IN THE HIGH COURT OF AUSTRALIA

ADELAIDE REGISTRY **No. A30 of 2017**

BETWEEN: **LEON PIPIKOS**

Appellant

and

VELIKA TRAYANS

Respondent

RESPONDENT'S OUTLINE OF ORAL ARGUMENT ON THE CROSS-APPEAL AND THE APPEAL

Part I:

This outline is in a form suitable for publication on the Internet.

Part II: Outline of argument

Preliminary

1. The respondent seeks leave to cross-appeal. This does not appear to be opposed. The Respondent proposes, if leave is given, to deal with the cross-appeal first.

2. In substance the cross-appeal is a notice of contention but under the Rules it is a cross-appeal because it involves a minor alteration to an order for costs.

3. It goes to the root of the litigation because, if there is no contract, the arguments about part performance fall away. If it succeeds, clearly there is no basis for limiting the costs order in the Respondent's favour to 85%. (AB524).

4. The trial judge found that there was no contract and that, in any event, it was too uncertain to be enforceable (AB472 [104]). The Full Court found a contract (AB 491[6], 512[80]).

Argument on cross-appeal

5. The contract found by the Chief Justice was a contract initially made between Leon and George in the presence of Sophie which Velika is said to have accepted by signing a transfer of the Penfield Road land as a purchaser after she was told about the agreement. See AB 491

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[6]; AB512 [80]. He did not upset the finding of the trial judge (contrary to the evidence of Leon and Sophie) that Velika was not present at the initial discussions (AB490[4]).

6. The passage at AB491 [6] suffers from the further problem that the Chief Justice treats Velika's admission (based on what she was told by George) as proving the primary fact which was not otherwise within her knowledge. An admission only has evidentiary significance if one knows the fact admitted of one's own knowledge. The Respondent accepts that the admission proves against her the fact that she was told certain things; it does not establish the truth of those things. See *Surujpaul v R* [1958] 1WLR 1050; *R v Hulbert* (1979) 68 Cr App R 343; Phipson 13ed [19-17].

10 7. This alleged contract has a number of problems. The respondent will make seven points orally.

8. The Chief Justice sought to support his findings by a new finding of fact that "it is most improbable that Leon would have agreed to George and Velika taking a half-interest in the Penfield Road property without securing an agreement that he would receive *in return* (our italics) a half-interest in the Clark Road property." This finding (adopted in [17] of the Appellant's Reply) coloured much of His Honour's findings of fact. It is wrong. In addition the respondent will make eight points orally.

9. The evidence is confusing about what exactly was sold. The respondent will make seven points orally.

20 The 2009 Acknowledgement

10. The 2009 Acknowledgment postdates the relevant events by 5 years. In all the circumstances it is of little evidentiary value. It is a weak admission not suggested to create rights by itself.

11. Both the trial judge and the Full Court found that it did not qualify as a "note or memorandum in writing" of any agreement. Although appeal ground 2.2 challenges this (AB535), the submissions of the Appellant do not raise the issue and the Respondent treats it as abandoned.

Submissions on the appeal

12. The appellant makes three principal submissions on his appeal. First, this court should
30 depart from previous High Court authority and instead follow the approach taken by the House of Lords in *Steadman v Steadman* [1976] AC 536 (Appellant's Reply [4]-[9]). Second, that the true basis of the doctrine is the fraud principle: *Caton v Caton* and it is not a

principle of proof (Appl's Supp Sub [3]). Thirdly, the acts of part performance relied upon satisfied the relevant test (AS [74], AR [10]-[11]).

13. The appellant's principal submissions should be rejected for the reasons set out in the respondent's written submissions (Respondent's Submission [9]-[33]) and below.

14. The distinction the appellant seeks to draw (*fraud vs proof*) does not hitherto appear to have been considered by any authority, textbook or academic writing, as a relevant distinction.

15. The jurisdiction of the courts of equity was enlivened when the statute could be used to effectuate a fraud: *Caton v Caton* (1865) LR 1 Ch. App 137 at 147; approved *Regent v Millet* (1976) 133 CLR 679 at 682. The proving of acts of part performance is necessary to establish an equity: *J C Williamson Ltd v Lukey and Mulholland* (1931) 45 CLR 282 at 300.

16. The appellant's second principal submission is not supported when one considers the speeches in *Steadman v Steadman*. A majority of the Law Lords purported to apply the test stated by the Earl of Selborne LC in *Maddison v Alderson* (1883) 8 App. Cas. 467.

17. The appellant must persuade this court to depart from previous authorities, including *Regent v Millet*, which approved the test stated by the Earl of Selborne LC (133 CLR at 683). The appellant cannot satisfy the requirements in *John v FCT* (1989) 166 CLR 417.

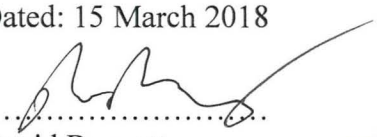
18. The authorities of *Maddison v Alderson* and *McBride v Sandland* (1918) 25 CLR 69 have stood for over 134 and 100 years respectively; *Steadman v Steadman* has not been followed in Australia (AB519:FN23). Nor is there sufficient reason to do so. If there is to be a change, it should be a legislative change - as occurred in the United Kingdom.

19. The acts of part performance relied upon by the appellant are not sufficient (RS[29]-[33]).

Remedies

20. The respondent relies upon her written submissions at [68]-[73]. The appellant has consented to the sale of the Clark Road property (AB493[21]; RS[71]), his monetary entitlement (if any) may be less than the offer filed in the court below. If so, the appellant would be required to pay the respondent's costs from 21 days after the filed offer.

Dated: 15 March 2018



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