IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

No. A30 of 2017

BETWEEN:

LEON PIPIKOS
Appellant

and

10 **VELIKA TRAYANS**
Respondent

RESPONDENT'S SUBMISSIONS

Part I: Certification

1. The respondent certifies that this submission is in a form suitable for publication on the internet.

20 ### Part II: Statement of issues (on the appeal and cross-appeal)

2. Was the court below in error in finding that there was an agreement between the appellant and the respondent?

3. Were there acts of part performance by the appellant sufficient to enable this court to decree specific performance of the agreement?

4. If not, is the appellant entitled to the remedy of a constructive trust?

5. Was the court below in error in reducing the respondent's costs of the appeal?

Part III: Section 78B notices

6. It is certified that neither the appeal nor cross-appeal raise any matters requiring the giving of a Notice pursuant to s.78B of the *Judiciary Act* 1903.

30 ### Part IV: Factual background

7. The respondent does not contest the facts recited at paragraphs [9] to [12], [14], [15], [18], [19], and [21] to [25] of the appellant's submissions. The contentious matters

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raised in paragraphs [13], [16], [17], [20], [26] and [27] to [31] are the subject of the Cross-Appeal submissions at Part VII below.

Part V: Applicable statutory provisions

8. The appellant's statement of the applicable statutory provisions is correct.

Part VI: The respondent's argument in answer to the appellant's argument

9. The appellant's submissions on the law of part performance should not be accepted for the reasons set out below.

10. The appellant's written submissions in paragraphs 32-48, briefly survey the consideration by this court of the law of part performance since *Maddison v Alderson*[1] in four decisions: *McBride v Sandland*[2], *Cooney v Burns*[3], *J.C. Williamson Ltd v Lukey and Mulholland*[4] and *Regent v Millett*[5].

11. The appellant in paragraph 49 then makes six "comments" about the case law. With respect, the comments are not correct. The following paragraphs address each of the six comments in turn.

12. First, it is not correct to assert that there is no decision of this court in which a majority has laid down an authoritative and binding test of part performance. In *Regent v Millett*[6], Gibbs J (as his Honour then was) stated (at p.683):

> "The argument advanced on behalf of the appellants, when reduced to its essentials, depends upon two propositions. First, it was said that the acts relied on were not unequivocally referable to some such contract as that alleged by the respondents. Indeed, it was submitted that a narrower test should be adopted and that it was necessary to establish "such a performance as must necessarily imply the existence of the contract" - to use the words of Lord O'Hagan in *Maddison v. Alderson* (1888) 8 App Cas 467, at p 483. However, the test suggested by the Earl of Selborne L.C. in that case (1888) 8 App Cas, at p 479, that the acts relied upon as part performance "must be unequivocally, and in their own nature, referable to some such agreement as that alleged", **has been consistently accepted as a correct statement of the law**. It is enough that the acts are unequivocally and in their own nature referable to some contract of the general nature of that alleged (see McBride v. Sandland (1918) 25 CLR 69, at p 78)." (**bold added**)

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[1] (1883) 8 App. Cas. 467

[2] (1918) 25 CLR 69.

[3] (1922) 30 CLR 216.

[4] (1931) 45 CLR 282.

[5] (1976) 133 CLR 679.

[6] (1976) 133 CLR 679.

13. Stephen, Mason, Jacobs and Murphy JJ each agreed with the reasons given by Gibbs J (at 684). It is therefore clear that this court has regarded the test as formulated by the Earl of Selborne LC as authoritative[7].

14. Secondly, there is no reason to depart, and none is given in paragraph 49 of the appellant's written submissions, from the test as stated by the Earl of Selborne LC. That test has been applied by this court on a number of occasions and is sound in principle.

15. Although expressed in the language of the 1880's, it can be seen that the test formulated by the Earl of Selborne LC involves two conceptual steps, first, identifying acts done by a person which are said to be acts of performance of a contract and, secondly, establishing that those acts are unequivocally referable to the existence of some such contract concerning an interest in land as is alleged.

16. Thirdly, the appellant asserts that "many of the statements quoted" are arguably obiter. Even assuming that they are, they are nevertheless the considered statements by members of this court and cannot simply be put to one side. Moreover, in *McBride v Sandland*[8] (see Isaacs and Rich JJ at 78-79; Higgins J at 95) and *Regent v Millett*[9], the doctrine of part performance formed part of the ratio of the case.

