PART PERFORMANCE

COLBERG v. *BRAUNBERGER'S ESTATE*

A curious feature of the judgment of the Appellate Division in *Colberg* v. *Braunberger's Estate*: *Colberg* v. *Schumacher*[1] is the authority to which it does not refer. To show why its silence is curious, it is necessary to refer briefly to a few of the many authorities on the doctrine of part performance in England and Canada.

In *Deglman* v. *Guaranty Trust Co. of Canada and Constantineau*,[2] the Supreme Court of Canada interpreted *Maddison* v. *Alderson*[3] restrictively and held that acts, in order to be sufficient to invoke the doctrine of part performance, must, in the words of Mr. Justice Rand, show a demonstrated connection between the acts of performance and the dealing with the land in question, or must, in the words quoted by Mr. Justice Cartwright, be unequivocally, and in their own nature, referable to some such agreement as that alleged, that is, to an agreement respecting the land. There is older Supreme Court authority to much the same effect in *McNeil* v. *Corbett*,[4] and there is more recent authority in the same court in *Brownscombe* v. *Public Trustee*[5] and *Thompson* v. *Guaranty Trust Co. of Canada*.[6] Something which the court has said four times has the appearance of settled policy.

In the meantime, the course of authority in England has been moving in a somewhat different direction, the most notable decision being that of the House of Lords in *Steadman* v. *Steadman*[7] in 1974. That case reinterprets *Maddison* v. *Alderson* so as to place more emphasis upon equities which require that the contract be enforced in order to avoid the Statute of Frauds being used as an instrument of fraud, and so as to place less emphasis upon the evidentiary nature of the acts of part performance. Though the precise extent of the evidentiary requirement is somewhat difficult to garner from the various speeches, it still remains. The acts of part performance themselves, and not oral evidence about them, must at least establish the probability that they were done in reliance on a contract.

Reference should also be made to an Alberta case the passage of which through the law reports, if not its passage through the courts, may also be termed curious. It is *Toombs* v. *Mueller*.[8] In that case, Mr. Justice D. C. McDonald, though without benefit of the *Steadman* case, said that "it may be . . . that the law of Canada . . . has developed a more restricted doctrine of part performance than that prevailing" in England and Australia. For the purposes of his judgment he assumed, without deciding, that that was so, but he went on to find that even the more restricted test had been satisfied in the case before him. The case next

1. (1978) 12 A.R. 183, 8 Alta. L.R. (2d) 73, (Alta. S.C. A.D.).
2. [1954] S.C.R. 725.
3. (1883) 8 A.C. 467.
4. (1908) 39 S.C.R. 608.
5. [1969] 68 W.W.R. 483.
6. (1974) 39 D.L.R. (3d) 408.
7. [1974] 2 All E.R. 977.
8. [1974] 6 W.W.R. 579 reversed [1975] 3 W.W.R. 96 and explained [1975] 5 W.W.R. 520.

appears in the Western Weekly Reports with a simple statement that the plaintiff's appeal had been allowed and that there were no written reasons.[9] On the face of it, that would suggest that the plaintiff had upon appeal achieved what the trial judge had denied him on equitable grounds, that is, specific performance. It next appears in an editor's note which is said to be explanatory but achieves an unusual degree of opacity. The note explains that the action was dealt with by the trial judge as an action for "special performance"[10] which presumably means "specific performance", whereas the plaintiff sought a declaration as to the nature of the agreement. It goes on to point out that "the trial judge found the agreement to be an agreement for sale but refused specific performance. The Court of Appeal also found it to be an agreement for sale and gave a declaration to that effect. It did not deal with the question of specific performance . . .".[11] This suggests that the plaintiff's success on appeal was to convert the trial judge's finding that there was agreement for sale into a declaration that there was an agreement for sale and to convert the trial judge's refusal of specific performance into benign inaction. The note ends with the sentence "the Court of Appeal did not disagree with the law relating to part performance as stated by the trial judge." This is no doubt comforting to know, but it leaves open the question whether the Appellate Division *agreed* with the trial judge's statement of the law (in which case his remarks presumably have the authority of the Appellate Division behind them), or whether the Appellate Division contemplated them unmoved. Since the court proceeded to make a declaration that there was an agreement for sale, the former appears more in accordance with the balance of probabilities, but there seem to be nice questions of fact and of the position of this decision in the hierarchy of precedents.

To return, however, as every commentator must ultimately return, to the case which is before us.[12]

In *Colberg* v. *Braunberger's Estate,* the plaintiff sued as purchaser under an alleged agreement for sale of land. The Appellate Division held that there was no agreement for sale, but it felt "required" to deal with the plaintiff's argument that certain of his acts were acts of part performance sufficient to take the case out of the Statute of Frauds. Since the discussion commences with the words "Although it is not necessary for this decision," it may be that the entire discussion is *obiter dictum,* but its prominence in the reasons for judgment almost gives it the status of an alternative grounds for decision, and it seems that it would normally have substantial precedential weight. It may be observed, however, that a court which has held on the totality of the evidence that there is no contract would have to go through some highly sophisticated intellectual gymnastics to find that a discrete and normally less persuasive part of the same evidence proves the existence of a contract, whether "unequivocally" or by a balance of probabilities. Fortunately the Appellate Division did not find itself required to do so.

