STEADMAN v. STEADMAN[1]

Vendor and Purchaser—Specific performance—Part performance of oral contract —Compromise agreement between husband and wife—Several terms—Whether sufficient part performance—Law of Property Act 1925 (Eng.), section 40.

Since the Statute of Frauds 1677 (Imp.), section 4, came into operation, an oral contract for the sale or other disposition of land or any interest in land has been unenforceable at law. That statute was passed, according to the preamble, to prevent 'many fraudulent practices, which are commonly endeavoured to be upheld by perjury and subornation of perjury; . . .' It was thought that the requirement of writing would prevent people being wrongfully deprived of their land by a contrived 'contract'. Section 4 is now embodied in the Law of Property Act 1925 (Eng.), section 40; in Victoria, section 126 of the Instruments Act 1958 contains a similar provision.

Soon, however, it was discovered that some people were using the requirement of writing as a means of avoiding their obligations under oral contracts for the disposition of an interest in land, particularly where the other party to the contract had performed some or all of his obligations. The Court of Chancery developed the doctrine of part performance so that in such a situation the statute itself would not be able to be used as a means of unconscionable dealing. Under the doctrine, 'the defendant is really "charged" upon the equities resulting from the acts done in execution of the contract, and not (within the meaning of the statute) upon the contract itself.'[2]

In *Steadman v. Steadman,* the facts are somewhat complex. Mr. and Mrs. S had been divorced. They were negotiating a settlement of the wife's claim for an order that the jointly-owned matrimonial home be sold. At the time of these negotiations there existed against Mr. S two maintenance orders, one each for his wife and child, and he was £194 in arrears. A compromise agreement was reached, which has been termed an 'oral package deal', and under which (i) the maintenance order for the wife was to be discharged, (ii) the maintenance order for the child was to continue, (iii) the arrears of maintenance were to be remitted except as to £100, and (iv) the wife was to surrender to Mr. S her interest in the home for £1500. The justices hearing the wife's claim were told of this agreement, and implemented those of its terms which related to maintenance, which alone were within their jurisdiction. Mr. S's solicitors then drew up a transfer which was delivered to Mrs. S, Mr. S having previously arranged for payment of the £1500 to be made, but she refused to sign it. She reinstituted her proceedings for the sale of the house. Mr. S pleaded the agreement, but Mrs. S pleaded that it was unenforceable. Mr. S. claimed the following as acts of part performance: (i) the announcement of the terms of the agreement to the justices, by virtue of which Mr. S forebore from seeking terms more favourable to himself; (ii) the payment of £100 of arrears; and (iii) the preparation and dispatch to Mrs. S of the transfer.

The House of Lords[3] accepted that there had been sufficient part performance by Mr. S, but not before lengthy dissertations as to the requirements for such sufficiency.

Attempts have often been made to restrict the doctrine of part performance, and,

[1] [1974] 3 W.L.R. 56. House of Lords; Lord Reid, Lord Morris of Borth-y-Gest, Viscount Dilhorne, Lord Simon of Glaisdale and Lord Salmon.

[2] *Per* the Earl of Selbourne L.C. in *Maddison v. Alderson* (1883), 8 App. Cas. 467, 475.

[3] Lord Morris of Borth-y-Gest dissenting.

as Lord Simon of Glaisdale notes,[4] these attempts would seem frequently to have resulted from a mistaken consideration of the doctrine as a rule of evidence rather than of substantive law. Those who see an act of part performance as an alternative means to that of writing of proving the contract see the doctrine as providing a means of avoiding the statute, and so naturally would want it severely restricted. But as was shown above, it is the equities which arise from the act of part performance which form the basis of the doctrine. To ask what will constitute a sufficient act of part performance is really to ask when an act will give rise to such equities. Indeed, Lord Reid emphasizes that when looking at the various tests for sufficiency of an act of part performance, 'the equitable nature of the remedy must be kept in mind.'[5] So regarded, the doctrine does not need deliberately to be restricted.

The starting point for the House of Lords in its inquiry was the classic statement of the Earl of Selborne L.C. in *Maddison v. Alderson*:—[6]

> 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: . . .

This statement itself prompts further investigation:—

(1) *'Unequivocally'*. It seems clear that the alleged acts of part performance need themselves to be proved only on the balance of probabilities. Furthermore, it would seem now that, at least in England, it is sufficient if these acts once proved show it to be more likely than not that they were done in the performance of some contract with the other party.[7]

Somewhat different phraseology has been used in Victoria. It has been said that the alleged acts must point 'plainly, and not merely in an equivocal fashion',[8] or must indicate 'a clear reference according to normal probabilities'[9] to a contract between the parties. These phrases, however, are entirely consistent with a requirement of proof on the balance of probabilities, which is the general standard of proof required in civil proceedings, and is proof 'according to normal probabilities'. If the alleged acts of part performance point to a contract in no more than 'an equivocal fashion', then the party alleging the acts has not discharged his burden of proof to any of the possible degrees, not even proof on the balance of probabilities, which is the degree most favourable to him. Therefore, if the acts on the balance of probabilities point to a contract, they can indeed be said to be pointing 'not merely in an equivocal fashion'. It is suggested, therefore, that a Victorian court today would follow the clear statement of their Lordships in the present case as to the standard of proof required.