17. Fourthly, the approach of the Earl of Selborne has not just been "highly influential", but, as stated above, has been considered as a correct statement of the law: *Regent v Millett*[10].

18. Fifthly, this court has stated that before overruling one of its previous decisions, certain matters must be demonstrated: *John v Federal Commissioner of Taxation*[11]. Four relevant considerations were set out in that case being: (1) whether the earlier decision rested upon a principle carefully worked out in a significant succession of cases; (2) whether there was a difference between the reasons of the Justices

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[7] It is acknowledged that the issue in *Regent v Millett* was whether the court should adopt a narrower test rather than (as here) whether it should adopt a wider test. This does not detract, however, from the test forming part of the ratio of the case.

[8] (1918) 25 CLR 69.

[9] (1976) 133 CLR 679.

[10] (1976) 133 CLR 679 at 683, per Gibbs J (as his Honour then was).

[11] (1989) 166 CLR 417 at 438-439

constituting the majority in the earlier decision; (3) whether the earlier decision had achieved a useful result or caused considerable inconvenience; (4) whether the earlier decision had been independently acted upon in a way which militated against reconsideration. The appellant does not address such matters. All favour the respondent.

19. Sixthly, this court has considered the basis of part performance. In *Regent v Millett*[12], his Honour Gibbs J (as he then was) stated (at p. 682):

> The principle upon which the doctrine of part performance rests was stated by Lord Cranworth, Lord Chancellor in *Caton v. Caton* (1866) LR 1 Ch App 137, at p 148 in words which appear to have a direct application to the present case. He said:
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> > "... when one of two contracting parties has been induced, or allowed by the other, to alter his position on the faith of the contract, as for instance by taking possession of land, and expending money in building or other like acts, there it would be a fraud in the other party to set up the legal invalidity of the contract on the faith of which he induced, or allowed, the person contracting with him to act, and expend his money."
>
> The books are full of cases in which it has been held that the entry into possession alone, or the taking of possession coupled with the expenditure of money by one party on the improvement of property, with the cognizance of the other party to the contract, may amount to part performance (see the cases cited in Halsbury's Laws of England, 3rd ed., vol. 36, par. 416)."

20. It follows from the above, that there is no reason to depart from the acceptance in previous cases of this court of the test as formulated by the Earl of Selborne LC in *Maddison v Alderson*[13].

21. The appellant in paragraphs 50-60 makes seven assertions about the House of Lords decision in *Steadman v Steadman* [1976] AC 536 (***Steadman's case***). The submissions that follow respond to each of the seven assertions in turn.

22. First, the approaches taken by the majority of Law Lords treat the speech of the Earl of Selborne LC in *Maddison v Alderson*[14] as a correct statement of the law and as a correct statement of the basis of part performance: see Lord Reid at 542C-H; Viscount Dilhorne at 551G-552G; Lord Simon of Glaisdale at 559C-560B; Lord Salmon at 567E-568H.

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[12] (1976) 133 CLR 679

[13] (1883) 8 App. Cas. 467

[14] (1888) 8 App. Cas. 467 at 479.

23. Secondly, the majority of the Law Lords approach the application of the principles concerning part performance in the context of the facts of the matter before them and they do not appear to be departing from the approach taken in *Maddison v Alderson*[15].

24. Thirdly, when the passages relied upon by the appellant are read in context, the speeches are responding to a submission by Mr Morland QC (counsel for the appellant[16]) that the payment of money by itself can never be an act of part performance: see, for example, Viscount Dilhorne at 553A-B.

25. Fourthly, to the extent that *Steadman's case* has "watered down" the need for "unequivocal referability" (which is not clear), it should not be followed.

10 26. Fifthly, looking at the surrounding circumstances is consistent with what the Earl of Selborne LC said in *Maddison v Alderson,* as Lord Reid at 542E-543A in *Steadman's case* demonstrates.

27. The appellant's sixth submission relies upon a few sentences taken out of context. The Law Lords in *Steadman's case* were not concerned to draw a distinction between "part performance" in common parlance and "part performance" as an equitable doctrine. Of necessity, a plaintiff's complaint will be that he or she performed one or more terms of a contract.

