Public Trustee as Administrator of the Estate of Williams (deceased) v Wadley - everything new is old again!

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> 'The very rapid development which has taken place in equitable estoppel in recent years has thrown into focus the viability and indeed the continued existence of the old, and much revered, equitable doctrine of part performance.'[1]

The recent decision of the Full Court of the Tasmanian Supreme Court in *Public Trustee as Administrator of the Estate of Williams v Wadley*,[2] is important for the very reason that it continues to demonstrate this rapid development of equitable estoppel; but it also indicates that estoppel (the legal principle on which the decision was made) may contain much the same problematical issues as caused difficulties with part performance. The case, which involved the all too familiar scenario[3] of one family member providing assistance to another on the basis that they would be considered favourably in the latter's will, raises a number of questions concerning the continuing importance (if any) of part performance and the interrelationship of this equitable doctrine with promissory estoppel. In this case, the daughter looked after her father for a number of years with an ex-

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1 Mulholland R, 'The Equitable Doctrines of Estoppel and Part Performance', (1989) 7 *Otago Law Review* 69 at p 69. It should be noted that s 36(1) of the *Conveyancing Law and Property Act* 1884 provides that 'No action may be brought upon any contract for the sale or other disposition of land, or any interest in land, unless the 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 Unreported 71/1997. The case is now reported in (1997) 8 Tas R 35.

3 Scenarios typical to well known part performance cases such *as Regent v Millett* (1976) 10 ALR 496, *Steadman v Steadman* [1976] AC 536, *Ogilvie v Ryan* [1976] 2 NSWLR 504; *Wakeham v Mackenzie* [1968] 1 WLR 1175. Interestingly these cases were based on part performance or a constructive trust; *Public Trustee as Administrator of the Estate of Williams v Wadley* 71/1997 was based on estoppel. As an argument on the constructive trust did not succeed, part performance was not argued.

pectation that the house would be hers upon his death. The father died intestate. The dispute before the court was between the Public Trustee (as administrator of the deceased's estate) and the daughter.

In particular the case demonstrates the idea that the law has moved from a theory of obligations based on notions of freedom of contract and the paramountcy of the bargain (the equitable doctrine of part performance being an exception to the general principle - the exception being formulated on the idea that the requirement in Statute that a contract be in writing cannot be used as an instrument of fraud),[4] to a broad based notion that the law will act to compensate the detriment incurred as a result of the reliance on a promise.[5] In essence, the development sees the courts evolving an extended theory of legal obligations, an extension which sees estoppel stepping into, and going beyond, the territory traditionally covered by part performance. *Public Trustee v Wadley* continues this extension.[6]

Furthermore the emphasis that the case places upon estoppel and the fact that part performance is ignored indicates that the role of this once venerable doctrine[7] has been largely usurped by estoppel. What is important in this development is that the Tasmanian Supreme Court may have inadvertently introduced the same difficulties into the application of estoppel in this type of factual scenario as existed in part performance.

The purpose of this casenote is to examine the decision of *Public Trustee v Wadley* against a background of what the law had been on part performance, and the problems that estoppel may bring to this area.

4 'The doctrine of part performance was developed by the Court of Chancery, as an exception to the *Statute of Frauds* 1677, which provided that certain contracts were unenforceable unless evidenced in writing. A successful plea of part performance would deprive a party of the right to rely upon the defence that the contract did not comply with the statute.' Mulholland R, 'The Equitable Doctrines of Estoppel and Part Performance', (1989) 7 *Otago Law Review* 69, p 70. See also the comments in *Steadman v Steadman* [1976] AC 536 at pp 540, 551.

5 As stated in the High Court decision of *Walton Stores (Interstate) Ltd v Maher* (1988) 62 ALJR 110 at p 125: 'The object of the equity is not to compel the party bound to fulfil the assumption or expectation; it is to avoid the detriment... If this object is kept steadily in mind the concern that a general application of the principle of equitable estoppel would make non-contractual promises enforceable as contractual promises can be allayed.' See also the comments by Mulholland R, note 4 above, pp 88-89.

