and a stricter holding to the *Statute of Frauds*[132].

94 The course of development in the United States of America has been different. At various points in time, courts in some jurisdictions in America have held that the doctrine of part performance is applicable to cases not involving acts unequivocally referable to the kind of contract alleged, on the basis of a general theory of equitable fraud of the type propounded by Pomeroy that, where one party to a contract has so acted to his or her detriment on the faith of the contract that it would be fraudulent for the other party to resile from it, equity will enforce the contract[133]. In such cases, however, the relief accorded has ordinarily been restricted to equitable compensation sufficient to put the plaintiff in the position in which the plaintiff would have been had he or she not acted on the faith of the contract[134]. And as Kiefel CJ, Bell, Gageler and Keane JJ in effect observe[135], that is tantamount to the kind of relief which might be accorded in this country in a case of promissory estoppel. Although the doctrine of part performance is related at a high level of abstraction to equity's capacity to restrain unconscionable departure from representations on the faith of which a representee has acted to his or her detriment, it is necessary, as Pound emphasised[136], to keep in mind that the two doctrines are different, have separate and distinct jurisprudential underpinnings and are governed by different criteria.

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132 See Pound, "The Progress of the Law, 1918-1919: Equity", (1920) 33 *Harvard Law Review* 929 at 942.

133 See for example *Tilton v Tilton* 9 NH 385 at 390 (1838); *Farrar v Patton* 20 Mo 81 at 84-85 (1854); *Vestry and Wardens of the Church of the Advent v Farrow* 7 Rich Eq 378 at 385 (1855); *Freeman v Freeman* 4 Hand 34 at 38 (1870); *Wright v Pucket* 22 Gratt 370 at 374 (1872); *Horn v Ludington* 32 Wis 73 at 76-77 (1873); *Newkumet v Kraft* 10 Phila 127 at 127 (1874); *Cole v Cole* 41 Md 301 at 304 (1875); *Seaman v Aschermann* 8 NW 818 at 819 (1881); *Sherman v Scott* 27 Hun 331 at 333 (1882); *Brown v Hoag* 29 NW 135 at 137 (1886). See and compare American Law Institute, *Restatement of the Law Second, Contracts*, (1979), §129, comments a, d, reporter's note; Brown, *Corbin on Contracts*, rev ed (1997), vol 4 at 521-526 §18.11.

134 See for example *Parkhurst v Van Cortlandt* 1 Johns Ch 273 at 284 (1814); *Deisher v Stein* 7 P 608 at 610 (1885). See also Watson, "Specific Performance", in Garland and McGehee (eds), *The American and English Encyclopaedia of Law*, 2nd ed (1904), vol 26, 7 at 61.

135 See at [61].

136 Pound, "The Progress of the Law, 1918-1919: Equity", (1920) 33 *Harvard Law Review* 929 at 937.

Consequently, the tendency that developed in the United States of America at various points in time to run the two doctrines together is one to be resisted.

Maddison v Alderson

95 One comes then to *Maddison v Alderson*, and so to Lord Selborne's seminal *ex post facto* rationalisation of the doctrine of part performance and the restrictions to which it is subject. In substance, Lord Selborne identified[137] the doctrine as applying only to contracts concerning land[138]. His Lordship then held[139] that the *Statute of Frauds* is not to be taken as avoiding parol contracts for the disposition of an interest in land but only as precluding the bringing of actions to enforce them by charging the defendant on the contract itself and some breach of it. In contrast, his Lordship said, in a suit for specific performance on the basis of part performance the defendant is charged not upon the contract itself but upon the equities resulting from the acts done in execution of the contract in order to prevent injustice of the kind which it is conceived the Statute cannot be thought to have had in contemplation[140]. The Statute is thus to be taken as limited to simple cases in which the defendant is charged only on the contract and so as not applying to cases in which there are equities resulting from acts or res gestae subsequent to and arising out of the contract[141]. His Lordship reasoned as follows[142]:

> "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 …

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137 *Maddison v Alderson* (1883) 8 App Cas 467 at 474.

138 See and contrast *Taylor v Beech* (1749) 1 Ves Sen 297 [27 ER 1042]; *Hammersley v De Biel* (1845) 12 Cl & F 45 [8 ER 1312]; *Lassence v Tierney* (1849) 1 H & Tw 115 [47 ER 1620]; *Surcome v Pinniger* (1853) 3 De G M & G 571 [43 ER 224]; *Ungley v Ungley* (1877) 5 Ch D 887; *Hollander v Atkinson* (1885) 6 LR (NSW) Eq 69; *Hall v Johnson* (1904) 29 VLR 649.

139 *Maddison v Alderson* (1883) 8 App Cas 467 at 474-475.

140 *Maddison v Alderson* (1883) 8 App Cas 467 at 475.

141 *Maddison v Alderson* (1883) 8 App Cas 467 at 476.

142 *Maddison v Alderson* (1883) 8 App Cas 467 at 476-479, quoting *Dale v Hamilton* (1846) 5 Hare 369 at 381 [67 ER 955 at 960].

> The doctrine, however, so established has been confined by judges of the greatest authority within limits intended to prevent a recurrence of the mischief which the statute was passed to suppress. The present case, resting entirely upon the parol evidence of one of the parties to the transaction, after the death of the other, forcibly illustrates the wisdom of the rule, which requires some evidentia rei to connect the alleged part performance with the alleged agreement. There is not otherwise enough in the situation in which the parties are found to raise questions which may not be solved without recourse to equity. 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.
>
> ... 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 …
>
> '[A]n act which though in truth done in pursuance of a contract, admits of explanation without supposing a contract, is not in general admitted to constitute an act of part performance taking the case out of the Statute of Frauds; as for example, the payment of a sum of money alleged to be purchase-money.'"

96 Arguably, Lord Selborne's thesis that the defendant is charged not upon the contract itself but rather upon the equities resulting from acts done in execution of the contract is open to the objection that the remedy of specific performance enforces the terms of the contract as if they were legally binding, and, in contradistinction to the relief that might be awarded in cases of equitable estoppel, is not limited to what is necessary to protect the plaintiff against the detriment he or she would suffer from the defendant's change of position[143]. But, as against that, it may be observed that, by enforcing the terms of the contract, the doctrine of part performance is little different in operation from what is

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143 See *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 at 404-405 per Mason CJ and Wilson J, 419, 427 per Brennan J; [1988] HCA 7; *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 411-413, 416 per Mason CJ (Gaudron J agreeing at 487), 428-429 per Brennan J, 442-443 per Deane J, 454 per Dawson J, 501 per McHugh J; [1990] HCA 39; *Giumelli v Giumelli* (1999) 196 CLR 101 at 123-125 [42]-[48] per Gleeson CJ, McHugh, Gummow and Callinan JJ; [1999] HCA 10; *Sidhu v Van Dyke* (2014) 251 CLR 505 at 528-530 [79]-[85] per French CJ, Kiefel, Bell and Keane JJ (Gageler J agreeing at 530 [89]); [2014] HCA 19.

sometimes described as *Dillwyn v Llewelyn*[144] proprietary estoppel – under which the prima facie measure of equitable relief is to enforce a representation of intention to confer an interest in land on the faith of which the plaintiff has acted to his or her detriment[145] – or, more generally, from the jurisdiction to enforce promises which was exercised in equity until *Jorden v Money*[146] restricted estoppel by representation to representations of existing fact and *Low v Bouverie*[147], for a time at least, confined estoppel by representation to a rule of evidence[148].

97 Either way, Lord Selborne was surely correct, however, that, by the time of *Maddison v Alderson*, at least a century of development of the doctrine of part performance had confined its operation to acts of part performance unequivocally referable to some such contract as is alleged, and definitively determined that the payment of money alleged to be the purchase price is not within that criterion.

98 *Maddison v Alderson* remained the law in England until *Steadman v Steadman*[149], to which it will be necessary to return later in these reasons.

The state of authority in this Court

99 A century ago, in *McBride v Sandland*[150], Isaacs and Rich JJ embraced Lord Selborne's explanation of the underlying principle of the doctrine of part performance as being that the defendant is not charged upon the contract itself

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144 (1862) 4 De G F & J 517 [45 ER 1285].

145 *Giumelli v Giumelli* (1999) 196 CLR 101 at 112 [5]-[6], 123-125 [42]-[48] per Gleeson CJ, McHugh, Gummow and Callinan JJ (Kirby J agreeing at 127 [63]); *Sidhu v Van Dyke* (2014) 251 CLR 505 at 528-530 [79]-[86] per French CJ, Kiefel, Bell and Keane JJ (Gageler J agreeing at 530 [89]). See also Heydon, Leeming and Turner, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies*, 5th ed (2015) at 524 [17-105]; Robertson, "The Reliance Basis of Proprietary Estoppel Remedies", [2008] *The Conveyancer and Property Lawyer* 295.

146 (1854) 5 HL Cas 185 [10 ER 868].

147 [1891] 3 Ch 82.

148 See generally Kirk, "Confronting the Forms of Action: The Emergence of Substantive Estoppel", (1991) 13 *Adelaide Law Review* 225 at 228-236, 239.

149 [1976] AC 536.