28. Seventhly, at issue in *Steadman's case* was not whether there was an oral agreement but whether there was part performance of that oral agreement by the husband: Lord
20 Reid at 540A-B; Lord Morris of Borth-y-Gest at 545F-G; Viscount Dilhorne at 551H; Lord Simon of Glaisdale at 566A-D; Lord Salmon at 566F-G.

Part performance in the present case - appellant's submissions [61]-[73]

29. Even if this court were to adopt the appellant's views about the requirements for application of the doctrine of part performance, the acts relied upon by the appellant at paragraph [74] do not satisfy either the "traditional" or what the appellant has called the "less severe approach" of Lord Reid in *Steadman's case* for the following reasons.

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[15] Meagher, Gummow and Lehane *Equity, Doctrine and Remedies* (2015; 5th ed.) p.685 [20-200].

[16] [1976] AC 536 at 539A

30. First, the payment of the balance of the purchase price on the Penfield Road property was an act required by the Penfield Road contract itself and it was an act done in performance of the Penfield Road contract.

31. Secondly, the execution of the transfer and other documents associated with the Penfield Road contract were required by the Penfield Road contract.

32. Thirdly, the courts below found that there had been no payment of the $8,000 that was alleged to be a term of the oral contract and there is no appeal against that finding.

33. Fourthly, none of the alleged acts of part performance have any relationship to Clark Road or its purchase.

The basis of the doctrine of part performance – appellant's submissions [76]-[78]

34. The basis of the doctrine of part performance is that the acts become the "equities" upon which the court will grant a remedy[17]. Another way of expressing the basis of the doctrine is that the court will not allow the other party to the alleged oral contract to plead the unenforceability of the agreement as a means of defeating the plaintiff's claim where the plaintiff has altered his or her position[18]. It is not necessary for this court to decide whether one or the other basis is the correct one. It may be that both explain the basis of the doctrine[19].

The appellant's paragraph [79]

35. With respect, paragraph 79 contains several erroneous statements of fact and law. It is incorrect to assert that the respondent has "repudiated" the terms of the agreement concerning the Penfield Road property. It is also incorrect to assert that the respondent ever agreed to "convey her half interest in the Clark Road property to Leon"; there is simply no factual basis for such a statement and it is contradicted at T283.11. Moreover, it is incorrect to assert that Leon was "induced" by Velika to "alter his position". Leon's discussions were with his brother George, whom he trusted, and not

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[17] (1883) 8 App. Cas. 467

[18] See *Regent v Millett* (1976) 133 CLR 679 at 682 per Gibbs J (as he then was), with whom Stephen, Mason, Jacobs and Murphy JJ agreed.

[19] Meagher, Gummow and Lehane *Equity, Doctrine and Remedies* (2015; 5th ed.) p.685 [20-225].

with the respondent.[20] The final sentence of [79] is refuted in paragraphs [42.4] ff of these submissions.

The Statute of Frauds

36. The appellant's written submissions do not address the finding by the Full Court that the August 2009 acknowledgement did not satisfy the requirement of being a memorandum in writing for the purposes of s.26 of the *Law of Property Act* 1936 (SA). Both the Judge at first instance and the Court of Appeal accepted that the August 2009 writing was not a sufficient memorandum of the alleged agreement.[21] With respect, that conclusion is correct. Nor can it be the alleged agreement. No version of the evidence of the alleged agreement fits the August 2009 writing.

37. The August 2009 writing cannot satisfy the Statute. That writing:

37.1. was at the appellant's dictation in circumstances where the respondent felt pressured to write and sign the same;

37.2. rises no higher than an acknowledgment of an agreement between the two brothers; it does not suggest that Velika was a party to it. It cannot, in itself, be the agreement since it long post-dates the relevant time and actions;

37.3. was obtained in circumstances that, on an examination of the evidence, suggest that the respondent taken at a disadvantage.[22] By 2009, George's behaviour had become erratic, and the management of the Taylors Road and Penfield Road properties was a source of friction between the two families. By then, the appellant was undoubtedly aware of the discussions between the appellant and George. She had ample reason to be apprehensive about an attempt by the appellant to try to compensate for George's unsatisfactory management of Taylors Road or Penfield Road.

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[20] *Pipikos v Trayans* (2016) 126 SASR 436, [2016] SASCFC 138 (hereafter 'FC') at paragraph [36]).