The plaintiff claimed two acts of part performance of the alleged agreement for sale. One was the acceptance by him, at the defendant's suggestion, of an offer of a mortgage loan to provide part of the purchase

9. *Id.* [1975] 3 W.W.R. 96.
10. [1975] 5 W.W.R. 520.
11. *Id.*
12. *Cf. Fardell* v. *Potts,* Uncommon Law, 2nd ed. at 5; *per* the Master of the Rolls.

price. The judgment notes that the offer was accepted after its expiry date, and this alleged act of performance does not thereafter figure largely in the judgment, but the later references to "acts" of part performance presumably include it, as the plural would not otherwise be appropriate. The second alleged act of part performance was the delivery by the plaintiff to the defendant of the plaintiff's cheque for the balance of the purchase price.

Mr. Justice Moir, with whom the other two members of the Appellate Division concurred, referred and referred only to the reasoning of Lord Reid in *Steadman* v. *Steadman*. He found there are two tests to be satisfied before the equitable doctrine of part performance applies. One is:[13]

> . . . that there must be equities which prevent a person who seeks to rely on the statute from doing so. The type of act is usually the incurring of expenses or prejudice of the purchaser's position. Lord Reid makes it clear that where the payment of money is concerned the rule only applies where the money is not recoverable. He says that where the money has been returned this would remove any "fraud" or any equity on which the purchaser could properly rely.

Mr. Justice Moir then held that the cheque had not been negotiated and that no money had been paid so that no equity arose and there was no act of part performance.

The second test which he took from Lord Reid:[14]

> . . . is that you must look at the alleged acts of part performance and see if they prove that there must have been a contract. You must not look at the oral contract and then find alleged acts of part performance. The acts must in themselves indicate that there must have been a contract or the purchaser would never act as he did in creating the equities that now favour him.

He went on:[15]

> The acts of the appellant did not create equities at all. They appear to me to be acts which are far from prejudicial and are totally consistent with the appellant's efforts to perform the contract. The acts are equally consistent with preparation for the performance as they are with the existence of an oral contract which must be enforced because of the equities between the alleged purchaser and the alleged vendor which it is argued woud amount to equitable fraud to permit the Statute of Frauds to stand in the way. In my respectful opinion the argument in respect of part performance must fail even though we accept the appellant's argument that there was a completed contract.

One might be pardoned for thinking that acts which are "totally consistent with the appellant's efforts to perform the contract" and which are "equally consistent with preparation for performance as they are with the existence of an oral contract" might well be taken to "prove that there must have been a contract." It may be that Mr. Justice Moir meant that the acts were intended to enable the plaintiff to perform a contract when one was made, but it seems more likely that he was applying the orthodox doctrine that acts are not acts of part performance if they are not in themselves performance but are merely preliminary acts intended to put the plaintiff into a position in which he can perform.

The judgment did not refer to the Canadian cases or to the narrower test, the possibility of the existence of which had not been scouted by a court of substantially overlapping membership in *Toombs* v. *Mueller*, at least if the explanatory note of the editor of the Western Weekly Reports is

13. *Supra* at 79.
14. *Id.* at 79.
15. *Id.*

accepted. That is the curious feature mentioned at the beginning of this note. It is true that acts which did not satisfy the less restrictive English test would not satisfy the more restrictive Canadian test, and that the decision, or dictum, in the *Braunberger* case therefore did not turn on the difference between the tests; but the application of a test by an Alberta court, whether the result of its application is positive or negative, suggests that that is the test prescribed by the law of Alberta. It seems unlikely, however, that the silence of the judgment can deprive the Canadian test of its legal validity; the *Steadman* test cannot yet be regarded as the undisputed law of Alberta.

The subject should not be left without a reference to the most curious thing of all. That is the proposition of the common law discovered by "the unselfish labours of generations of British jurists"[16] that acts are acts of part performance so as to take a contract out of the Statute of Frauds only if the acts themselves prove a contract, whether the test is narrow or broad. Acceptance of the proposition places the court in a position which is difficult to rationalize. In the course of a particular trial, the plaintiff may conclusively prove facts which establish that there was an oral contract. He may conclusively prove that he performed the alleged acts of part performance in reliance upon the contract and with the intention of carrying it out. He may conclusively prove that the defendant understood that that was what the plaintiff was doing and acquiesced in it. At the end of the trial, the judge's duty, though not the reason for it, is clear. He must exclude from his mind the fact that there is a contract. He must exclude from his mind the fact that he knows why the plaintiff performed the alleged acts. He must look at the alleged acts themselves and decide whether or not they, by themselves, prove what has been richly and conclusively established by the totality of evidence. If the answer is yes, then he can let all the other evidence back into his mind. If the answer is no, all the other evidence is of no avail. It is not enough that the plaintiff has the merits; his case must pass an additional test having nothing to do with merit, proof, the reasons for a requirement of writing, justice or reason.

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16. *Chicken* v. *Ham*, Uncommon Law, 2nd ed., 71, 73 *per* the Lord Chancellor.

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