150 (1918) 25 CLR 69 at 77-79; [1918] HCA 32.

and some breach of it but rather upon the equities arising from the acts of part performance of the contract that are relied upon. Thus, where the doctrine is invoked, the proper course is to seek first to establish such performance as must necessarily imply the existence of the kind of contract alleged and, when and if that has been achieved, to admit of parol evidence to prove the terms of the alleged contract. In their joint judgment, Isaacs and Rich JJ summarised[151] the position as follows:

> "(1) 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 done with no other view than to perform such an agreement (*Maddison* v *Alderson*; *Gunter* v *Halsey*; *Ex parte Hooper*).
>
> (2) By 'some such agreement as that alleged' is meant some contract of the general nature of that alleged (*Maddison* v *Alderson*; *Savage* v *Carroll*; *Fry on Specific Performance*, 5th ed, at p 292).
>
> (3) 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 (*Savage* v *Carroll*; *Hodson* v *Heuland*). Expressions are found in some cases which, if literally read, are to the effect that mere possession by a stranger is sufficient to let in parol evidence of any contract alleged. Those cases were prior to *Maddison* v *Alderson*, and the expressions if literally read appear to be too wide, because, so read, they would conflict with the requirement that the act must unequivocally refer to some such contract as is alleged, and because bare possession does not necessarily connote trespass or, alternatively, a contract at all; indeed, some contracts would not justify the act done. Possession may be the result of mere permission. But if the circumstances under which the possession was given are proved, then the Court may judge whether the act indicates permission or contract, and, if contract, its general character. For instance, in *Frame* v *Dawson* the expression 'some agreement' is used, we think, in contradistinction to the specific terms of the agreement, and not in the most general sense of any agreement whatever.
>
> (4) It must have been in fact done by the party relying on it 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, that is moral turpitude, is

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151 *McBride v Sandland* (1918) 25 CLR 69 at 78-79.

the ground of jurisdiction (*Fry on Specific Performance*, 5th ed, par 588; *McCormick* v *Grogan*; *Whitbread* v *Brockhurst*; *Phillips* v *Alderton*).

(5) It must be done by a party to the agreement (*Fry on Specific Performance*, par 589).

These requirements must be satisfied before the actual terms of the alleged agreement are allowed to be deposed to.

Further, when those terms are established, it still remains to be shown :—

(6) That there was a completed agreement (*Thynne* v *Glengall*).

(7) That the act was done under the terms of that agreement by force of that agreement (*Thynne* v *Glengall*)." (footnotes omitted)

100 Four years later, in *Cooney v Burns*[152], this Court unanimously accepted what was said by Lord Selborne in *Maddison v Alderson* and Isaacs J added[153] to what he and Rich J had said in *McBride v Sandland* that what equity enforces under the doctrine of part performance is not a contractual right but an equity which arises from such acts of part performance of the alleged contract as would make it a fraud upon the plaintiff for the defendant to recede from the contract, and, therefore, that the test for the doctrine's engagement is whether the defendant has gone so far, as purchaser, directly or indirectly exercising, or, as vendor, in permitting the purchaser directly or indirectly to exercise, rights of ownership over the property in suit as to make it a fraud on the plaintiff unless ownership is completely and effectively conveyed pursuant to the alleged agreement. Consequently, as his Honour observed[154]:

"[T]here is always in part performance *the actual transfer by enjoyment, directly or indirectly, of some right of ownership which the legal title would confer*." (emphasis in original)

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152 (1922) 30 CLR 216 at 221-222 per Knox CJ, 229-230 per Isaacs J, 239 per Higgins J (Gavan Duffy J agreeing at 243), 243-244 per Starke J; [1922] HCA 8.

153 *Cooney v Burns* (1922) 30 CLR 216 at 231-235.

154 *Cooney v Burns* (1922) 30 CLR 216 at 235.

101 The point was later reiterated by Dixon J in *J C Williamson Ltd v Lukey and Mulholland*[155] thus:

> "In cases of specific performance, the party is said to be charged upon the equities arising out of the acts of part performance and not merely upon the contract. The acts of part performance 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."

102 Similarly, in *Regent v Millett*[156], Gibbs J, with whom all other members of the Court agreed, referred with apparent approval to *McBride v Sandland* and *Cooney v Burns* and stated:

> "The principle upon which the doctrine of part performance rests was stated by Lord Cranworth, Lord Chancellor in *Caton* v *Caton* in words which appear to have a direct application to the present case. He said:
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> > '… when one of two contracting parties has been induced, or allowed by the other, to alter his position on the faith of the contract, as for instance by taking possession of land, and expending money in building or other like acts, 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.'
>
> The books are full of cases in which it has been held that the entry into possession alone, or the taking of possession coupled with the expenditure of money by one party on the improvement of property, with the cognizance of the other party to the contract, may amount to part performance (see the cases cited in *Halsbury's Laws of England*, 3rd ed, vol 36, par 416).
>
> ... [T]he test suggested by the Earl of Selborne LC in [*Maddison v Alderson*], that the acts relied upon as part performance 'must be unequivocally, and in their own nature, referable to some such agreement as that alleged', has been consistently accepted as a correct statement of the law. It is enough that the acts are unequivocally and in their own nature referable to some contract of the general nature of that alleged (see *McBride* v *Sandland*)." (footnotes omitted)

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155 (1931) 45 CLR 282 at 300 (Gavan Duffy CJ agreeing at 290).

156 (1976) 133 CLR 679 at 682-683; [1976] HCA 40.

The requirement of unequivocal referability

103 In this case, the appellant contended that *Maddison v Alderson*, and therefore *McBride v Sandland* and *Cooney v Burns*, proceeded from a misconception that acts of part performance relied upon must be unequivocally and of their own nature referable to some such agreement as is alleged. Counsel for the appellant submitted that the requirement for unequivocal referability evolved in the Court of Chancery as part of the Court's adjectival requirement of strict proof of contracts for disposition of interests in land and not as part of the substantive principle of equitable fraud relied on by parties to overcome the *Statute of Frauds*. It followed, it was submitted, that when Chancery procedure was reformed in the 19th century, and the mode of proof in Chancery became as it is at law, the requirement for strict referability should logically have been dispensed with while the substantive fraud principle should have remained a means of overcoming the Statute. Instead of that, counsel contended, it was apparent that 19th century Chancery judges not sufficiently cognisant of the distinction between adjectival matters of proof and substantive matters of principle had erroneously maintained the requirement for strict referability as if it were an essential condition of the substantive doctrine of part performance. Counsel submitted that the true underlying principle of the doctrine is what he described as the broad principle of equitable fraud expounded by Lord Cranworth in *Caton v Caton*, and more fully developed by Pomeroy as part of his all-embracing theory of equitable fraud. Under such a principle, counsel submitted, there is no requirement of unequivocal referability but only of proof on the balance of probabilities of such acts of part performance on the faith of the alleged contract as would make it unconscionable for the other party to the contract to be allowed to deny it. And so much, it was contended, was implicitly recognised by Gibbs J in *Regent v Millett*.

104 Those contentions face difficulties at a number of levels, and should be rejected. First, the strict rules of proof which applied in Chancery were in operation at the time of *Potts v Turvin* in 1681, some 60 years before Lord Hardwicke first articulated the requirement of unequivocal referability in *Gunter v Halsey*. There is nothing that suggests that Lord Hardwicke conceived of the requirement of unequivocal referability as an aspect of Chancery procedure that a succession of Lord Chancellors before him had overlooked.

105 Secondly, as was explained in *Walton v Hobbs*[157], the rule of proof in Chancery was that where there was only a single deposition by a plaintiff against the oath of a defendant there could be no decree of specific performance, but where there were a great many circumstances strengthening and supporting the

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157 (1739) 2 Atk 19 at 19 [26 ER 409 at 409].

plaintiff's deposition the case did not come within the rule[158]. That rule applied equally to proof of acts unequivocally referable to the kind of contract alleged as to the terms of the contract[159]. In some cases, the strong circumstances necessary to corroborate the plaintiff's testimony as to the terms of the contract may have been the same as those required to prove the acts unequivocally referable to the kind of contract alleged but in other cases they may have been different. Thus, in some cases, there would have been circumstances which sufficiently corroborated the plaintiff's testimony of the acts of part performance relied upon but which did not sufficiently prove the terms of the contract. That possibility logically belies the suggestion that the unequivocal referability rule owed anything to the mode of proof in Chancery.

106 Thirdly, as has been seen, the requirement for unequivocal referability as first articulated in *Gunter v Halsey* in 1739 is likely to have sprung from the then extant notion that a contract was taken out of the mischief of the *Statute of Frauds* where the acts done were such as could be done with no other view or design than to perform the agreement. That idea was equally accepted at law as it was in equity[160]. So far from being a byproduct of the mode of proof applied in Chancery, it appears that the requirement of unequivocal referability was in effect a judicially imposed, free-standing policy limitation on the spread of the doctrine of part performance to cases which it was thought might frustrate the object of the Statute[161].

107 Fourthly, there was no misunderstanding among 19th century Chancery judges of the distinction between the rules of proof which operated in Chancery prior to the procedural reforms and the separate and distinct requirement that acts of part performance relied upon to take a case out of the scope of the *Statute of Frauds* be unequivocally referable to the kind of contract alleged. To the contrary, as is apparent from Lord Blackburn's speech in *Maddison v Alderson*[162], 19th century Chancery judges were acutely aware of the differences in modes of proof brought about by the procedural reforms and of the difficulties which they

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158 See also *Sir Thomas Janson, Bart v Rany* (1740) 2 Atk 140 [26 ER 488].