[21] *Pipikos v Trayans* [2015] SADC 149 (hereafter 'TJ') at paragraph [100], FC[88]

[22] She was asked by George to go to Leon's house to pick something up. She had another appointment, had to extend her lunch break, and wanted to get back to work. The appellant confronted her with the issue of half the land and his money. She felt pressured. She was sufficiently stressed that on her return to work, her co-workers took her to the hospital. Respondent XN T235:01 – 244:11, Koehn T360:09, Appellant XXN T91:28 – 92:06, 92:19 – 97:04

37.4. does not refer to price;

37.5. is imprecise as to the exact interest in Clark Road; and

37.6. does not say who is to be responsible for the mortgage or in what proportions.

Orders sought by the appellant

38. As to the orders sought by the appellant, it is relevant that the appellant, his wife and the respondent have consented to an order for sale of the Taylors Road, Penfield Road and Clark Road properties.[23] That order remains in force, but the Clark Road property has not sold. It is inconsistent with that order to seek specific performance.

Part VII: The respondent's argument on the cross-appeal

10 *Summary of Cross-Appeal*

39. The trial judge found that:

39.1. The appellant and his brother George "*had some discussions about the Clark Road property at about the time of the Penfield Road purchase*", and the respondent "*was aware, in general terms, of those discussions at that time.*" (TJ[94])

39.2. However, taking into account the whole of the evidence, "*there was no oral agreement to sell an interest in the Clark Road land between the plaintiff and the defendant.*" (TJ[101])

40. The Full Court held:

20 40.1. The appellant and his brother George "*did conclude an agreement that [the respondent] would transfer to [the appellant] a half–interest in the Clark Road property in exchange for [the appellant] paying the whole of the owners' contribution, on the Penfield Road property, and paying a further sum of $8000 to [the respondent] and George.*" FC[3].

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[23] FC[21].

40.2. The respondent's admission that she knew of this agreement, and her conduct in taking an interest in the Penfield Road property in that knowledge, bound her to that agreement. FC[4], [80].

41. The Full Court thus formulated that agreement as a term of the acquisition of Penfield Road, or a collateral agreement in two parts, distinct from 'the semantic form'[24] of discussions between the Leon and George:

41.1. a conveyance of a legal interest in the one undivided moiety (not half of the unimproved land) of Clark Road, coupled with:

41.2. "*a collateral agreement that on any accounting of the income generated from the property, or the proceeds of its sale, or on any partition, George and Velika would be credited for the value of the improvements.*" FC[30]. (emphasis added)

42. The Full Court erred in finding the respondent had entered into a concluded and enforceable agreement to convey an interest in Clark Road because:

42.1. It accorded insufficient respect to the trial judge's assessment of the witnesses and evidence. The trial judge was not persuaded of the truth of essential elements of the respondent's case.

42.2. The evidence, such as it was,

42.2.a) reflected a difficulty in identifying the interest in Clark Road said to have been 'sold'. However, it was sufficiently plain that interest for which the appellant contended was an interest in the soil (or bare or unimproved land), discrete from the improvements;

42.2.b) is insufficient to make out such an agreement, or the agreement found by the Full Court;

42.2.c) is insufficient to make out an agreement that conveys any enforceable interest in land;

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24 FC[30]

42.3. The terms of such an agreement fail to deal with:

42.3.a) The prior registered mortgagee interest over the whole of the land;

42.3.b) Realisation of the asserted interest in the land.

42.4. The agreement found by the Full Court rests ultimately on an inference or premise that is not supported by the evidence, namely "*[I]t is most improbable that [the appellant] 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 a half – interest in the Clark Road property.*" (FC[5]) This proposition is inconsistent with the following four matters:

10 42.4.a) the first is Leon's evidence that he considered that the unimproved value of Clark Road was $80-90,000 and that he offered $45,000 being half of the maximum. He did not suggest that he believed that he was getting some capital benefit from the purchase.

42.4.b) secondly, the true purpose of Leon's suggestion concerning Clark Road was to ensure that George was put in funds to reimburse him for paying his share of the purchasers' cash contribution; this is exactly the proposition put in the plaintiff's opening at T.7L25-26 and in the statement of claim;

42.4.c) thirdly, there is not the slightest suggestion in Leon's evidence that he
20 was only agreeing to George and Velika joining in the Penfield Road purchase on the basis that, he would make some profit out of their home. The first suggestion to this effect appears in the judgment of Kourakis CJ, in his Honour's reinterpretation of the facts.

