

Case Note:

MCMAHON v AMBROSE [1987] VR 816

A permanent appellate court for Victoria¹ is a tempting prospect if it means that cases involving complex legal questions may be heard by a judicial panel whose members are expert appellate judges. If Mr Justice Kirby is correct in saying that the appellate function involves a greater element of theory, principle and conceptualization of the law² than is required at the trial level, then the Full Court of Victoria with its continually changing membership is yet to achieve the degree of excellence and high efficiency worthy of its status and its individual members. The role played by judges in the development of the law is significant when the case before the court raises a controversial issue that demands judicial expertise at the appellate level. It is believed that *McMahon v Ambrose*³ is such a case.

McMahon v Ambrose was an appeal against the decision of Hampel J.⁴ The case involved the question of whether the Court had jurisdiction to grant equitable damages pursuant to s 62(3) of the *Supreme Court Act 1958*⁵ in respect of an agreement to assign a lease where the lease had expired before commencement of proceedings. Since the exercise of discretion granted by virtue of s 62(3) to award equitable damages is limited to cases where the plaintiff has a title to equitable relief,⁶ it was necessary in the circumstances to establish a right to specific performance of the agreement. The facts of the case raised some very basic questions concerning the availability of specific performance⁷ and the rule in *Walsh v Lonsdale*.⁸

In August 1980, A leased property from R for a term of three years with the intention of occupying the property. He later decided not to do so and instructed an estate agent to sub-let the property. Four weeks later M and A orally agreed to an assignment of the lease to M on the basis that M would pay R one months rental in advance and would re-imburse A for half the rental

¹ The Attorney-General has recently released a Discussion Paper which canvasses the establishment of a permanent Court of Appeal for Victoria.

² 'Permanent Appellate Courts — The Debate Continues' (1988) 4 Aust Bar Rev 51, 57.

³ [1987] VR 817.

⁴ *Rojain Pty Ltd v Ambrose; McMahon, Third Party* [1986] VR 449.

⁵ Section 62(3) *Supreme Court Act 1958* provides:

'In all cases in which the Court entertains an application for an injunction against a breach of any covenant contract or agreement or against the commission or continuance of any wrongful act or for the specific performance of any covenant contract or agreement the Court may if it thinks fit award damages to the party injured either in addition to or in substitution for such injunction or specific performance and such damages may be assessed in such manner as the Court directs.

Nothing in this paragraph shall limit or affect the jurisdiction or powers which the Court has apart from this paragraph.'

⁶ *J C Williamson Ltd v Lukey and Mulholland* (1931) 45 CLR 282, 295.

⁷ I C F Spry points out that the doctrine of specific performance has until recently, received relatively little attention. See 'Some Recent Problems in Regard to Specific Performance' in P D Finn (ed) *Essays in Equity*, (Sydney, Law Book Co 1985).

⁸ (1882) 21 ChD 9.

already incurred. M delivered two cheques to A and collected the keys. Next day he arranged for telephone installation, cleaning, removal of existing cane blinds and solar film which he agreed to replace upon vacating the property at the end of the occupancy.

In November 1980, M advised A he could not afford to proceed. He denied A's allegations that an assignment of the lease had taken place. However, when M heard that S had indicated to A an interest in leasing the property, he was prepared to resolve the matter by executing a deed of assignment from A to M and a further deed from M to S with each party making some contribution to outstanding rental payments. Draft deeds of assignment were prepared on a 'without prejudice' basis as a proposed final settlement of all the matters in dispute between A and M.⁹

In February 1981, A advised M that S had withdrawn from the transaction. A had no further contact with M until November 1981 when R issued a writ against A claiming \$37,584.38 by way of damages and interest. The lease was terminated in December 1981. A issued a third party notice against M in May 1982, claiming indemnity from M in respect of any sum and costs which R might recover against him pursuant to s 77(1)(c) of the *Property Law Act* 1958.¹⁰

The matter between R and A was settled in August 1983 by A paying R \$22,000 plus costs. The third party claim between A and M commenced in October 1983 before Hampel J who awarded A \$22,000 in equitable damages *in lieu* of specific performance. His Honour found there had been an oral contract to assign the lease and sufficient acts of part performance.¹¹ Furthermore, he believed he had jurisdiction to grant specific performance of the contract to assign the lease notwithstanding the fact that the lease itself had been terminated. Accordingly, since there had been an equitable assignment of the lease, on the basis of *Walsh v Lonsdale* A was entitled as against M to equitable damages in lieu of specific performance.