6 See the comments by Mulholland R, note 4 above, p 69.

7 The earliest reported case on estoppel that I am aware of is *Butcher v Stapley* (1686) 1 Vern 363; 23 ER 524.

Facts of *Public Trustee as Administrator of the Estate of Williams (Deceased) v Wadley*

Ms Wadley was one of two children of the deceased. Following her parents' divorce she had little contact with her father until 1971. From this year until his death in 1992, she had regular contact. The deceased purchased land and in 1979 built a modest house upon it. From 1979 until the death of the father, Ms Wadley performed various domestic services for him such as cleaning of windows and cupboards, cooking, cleaning of bathroom and toilet, washing and purchasing items such as doonas, ornaments and paintings. It was alleged that these services were provided for approximately 4 hours per week between 1980 and 1986, from 1987 to 1991 a total of six hours per week and three hours per week from mid 1991 to mid 1992. Throughout this period there were a number of statements by the father of Ms Wadley that when he died the house would be hers.[8] She alleged that these statements led her to assume, or to have an expectation, that she would be provided with the house upon the death of her father. Her father died intestate and Ms Wadley brought an action against the Public Trustee as Administrator of her deceased father's estate. She claimed to be beneficially entitled to an interest in the deceased's house and land upon the basis of promissory estoppel. An alternative claim that the property was held in trust for her was rejected by the trial judge and not pursued on appeal. The trial judge awarded her a one-half interest in the house and land by way of equitable charge or as equitable compensation.

The Administrator of the deceased's estate appealed on the grounds that there was no real detriment suffered by Wadley, that the award was manifestly excessive and that reasons for the calculation of compensation were not provided.

The Full Court of the Tasmanian Supreme Court, in a majority decision upheld the Public Trustees appeal and varied the amount of compensation payable.[9] The elements of the judgment that are of interest to the topic under discussion were; first, that equitable estoppel was the principal ground of argument,[10] and second, that the three

8 See the analysis of the evidence, Unreported 71/1997 at 4, judgement of Crawford J.

9 The judgement of the trial judge was varied by substituting the amount of $15000 for $34250.

10 As the reporter of the judgment and having access to the appeal submissions and the notes from the minute book, I am certain that there was no evidence that part performance was raised.

judges all differed in their view as to the appropriate amount to be awarded.

Before reviewing this aspect of the judgment, it is necessary to briefly outline the doctrine of part performance.

The Law of Part Performance

Taking Australian cases on their own, the law relating to equitable part performance in Australia is well settled.[11] The difficulty can arise where the persuasive authority of the English House of Lords in *Steadman v Steadman*[12] is considered.[13]

Conditions necessary for the doctrine of part performance

The first requirement is that the act relied on to establish the contract must at least be permitted by the contract. It does not appear to be the case that the act must be required or authorized by the agreement.[14] Secondly the Australian position appears to be the that the act must be unequivocally and by its own nature referable to some such agreement as that alleged.[15] The third requirement is that the act of part performance must involve a change of position on the part of the person seeking to rely on part performance, and that the plaintiff would be unfairly prejudiced if the other party was entitled to rely on the absence of the written evidence.[16]

11 See the comments by Mackie K, 'Part Performance of Contracts - Recent Australian Developments', (1987) 9 *UTLR* 61 at p 61: 'Prior to the decision of the House of Lords in *Steadman v Steadman* the law relating to equitable part performance in Australia was well settled. In *McBride v Sandland* and *Cooney v Burns* the High Court of Australia endorsed the principles relating to the doctrine established in *Maddison v Alderson,* and in particular, held that the acts relied on must be unequivocally and of their own nature referable to some such agreement as that alleged.'

12 [1976] AC 536.