42.4.d) fourthly, Leon believed that the rent being received from Penfield Road would be sufficient to pay the mortgage instalments on it (FC[14]); this provided an added incentive for the purchase of Penfield Road. It is probable that he accepted that his brother would be able at some time to reimburse the outlay on his behalf.

43. The Full Court placed great emphasis on Velika's knowledge of the agreement between Leon and George concerning Clark Road. However, that knowledge was confined to the suggestion that the obligation of George to equalise the contributions to Penfield Road would be facilitated by the relevant sale of an interest in Clark Road. She did not understand that it was a condition of the agreement jointly to purchase Penfield Road that such a sale take place nor that it was intended that she give Leon a capital profit on her home as consideration for allowing her and George into the Penfield Road purchase. This prevents any supposed ratification being a ratification of the contract now alleged. See T282-284. She did not even know the price.

10 44. The acquisition of Penfield Road occurred as one of a wide range of informal, interconnected and mutual financial transactions in which the brothers engaged. The transactions were largely undocumented, and any accounting was informal.[25] It is evident that the financial relationship between the brothers was based on mutual trust,[26] It was a flexible and informal relationship, somewhat akin to a "running account".

45. The involvement of the respondent, George's wife, in these financial dealings, was minimal.[27] Her lack of involvement is illustrated by the earlier purchase of Taylors Road, near to the home of the respondent and George at Clark Road.[28] That transaction, and the subsequent management of Taylors Road and Penfield Road also
20 illustrate the informality and absence of documentation in the financial dealings between the two brothers.

46. At all times, Clark Road was the matrimonial home of the respondent and George, and the respondent was the sole registered proprietor of that property. The alleged agreement is the only transaction between the brothers said to involve the respondent's Clark Road home.

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[25] George Pipkos T331:34 – 332:13

[26] Appellant T49:20-26, George T332:11-13

[27] The flavour of excluding the respondent is also seen in relation to a car transaction in the Appellant's evidence at T24:08

[28] Taylors Road was purchased as a form of partnership or joint-venture between the two couples, but the respondent was not involved and was not registered as a proprietor: Appellant T20:32

47. There is no written record of the alleged agreement, no evidence of any oral confirmation, no conduct consistent with its existence, and no attempt by any party to perform it or by the appellant to assert an interest in Clark Road, until 2009, some 5 years later, when the relationship between the two brothers had become strained.[29]

48. That there was an agreement to acquire Penfield Road is not in doubt. Its terms are not recorded in writing beyond the fact of a contract of purchase, loan documentation, and settlement of the purchase. That agreement is conceptually and legally quite distinct from an alleged agreement to buy and sell an interest in Clark Road. There is a sense in the Reasons of the Full Court that it was looking to find a complete transaction involving both properties. In fact the acquisition of Penfield Road not only occurred between the two brothers but was also quite separate from any agreement to facilitate the discharge of the equalisation obligation by a sale of an interest in Clark Road.

The appellant's pleaded case at trial

49. The appellant's pleaded case was:

> "2 In July 2004 the [appellant] purchased half of the [respondent's] interest in the land but not the improvements in the Clark Road property for $45,000.00 in order to provide the [respondent] and her husband with the funds to purchase jointly with the [appellant] the property situated at ...Penfield Road ....
>
> Particulars
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> The [respondent] and her husband and the [appellant] and his wife agreed to purchase a property at Penfield Road Virginia July 2004 for $260,000. The [respondent] and her husband did not have sufficient funds to pay their share of the deposit for the purchase of the property. It was agreed that the [appellant] would pay the [respondent's] share of the deposit, being the sum of $37,441.81, which he did. ...
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> At the same time, the balance of the $45,000, being the sum of $8000, was paid by the [appellant] to the [respondent's] husband, on her behalf, in cash." (AB p.7 at [2])

50. The pleaded case betrays an inconsistency between the agreement asserted (an 'interest in the land but not the improvements') and the relief claimed ('registration as a joint proprietor of one undivided moiety') (AB p.8 at Relief [1], [2]. The pleading plainly seeks a registerable interest in Clark Road. There is no suggestion how to deal with that part of the 'undivided moiety' representing improvements.[30] There is also no pleading of the August 2009 document.

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[29] see, e.g. the appellant at T91:28-32, T119:35 – 121:14; and FC[16], [17], [36].

[30] The anodyne plea at Relief [4] is insufficient.