The rule in *Walsh v Lonsdale* allows a court of equity to regard a party to a specifically enforceable contract for the transfer of a legal interest as being in the same position, as between himself and the other party to the contract, as if the legal interest has actually been transferred. Each party is able to rely on the rights contemplated by the agreement as though title had passed at common law. The type of contract necessary to bring the principle into operation is a valid enforceable contract capable of specific performance.

Hampel J reasoned that since the agreement between A and M was specific-

⁹ Both at first instance and on appeal, this documentation was regarded as privileged and therefore inadmissible in the proceedings.

¹⁰ Section 77(1)(c) of the *Property Law Act* 1958 provides that in a deed of assignment of the residue of the term of a lease there shall be deemed to be included and implied a covenant to the effect that the assignee will pay the rent and to save harmless and keep the assignor indemnified from all proceedings and claims on account of any omission to pay the rent.

¹¹ Marks J criticized Hampel J's analysis of the part performance issue on the basis that although he stated the law correctly, in accordance with *Thwaites v Ryan* [1984] VR 65, he misapplied it by looking at M's acts when he should have looked at A's acts. In any case, Marks J found there were sufficient acts of part performance on different grounds.

ally enforceable, the *Walsh v Lonsdale* principle applied to allow the parties to have rights and liabilities in equity equivalent to those they would have had in law had the interest been assigned by deed in accordance with the agreement. A was therefore able to enforce the covenant implied under s 77(1)(c) of the *Property Law Act* and require M to indemnify him with respect of R's claim against A.

M's appeal to the Full Court was allowed by Murray and Marks JJ on the basis that specific performance was not available to A and thus no equitable damages could be awarded. McGarvie J dissenting, held that A had a right to specific performance which enabled the *Walsh v Lonsdale* principle to be applied in his favour. The central issue considered by all three appeal judges was the effect of the forfeiture of the lease itself prior to the commencement of proceedings. A's interest in the lease itself had been terminated and yet his remedy against M depended on the availability of specific performance to enforce an agreement to assign that lease.

Hampel J had dealt with this issue by reviewing a range of current authorities involving the Court's jurisdiction to grant specific performance of a lease for a term that has expired. Hampel J asserted that although there were difficulties in trying to reconcile some aspects of the authorities he had considered, the Court nevertheless had jurisdiction to grant specific performance of the contract to assign a lease notwithstanding the termination of the lease before the date of the hearing.¹² In his opinion, the expiration of the term of the lease was a matter, along with other matters, to be taken into account in deciding whether the the Court should exercise its discretion to grant specific performance.

Murray J looked at the same authorities and considered they were of little assistance as none of them had dealt squarely with the issue raised on the present case. He concluded the Court had no jurisdiction to award specific performance in the present case although the authorities were open to the interpretation that the Court might order specific performance in 'exceptional circumstances'.¹³ Unfortunately, beyond a finding that there were no exceptional circumstances in the present case, the meaning of the phrase was left unexplained.

Marks J also adopted a rather narrow view of the authorities, concluding that the equitable jurisdiction does not extend to empowering a Court to do 'substantial justice' or what is 'fair' while disregarding legal and equitable rights'.¹⁴ His Honour was of the opinion that the Court had no jurisdiction to order specific performance if 'full' performance of the agreement was not possible. This approach is perhaps unnecessarily rigid and would seem to remove the court's ability to assess the existence of appropriate circumstances for granting the equitable relief.