13 It should be noted that by virtue of the *Law of Property (Miscellaneous) Provisions Act* 1989 (UK) the equitable doctrine of part performance was abolished. In essence the law was simplified so that an agreement for the sale of land must be in writing, if not, there is no contract. See the comments on the English position by Davis C, 'Estoppel: An Adequate Substitute for Part Performance?' (1993) 13 *Oxford Journal of Legal Studies* 99.

14 *Regent v Millett* (1976) 133 CLR 679.

15 *McBride v Sandland* (1918) 25 CLR 69; *Cooney v Burns* (1922) 30 CLR 216. Arguably the English position on this point is different: see *Steadman v Steadman* [1976] AC 536.

16 *Francis v Francis* [1952] VLR 321 at 340.

Examples of the types of activities that have been held to satisfy part performance include payment of money under special circumstances,[17] making significant alterations or improvements to the land,[18] taking a mortgage over the land together with authority to complete it[19] and taking possession.[20] Activities which have been held to be insufficient include a daughter returning home to look after her parents,[21] a housekeeper staying on without receiving payment,[22] and the obtaining of a survey over the land together with an application for planning permission.[23]

While the particular instances from the cases may be illustrative of what has constituted part performance, the divergence between Australia and England may lie in the issue of the sufficiency of the acts relied upon, as well as the nature of the acts required to establish part performance.

Arguably the more accepted approach in Australia is to:

> 'first seek to find such a performance as must imply a contract, and then proceed to ascertain the general nature of such contract as the performance implies, and then to compare that result, if one gets to it, with the general nature of the contract pleaded.'[24]

As stated by the High Court in *JC Williamson Ltd v Lukey and Mulholland*:[25]

> '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.'[26]

By contrast Glass JA in *Millett v Regent*,[27] considered that one first implies the general nature of the contract and then determine

17 *Steadman v Steadman* [1976] AC 536; *Cohen v Nessdale* [1981] 3 ALL ER 118.

18 *Broughton v Snook* [1938] Ch 505.

19 *ANZ Banking Group Ltd v Widin* (1990) 102 ALR 289.

20 *Regent v Millett* (1976) 133 CLR 679.

21 *Re Gonin* [1979] Ch 16.

22 *Maddison v Alderson* (1883) 8 App Cas 467. Contrast the stronger set of facts evident in *Ogilvie v Ryan* [1976] 2 NSWLR 504 where not only was the female party the housekeeper, but they lived together as man and wife over a number of years. It was held to be insufficient to establish part performance, but a constructive trust argument in favour of the surviving woman succeeded.

23 *New Hart Builders Ltd v Brindley* [1975] Ch 342.

24 Fullagar J in *Thwaites v Ryan* [1984] VR 65 at 77.

25 (1931) 45 CLR 282.

26 (1931) 45 CLR 282 at 300 per Dixon J.

27 [1975] 1 NSWLR 62 at 73.

whether the acts point unequivocally to it.[28] An example of the application of the problems caused by this issue can be seen by examining the facts of the House of Lords decision in *Steadman v Steadman*.[29] In this case, the parties marriage had been dissolved and they were in the process of negotiating a property settlement. The two parties agreed that the matrimonial home would be transferred to the husband and that maintenance orders would be discharged with the exception of £100 which was to be paid into court. The husband paid this amount into court. Subsequently, the wife refused to sign a transfer, considering that a higher price for the house would be obtained on the open market. If one was to search for such acts as might imply a contract the husband would have been unsuccessful. His activities of paying the money into court and preparing a transfer were directly relevant to the property settlement and only indirectly related to the land in dispute. Certainly the acts were equivocal in terms of establishing a contract for the sale of land. Despite this the husband was successful in establishing part performance - it was only necessary that the acts in question:

> 'be such as must be referred to some contract, and may be referred to the alleged one; that they prove the existence of some contract, and are consistent with the contract alleged.'[30]

If one turns to a reliance based doctrine formulated around estoppel, the issue becomes one, not of the sufficiency of the acts, but whether there is detriment which is not trivial (arguably the flip side of the same coin).[31] Applying the principles of estoppel to the scenario of *Steadman v Steadman*,[32] would the wife have raised an expectation in

28 This approach is somewhat more akin to the more liberal view of referability established in *Steadman v Steadman* [1976] AC 536.