159 See Story, *Commentaries on Equity Jurisprudence*, 1st Eng ed (1884) at 506 §764.

160 See *Maddison v Alderson* (1883) 8 App Cas 467 at 488 per Lord Blackburn.

161 Pound, "The Progress of the Law, 1918-1919: Equity", (1920) 33 *Harvard Law Review* 929 at 944; Spry, *The Principles of Equitable Remedies: Specific Performance, Injunctions, Rectification and Equitable Damages*, 9th ed (2014) at 263.

162 (1883) 8 App Cas 467 at 489.

might create, and yet remained adamant that there should be no change to the scope of the doctrine of part performance:

> "There are many rules laid down as to what should guide a judge, determining for himself what the facts are, in thinking the proof of a contract sufficient. I see great difficulty, now that equity is to be administered by a Court which has the facts found by a jury, in applying these to a trial by jury, but that is a question not raised now. But I do not think this anomaly [that entering into possession will always take a case out of the Statute] should be extended; and it is not a little remarkable that there is no case, at least none was cited, and I have found none, in which there has not been a change in the possession of the land, or, in the case where the purchaser was a tenant already in possession, a change in the nature of his tenure, which, rightly or wrongly, was held equivalent to a change in the possession."

108 Fifthly, the idea that Lord Cranworth's observations in *Caton v Caton* are to be seen as expressing some broader principle of equitable fraud of the kind subsequently propounded by Pomeroy and adopted at various times in parts of the United States of America is misplaced. As has been emphasised, Lord Cranworth in *Caton v Caton*, just like Lord Cottenham in *Mundy v Jolliffe*, was doing no more than articulating an *ex post facto* rationalisation of the incidents of the doctrine of part performance as developed as a matter of legal history. So much is especially clear in Lord Cranworth's speech where, having stated that the ground on which the doctrine of part performance takes a contract out of the purview of the *Statute of Frauds* arises where a party to a contract has acted to his or her detriment on the faith of a contract, his Lordship immediately went on to add[163] epexegetically that such acts included "taking possession of land, and expending money in building or other like acts" (both being established categories of acts of part performance unequivocally referable to the type of contract alleged).

109 Sixthly, there is nothing in Gibbs J's judgment in *Regent v Millett* that suggests an intention to depart from the requirements of the doctrine of part performance as adumbrated by Lord Selborne in *Maddison v Alderson* and adopted by this Court in *McBride v Sandland* and *Cooney v Burns*. It is true that his Honour referred[164] to the possibility of it being easier to hold for a plaintiff if the test were as propounded in *Steadman v Steadman*. But Gibbs J decided the case on the basis of established principle. His Honour's reference to *Caton v*

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163 *Caton v Caton* (1866) LR 1 Ch App 137 at 148.

164 *Regent v Millett* (1976) 133 CLR 679 at 683.

Caton was evidently to make the point in support of the orthodox application of established principle that the facts in *Regent v Millett* coincided more or less precisely with the example identified in *Caton v Caton* of proof of acts of part performance unequivocally referable to the kind of contract alleged such as taking possession of land and spending money in building or other like acts.

Should the requirement for unequivocal referability be abandoned?

110 The appellant further contended that, notwithstanding previous authority, this Court should now adopt the broad approach to part performance propounded by Pomeroy on the basis that it is more consistent with equitable principle[165] and better accords with developments in England, the United States of America, Canada and New Zealand. That contention is unpersuasive.

111 Reference was earlier made to the decision of the House of Lords in *Steadman v Steadman*[166], which concerned parties to a dissolved marriage who had orally agreed that the wife would surrender her interest in the matrimonial home for £1,500 and that the husband's £194 arrears of maintenance would be remitted except for £100. Thereafter consent orders were made by the magistrates' court in accordance with the terms of the agreement, and the husband paid the £100 and his solicitor, on instructions, tendered to the wife a deed of transfer of the matrimonial home. The wife refused to sign the deed. It was held by a majority that what the husband had done in pursuance of the oral agreement comprised sufficient acts of part performance. It is difficult to extract a definitive ratio from the speeches of the majority.

112 Lord Reid held[167] that it was sufficient if the acts of part performance relied upon proved on the balance of probabilities (leaving aside evidence about the alleged contract) that there must have been a contract, and in effect concluded that the husband's acts of sending the deed of transfer to the wife and incurring expense to do so constituted a sufficient act of part performance. Viscount Dilhorne held[168] that it was necessary that the acts relied upon point to the existence of some such contract as alleged (having regard to evidence of the contract), and concluded that the acts relied upon met that description, either on

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165 See and compare Spry, *The Principles of Equitable Remedies: Specific Performance, Injunctions, Rectification and Equitable Damages*, 9th ed (2014) at 272.

166 [1976] AC 536.

167 *Steadman v Steadman* [1976] AC 536 at 540-542.

168 *Steadman v Steadman* [1976] AC 536 at 553-554, 556.

the basis that what had been said in the magistrates' court in support of the consent orders made it plain that the £100 was paid in part performance of the alleged contract or, alternatively, because that fact coupled with the tender of the deed of transfer to the wife was consistent with the agreement which the husband alleged. Lord Simon of Glaisdale accepted[169] that the test was that the acts of part performance relied upon be more likely than not referable to some such contract as alleged, and that there was part performance because it was more probable than not that the husband acted as he did because of a contract with the wife consistent with that alleged. Lord Salmon applied[170] *Maddison v Alderson*, which he considered stood for the principle that "acts which prima facie establish the existence of some contract no more likely to be concerned with land than with anything else cannot be sufficient part performance", but said that he did not accept the line of authority which had established that payment of money can never constitute a sufficient act of part performance. His Lordship held[171] that the payment of the £100, and the other acts of purported part performance, when viewed in light of the surrounding circumstances, engaged the doctrine of part performance. Lord Morris of Borth-y-Gest, in dissent, adopted[172] an orthodox approach of requiring unequivocal referability in accordance with *Maddison v Alderson* and concluded that the acts of part performance relied upon did not satisfy that requirement.

113 Given that Lord Reid and Lord Simon were the only Law Lords who were prepared openly to depart from the *Maddison v Alderson* requirement of unequivocal referability, and each of them adopted a different basis for doing so, and that Viscount Dilhorne and Lord Salmon purported to adhere to *Maddison v Alderson*, there is, with respect, little in any of the majority speeches that provides a satisfactory or compelling basis to depart from *Maddison v Alderson*. Much more compelling, with great respect, is the reasoning of Lord Morris in dissent[173]:

> "Courts of equity did not set out to make the terms of an Act of Parliament virtually nugatory. What the courts did was to consider the alleged acts of part performance and to decide whether the reasonable explanation of them was that the parties must have made (or stated otherwise had made)

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169 *Steadman v Steadman* [1976] AC 536 at 563-564, 566.

170 *Steadman v Steadman* [1976] AC 536 at 567-568, 570.

171 *Steadman v Steadman* [1976] AC 536 at 572-573.

172 *Steadman v Steadman* [1976] AC 536 at 546-548.

173 *Steadman v Steadman* [1976] AC 536 at 547.

> some contract such as the contract alleged. As the whole area of the law of part performance relates to contracts 'for the sale or other disposition of land or any interest in land,' I would have thought that it followed that on a consideration of alleged acts of part performance it has to be decided whether their reasonable explanation is that the parties must have made some contract in relation to land such as the contract alleged."

114 To that may be added that the doctrine of part performance was abolished in England by s 2(1) of the *Law of Property (Miscellaneous Provisions) Act* 1989 (UK) and hence that there will be no further development of the law relating to the *Statute of Frauds* in that country[174].

115 So far as the United States of America is concerned, having regard to what has already been said in relation to the topic, it is perhaps sufficient to observe that the approach in that country varies from jurisdiction to jurisdiction, and from time to time, and, in some jurisdictions, still precisely accords to *Maddison v Alderson*. The fact that some American jurisdictions have adopted Pomeroy's thesis while others have adhered to the *status quo ante* is not a sufficient reason to depart from long-established authority. Furthermore, to return to something mentioned earlier in these reasons, in some if not all of the American jurisdictions that have adopted Pomeroy's thesis, the relief ordinarily accorded is or was not specific performance but rather a lesser remedy sufficient to put the plaintiff in the position in which he or she would have been but for acting on the faith of the contract to his or her detriment. As was earlier observed, that more closely resembles the kind of relief which may be accorded in this country in cases of equitable estoppel, and it is notable that the appellant has not sought that kind of relief. He has only ever sought the specific performance of the contract alleged.

116 The only Canadian decision to which counsel for the appellant referred was the judgment of the Supreme Court of Canada in *Hill v Nova Scotia (Attorney General)*[175]. In that case, the province of Nova Scotia ("the Province") expropriated a strip of land for a controlled access highway that bisected Hill's farm. Representatives of the Province's Department of Transport represented to Hill, orally and in writing, that as part of the compensation he had accepted he would receive an interest in the highway to permit him to move people, equipment and livestock back and forth across the highway. In furtherance of the agreement, the Department built fences, gates and ramps, which Hill and his sons

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174 See also *Firstpost Homes Ltd v Johnson* [1995] 1 WLR 1567 at 1571 per Peter Gibson LJ (Hutchison LJ agreeing at 1576); [1995] 4 All ER 355 at 358, 363.