The appellant's case at trial

51. The factual case opened upon and advanced by the appellant at trial was that the Clark Road Agreement was made in two stages – in discussion with George at Penfield Road and immediately afterwards in a discussion involving the respondent at her home.[31]

52. That evidence was rejected by the trial judge, who was unpersuaded by the evidence of the appellant and his witnesses where there was conflict (TJ[13], [14]).

53. The trial judge had the very real benefit of seeing and hearing the witnesses, with the subtleties of behaviour and mannerism which cannot survive the transition to written transcript. Indeed, this is the very sort of case where to see and hear the evidence of the witnesses is critical to both an assessment of the credibility of the witnesses and an understanding of the subtleties of their evidence including tone and emphasis. Her approach and findings were criticised on appeal,[32] and in part overturned.[33]

54. The trial judge's rejection of discussions at Clark Road directly involving the respondent, and her finding that payment of the $8,000 was not made out, were not disturbed by the Full Court. Her overall preference for the evidence of the respondent remains substantially intact.[34] That has significant consequence for the credibility of the appellant's case.

55. The appellant sought to change his case after submissions, to introduce cases of ratification and part-performance by Reply.[35] The application was refused, but the Full Court considered (wrongly, it is submitted) the existing pleading sufficiently broad to encompass a case of contract by conduct.[36]

56. The effect of the appellant's evidence (but not that of his wife[37]) was an alleged oral agreement whereby, in consideration of the appellant advancing the cost of the

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[31] Opening T7:30, Appellant T25:31 – 28:08, George T337:32 – 338:15

[32] e.g, at FC[38]

[33] at FC[68]. However, the Trial Judge's finding that the appellant did not pay the '$8,000', contrary to the evidence of both the appellant and Sophie Pipikos, was upheld: FC[46], [70].

[34] FC[4]

[35] TJ[6], [9], FC[76].

[36] FC[79], [80].

[37] TJ[68]

Penfield Road acquisition after borrowings, he acquired a distinct half-interest in the physical land, but not the improvements, of the respondent's home property at Clark Road.[38]

57. The Trial Judge identified (correctly it is submitted) the consequential difficulty in describing the interest in the land said to have been acquired (TJ[115],[116]).

The Full Court's Findings

58. The Full Court overturned the trial judge's findings that there was no agreement (at TJ[101] and [104]) and instead found an agreement as summarised at paragraphs [39] and [40] above. The agreement so constructed is a sophisticated legal edifice on slight evidential foundations.[39]

59. In so doing,

59.1. The Full Court did not overturn, or make its own determination, of the Trial Judge's rejection of the evidence of the appellant and Sophie Pipikos that the respondent participated in the 'agreement'. The Full Court thus did not accept the appellant's primary evidence of the agreement, or reject the respondent's evidence that she did not participate in any such agreement. Rather, it accepted that any agreement occurred separately between the appellant and George, preferring the appellant's evidence and that of George to the effect that an agreement was reached.[40] (see FC[4])

59.2. The Full Court judgment thus adopted the appellant's 'alternative' case'[41] that there was an agreement between Leon and George, of which the respondent became aware before settlement of the purchase of Penfold Road.[42] What was

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[38] e.g, T25:31 - 28:08, 26:22 - 28:08, 68:23 – 76:30. The evidence variously uses the words 'property' (e.g at T27:20-23 and 'land' (e.g at T27:26-28). Other observations, e.g at TJ[13], were not addressed by the Full Court.

[39] There is no evidential basis at all for an accounting of income, or what might happen on partition, or on crediting 'the value of the improvements', with the notion of an account that the last implies.

[40] FC[68].

[41] FC[59].

[42] FC[5] See also, e.g, FC[53]. George's evidence was 'difficult', but for what it is worth, relevantly it is to the effect that the question of the appellant acquiring an interest in the respondent's land arose between the appellant and George after the contract for purchase of the Penfield land was settled, and in a different context: George T338:16 – 339:07.

actually said between the two brothers is not the subject of any findings, although implicitly the Court accepted the appellant's evidence, in cross-examination, when for the only time he asserted a term involving a process of valuation.[43]

59.3. On the premise of a discussion between the two brothers for the appellant to acquire an interest in the land, but not the improvements, of Clark Road, the discussion has the character of an incident intermingled in the course of a flexible and changing financial relationship. On the evidence as accepted by the Full Court, the respondent's acquiescence in completion of the Penfield Road transaction is taken to fix that incident as a discrete term or supplementary agreement for a conveyance of a 50% interest with a collateral agreement to account back.

