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Précis Paper

The Law of Part-Performance in Australia

A consideration of the case of *Pipikos v Trayans [2018] HCA 39*, which concerned the law of part-performance in Australia.

Discussion Includes

- **The facts in the case**
- **The law of part-performance in Australia**
- **Appearing for an appellant vs appearing for a respondent**
- **The cross-appeal**
- **The change in the appellants argument**

Précis Paper

The law of part-performance in Australia

1. In this edition of BenchTV, David Bennett QC (Barrister, 5 Wentworth Chambers) and Andrew Tokley SC (Barrister, 5 Wentworth Chambers) discuss the case of *Pipikos v Trayans [2018] HCA 39*, which concerned the law of part-performance in Australia.

<u>The facts in the case</u>

2. There were two brothers. One of them was the plaintiff, and the defendant was the wife of the other, his sister-in-law. The two brothers had done a number of real estate deals together over the years. The plaintiff came to his brother and said that he had found what looked like a good deal and suggested they buy it between the four of them, that is the two brothers and their wives. He offered to finance it all, but required that in order that the brother and his wife be able to pay him back, he would purchase a half-interest in the land on which the house they lived in stood.

3. Unbeknown to the plaintiff, the land was not owned by his brother but by his sister-in-law. When his brother told his wife about the proposed deal she immediately refused, as she was not interested in selling her home for the purposes of an investment. However the investment went ahead. In South Australia, a transfer of property has to be signed by the purchaser as well as the vendor, and all four of them including the defendant signed the transfer. This was what the primary matter was alleged to be, the act of part-performance. The other act of part-performance alleged was the payment by the plaintiff for the property in the first instance.

4. Any so-called contract between the plaintiff and the defendant had a lot of different difficulties, apart from the absence of a note or memorandum in writing. The parties weren't *ad idem* on who the parties actually were, because the plaintiff thought that he was contracting with his brother, and did not realise that the owner of the land was in fact his brother's wife. The price was discussed between the brothers, but the defendant sister-in-law was never told the price. What property was being transferred was also a question of some controversy. At one point it was going to be half the property, with a line drawn through it at the half not containing the house. At other times it was said to be a one-half interest in the land excluding the house. The former would have required a subdivision, and the latter was probably impossible because one cannot transfer a house or part of a house independently of the land. There was also no discussion as to how the mortgage on the defendant's home was going to be paid off.

5. So there was an agreement where one of the parties had said that she didn't want to have anything to do with it and where there was no clear agreement on who the parties

were, what the price would be, what the terms were or what the property actually was. It is harder to imaging a stronger case for the statue of frauds.

6. The trial judge found that there was no agreement, and then said that even if there was an agreement, there was no memorandum in writing. The plaintiff appealed to the full court of the Supreme Court of South Australia where he succeeded on the question of whether there was a contract. What the Court said was that the plaintiff had made an offer to the defendant through her husband and then she had accepted it by signing the transfer. However, the Court agreed that there was no memorandum in writing and no part-performance, because quite clearly both the payment for the investment property by the plaintiff and the signature on the transfer of the investment property by the defendant were both equally referable to a decision to invest in it together. There was nothing in either act of part-performance that had any connection to the land owned by the defendant. It was clear that there was no part-performance under the existing test.
7. The plaintiff appealed to the High Court against the dismissal of his claim, and that merely involved the part-performance issue, because he'd won on the facts in the full court of the Supreme Court of South Australia. David Bennett and Andrew Tokley put on a cross-appeal in relation to the decision of the full court. It was not a notice of contention, because it involved altering an order for costs, which technically made it a cross-appeal.
8. The question in the High Court was whether the old test of being 'unequivocally referable' to an agreement should remain. The High Court held that he didn't have to consider the cross-appeal because it was allowing the appeal, so it simply refused leave to cross-appeal.

<u>The law of part-performance in Australia</u>

9. Andrew Tokley was responding to the argument by the appellant on the question of whether the law of par- performance should change in Australia, or whether it should remain the same as it had for nearly 100 years. When the appellant was granted special leave to appeal to the High Court of Australia, it was given on the basis that it was going to be argued that the Australian law should follow the English House of Lords decision of ***Steadman v Steadman [1976] AC 536 HL***, which purported to follow the principle authority dealing with the law of performance called ***Maddison v Alderson [1883] 8 AC 467 HL (UK),*** a decision of the Earl of Selbourne, the Lord Chancellor. However, sometime after that decision the English Parliament decided to overrule it by enacting a law that said that in effect all contracts dealing with land had to be in writing, and the law of part-performance was swept away by that legislation. There was no such legislative change in Australia, and when the appellant sought special leave to appeal they argued, successfully on the application of special leave to appeal, that the High Court of Australia should revisit the question, and whether it should follow the English

line of authority of ***Steadman v Steadman*** in preference to the Australian line of authority.

10. When this got to the High Court, counsel for the appellant had changed, and It was put forward by Guy Reynolds SC for the appellant that the basis of the law of part-performance was not as in fact it had been postulated in some High Court decisions, but it was a much more subtle form of fraud being perpetrated upon a purchaser of land. This argument was ultimately rejected, but it was nevertheless an argument that had to be met in the appeal, and it was an argument that was presented late in the proceedings, which was met on the merits. It might be possible to argue that because the argument in the High Court was no longer following the line of argument upon which special leave had been granted, perhaps special leave should have been revoked. However that argument was not put but instead the appellant's argument was met on its merits.