175 [1997] 1 SCR 69.

used, and the Department maintained for 27 years. The Province then alleged that the agreement did not create an interest in land and argued that certain legislation forbade it. That legislation provided that no person shall, without a written permit from the relevant Minister, construct or use any private road, entrance way or gate that opens up onto a controlled access highway. The judge at first instance held that the Province had granted an equitable easement across the highway to Hill. The Nova Scotia Court of Appeal allowed an appeal by majority. On appeal to the Supreme Court, it was held[176] that the representation made to Hill that he had an interest in the highway similar to an easement formed part of the consideration for the expropriation of the land, and that, by the Department's actions over 27 years, it had confirmed that representation. Hill had thereby acquired an equitable permission or interest in the land in the form of a right of way to enter upon and cross the highway. It was further observed[177] that the legislation required the permission to be in writing, and on the facts it may have been, but, if it were not, the doctrine of part performance prevented the Province from relying on the legislation. Specifically with reference to the application of the doctrine of part performance, the Court held that[178]:

> "Where the terms of an agreement have already been carried out, the danger of fraud is averted or at least greatly reduced. To borrow a phrase from the law of tort, the thing speaks for itself. In the present case, for example, it does not matter so much what was said. What is critical is what was done; and what was done was the construction and maintenance of access ramps. There is no mistaking the purpose for which those ramps were constructed: it was to allow Mr Hill a way of reaching and crossing the highway. Accordingly, in this instance strict adherence to the literal terms of the writing requirement would not serve the purpose for which it was devised. Fraud would not be prevented; rather, [Hill and his sons] would be defrauded.
>
> It is for this reason that equity evolved the doctrine of part performance:
>
> > '[This doctrine] was evoked when, almost from the moment of passing of the Statute of Frauds, it was appreciated that it was being used for a variant of unconscionable dealing, which the statute itself was designed to remedy. A party to an oral contract for the disposition of an interest in land could, despite performance

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176 *Hill v Nova Scotia (Attorney General)* [1997] 1 SCR 69 at 73-74 [6]-[8].

177 *Hill v Nova Scotia (Attorney General)* [1997] 1 SCR 69 at 74-77 [8]-[14].

178 *Hill v Nova Scotia (Attorney General)* [1997] 1 SCR 69 at 74-75 [9]-[11].

> of the reciprocal terms by the other party, by virtue of the statute disclaim liability for his own performance on the ground that the contract had not been in writing. Common Law was helpless. But Equity, with its purpose of vindicating good faith and with its remedies of injunction and specific performance, could deal with the situation. The Statute of Frauds did not make such contracts void but merely unenforceable; and, if the statute was to be relied on as a defence, it had to be specifically pleaded. Where, therefore, 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 contractual obligations, the first party would be precluded by the Court of Chancery from claiming exoneration, on the ground that the contract was unenforceable, from performance of his reciprocal obligations; and the court would, if required, decree specific performance of the contract. Equity would not, as it was put, allow the Statute of Frauds "to be used as an engine of fraud." *This became known as the doctrine of part performance – the "part" performance being that of the party who had, to the knowledge of the other party, acted to his detriment in carrying out irremediably his own obligations (or some significant part of them) under the otherwise unenforceable contract*. [*Steadman v Steadman*, *supra*, at p 558.]'
>
> Quite simply equity recognizes as done that which ought to have been done. A verbal agreement which has been partly performed will be enforced." (emphasis added)

117 As can be seen, the Supreme Court made no reference to *Maddison v Alderson* or to any other authority on the subject except the quoted passage of Lord Simon's speech from *Steadman v Steadman*. Nor did the Supreme Court condescend to any sort of analysis of the quality of acts needed to bring a matter within the doctrine of part performance. It is notable that, by giving possession of the land in suit to the Province in accordance with the agreement, Hill in fact did an act of part performance which was unequivocally referable to the kind of contract he alleged, and, on that basis, parol evidence would have been admissible to prove the terms of the agreement in accordance with *Maddison v Alderson*. But whatever the basis of the Supreme Court's decision, given that it does not consider the requirement of unequivocal referability, and does not appear to suggest an intention to depart from that requirement, it should not be regarded as a reason to depart from the requirement.

118 Finally, with respect to New Zealand, counsel for the appellant invoked the decision of the Court of Appeal of New Zealand in *Mahoe Buildings Ltd v*

Fair Investments Ltd[179], in which it was observed that the formulation of the requirements of part performance undertaken by Tipping J in *T A Dellaca Ltd v PDL Industries Ltd*[180] provided a helpful analysis for the purposes of the case in question. In *T A Dellaca Ltd v PDL Industries Ltd*[181], after an extensive review of authorities, Tipping J stated:

> "I am of the view that in a part performance case the Court must consider three points which I would frame as follows:
>
> 1. Was there a sufficient oral agreement such as would have been enforceable but for the Act?
>
> 2. Has there been part performance of that oral agreement by the doing of something which:
>
> (a) clearly amounts to a step in the performance of a contractual obligation or the exercise of a contractual right under the oral contract; and
>
> (b) when viewed independently of the oral contract was, on the probabilities, done on the footing that a contract relating to the land and such as that alleged was in existence.
>
> 3. Do the circumstances in which that part performance took place make it unconscionable (fraudulent in equity) for the defendant to rely on the Act?"

119 Reference to the remainder of Tipping J's reasoning[182] reveals that his Honour took the ratio of *Steadman v Steadman* to be that, contrary to earlier authority, the payment of money can in certain circumstances amount to an act of part performance and that he did not consider it necessary to refer to any of the cases in England before *Steadman v Steadman*. His Honour added[183], however, that:

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179 [1994] 1 NZLR 281 at 287.

180 [1992] 3 NZLR 88 at 109.

181 [1992] 3 NZLR 88 at 109.

182 *T A Dellaca Ltd v PDL Industries Ltd* [1992] 3 NZLR 88 at 102.

183 *T A Dellaca Ltd v PDL Industries Ltd* [1992] 3 NZLR 88 at 104.

> "While it is true that in some ways their Lordships may have relaxed the rule to some extent, it seems to me that there is an underlying theme throughout all the speeches that the act to qualify as one taken in part performance must be an act which, as Viscount Dilhorne put it, can reasonably be described as an act of part performance in ordinary parlance. It was that sort of act which founded the doctrine in the first place."

120 In the result, it is not immediately apparent that Tipping J in *T A Dellaca Ltd v PDL Industries Ltd* or the Court of Appeal in *Mahoe Buildings Ltd v Fair Investments Ltd* intended to depart from the requirement of unequivocal referability. It is also not without significance that the acts of part performance in both *T A Dellaca Ltd v PDL Industries Ltd* and *Mahoe Buildings Ltd v Fair Investments Ltd* were of a kind unequivocally referable to the type of contract alleged. Accordingly, there does not appear to be sufficient reason in either decision to abandon the requirement of unequivocal referability.

121 In *John v Federal Commissioner of Taxation*[184], the judgment of the plurality laid down that, in determining whether to overrule an earlier decision of the Court, the considerations that are relevant include whether the earlier decision rested upon a principle carefully worked out in a significant succession of cases; whether there was a difference between the reasons of the Justices constituting the majority in the earlier decision; whether the earlier decision has achieved a useful result or has caused considerable inconvenience; and whether the earlier decision has been independently acted upon in a way that militates against change. In this case, each of those considerations points towards retention of the requirement of unequivocal referability. As has been seen, the requirement rests on a principle developed over some 300 years as a means of preventing the doctrine of part performance expanding to cases which would frustrate the intended operation of the *Statute of Frauds*. There was no relevant difference between the reasoning of the Law Lords in *Maddison v Alderson* or between the reasoning of the Justices who adopted *Maddison v Alderson* in *McBride v Sandland* and *Cooney v Burns*. The principles therein accepted have been acted on repeatedly, by this Court and by other courts in this country[185], for more than a

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184 (1989) 166 CLR 417 at 438-439 per Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ; [1989] HCA 5.

185 See for example *Regent v Millett* (1976) 133 CLR 679 at 683 per Gibbs J (Stephen J, Mason J, Jacobs J and Murphy J agreeing at 684); *Ogilvie v Ryan* [1976] 2 NSWLR 504 at 524-525; *Thwaites v Ryan* [1984] VR 65 at 78 per Fullagar J (Starke J agreeing at 70); *McMahon v Ambrose* [1987] VR 817 at 847 per Marks J; *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 at 432 per Brennan J; *Khoury v Khouri* (2006) 66 NSWLR 241 at 244 [16]

(Footnote continues on next page)

century, and there is little reason to doubt that the comparatively stringent requirement continues to serve the objective that it was created to achieve: to prevent recurrence of the mischief which the Statute was enacted to suppress.

Conclusion

122 The appellant's contentions in support of some broader principle of equity not subject to the requirement of unequivocal referability should be rejected.

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per Hodgson JA, 263-267 [77]-[86] per Bryson JA (Handley JA agreeing at 242 [1]).

EDELMAN J.

Introduction

123 The principal issue on this appeal is whether the Full Court of the Supreme Court of South Australia was correct in concluding that the doctrine of part performance did not apply, effectively because the alleged act of part performance was not unequivocally referable to some such contract of the general nature of that alleged[186]. The appellant's submission was that this requirement is not an entrenched part of the doctrine of part performance in Australia and that it is contrary to the principle upon which the doctrine is based. He submitted that this Court should place the doctrine on a firmer footing by following what was said to be the path briefly paved by the House of Lords in *Steadman v Steadman*[187], until legislative intervention brought that path to a dead end[188].