29 [1976] AC 536.

30 *Kingswood Estate Co Ltd v Anderson* [1963] 2 QB 169 at 189. It should also be noted that this decision has been described as a case of estoppel: see the comments by Mulholland R, 'The Equitable Doctrines of Estoppel and Part Performance', (1989) 7 *Otago Law Review* 69 at p 82. Contrast the comments of Wade H, 'Part Performance: Back to Square One', (1974) 90 *LQR* 433, Mason A, 'Declarations, Injunctions and Constructive Trusts: Divergent Developments in England and Australia', (1980) 11 *UQLJ* 121. On part performance generally see Richardson N, 'The Doctrine of Part Performance', (1994) *NZLJ* 396; Harris W, 'The Doctrine of Part Performance and the Constructive Trust', (1993) 11 *ABR* 27; Mulholland R, 'Part Performance: back to classical theory', (1993) *NZLJ* 109; Mackie K, 'Part Performance of Contracts - Recent Australian Developments', (1987) 9 *UTLR* 61; PA Ridge, 'The Equitable Doctrines of Part Performance and Proprietary Estoppel' (1988) 16 *MULR* 725.

31 See *Public Trustee as Administrator of the Estate of Williams (Deceased) v Wadley* Unreported 71/1997 at 2 per Crawford J; at 7 per Zeeman J.

32 [1976] AC 536.

the husband that the land would be transferred pursuant to the property agreement? The answer to be this must be yes. Furthermore her resiling from this agreement must be seen as, and was in fact deemed to be unconscionable.[33] Arguably the judgments draw together the central tenets of the equitable doctrines of part performance and estoppel (if not of all equitable maxims) - that being a desire to remedy unjust conduct.

The second issue with the doctrine of part performance is the nature of the acts required to establish part performance. To be considered as acts of part performance, need they be necessarily required by the contract, or is it sufficient if they are performed in consequence of the existence of a contract? This issue has not yet been decided in Australia.[34] However, if one accepts that the doctrine of part performance is a device to ameliorate the harshness of requiring all land contracts to be in writing, then in principle the answer must be that acts done in consequence of the contract, though not expressly required or authorized, are acts of part performance.[35] The central question to be resolved must be, do the acts prove the existence of the contract, thus eliminating the need for written evidence?

As can be seen from this brief discussion of the doctrine of part performance two issues are outstanding - what are sufficient acts of part performance and what is the nature of the acts required to establish the doctrine? In terms of estoppel, has detriment been suffered as a result of reliance on a promise, and can any acts performed for some other reason (such as love and affection) but arguably consistent with the expectation be compensated?[36]

It is these same issues that arose in the context of the appropriate amount of monetary compensation to be awarded to Ms Wadley.

33 'She heard the terms of the agreement announced. She made no objection. She received £100 from the respondent which she has retained and then, in the hope no doubt that she would get more than £1500 for her share of the house, she gave, more than two months later ... her first intimation of her intention to resile from the agreement. I think that to allow her to do so ... would indeed be to allow [the statute] to be an *instrument of injustice*.' (emphasis added) *Steadman v Steadman* [1976] AC 536 at 555 per Viscount Dilhorne.

34 Contrast the judgments of Hutley JA and Glass JA in the New South Wales Court of Appeal decision in *Millett v Regent* [1975] 2 NSWLR 62; On appeal to the High Court this was not resolved *Regent v Millett* (1976) 10 ALR 496. See also the comments by Mackie K, 'Part Performance of Contracts - Recent Australian Developments', (1987) 9 *UTLR* at pp 65-66.

35 See the comments by Mackie K, id, at p 67.

36 It should be noted that the remedy for a breach of part performance is specific performance of the contract or damages in lieu. See Davis C, note 14 above, p 102.