60. At paragraph [68] of the Full Court's judgment, the Full Court summarised its reasons for finding that the trial judge was in error and that there was a concluded agreement to transfer an interest in Clark Road. The Full Court erred in overturning the trial judge's findings to the contrary for the following reasons:

60.1. *Sophie Pipikos* in fact knew nothing of the agreement. Her evidence of being present at the Clark Road discussion was not accepted. Her only knowledge could have come from the appellant. In that context, her understanding that the alleged agreement was for acquisition of the undeveloped half of Clark Road is a significant indication of the vagueness, and incompleteness of the alleged agreement. Despite the gloss given by the Full Court at FC[41], it is apparent that Sophie's second-hand understanding was not consistent with an acquisition of a half of the whole property, with a collateral agreement to account back for the value of improvements.[44] That understanding is set out at FC[60]. It puts the agreement about Clark Road solely on the basis of facilitating payment of the equalisation obligation, not giving a capital reciprocal benefit to Leon.

60.2. There was no dispute that there was a discussion between George and Leon about a share in the Clark Road land. The fact of such a discussion, and the

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[43] FC[28] That "term" had no prior existence in the correspondence, pleadings or evidence. It is notable that it is not suggested that the respondent was ever aware of any such term.

[44] TJ[68].

respondent's subsequent knowledge of it, does not raise the discussion to the level of a concluded agreement.

60.3. The trial judge did in fact acknowledge the respondent's evidence of knowledge at TJ[93], [94].

60.4. There is no dispute that by the time of the 2009 writing, the respondent knew in very broad terms of the discussion. The writing acknowledges that. No other weight can fairly be put on it. See also paragraph [47] above.

60.5. See paragraph [60.3] above.

61. Ultimately, the account of the appellant is not inherently probable. An agreement to acquire a half interest in land without improvements might arise in an unsophisticated mind, but the appellant was not unsophisticated in relation to real estate. He was the owner of a number of other properties.[45] The appellant was never at risk of losing the benefit of his greater contribution to the acquisition of Penfield Road, and there is no reason to think it 'most improbable' he would have advanced the additional contribution without some form of security over Clark Road (FC[5]). Given that the discussion between the brothers occurred, but was never implemented in any meaningful way, the discussion was, at the most, an incident in their personal and financial relationship that never attained the status of an enforceable agreement.

62. In addition to its sophisticated formulation, the finding by inference that the respondent was party to that term or collateral agreement is unsatisfactory for the following reasons:

62.1. There is no finding of an agreement involving the respondent. Rather it seems that notions of ratification or agreement by conduct (there is nothing to suggest agency) underpin the assertion that the respondent 'joined in the agreement'.[46] That 'joinder' depends on an analysis of the respondent's evidence – as to which see below.

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[45] T:60, 61.

[46] FC[52].

62.2. That the respondent did at some point learn of an agreement between the two brothers concerning Clark Road is common ground. The evidence of when she learned of it or what she learned is unsatisfactory.

62.2.a) As noted above, Leon's evidence of a direct discussion between him and the respondent was not accepted by the trial judge.

62.2.b) The respondent learned of an agreement concerning Clark Road from her husband George and she responded in terms that both indicated her disapproval of the idea and a request that he undo what he had done. His evidence was he told the appellant after settlement of the sale.

10 62.2.c) The net effect of the respondent's evidence was that she was aware before the settlement of the Penfield Road property of some sort of arrangement between the brothers.[47] On a fair analysis of the whole of that evidence, however, it cannot be said that she understood that the purchase of the Penfield Road property was dependent upon the sale of an interest in Clark Road.

62.3.Most importantly, see paragraph [46], above.

62.4. When she did learn of it, she at once rejected it. It is significant that she understood it to be a 'claim to our family home'[48], not on unimproved land. The Full Court does not seem to have considered the consequence of her rejection.

20 63. The agreement thus created suffers from the following substantive and practical difficulties:

63.1. It concerns an interest in the Clark Road land, distinct from the improvements on that land, which has no independent legal existence.

63.2. The only evidence of how that interest was to be identified arose in cross-examination, when the appellant asserted further words to the effect that there would be a valuation of the land as distinct from the improvements. There was no prior hint of this conversation. It was not put to George Pipikos in cross-examination.