124 The appellant's submissions, rightly, focused upon the principled basis for the doctrine and its historical development. Properly understood, the appellant submitted, the foundation of the doctrine of part performance is the avoidance of fraud. With such a foundation, he submitted, there can be no place for a requirement that acts of part performance be unequivocally referable to a contract of the general nature of that alleged. He submitted that to the extent that this requirement is recognised, the doctrine should be extended to abolish it.

125 The reach of the doctrine should not be extended, because that extension cannot be justified by the rationale for the doctrine. The reasons that follow explain why the rationale for the doctrine is not that the *Statute of Frauds* 1677[189] and equivalent statutes must not be used as an instrument of fraud. Nor is it that the court enforces "equities" arising from an act of part performance. Rather, the court enforces the contract itself. The rationale is the imposition of a moral principle despite the terms of the statute. The historical basis for that rationale for part performance lay in the 17th century doctrine by which a court would ignore matters falling within the terms of a statute if they were outside the statute's "equity". The doctrine of the "equity of the statute" permitted an imposition of external morality despite the terms of the statute. Although that

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186 *Pipikos v Trayans* (2016) 126 SASR 436 at 462 [100].

187 [1976] AC 536.

188 *Law of Property (Miscellaneous Provisions) Act* 1989 (UK), ss 2(1), 2(8), 4, Sched 2.

189 29 Car II c 3.

view has long been discarded, as Lord Blackburn said in *Maddison v Alderson*[190] the construction of the *Statute of Frauds* is not *res integra*. Nor is the construction of the equivalent statutory provisions. Relevantly, on this appeal, the doctrine of part performance is expressly preserved by s 26 of the *Law of Property Act* 1936 (SA). The doctrine cannot, and should not, be abolished judicially. But it certainly should not be extended. The appeal must be dismissed.

The doctrine and its development

126 Section 26 of the *Law of Property Act* provides as follows:

> "(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 or by some person thereunto by him lawfully authorised.
>
> (2) This section does not affect the law relating to part performance, or sale by the court."

127 This section was based upon s 4 of the *Statute of Frauds*, which provided that "noe Action shall be brought whereby to charge ... any person ... upon any Contract or Sale of Lands ... unlesse the Agreement upon which such Action shall be brought or some Memorandum or Note thereof shall be in Writeing and signed by the partie to be charged therewith or some other person thereunto by him lawfully authorized". The doctrine of part performance was conceived in order to enforce a contract that did not satisfy the requirements of writing contained in the *Statute of Frauds*. It required the person seeking to enforce a contract that did not satisfy the statutory writing requirements to prove sufficient acts of part performance as a "condition precedent"[191] to "let in"[192] or "open the

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190 (1883) 8 App Cas 467 at 489.

191 Pomeroy, *A Treatise on the Specific Performance of Contracts*, (1879) at 151.

192 *Chaproniere v Lambert* [1917] 2 Ch 356 at 361; *Rawlinson v Ames* [1925] Ch 96 at 114; Fry and Northcote, *A Treatise on the Specific Performance of Contracts*, 6th ed (1921) at 277 §580.

door"[193] to oral evidence of the whole agreement, which would be enforced if it were an agreement that, of its nature, was enforceable by a court of equity[194].

128 Part performance was initially developed together with another circumstance in which an agreement without sufficient writing could be enforced despite the provisions of the Statute. That circumstance was where the agreement was admitted by the defendant. This is illustrated by the decision of Lord Hardwicke LC in *Lacon v Mertins*. Dickens' report of that case referred only to the Lord Chancellor's observation, reiterating a point that he and Lord Macclesfield LC had made previously[195], that, if a defendant admitted the agreement, the admission would take the case out of the *Statute of Frauds*[196]. The admission would also have bound the defendant's representative when the defendant died before the decree[197]. However, in Atkyns' more detailed report of the case, the Lord Chancellor is reported as referring also to part performance as a basis upon which the contract "ought to be performed"[198].

129 The allied exception concerning admissions was soon abolished. In *Popham v Eyre*[199], the Lord Chancellor said that for the court to enforce an agreement that did not satisfy the statutory requirements of writing due only to an admission would be to repeal the *Statute of Frauds*. And in *Moore v Edwards*[200], Lord Loughborough LC focused upon Lord Hardwicke's alternative remarks about part performance in *Lacon v Mertins* and said that Atkyns' report about admission as a ground for specific performance was a "complete[] mis-statement". In 1806, Sir William Grant MR said that admissions were "immaterial"; if a defendant insisted upon the benefit of the Statute, then the

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193 *Brough v Nettleton* [1921] 2 Ch 25 at 28.

194 *Chaproniere v Lambert* [1917] 2 Ch 356 at 361; Fry and Northcote, *A Treatise on the Specific Performance of Contracts*, 6th ed (1921) at 277 §580; Williams, *The Statute of Frauds Section Four*, (1932) at 259-260.

195 See *Child v Godolphin* (1723) Dick 39 [21 ER 181]; *Cottington v Fletcher* (1740) 2 Atk 155 [26 ER 498].

196 (1743) Dick 664 at 664 [21 ER 430 at 430].

197 Story, *Commentaries on Equity Jurisprudence*, (1836), vol 2 at 57 fn 1.

198 (1743) 3 Atk 1 at 3 [26 ER 803 at 804].

199 (1774) Lofft 786 at 808 [98 ER 919 at 930-931].

200 (1798) 4 Ves Jun 23 at 24 [31 ER 12 at 13].

plaintiff was required to show a complete written agreement[201]. Apart from pleading issues, the consensus became that an admission was not generally sufficient to take the matter outside the Statute[202]. The relevance of an admission became generally limited to a way to prove the terms of the contract *after* sufficient acts of part performance had been proved[203].

130 The legitimacy of the doctrine of part performance was also disputed. Lord Eldon LC said that the Court of Chancery had "gone much farther than a wholesome attention to this Statute with reference to the specific performance of agreements will justify"[204]. Roberts described the doctrine as executing an agreement "in the teeth of the statute"[205]. Lord Kenyon "lament[ed] extremely that exceptions were ever introduced in construing the Statute of Frauds"[206]. Lord Blackburn said that the Statute was construed "as if it contained these words, 'or unless possession of the land shall be given and accepted'"[207]. Part performance was described as a doctrine by which the Court of Chancery "radically modified"[208] the provisions of the Statute. At the conclusion of the 18th century, Sir Richard Arden MR said[209]:

> "I admit, my opinion is, that the Court has gone rather too far in permitting part-performance and other circumstances to take cases out of

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201 *Blagden v Bradbear* (1806) 12 Ves Jun 466 at 471 [33 ER 176 at 178]. See also *Cooth v Jackson* (1801) 6 Ves Jun 12 at 20-21 [31 ER 913 at 918].

202 Sugden, *A Practical Treatise of the Law of Vendors and Purchasers of Estates*, 7th ed (1826) at 102; Story, *Commentaries on Equity Jurisprudence*, (1836), vol 2 at 59-60 §757; Mitford and Tyler, *A Treatise on the Pleadings in Suits in the Court of Chancery by English Bill*, (1876) at 355.

203 *Cooth v Jackson* (1801) 6 Ves Jun 12 at 37-38 [31 ER 913 at 926-927].

204 *Morison v Turnour* (1811) 18 Ves Jun 175 at 183 [34 ER 284 at 287].

205 Roberts, *A Treatise on the Statute of Frauds*, (1807) at 133.

206 *Chater v Beckett* (1797) 7 TR 201 at 204 [101 ER 931 at 933].

207 *Maddison v Alderson* (1883) 8 App Cas 467 at 489. See also Maitland, *Equity also the Forms of Action at Common Law*, (1910) at 241.

208 Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit*, (1987) at 614. See also Holdsworth, *A History of English Law*, 2nd ed (1937), vol 6 at 393.

209 *Forster v Hale* (1798) 3 Ves Jun 696 at 712-713 [30 ER 1226 at 1234].

> the Statute, and then, unavoidably perhaps, after establishing the agreement, to admit parol evidence of the contents of that agreement. As to part-performance, it might be evidence of some agreement; but of what must be left to parol evidence. I always thought the Court went a great way. They ought not to have held it evidence of an unknown agreement ... Those cases are very dissatisfactory. It was very right to say, the Statute should not be an engine of fraud; therefore compensation would have been very proper."

131 Yet the doctrine survived. It did not evolve into a different, or narrower, doctrine, such as one that provided monetary compensation to relieve detriment. It was expressly preserved in some legislation that re-enacted s 4 of the *Statute of Frauds*, including the relevant legislation on this appeal. Although the doctrine survived, judicial doubts about its legitimacy led to it being constrained.

132 The constraint upon the doctrine relevant to this appeal was that the acts of part performance must be "such as could be done with no other view or design than to perform the agreement"[210]. This was later expressed by Sir Thomas Plumer MR as a requirement that the acts must be "unequivocally [referable] to the agreement"[211]. Initially, this requirement was treated loosely so that payment of a material part of the purchase price would suffice[212]. But the sufficiency of payment of money was later denied[213], and there became few circumstances that did not include the giving or taking of possession that would suffice to satisfy this requirement[214]. Other constraints were sometimes imposed upon the doctrine. One was that the acts must have been done in part performance of the contract alleged[215]. In other words, once the agreement was proved, it must be

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210 *Gunter v Halsey* (1739) Amb 586 at 586-587 [27 ER 381 at 381].