(2) *'In their own nature'*. This phrase means simply that oral testimony is not admissible to show the nexus between the alleged acts and the alleged contract. The acts must show that themselves. But the phrase does not mean that where there is

[4] [1974] 3 W.L.R. 56, 77. See also *per* Lord Reid at p. 61.
[5] *Ibid.* 60.
[6] (1883), 8 App. Cas. 467, 479.
[7] *Per* Lord Reid at p. 61, and Lord Simon of Glaisdale at pp. 81-2. Viscount Dilhorne believed that the acts alleged need only 'point' to some such contract as that alleged (p. 75); and Lord Morris of Borth-y-Gest merely said that some such contract must be 'a reasonable explanation' of the alleged acts (p. 66). Lord Salmon did not consider the point.
[8] *Francis v. Francis*, [1952] V.L.R. 321, 340, *per* Smith J.
[9] *Ibid.* 322, *per* Sholl J.; *Commonwealth Oil Refineries Ltd. v Hollins*, [1956] V.L.R. 169, 179. See also Voumard, *Sale of Land in Victoria* (2nd ed. 1965) 90.

more than one alleged act they must all be looked at individually with no reference to any of the others.[10]

(3) *'Some such agreement as that alleged'*. Clearly, the alleged acts of part performance do not have to point to the precise terms of the alleged contract. That has been described as a 'long exploded idea'.[11] It seems that it will be sufficient in England if the acts, probably only on the balance of probabilities,[12] 'prove the existence of some contract [between the plaintiff and the defendant], and are consistent with the contract alleged', as Upjohn L.J. noted in *Kingswood Estate Co. Ltd. v. Anderson.*[13]

The Victorian authorities are of little assistance on this question. In *Francis v. Francis,*[14] Smith J. said that the acts must point to the existence of an agreement between the parties 'falling within the general class to which the agreement alleged belongs'[15] Sholl J. in that case referred merely to 'a contract between the parties',[16] as did the Court in *Commonwealth Oil Refineries Ltd. v. Hollins.*[17] It seems likely that in Victoria the phraseology of Upjohn L.J. in *Kingswood Estate Co. Ltd. v. Anderson*[18] will be adopted.

(4) *Whether the act of part performance must indicate that term of the agreement which deals with the disposition of an interest in land.* There is some authority which appears to hold that an act of part performance will be insufficient unless it points to that term of the agreement which concerns the disposition of an interest in land.[19] The House of Lords in the present case was divided on the issue.[20]

It will be noted, however, that those cases in which the court has held that the acts of part performance must point to the term concerning the disposition of an interest in land almost always are cases dealing with single-term contracts. And in most cases of single-term contracts dealing with the disposition of an interest in land, where the acts of part performance satisfy the other requirements for sufficiency, they will also point to the disposition of such an interest.

In cases of multi-term contracts like the present one, and particularly where those

[10] *Per* Lord Simon of Glaisdale at p. 82 ('The acts may throw light on each other; and there is no reason to exclude light'); *per* Lord Salmon at p. 89. Viscount Dilhorne assumes the point, at p. 72. *Contra*: Lord Morris of Borth-y-Gest, at p. 67. Lord Reid did not find it necessary to consider the point.

[11] *Kingswood Estate Co. Ltd. v. Anderson,* [1963] 2 Q.B. 169, 189, *per* Upjohn L.J.

[12] See the discussion of 'unequivocally', *supra.*

[13] [1963] 2 Q.B. 169, 189. See also *per* Lord Simon of Glaisdale at [1974] 3 W.L.R. 56, 80; *per* Viscount Dilhorne at p. 72; and *per* Lord Reid at p. 61. Lord Morris of Borth-y-Gest (at p. 65) and Lord Salmon (at p. 86) believe that the alleged acts must point to a contract for the disposition of an interest in land, as to which see the discussion *infra,* and also *Cooney v. Burns* (1922), 30 C.L.R. 216.

[14] [1952] V.L.R. 321.

[15] *Ibid.* 340.

[16] *Ibid.* 332.

[17] [1956] V.L.R. 169, 179.

[18] [1963] 2 Q.B. 169, 189.

[19] See *Maddison v. Alderson* (1883), 8 App. Cas. 467, especially *per* Lord Blackburn at p. 489; *Cooney v. Burns* (1922), 30 C.L.R. 216. See also *Snell's Principles of Equity* (27th ed. 1973) 587; Voumard, *op. cit.* 90.