It is suggested that the prior authorities did not support any convincing generalizations as to the Court's jurisdiction relevant to the given facts. In

¹² [1986] VR 449, 461.

¹³ [1987] VR 817, 822.

¹⁴ *Id.*, 851.

each of the authorities considered, the factual context in which the availability of specific performance was considered was quite unlike the given facts. Furthermore, some of the decisions have been criticized as incorrect.¹⁵ It is interesting to note that neither Murray J nor Marks J were content to base their decision solely on the Court's lack of jurisdiction to award specific performance. Both judges in the alternative concluded that even if the Court had jurisdiction to award specific performance it should not exercise its discretion in A's favour, thereby setting aside this ground of Hampel J's decision also.¹⁶

McGarvie J, on the other hand dismissed the appeal. He agreed with Hampel J's view that no rule existed which precluded the granting of specific performance in appropriate cases when proceedings were commenced after the expiration of a lease. It was therefore theoretically possible that an order for specific performance could be granted to bring into existence a deed of assignment contemplated by the parties to a contract to assign a lease even though the lease itself had been forfeited.

However, the key to McGarvie J's decision in A's favour was that the availability of specific performance was linked to the application of the *Walsh v Lonsdale* principle. In order to establish the existence of equitable rights which would ultimately give A rights under s 77(1)(c) of the *Property Law Act*, it was necessary that the Court be prepared to grant the remedy of specific performance. The *Walsh v Lonsdale* principle does not require the Court to make an actual order for specific performance; it merely requires the Court to express its willingness to grant specific performance on the given facts.

His Honour placed heavy emphasis on the fact that the availability of specific performance was considered not for the purpose of allowing the parties to enjoy future rights, but as a means of enabling A to rely on the rights contemplated by the contract. The doctrine is retrospective in the sense that it enables the parties to rely on past rights which operate from the date the agreement was entered into; the inability of the parties to enjoy future rights was irrelevant.

His Honour takes the traditional view that the principle in *Walsh v Lonsdale* cannot be applied unless a court decided at the time of the hearing that it was appropriate to grant specific performance. McGarvie J apparently shares the view expressed by Murray J¹⁷ on this issue — namely, that it is necessary to show a present right to specific performance.¹⁸

¹⁵ For example, see Michael Albery's comments in 90 LQR 149; Meagher, Gummow and Lehane, *Equity Doctrines and Remedies* (2nd ed., Sydney, Butterworths 1984) para. 242; *cf id* para 2029.

¹⁶ Marks J *supra* at 852 and Murray J *supra* at 822 found that A had been guilty of unreasonable delay which constituted sufficient grounds for their refusal to exercise their discretion in A's favour.

¹⁷ [1987] VR 817, 820.

¹⁸ Neither Murray nor McGarvie JJ agrees with Hampel J on this issue. See [1986] VR 449, 461 where Hampel J relies on the controversial decision in *Tottenham Hotspur Football & Athletic Co Ltd v Princegrove Publishers Ltd* [1974] 1 All ER 17, where the principle in *Walsh v Lonsdale* was extended to apply where the right to specific performance would have been awarded to the plaintiff during the currency of the agreement which had come to an end before the date of the hearing. One may draw some support for this view by

In a thorough and convincing analysis, McGarvie J found there was a present right to specific performance. The Court had jurisdiction to award specific performance of the agreement to assign despite the prior determination of the lease. His Honour considered the usual discretionary bars applicable to equitable relief in general, such as clean hands, unreasonable delay and so on but was not prepared to refuse relief on any such ground. Similarly, His Honour would not accept any suggestion that performance of the contract was impossible or futile.

The nature of the performance sought was not impossible because specific performance of the contract between A and M would require the execution of a deed of assignment by M and it was still possible for M to pick up a pen and sign a deed. The making of an order for specific performance would not be futile.¹⁹ In fact the proposed order was the only means by which A could enforce the rights he claimed. Specific performance was needed because an award of damages was not a sufficient remedy. His Honour acknowledged that the present case was not one of the more common situations, which require the enforcement of other interests such as enjoyment of the term of the lease, where damages might offer a complete remedy to compensate the plaintiff.