11. Interestingly, the appellant steered clear of the decision of ***Steadman v Steadman***, so that when Andrew Tokley came to reply to the appellant's argument he chose to emphasise this fact. He took the High Court to those passages in which the House of Lords approved the earlier test in ***Maddison v Alderson*** which had been subsequently applied by High Court authority since that time. It is an area of the law which clearly divides people both in terms of the rationale as to why the law of part-performance is as it is, and also the application of the principle enunciated by the Earl of Selbourne is not easy. During the course of the argument, it became apparent to Andrew Tokley that several of the High Court judges had some concerns about both the principle and about the way in which it might be a applied, and at the end of the High Court hearing it was very difficult to know whether the High Court was in favour of the appellant or the respondent.

12. Several judgments were delivered by the various members of the High Court, however all seven found ultimately in favour of maintaining the principle enunciated by Lord Selbourne that the act of part-performance must be unequivocally referable to the contract in question and not some other contract that might have existed between the parties. For now, this puts an end to the idea that we might follow a House of Lords decision and that the law in Australia might change. Given the endorsement by seven members of the High Court, it would be very surprising if the argument was resurrected, however it may be that at some future point in time someone will find another was to consider the law of part-performance.

<u>Appearing for an appellant vs appearing for a respondent</u>

13. In the High Court it can be much easier to appear for an appellant because one knows in advance the argument that you want to put. When you are a respondent in a case, the argument can change quite dramatically during the course of the hearing, because of

the questions that come from the bench. As an advocate flexibility in terms of being able to respond to questions from the Court as well as the points being made by your opponent is very important. In this case the counsel for the respondent prepared on the basis that they would address the principle authorities that had been referred to by their opponent and tried to show how those principle authorities in fact supported the respondent's case and not the appellant's case, and when the appellant started addressing the court on the argument it appeared that the Court gave it a rather cool reception. Part of what Andrew Tokley for the respondent wanted to do was to emphasise that the Court was right in its approach to the argument that it had been receiving, by going back over some of the passages that the court had been taken to and show how they could be interpreted in different ways.

<u>The cross-appeal</u>

14. **Because there was both an a cross-appeal and an appeal to respond to, Andrew Tokley was responding to the appeal and David Bennett was going to address on the cross-appeal, which did not seem difficult in terms of legal complexity but difficult in terms of its factual complexity, and it was unclear how the court would respond to it. When the court decided that it would not hear the cross-appeal, the respondent's counsel suspected that the reason for this was that they had made up their mind that they would dismiss the appeal and therefore there was no need to hear the cross-appeal. At the same time, because David Bennett was not going to address the cross-appeal, Andrew Tokley had to be ready to go immediately on the appeal.**

15. **When you have a cross-appeal in the High Court, it is not necessary to have a separate application for special leave to appeal filed in writing, you have to address the cross-appeal by notice of cross-appeal. At the same time, when the matter is called upon in the Court you have to be prepared to argue why leave should be granted for the cross-appeal, and then proceed to argue the appeal. Sometimes the grant of leave and merits on a cross-appeal are so intertwined that you are really addressing merits of any cross-appeal at the same time as addressing the question as to why special leave should be granted for a cross-appeal.**

16. **In this case the substance of the cross-appeal was saying that it should never have gotten to an appeal as the trial judge was right in saying that there was no contract at all, verbal or written.**

<u>The change in the appellant's argument</u>

17. **The change in approach in the appellant argument may have ultimately counted against them, because the argument that could have been made was that *Steadman v Steadman* demonstrated a relaxation of the law of part-performance, and that**

relaxation was justified by the injustice that might follow if a plaintiff could not obtain relief in respect of an oral contract for the sale of land. As it turned out this point wasn't put very strongly at all during the oral argument, although it had been put quite forcefully in writing for the appeal.

18. Edelman J wrote a separate judgment on the basis of the principles of part-performance, whether the part-performance proves that there really was a contract, or that justice requires that where there has been part-performance that it be performed notwithstanding the statute of frauds, and there are the two different lines which might produce a different approach to what the test is.

19. Acts and conduct themselves can always be equivocal, and this is part of the problem and is perhaps why the test is formulated in the way that it is, as a person could easily hand over money to another person for a purpose that is unrelated to the acquisition of land; a person could occupy a person's house for a period of time and again it could be unrelated to the purchase of land, although acts of possession are regarded as exemplar part-performance. One can understand the difficulty that the Court has to grapple with in articulating a test which enables one to say that that a particular act or conduct is referable to the existence of an oral agreement which has been partly performed, and to no other agreement between the parties.

20. Andrew Tokley believes that the test is the correct one. The question is whether in the larger scheme of things it results in an injustice to a plaintiff who, having obtained an oral agreement from a vendor of land, and having performed some acts that are consistent with part-performance, is then unable to demonstrate that they have a firm contract for the sale of land to them and is thereby shut out from a remedy.

BIOGRAPHY

David Bennett AC QC

Barrister, 5 Wentworth Chambers - Sydney

David was called to the Bar in 1967 and appointed Queens Counsel in 1979. He served two five-year terms as the Solicitor-General of Australia from 1998. His current practice includes appellate, constitutional, administrative, revenue, trade practices and competition law. David has also served as President of the NSW Bar Association and President of the Australian Bar Association.

Andrew Tokley SC

Barrister, 5 Wentworth Chambers - Sydney

Andrew was admitted to practice as a solicitor in Australia in 1984 and in London in 1991. Since 1997 he has practised exclusively as a barrister. He was appointed Senior Counsel in 2012. He has appeared on many occasions in the High Court of Australia and in intermediate courts of appeal. Andrew has a broad appellate practice having appeared in appeals involving administrative law, constitutional law, contract, criminal evidence and procedure, professional indemnity, property, superannuation, torts and trust law.

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Pipikos v Trayans [2018] HCA 39

Judgment Link

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Legislation

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Other

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