What was the extent to which acts done, out of love and affection for her father should be compensated? Arguably the judges of the Tasmanian Supreme Court were not consistent on this issue.

Estoppel and *Public Trustee as Administrator of the Estate of Williams (deceased) v Wadley*

The Full Court of the Tasmanian Supreme Court resolved the matter on the basis of estoppel rather than part performance.[37] All three judges agreed that what was demanded was that Ms Wadley be compensated with the minimum equity required to do justice. Ms Wadley had relied on the statements made by her father and as a consequence of this expectation performed general house-keeping duties to her detriment. To this end it was a classic estoppel scenario. Despite the scenario being customary, unfortunately the approach of the judges was less so.

Wright J (in dissent)

In dissent, Wright J upheld the view of the trial judge. The amount of compensation to be awarded was not to be assessed as though it were a claim by an unpaid employee.

> 'Clearly enough, the relief to be granted to the respondent should not extend beyond compensating her for the detriment which she has sustained but, in my opinion, that does not mean that compensation should be assessed as though this was a quantum meriut claim by an unpaid employee seeking recompense for services rendered.'[38]

The majority judgments (Crawford and Zeeman JJ)

The majority judges adopted a different approach. Crawford J, having decided that Wadley was entitled to some level of compensation, stated that:

37 To this end they implicitly support the comments of Hill J sitting in the Federal Court of Appeal in *ANZ Banking Group Ltd v Widin* (1990) 102 ALR 289 at 305; a case which concentrated upon part performance but nevertheless concluded with the statement: 'While the bank does not seek to rest its case on estoppel, the discussion of the principles upon which the present law of estoppel is based by some of the members of the High Court in *The Commonwealth of Australia v Verwayen* ... lends further support to the view that the doctrine of part performance should be applied [to the facts of the present case].'

38 Unreported 71/1997, per Wright J at 1.

> 'The doctrine of equitable estoppel permits the court to do what is required, but no more, to prevent a person who has relied upon an assumption to a present, past or future state of affairs, which assumption the party estopped has induced him or her to hold, from suffering detriment in reliance upon the assumption as a result of the denial of its correctness.'[39]

Having made this statement of principle his honour considered that there was one aspect of his judgment that was different from that of Zeeman J, the other majority judge. In his Honour's view the:

> 'relevant detriment ought not to have been assessed having regard to the work the respondent performed for the deceased which she would have done for her father in any event ought not in equity or good conscience be considered as part of the detriment suffered by her consequent upon the failure of the deceased to leave her the property. The court is only obliged to determine what was the minimum equity to do justice to the respondent, the minimum relief necessary to do justice between her and the deceased.'[40]

By contrast to this judgment, Zeeman J considered that it was of no relevance that out of natural love and affection the daughter may have completed some general house-keeping tasks for her father, irrespective of any promise being made. Ms Wadley was under no obligation to do anything and the fact that some services may have been completed even if there was no promise was not something of which the court should be aware.[41]

Conclusion

This dichotomy between the decisions of the judges in the majority in *Public Trustee as Administrator of the Estate of Williams (deceased) v*

39 Unreported 71/1997, per Crawford J at 6.

40 Unreported 71/1997, per Crawford J at 7.

41 See the comments by Zeeman J at Unreported 71/1997 at 7. 'The appellant's submission was to the effect that the detriment ought to be limited to such work which the respondent would not have done had she not been given the expectation that she would inherit the property. I do not accept that as being the appropriate approach. It may well have been that had the deceased not made any promise that the respondent, out of natural love and affection for him, would have done some work. However the respondent was under no obligation to do anything at the time that the promise was made. The promise was that, if she continued to do what she had been doing, she would inherit the property. She continued to do it until ill health prevented it. Thereafter she provided services on a reduced scale but that reduction did not make the promise inoperative. The fact that the respondent might well have performed some of her services even if no promise been (sic) made is of no relevance.'