211 *Morphett v Jones* (1818) 1 Swans 172 at 181 [36 ER 344 at 348]. See also *Frame v Dawson* (1807) 14 Ves Jun 386 at 387 [33 ER 569 at 569]; *Maddison v Alderson* (1883) 8 App Cas 467 at 479.

212 *Lacon v Mertins* (1743) 3 Atk 1 at 3-4 [26 ER 803 at 804-805].

213 *Buckmaster v Harrop* (1802) 7 Ves Jun 341 [32 ER 139]; *Clinan v Cooke* (1802) 1 Sch & Lef 22 at 41; *Hughes v Morris* (1852) 2 De G M & G 349 at 356 [42 ER 907 at 910]; Sugden, *A Practical Treatise of the Law of Vendors and Purchasers of Estates*, 7th ed (1826) at 112, discussing *Butcher v Butcher* (1804) 9 Ves Jun 382 [32 ER 650]; Story, *Commentaries on Equity Jurisprudence*, (1836), vol 2 at 64-66 §760.

214 *Maddison v Alderson* (1883) 8 App Cas 467 at 489.

215 *McBride v Sandland* (1918) 25 CLR 69 at 79; [1918] HCA 32; *Cooney v Burns* (1922) 30 CLR 216 at 231-232; [1922] HCA 8; *J C Williamson Ltd v Lukey and*

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shown that the acts were done under the terms of the agreement. Another suggested constraint was that the acts of part performance must be acts by the party seeking to enforce the contract[216]. It is unnecessary on this appeal to consider those constraints or other possibilities raised in some of the older authorities.

133 When a significant reform is proposed to a controversial doctrine that has existed for around three centuries, it is necessary to understand the rationale for the doctrine in light of its origins and development. Once that is understood, it is possible to consider whether the doctrine should now be placed on a different footing.

The various rationales for the doctrine

Different modes of proof and procedure in Chancery

134 A core part of the appellant's oral submissions was devoted to rejecting a proposed rationale for the doctrine of part performance, namely, that the doctrine was concerned with unique principles of proof and procedure in Chancery. The submissions on this point should be accepted.

135 The essence of this proposed rationale is that the *Statute of Frauds* did not apply to bills in equity, or applied in a different way, because of the unique features of Chancery proof and procedure. This rationale had strong support. In *Litton Strode v Falkland*[217], the Lord Chancellor was attributed with saying that a hearing in Chancery "is not like the Case of Evidence to a Jury, who are easily [biased] by it, which this Court is not". Relying upon this obiter dictum, Thayer[218] and Wigmore[219], who were followed by Holdsworth[220], argued that

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Mulholland (1931) 45 CLR 282 at 300; [1931] HCA 15; *Regent v Millett* (1976) 133 CLR 679 at 683; [1976] HCA 40.

216 *Caton v Caton* (1866) LR 1 Ch App 137 at 148; Ashburner, *Principles of Equity*, (1902) at 540. Cf Williams, *The Statute of Frauds Section Four*, (1932) at 261, discussing *Dickinson v Barrow* [1904] 2 Ch 339.

217 (1708) 3 Chan Rep 169 at 177 [21 ER 758 at 760].

218 Thayer, *A Preliminary Treatise on Evidence at the Common Law*, (1898) at 431.

219 Wigmore, *A Treatise on the System of Evidence in Trials at Common Law*, (1905), vol 4 at 3421 §2426.

220 Holdsworth, *A History of English Law*, 2nd ed (1937), vol 6 at 393.

Chancery did not depend upon a jury to find facts, and the parties were able to give evidence.

136 The different procedures and proof requirements of Chancery trials may have been the context in which some judges chose not to apply the *Statute of Frauds* according to its terms, but those different procedures do not provide any rationale for why the Statute ought not apply. If those procedures were somehow the rationale for the doctrine of part performance, the common law should have recognised the doctrine once its procedures also allowed facts to be found by the judge and the parties to give evidence. Further, as Professor Macnair has observed, the content of the *Statute of Frauds* shows that the concern of the Statute was not merely with jury trials. The Statute addressed problems with proof of wills in the church courts, and required writing in matters of pure equity, such as trusts and the assignment of equitable interests[221]. At the time the Statute was passed, on occasion equity courts would also send issues of fact for determination by a common law jury[222].

137 The only attempt at a substantive justification for the doctrine based upon unique Chancery procedures was made by A W B Simpson, who observed that the Statute speaks in language redolent only of the common law, referring to "actions" to "charge" defendants. However, as Simpson acknowledged, there is no trace in any of the cases of any reliance upon these verbal distinctions as a means to justify the exclusion of equitable principles from the reach of the Statute[223]. Many of the early cases, not involving part performance, were concerned with whether the requirements of the Statute had been met in equity bills for specific performance[224].

Enforcement of the equities, not the contract

138 An alternative rationale for the doctrine of part performance was that suggested by Lord Selborne LC in *Maddison v Alderson*[225], although his was not the first such suggestion[226]. The Lord Chancellor said that, in a suit founded on

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221 Macnair, *The Law of Proof in Early Modern Equity*, (1999) at 153-154.

222 Macnair, *The Law of Proof in Early Modern Equity*, (1999) at 157-158.

223 Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit*, (1975) at 615.

224 Macnair, *The Law of Proof in Early Modern Equity*, (1999) at 160.

225 (1883) 8 App Cas 467 at 475.

226 Story, *Commentaries on Equity Jurisprudence*, (1836), vol 2 at 57 §754.

part performance, the defendant is not charged upon the contract itself but "upon the equities resulting from the acts done in execution of the contract". He said that, on those equities, the "choice is between undoing what has been done ... and completing what has been left undone"[227].

139 This explanation has the great benefit of reconciling the doctrine with the terms of the *Statute of Frauds*. It was adopted by Isaacs and Rich JJ in *McBride v Sandland*[228], and was described by Evatt J in *J C Williamson Ltd v Lukey and Mulholland* as "put[ting] forward the doctrine from the point of view of Courts of Equity in the most effective and plausible way"[229]. In the same case, Dixon J referred to this rationale, although in much more cautious terms: "the party *is said to* be charged upon the equities arising out of the acts of part performance and not merely upon the contract" (emphasis added)[230]. However, he continued, in terms that undermined this rationale: "in such a case the equity which so arises is to have the entire contract carried into execution by both sides".

140 The immediate problem with this rationale, based only upon "equities", is that it is inconsistent with the courts' focus in all the cases upon proof of the terms of the contract without sufficient writing, and the order of specific performance of those terms. The order is not limited to requiring performance of a contract, or "an equity" that is implied only from the acts alleged to invoke the doctrine. As explained above, part performance opens the door for a plaintiff to prove the terms of the actual contract, including by admission or evidence. It is then the terms of the actual contract that are enforced, not the "equities" arising from the part performance.

141 Lord Selborne LC was also incorrect in his assumption that, if the "equities" were enforced, the available choices were only to (1) make orders undoing the acts that had been done, or (2) order that performance be completed. This flaw in the Lord Chancellor's logic was soon exposed by Ashburner, who said[231]:

> "Acts done under a contract which cannot be actively enforced may give the party doing them an independent equity; but that is, or may be, entirely

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227 (1883) 8 App Cas 467 at 476.

228 (1918) 25 CLR 69 at 77.

229 (1931) 45 CLR 282 at 308.

230 (1931) 45 CLR 282 at 300.

231 Ashburner, *Principles of Equity*, (1902) at 540. See also Browne, *Ashburner's Principles of Equity*, 2nd ed (1933) at 392.

> different from the right to have the contract enforced. Such an equity may be satisfied by much less than the enforcement in the plaintiff's favour of all the terms of the contract. *Eg*, expenditure on land may be satisfied by giving a lien on the land for the amount expended."

142 The same point was made by Pound, who observed that Lord Selborne LC was not suggesting that relief should be confined to restitution in equity[232]. Pound correctly said that the courts did not "enforce the equitable claims of the plaintiff arising from fraud or part performance as such, but rather the contract itself, exactly as if it were a legally enforceable contract for which the legal remedy was inadequate"[233]. Hence, the three Justices who addressed the point in this Court in *J C Williamson Ltd v Lukey and Mulholland*[234] rejected a submission that an injunction, rather than specific performance of the contract, could be ordered on the basis of the "equities" arising from part performance.

143 There are two further difficulties with the rationale that only the "equities" are enforced, rather than the oral contract itself. First, the theory cannot explain why these "equities" of part performance were initially enforced, in the absence of any part performance, where the agreement was admitted. In other words, before the decline of the enforcement of a contract because it was admitted, this rationale would have meant that the equities could be enforced even when there were no equities. One response to this may be that, as the doctrine developed, its true rationale emerged as one that enforced equities, or new legal rights, arising from the acts themselves. On this approach, as Sir John Baker suggested, the doctrine of part performance would have become "something like an equitable estoppel"[235]. Pomeroy argued that this path was taken in the United States[236]:

> "When a verbal contract has been made, and one party has knowingly aided or permitted the other to go on and do acts in part performance of the agreement, acts done in full reliance upon such agreement as a valid and binding contract, and which would not have been done without the agreement, and which are of such a nature as to change the relations of the parties, and to prevent a restoration to their former condition and an

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232 Pound, "The Progress of the Law, 1918-1919: Equity", (1920) 33 *Harvard Law Review* 929 at 936-937.