[20] Lord Morris of Borth-y-Gest (p. 66) and Lord Salmon (p. 86) believed that the acts must point to the disposition of an interest in land. *Contra*: Lord Reid (pp. 60-1) and Viscount Dilhorne (pp. 72-3). Lord Simon of Glaisdale discussed the point (p. 81) but did not find it necessary to reach a conclusion. Note that the headnote in the *Weekly Law Reports* would appear to be unsound on this point.

terms are not severable, the acts do not have to point to that term which concerns the disposition of an interest in land for it to become unconscionable for the defendant to plead the statute. The acts will still give rise to the equities upon which a defendant would be charged. It is suggested, therefore, bearing in mind the equitable basis of the doctrine of part performance, that it cannot be laid down as a definite rule that the acts must always point to the disposition of an interest in land. Furthermore, there is some authority to suggest that such a rule has not always been laid down in the past.[21]

(5) *Whether the payment of money can ever constitute sufficient part performance.* It has been said that the payment of money can never constitute sufficient part performance.[22] In the cases where this has been said, however, the payment of money has always been an equivocal act. In fact, the payment of money should be no more than an illustration of the general principle, so that where admissible evidence (such as other acts of part performance) shows that the payment was not equivocal, it should be regarded as a sufficient act of part performance provided that the other requirements are satisfied.[23] In the present case, the payment of £100 of arrears was not an equivocal act when looked at in the circumstances, and so it was held to be sufficient part performance.[24]

(6) *Preparatory acts.* It is well established that an act which is merely preparatory to the performance of a contract cannot be an act of part performance.[25] The preparation and sending to Mrs. S of the transfer, however, was not merely preparatory to the performance of the contract, as it was one of the obligations imposed on Mr. S by the agreement.[26]

(7) *Whether spoken words can ever constitute sufficient part performance.* Their Lordships were divided as to whether the act of telling the justices of the agreement could constitute part performance.[27] But the view of Lord Simon of Glaisdale would appear, with respect, to be persuasively sound. He notes that oral evidence is inadmissible 'to establish that the acts relied on were in performance of a contract.'[28] Nevertheless, proof of acts themselves is almost always made by oral testimony, and there is nothing to prevent words being an act of part performance in themselves if they satisfy the other requirements.[29]

Conclusion. It is thought that the present position in Victoria of the law relating

[21] See *Brough v. Nettleton,* [1921] 2 Ch. 25; *Wakeham v. Mackenzie,* [1968] 1 W.L.R. 1175. See also *per* Viscount Dilhorne at [1974] 3 W.L.R. 56, 72, and Lord Simon of Glaisdale at p. 81.

[22] See *Maddison v. Alderson* (1883), 8 App. Cas. 467; *Jones v. Peters* [1948] V.L.R. 331; *Harlow v. Mitchell,* [1970] Q.W.N. 68.

[23] *Per* Lord Simon of Glaisdale at p. 83; Lord Reid at p. 60; Lord Salmon at p. 89; and Viscount Dilhorne at p. 72. *Contra*: Lord Morris of Borth-y-Gest, who believed that no evidence which would show the payment to be unequivocal would ever be admissible (p. 67).

[24] *Ibid.*

[25] *Maddison v. Alderson* (1883), 8 App. Cas. 467; *Cooney v. Burns* (1922), 30 C.L.R. 216; *Francis v. Francis,* [1952] V.L.R. 321.

[26] It is the 'universal custom' for a deed of transfer to be prepared by the transferee or his solicitor: *per* Lord Reid at p. 60. See also *per* Viscount Dilhorne at p. 72; Lord Simon of Glaisdale at p. 79; and Lord Salmon at p. 90. *Contra*: Lord Morris of Borth-y-Gest at p. 67.

[27] Lord Reid thought it 'very doubtful' (p. 60), and Lord Morris of Borth-y-Gest also thought it insufficient. Viscount Dilhorne (p. 72) and Lord Simon of Glaisdale (p. 82) felt that it did constitute an act of part performance. Lord Salmon expressed no opinion.

[28] [1974] 3 W.L.R. 56, 82.

[29] His Lordship cites *Ratten v. The Queen,* [1972] A.C. 378, 387, *per* Lord Wilberforce; and *Teper v. The Queen,* [1952] A.C. 480, 487, *per* Lord Normand.

to part performance may be summed up as follows.[30] Where the defendant to an action for specific performance pleads that the contract is unenforceable, and where the plaintiff alleges acts of part performance, the latter must prove those acts on the balance of probabilities. These acts, considered together and in the circumstances, must of themselves show that it is more likely than not that they were done in performance of and in reliance on (and not merely preparatory to) some contract with the defendant, and they must be consistent with the actual contract alleged. If they do this, the acts will give rise to an equity in the plaintiff which makes it unconscionable for the defendant to rely on the statute. The acts need not necessarily point to that term of the agreement which concerns the disposition of an interest in land; spoken words may constitute an act of part performance; and it is of no especial significance that an alleged act of part performance is the payment of money, except that in most cases such an act will be equivocal and will not satisfy the requirements above.

J. P. FIELD

[30] For a statement of those clearly settled parts of the Victorian law relating to part performance which are not touched by this note, see Voumard, *op. cit.* 89-96.