Wadley[42], as well as the differences exemplified in the approaches of the minority and majority, indicates that those problematic issues that existed within part performance may bedevil the award of compensation in equitable estoppel. The problem of what will constitute sufficient acts of part performance correlates to the question of what is material detriment in estoppel. In part performance the question was raised as to whether the acts needed to be unequivocally referable to the contract alleged,[43] or, in the terms of the more liberal test, referable to some such contract.[44] In estoppel we will ask was the detriment more than trivial.

The second aspect of part performance concerns the nature of the acts of part performance. Must they be authorized or required by the contract[45] or can they just be done as a consequence of the contract?[46] Similarly with estoppel should there be compensation for that detriment suffered solely as a result of the reliance on the promise[47] or does equity permit recovery for all acts done, irrespective of whether they would have been performed had the expectation not been created? In the end result does equitable estoppel in any way differ from the equitable doctrine of part performance? Have we just replaced a venerable equitable institution[48] with the flagship of modern Chancery jurisdiction, estoppel?[49] One suspects so. In the end perhaps there is a lot to be said in support of the approach of Wright J in *Public Trustee as Administrator of the Estate of Williams v Wadley*:

> 'It has been generally acknowledged that in some cases a proper result will only be achieved by compelling the party acting inequitably to make

42 Unreported 71/1997.

43 *Maddison v Alderson* (1883) 8 App Cas 467 at p 479: '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.'

44 *Kingswood Estate Co Ltd v Anderson* [1963] 2 QB 169; *Steadman v Steadman* [1976] AC 536.

45 *Millett v Regent* [1975] 1 NSWLR 62 at 71 per Glass JA.

46 *Millett v Regent*, Id, at 65-68 per Hutley JA.

47 *Public Trustee as Administrator of the Estate of Williams (deceased) v Wadley* 71/1997 per Crawford J.

48 Though it is recognised that one significant advantage of estoppel over part performance is the flexibility of the remedies available. See the comments by Davis C, note 14 above, p 115. In response to this it could be suggested that the courts should adopt the most appropriate remedy once a breach has been established. See generally Rickett C and Gardner R, 'Compensating for loss in equity: The evolution of a remedy?' (1994) 24 *VUWLR* 19.

49 Though arguably estoppel has a longer history than part performance. See the comments by Mulholland, note 4 above, p 73.

> good the broken promise or representation. It seems to me that this acknowledgment involves acceptance of the propositions (a) that in individual cases there may be differing views as to the method by which a just outcome is achieved; and (b) that in cases where an award of compensation is considered appropriate such sum is not necessarily assessed by reference to some predetermined or mathematical yardstick.'[50]

We need to ask what we are attempting to achieve by permitting these doctrines, be it part performance or estoppel, to override the clear terms of s 36 of the *Conveyancing Law and Property Act* 1884.[51] Ultimately it must be to prevent injustice. The equitable doctrines were introduced because it is fraudulent (in the terms of part performance) or unconscionable (in the terms of estoppel) to rely on your strict legal rights. Given that unconscionability is the fundamental tenet of equity jurisdiction, recourse to set formulas or guidelines, whilst providing some level of certainty, may not always lead to a just outcome. Perhaps it is time to dispense with a discussion as to the acts required for part performance, or to ask what is the level of detriment suffered by the individual relying on the promise. In the end the successful application of the doctrines of part performance or estoppel lead to the same thing - the raising of an equity in favor of the plaintiff.[52] Once this is accepted recourse to a set formula to provide a just outcome is inappropriate.[53]

50 Unreported 71/1997 at 1.

51 See note 2 above, where s 36 is noted.

52 However it is conceded that the equitable doctrines of part performance and estoppel are still conceptually different in terms of remedies. Part performance leads to a remedy of specific performance (*Brittain v Rossiter* (1879) 11 QBD 123; *Brough v Nettleton* [1921] 2 Ch 25) whereas estoppel is not so limited (*Plimmer v Mayor etc. of Wellington* (1884) 9 App Cas 699).

53 Though it is recognised that there is a downside to flexible remedies - the difficulty of advising clients.