233 Pound, "The Progress of the Law, 1918-1919: Equity", (1920) 33 *Harvard Law Review* 929 at 936.

234 (1931) 45 CLR 282 at 290, 300-301, 308.

235 Baker, *An Introduction to English Legal History*, 4th ed (2002) at 350.

236 Pomeroy, *A Treatise on the Specific Performance of Contracts*, (1879) at 144-145.

> adequate compensation for the loss by a legal judgment for damages, then it would be a virtual fraud in the first party to interpose the statute of frauds as a bar to a completion of the contract".

144 However, as explained in the reasons of Kiefel CJ, Bell, Gageler and Keane JJ[237] and the reasons of Nettle and Gordon JJ[238], English and Australian law retained the clear differences between the doctrines of part performance and estoppel. Most notably, from its inception the doctrine of part performance in English and Australian law has remained a manner by which a contract without the required statutory writing could be proved and enforced.

145 A second difficulty with the rationale that the doctrine enforces the equities rather than the contract is that this rationale could lead to results that are contrary to principle and precedent. Since it is said to be the "equities" that are specifically performed, and not the contract, a plaintiff would have no right to damages in substitution of "specific performance of any covenant, contract, or agreement" if there were some bar, or circumstances, precluding an order for specific performance that would otherwise have been made. Yet, one of the very reasons for *Lord Cairns' Act*[239] was to ensure that the court had jurisdiction to award compensation in such a case[240]. There was no suggestion in this Court in *J C Williamson Ltd v Lukey and Mulholland*[241] that the trial judge would have erred in awarding damages under the Victorian equivalent of *Lord Cairns' Act*[242], had he been correct that part performance was established.

Allowing the action in order to prevent a fraud

146 In the early decisions on part performance, the few explanations that were given generally expressed the basis of the doctrine as being the avoidance of fraud. There were some cases of genuine fraud where the Statute was not

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237 At [58]-[61].

238 At [94].

239 *Chancery Amendment Act* 1858 (UK) (21 & 22 Vict c 27).

240 United Kingdom, Chancery Commission, *The Third Report of Her Majesty's Commissioners Appointed to Inquire into the Process, Practice, and System of Pleading in the Court of Chancery*, (1856) at 4.

241 See (1931) 45 CLR 282 at 297.

242 *Supreme Court Act* 1928 (Vic), s 62(4).

applied[243]. But it was not usually this genuine fraud to which reference was had in instances of part performance[244].

147 A decision that relied upon this rationale is Lord Cranworth LC's speech in *Caton v Caton*[245]. In that case, the Lord Chancellor said that the reason "part performance takes a contract out of the purview of the *Statute of Frauds*" was that:

> "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".

148 In this speech, the Lord Chancellor echoed statements by Sugden (later, Lord St Leonards) that specific performance was ordered so that "one side may not take advantage of the statute, to be guilty of fraud"[246]. But to rely upon provisions of a general statute to the disadvantage of another is not fraudulent. As Lord Selborne LC said in *Maddison v Alderson*[247], with reference to fraud, "it cannot be meant that equity will relieve against a public statute of general policy in cases admitted to fall within it". The same point had been made in 1807 in Roberts' work on the *Statute of Frauds.* He observed that, unlike cases where the transaction involves actual fraud, in the case of part performance the so-called fraud consisted only in "unconscientiously insisting upon the statute" to prevent enforcement of the antecedent agreement[248]. He continued[249]:

> "It is easy to see that this is a very different mode of procedure from that which the courts are to be regarded as pursuing in the case of fraudulent suppression or representation".

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243 See *Pym v Blackburn* (1796) 3 Ves Jun 34 at 38, fn (1) [30 ER 878 at 881].

244 Pound, "The Progress of the Law, 1918-1919: Equity", (1920) 33 *Harvard Law Review* 929 at 937. See also *Maddison v Alderson* (1883) 8 App Cas 467 at 490.

245 (1866) LR 1 Ch App 137 at 148.

246 Sugden, *A Practical Treatise of the Law of Vendors and Purchasers of Estates*, 7th ed (1826) at 104. See also *Buckmaster v Harrop* (1802) 7 Ves Jun 341 at 346 [32 ER 139 at 141].

247 (1883) 8 App Cas 467 at 474.

248 Roberts, *A Treatise on the Statute of Frauds*, (1807) at 135.

249 Roberts, *A Treatise on the Statute of Frauds*, (1807) at 136.

149 The fictitious nature of fraud when used as the rationale underpinning the doctrine of part performance can be seen by contrasting (i) the entitlement to rely upon the Statute at any point until immediately before the other party acts in a manner unequivocally referable to a contract of the general nature of that alleged, and (ii) the lack of such entitlement from that point, even if the acts are performed without the knowledge of the person wishing to rely on the Statute. The suggestion that performance of those acts turns the other party, even without knowledge, into a fraudster reveals the simple point that the "fraud" in such cases is not genuine fraud[250].

150 Since such conduct was neither actual fraud nor a vitiating factor that is sometimes described as "equitable fraud", part performance has been described as "equitable or constructive fraud"[251]. But this conceals the real justification for the doctrine, in the same way that describing a dog as a "constructive cat" fails to explain why a dog should be treated as if it were a cat[252]. Recognising that there was no actual fraud in many cases of part performance, Story said that the jurisdiction of equity was based upon taking "every one's act according to conscience, and not to suffer undue advantage to be taken of the strict forms of positive rules"[253]. As Williams observed, in the 17th and 18th century cases on part performance the courts "seem[] invariably to have been concerned with the moral aspect of the matter"[254]. The remaining, and accurate, rationale explains, as a matter of history, why it was possible for judges to prevent a party from insisting upon the terms of a statute by imposing external notions of conscience or morality upon the statute, despite its terms.

Enforcing the agreement for moral reasons despite the Statute

151 The reason that the doctrine of part performance was recognised, despite the terms of the *Statute of Frauds*, was the principle of morality, sometimes described as public conscience. In the context of what would become the secret trust exception to the Statute, Lord Nottingham denied that this morality was the idiosyncratic conscience of an individual Chancellor, insisting that it was a notion of objective, public conscience[255]. The principle of morality was that a

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250 See *Matthews v Holmes* (1853) 5 Gr 1 at 80.

251 Spry, *The Principles of Equitable Remedies*, 9th ed (2014) at 262.

252 See Swadling, "The Fiction of the Constructive Trust", (2011) 64 *Current Legal Problems* 399 at 399.

253 Story, *Commentaries on Equity Jurisprudence*, (1836), vol 1 at 324 §330.

254 Williams, *The Statute of Frauds Section Four*, (1932) at 234.

255 *Cook v Fountain* (1676) 3 Swans 585 at 600 [36 ER 984 at 990].

contract, which was accepted by the judge to be unequivocally in existence, should be performed. That principle informed the decisions to take outside the *Statute of Frauds* both (i) cases of part performance[256], and (ii) early cases where a contract was admitted[257]. This was the morality that led courts to characterise the failure to perform an agreement using the fiction of fraud as "a fraud upon the person performing", rather than attempting to suggest that "the agreement was not originally within the contemplation of the statute"[258]. Also using fraud in this sense, Lord O'Hagan said in *Maddison v Alderson*[259] that some of the older, "bold decisions" had been "prompted no doubt by a desire to defeat fraud and accomplish justice".

152 In 1999, Gleeson CJ, Gaudron and Gummow JJ said that the doctrine of part performance has a history of three centuries of case law to "the effect of allowing specific performance *of a contract* which on its face the Statute of Frauds renders unenforceable"[260] (emphasis added). As Gummow J observed extrajudicially[261], early cases that allowed enforcement of a contract by part performance did so "in an age when the doctrine of the equity of the statute ... was given fairly free rein". One limb of the doctrine of the equity of the statute, prevailing at the time of the *Statute of Frauds*[262], was that "cases within the terms of the statute but not within its mischief might be placed outside its operation"[263]. This doctrine of the equity of the statute, and its application to part performance, was thus "closely connected with the attitude of seventeenth- and eighteenth-

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256 Story, *Commentaries on Equity Jurisprudence*, (1836), vol 1 at 324 §330.

257 Roberts, *A Treatise on the Statute of Frauds*, (1807) at 156-157; *Whitchurch v Bevis* (1786) Dick 664 at 665 [21 ER 430 at 430].

258 *Whitbread v Brockhurst* (1784) 1 Bro CC 404 at 413 [28 ER 1205 at 1210].

259 (1883) 8 App Cas 467 at 485.

260 *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 at 60 [19]; [1999] HCA 67.

261 Gummow, *Change and Continuity*, (1999) at 66-77.

262 Coke, *The First Part of the Institutes of the Laws of England*, 9th ed (1684), c 2, s 21.

263 *Nelson v Nelson* (1995) 184 CLR 538 at 553; [1995] HCA 25.

century courts toward statutes" where Lords Chancellors saw their exercise of power "over ... ethical lines" when construing statutes[264].

153 One reason the breadth of this approach to the *Statute of Frauds* was less controversial in the 17th century than today was that the draftsperson of a statute could be the judge called upon to construe it. Lord Nottingham was likely the first draftsman[265] of the *Statute of Frauds*, as well as being one of those who first construed it[266]. In a case shortly after its enactment, he said that he "had some reason to know the meaning of this law; for it had its first rise from me"[267]. Prior to the enactment of the *Statute of Frauds*, as Lord Nottingham had written extrajudicially[268] and judicially[269], equity would not compel the performance of a parol agreement, that is, an agreement that was not in the form of a deed, unless it had been executed in part or executed on one side[270]. By continuing to recognise specific performance of partly performed agreements that did not

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264 Pound, "The Progress of the Law, 1918-1919: Equity", (1920) 33 *Harvard Law Review* 929 at 941.