It is suggested that McGarvie J's reasoning is more plausible than that of the majority. His Honour's decision is based on a traditional view of *Walsh v Lonsdale*. He has not introduced or developed any novel concept in order to find that A had a present right to specific performance. He simply recognizes that A did not require specific performance of the lease that had been terminated prior to the commencement of the proceedings but rather specific performance of the contract to assign a lease which had been forfeited due to M's breach of contract. Full performance of the contract was impossible, but the substance of A's claim did not require full performance. McGarvie J avoids using the phrase 'in exceptional circumstances' adopted and left unexplained by Murray J who had conceded the possibility that despite the early termination of the lease the Court may still have jurisdiction to award specific performance.

Both Marks and Murray JJ took the view that even if they had jurisdiction to award specific performance, they would not exercise their discretion in A's favour due to his unreasonable delay and his inability to perform the contract. It is suggested that McGarvie J's alternative view regarding the exercise of discretion in A's favour is appropriate as it brings his decision to its logical

pointing to an analogous conceptual situation where the vendor, after execution of a contract of sale, is treated as trustee for the purchaser prior to completion of the transaction. In *Bunny Industries v F S W Enterprises Pty Ltd* [1982] Qd R 712 the defendant vendor had resold the subject property to a subsequent purchaser in breach of the contract between himself and the plaintiff first purchaser and the court expressed the view (*obiter*) that the relevant date to consider for the availability of specific performance was whether it was available up to the date of the alleged breach of contract.

¹⁹ See [1986] VR 499, 455 where Hampel J expresses the view that recent cases dealing with contracts for the creation of transient and terminable interests, such as a lease, showed that there was a trend away from allowing absolute futility of performance to operate as a defence to an action for specific performance.

conclusion. Once the availability of specific performance was acknowledged there were no additional factors relevant to deter the Court from exercising its discretion. Recognition of A's right to specific performance involved a recognition that M was responsible for A's liability to R — and there was no basis for declining to do so for discretionary reasons.

The plaintiff's remedy in this case rested entirely on the availability of specific performance of a contract to assign a transient interest, namely a lease. The difficulty lay in the fact that the transient interest had been terminated before the plaintiff's case was heard. The resolution required a rationalization of the court's jurisdiction to award specific performance in these circumstances. The Full Court did not have the benefit of any previous decision of a Commonwealth court which was either directly in point or even related to the issue raised. It is hoped that should the issue arise for decision by a higher court the approach taken by McGarvie J in his strong dissent would be preferred and adopted.

Author's Note:

Since the date of writing, the High Court has handed down its decision in *Chan v Cresdon Pty Ltd.*²⁰ The majority (Mason CJ, Brennan, Deane and McHugh JJ) held that the guarantors of a registrable lease which had not been registered under s 43 of the *Real Property Act* 1861 (Qld) were not liable under the guarantee, even though as between the lessor and lessee an equitable lease arose out of the registrable lease. The Court rejected the argument that the equitable lease was as good as legal lease and confirmed that the existence of equitable lease rested on the specific enforceability of the agreement. In discussing the nature of the equitable lease, the Court noted that 'in appropriate circumstances the lessee could secure an order in the nature of specific performance requiring the lessor to register, or procure registration of, the lease'²¹ but that this would not establish the liability of the guarantors which depended on the existence of a legal lease at the time of litigation. In reaching this conclusion, the court discussed and adopted the theory that in such circumstances there has always been a jurisdiction to backdate specific performance for the purpose of protecting rights acquired by the parties under the contract and this would necessarily imply the protection of such rights which existed at the commencement date of the contract. It is suggested that this approach endorses the reasoning of McGarvie J in *McMahon v Ambrose*.

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²⁰ (1989) 64 ALJR 111.

²¹ *Id.*, 113.

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