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[47] FC[56], [57], [58].

[48] FC[65], see T231:20 ff

63.3. There is no suggestion in the evidence of an accounting, accommodation rent, or what was to occur if the respondent did not sell Clark Road.

63.4. Clark Road, including its improvements, was at all times, and is, the subject of a registered third-party mortgage. The appellant knew of this.[49] For an agreement in the terms suggested, a further term of unknown provenance or extent would need to be interpolated, dealing with the prior registered interest of the mortgagee. Is that interest also to be apportioned between bare land and improvements or is it to be discharged by Velika alone or by Leon and Sophie?

63.5. Could the appellant force the sale of Clark Road? There is no suggestion in the evidence that his interest crystallises except "if it ever came time to sell the property" (FC[28]).

64. The combination of:

64.1. the rejection of the evidence of the discussions between appellant and respondent;

64.2. the general insufficiency of the evidence of what in fact was said, and when;

64.3. the imprecision and thus confusion of the nature of the interest in Clark Road to be acquired, including the evidence of Sophie Pipikos that she understood the acquisition to be the unimproved half of the property (unpersuasively characterised by the Full Court as an error as to planning law: FC[45]);

64.4. the failure to consider or deal with the prior registered mortgagee interest;

64.5. the need, as seen by the Full Court, to construct a separate collateral agreement or term of a complexity that goes beyond the evidence or the likely understanding of those involved;

argues for an "agreement" whose terms are insufficient and too uncertain to be enforceable.

65. The multiple uncertainties affecting the 'agreement', the complexity of the contract that needs to be constructed to identify and implement the appellant's asserted interest,

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[49] T139:28-140:04

and the absence of any prejudice (below), all illustrate why the existing understanding of the Statute of Frauds remains apt, and why the Court should not strain to convert the informal oral discussions between the two brothers for the sale of an interest in land that neither owned into a contract enforceable against the respondent as the distinct registered proprietor.

66. That is particularly the case when, assuming reliance by the appellant on his discussions with his brother, he had other remedies. The obvious remedy is an account for his greater contribution upon the sale of Penfield Road. Penfield Road has been sold, the net proceeds are in the District Court, and that Court is at present part–heard on that account. This means that the sole purpose of the alleged sale of part of Clark Road has been superseded.

67. The appellant's submissions do not say how the alleged constructive trust arises. This is not surprising as there is no factual basis for a constructive trust. It is not addressed in the reasons given by the Full Court. It was not addressed on the application for special leave to appeal.

Part VIII: Costs and other remedies

68. If the respondent succeeds on her cross-appeal, the costs order made by the Full Court awarding her only 85% of her costs should be set aside and an order awarding the respondent 100% of her costs should be made in lieu thereof.

69. The respondent has never denied that Leon is entitled to the benefit of his greater contribution to the Penfield Road property. It is not in dispute that, that property was sold by agreed court order, and the net proceeds of sale paid into the District Court suitor's fund, where they remain.

70. The agreement that Clark Road should be sold (see FC[21]) obviates any possibility of a decree of specific performance. The only remedy now available to the appellant (if successful) is a monetary recovery from the sale of the Clark Road property.

71. Even if successful in his appeal, it may be that the appellant will not recover more from a sale of the Clark Road property than an amount offered by way of compromise by the respondent. The respondent filed an offer in the District Court proceedings to consent to judgment in a sum inclusive of interest plus costs. The offer has not been accepted and, under the District Court's Rules the appellant may be liable for the

respondent's costs in any event. In such circumstances, even if he is successful, the question of the appellant's costs of the appeal should be dealt with by the court below.[50]

72. The parties have commenced upon an accounting for their respective contributions to both Taylors Road and Penfield Road, which accounting is at present part heard before a Master of the District Court.

Part IX: Orders sought

73. The orders sought by the respondent are that:

73.1. the appeal be dismissed;

73.2. the cross-appeal be allowed;

73.3. the order of the Full Court of the Supreme Court of South Australia as to the costs of the appeal to that court be set aside and in lieu thereof it be ordered that, the respondent have 100% of her costs of the appeal to that court.

73.4. the appellant pay the respondent's costs of the appeal and the cross-appeal in this Court.

Dated 23 October 2017

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[50] See *Aktas v Westpac* (2010) 241 CLR 570 at p.573 [4] and 574 [13].