265 Costigan, "The Date and Authorship of the Statute of Frauds", (1913) 26 *Harvard Law Review* 329 at 335; Hening, "The Original Drafts of the Statute of Frauds (29 Car II c 3) and their Authors", (1913) 61 *University of Pennsylvania Law Review* 283 at 288-289.

266 See, eg, *Turner v Turner* (1678) in Yale (ed), *Lord Nottingham's Chancery Cases*, (1961), vol 2, 711 at 712; *Alfary v Sergeant* (1679) in Yale (ed), *Lord Nottingham's Chancery Cases*, (1961), vol 2, 761; *Combs v Norrington* (1680) in Yale (ed), *Lord Nottingham's Chancery Cases*, (1961), vol 2, 793; *Mowbray v Bacon* (1680) in Yale (ed), *Lord Nottingham's Chancery Cases*, (1961), vol 2, 852; *Potts v Turvin* (1681) in Yale (ed), *Lord Nottingham's Chancery Cases*, (1961), vol 2, 856.

267 *Ash v Abdy* (1678) 3 Swans 664 at 664 [36 ER 1014 at 1014].

268 Yale (ed), *Lord Nottingham's 'Manual of Chancery Practice' and 'Prolegomena of Chancery and Equity'*, (1965) at 310. As to the date at which he wrote, see Dawson, "Book Review", (1966) 10 *American Journal of Legal History* 82 at 83. See also *Khoury v Khouri* (2006) 66 NSWLR 241 at 262 [74].

269 *Reasby & Smallwood* (1677) in Yale (ed), *Lord Nottingham's Chancery Cases*, (1961), vol 2, 514; *Taylor & Badderley* (1678) in Yale (ed), *Lord Nottingham's Chancery Cases*, (1961), vol 2, 667; *Cope & North* (1678) in Yale (ed), *Lord Nottingham's Chancery Cases*, (1961), vol 2, 695.

270 Macnair, *The Law of Proof in Early Modern Equity*, (1999) at 148, citing *The Practice of the High Court of Chancery Unfolded*, (1651) at 48 and Sheppard, *The Faithful Councellor*, (1651) at 619-621.

satisfy the statutory requirements of writing, the courts of equity, in that respect, substantially disregarded the *Statute of Frauds*.

154 This technique of construction was not initially controversial because it arose at a time that predated modern notions of separation of powers, as well as parliamentary sovereignty[271]. It has been said that "so long as the law maker is his own interpreter the problem of a technique of interpretation [construction] does not arise"[272]. Although substantial changes were made to Lord Nottingham's first draft of the *Statute of Frauds*[273], his claim to the original draftsmanship was seen as giving him a licence that would not exist after the recognition of a separation of powers.

155 The doctrine of the equity of the statute, in its strong sense involving imposition of external ethical considerations despite the terms of the statute, fell into disfavour. It was criticised by Bentham in the second half of the 18th century[274], and by others during the 19th century[275]. In 1874, Sedgwick said that the doctrine "approaches so near the power of legislation that a wise judiciary will exercise it with reluctance, and only in extraordinary cases"[276]. In the same year as his speech in *Maddison v Alderson*, Lord Selborne LC said that in the construction of statutes "[i]n ancient times the provinces of the Judge and of the legislator were not unfrequently confounded"[277]. Similar concerns were

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271 *Nelson v Nelson* (1995) 184 CLR 538 at 552. See also Manning, "Textualism and the Equity of the Statute", (2001) 101 *Columbia Law Review* 1 at 42-43.

272 Thorne, "The Equity of a Statute and Heydon's Case", (1936) 31 *Illinois Law Review* 202 at 203. See also Costigan, "Interpretation of the Statute of Frauds", (1919) 14 *Illinois Law Review* 1 at 9-10.

273 Hening, "The Original Drafts of the Statute of Frauds (29 Car II c 3) and their Authors", (1913) 61 *University of Pennsylvania Law Review* 283 at 291; Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit*, (1975) at 602.

274 Bentham and Hart, *Of Laws in General*, (1970) at 239-240. See also *Nelson v Nelson* (1995) 184 CLR 538 at 552-553.

275 Pollock, *Essays in Jurisprudence and Ethics*, (1882) at 85. See also *Gwynne v Burnell* (1840) 6 Bing (NC) 453 at 561 [133 ER 175 at 217].

276 Sedgwick and Pomeroy, *A Treatise on the Rules which Govern the Interpretation and Construction of Statutory and Constitutional Law*, 2nd ed (1874) at 251, citing *Monson v Chester* 22 Pick 385 at 387 (1839).

277 *Bradlaugh v Clarke* (1883) 8 App Cas 354 at 363.

expressed about the breadth of doctrines that had developed, contrary to the terms of the *Statute of Frauds*[278], through the use of the equity of the statute.

156 The development of constraints upon part performance confined the doctrine's operation and thus reduced conflict with the terms of the Statute. Hence, as Maitland recognised, there needed to be "cogent evidence in the situation of the parties before you can receive oral evidence of the agreement"[279]. In *Maddison v Alderson*, Lord Blackburn acknowledged that the doctrine of part performance was "an established anomaly" but, refusing to relax existing constraints upon the doctrine, held that this anomaly should not be extended[280]. Indeed, the particular constraint in issue on this appeal, namely, that the acts of part performance must be unequivocally, and in their own nature, referable to some such agreement of the general nature of that alleged, was sometimes expressed in stricter terms. For instance, in *Maddison v Alderson*[281], Lord O'Hagan, further narrowing an approach of Sir William Grant MR[282], described it as a requirement that the acts "necessarily imply the existence of the contract". Although there is no principled reason now to tighten this constraint, almost three centuries after it was first introduced[283], the history of the doctrine and its questionable rationale are powerful reasons not to loosen or abandon the constraint.

Conclusion

157 Although the requirement of unequivocal referability has sometimes been expressed by different verbal formulations[284], the constraint that the acts of part performance must be unequivocally, and in their own nature, referable to some such agreement as that alleged has been "consistently accepted as a correct

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278 *Chater v Beckett* (1797) 7 TR 201 at 204 [101 ER 931 at 933]; *Hindson v Kersey* (1765) in Burn, *The Ecclesiastical Law*, 9th ed (1842), vol 4, 116 at 118. See also Roberts, *A Treatise on the Statute of Frauds*, (1807) at xviii-xix.

279 Maitland, *Equity also the Forms of Action at Common Law*, (1910) at 241.

280 (1883) 8 App Cas 467 at 489.

281 (1883) 8 App Cas 467 at 483-484.

282 *Frame v Dawson* (1807) 14 Ves Jun 386 at 388 [33 ER 569 at 569].

283 See *Gunter v Halsey* (1739) Amb 586 at 586-587 [27 ER 381 at 381].

284 See, eg, *J C Williamson Ltd v Lukey and Mulholland* (1931) 45 CLR 282 at 300.

statement of the law"[285]. I agree with Kiefel CJ, Bell, Gageler and Keane JJ that the decision of the House of Lords in *Steadman v Steadman*[286] is not a sound basis to alter it.

158 The requirement that the act be unequivocally referable to some such agreement as that alleged involves loose terms. There has been much room for dispute about (i) when an act will sufficiently relate to a contract, so as to be unequivocally referable to it, and (ii) when a contract will be "some such agreement" as the agreement that is alleged. Each of these questions may ultimately depend on evaluative conclusions based upon all the circumstances surrounding the act or acts. Those 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. Certainly, the doctrine of part performance should not be shorn of this well-established constraint of unequivocal referability.

159 The need for the acts to be unequivocally referable to "some such agreement as that alleged" requires only that the acts be referable to an agreement "of the general nature of that alleged"[287]. For instance, the giving or taking of possession will generally be a sufficient act of part performance of a contract for the sale of land, even though it is an act that may be equally referable to a contract of lease. It is unnecessary to explore these issues on this appeal. As Kiefel CJ, Bell, Gageler and Keane JJ explain, the appellant's acts were consistent with transactions other than those of the general nature of a sale of the Clark Road land. The appellant conceded in oral submissions that the acts were not unequivocally referable to a contract of the general nature of a sale of that land. The appeal must be dismissed and the order made as proposed by Kiefel CJ, Bell, Gageler and Keane JJ.

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285 *Regent v Millett* (1976) 133 CLR 679 at 683. See, eg, *Gunter v Halsey* (1739) Amb 586 at 586-587 [27 ER 381 at 381]; *Frame v Dawson* (1807) 14 Ves Jun 386 at 387 [33 ER 569 at 569]; *Morphett v Jones* (1818) 1 Swans 172 at 181 [36 ER 344 at 348]; *Maddison v Alderson* (1883) 8 App Cas 467 at 479; *Thomas v The Crown* (1904) 2 CLR 127 at 138; [1904] HCA 29; *Maiden v Maiden* (1909) 7 CLR 727 at 737-738; [1909] HCA 16; *McBride v Sandland* (1918) 25 CLR 69 at 78.

286 [1976] AC 536.

287 *McBride v Sandland* (1918) 25 CLR 69 at 78; *Regent v Millett* (1976) 133 CLR 679 at 683.