Part Performance of an Oral Contract

STEP 1 – SET THE SCENE

- **Mention at the outset**: Even if a contract to create an interest in land is oral and fails to meet the formal writing requirements, it can still be enforced in equity if it has been partly performed - effectively, part performance puts parties in the position ***they would have been*** in ***if*** the contract had been in **writing**. Pursuant to **section 55(d)** of the *Property Law Act*, the formality (i.e. writing) requirements in s53 do no invalidate a claim in part performance.
  1. Part performance is largely concerned with **evidentiary issues**, allowing normally inadmissible ***parol evidence*** of the oral agreement be adduced from evidence of performance.
  2. The essence of part performance is that a party to oral agreement performs an act to his detriment, and the act is "**unequivocally** and in its own nature… **referable** to some such agreement as that alleged. That is, it could be done with no other view than to perform such an agreement". (*Maddison v Alderson (1883)*)
- **Note:** If you argue **part performance you will probably also argue CICT** as an alternative equitable interest.
  1. **Note, though**, the remedy here is better: it is a **specifically enforceable contract**, not an equitable interest through a trust.
- **Typical Part Performance scenarios:**
  1. Where X has taken **possession** of the land, with the consent of the vendor/landlord, it is clear that he has partly performed the oral agreement, and therefore has an equitable interest (*Regent v Millet*)
  2. Where X has **paid money** in accordance with the oral agreement. Under Australia law this is **not sufficient** to satisfy part performance (*McBride v Sandland*); however, the payment of money is now considered sufficient part performance in UK (*Steadman v Steadman*), which suggests that the law could possibly change in the near future.
     - **Note,** though, that *Steadman* was **rejected** in principle by the High Court in *Regent*.
- **RULE**: Based on *Regent v Millet*, there seems to be **four basic elements** required to make out a claim in part performance:
  1. **Oral Contract -** must be valid oral agreement for the creation of a property interest, and evidence to support that agreement.
  2. **Acts of performance** - plaintiff must have performed acts on the faith of that agreement that were either: (a) required by the contract *or* (b) permitted by it and permitted or encouraged by the defendant
  3. **Unequivocal referability -** acts performed must be unequivocally referable to the existence of an agreement of the kind alleged
  4. **Unconscionable to deny interest** - *prima facie* easy to satisfy
  5. *** Specific performance available** - circumstances must be such that the agreement would be specifically performable in equity

STEP 2 - ORAL CONTRACT

- There must be an **oral agreement** for the creation of the property interest and there be evidence of that agreement
- This will usually be an ***express communication*** between the parties

STEP 3 - ACTS OF PART PERFORMANCE

- The plaintiff must have performed acts **on the faith of that agreement** that were either
  - **Required** by the contract; or
  - **Permitted** by the contract or **encouraged** by the defendant
- Identify the acts, *usually*:
  - Payment of moneys
  - Moving into the land with the cognizance of the other party (i.e. defendant)
  - Paying off mortgage (*Regent*)
  - Effecting repairs (*Regent*)
  - Accepting/endorsing bills for bills which provided funds to a mortgagor (*ANZ*)
- After identifying the acts, ask the question: are these identifiable acts ***unequivocally referable*** to the nature of the purported oral contract?

STEP 4 - UNEQUIVOCAL REFERABILITY

- The acts performed (and identified above) must point ***unequivocally* to the existence of an agreement of the kind alleged** (*McBride*). That is, the acts are unequivocally and "*in their own nature"* referable to some such agreement as that alleged (*Maddison*).
- **Established** acts of part performance that are unequivocally referable in Australia:
  - The **payment** of **money must always be coupled** with another **act** to be regarded as unequivocally referable (*Regent* HCA)
    - The payment of money is never argued to be a sufficient act of part performance because it is always equivocal; it never points to any particular kind of contract (*Steadman*)
    - In *Regent*: Oral agreement between parents and children that they could have property transferred to them if mortgage paid. The children performed *numerous acts*: went into **possession**, made **mortgage repayments**, performed **repairs**, obtained another **bank loan** to cover the cost of some further repairs. The father (defendant) was **cognizant** of these acts.
      - **Therefore!** Taking **possession** of the property ***coupled*** with the expenditure of money on that property will **always be sufficient** evidence (per Gibbs J).
      - **Note:** The acts related to the *general nature* of the oral agreement alleged
    - In *ANZ*: The Bank obtained an indemnity agreement, took a mortgage in blank form with authority to complete it, then endorses bills by virtue of which it became liable to holders thereof. It then sold those bills, crediting them to the defendant's account.
  - Going into **possession** is *usually* seen as enough (*Mason v Clarke* and *Regent*) - but look to circumstances for clarification
  - Deposit of *title deeds* coupled with payment of money is enough for an **equitable mortgage** (*Maddison*)
  - In *Mason v Clarke* UK: an oral agreement to grant a right to snare and take away rabbits (a profit a prendre) was held to be partly performed by setting the snares and removing rabbits.
- There must be **not be any reasonable alternative explanation** for the actions (*Ogilvie*):
  - Housework and care performed out of **love** and **affection** is insufficient (but can be a motivating factor) (*Ogilvie*)
    - In *Ogilvie*: Giving up tenancy and moving in with man was not unequivocally referable to the agreement of a life estate as it can be explained by love and affection (but was enough to evince sufficient intention for a ***common intention constructive trust***)
  - There **mere payment of money** is **insufficient** for part performance (unless coupled with another act) (Hill J in *ANZ)*

- **Exam Tip:** Juxtapose the conduct of the plaintiff with the ***"general context"*** of the scenario:
  - In *ANZ* the bank obtained a number of documents (indemnity agreement, blank form mortgage), assumed **liability**, and **altered its position** on the faith of the oral agreement.
  - Was the defendant **cognizant** of these acts (in execution of the oral agreement) while they were occurring? (*Ogilvie*)
  - For **equitable mortgages:** sufficient for part-performance of mortgage if there is receipt of a **duplicate certificate of title** and **payment of advance** (obiter in *Just Holdings*).

STEP 5 - AVAILABILITY OF SPECIFIC PERFORMANCE

- Importantly, even if part performance is accepted, the effect is not to enforce the contract. The Court simply allows parol evidence of the oral agreement to be admitted so that the agreement may be seen as existing; **part performance is not specific performance** (*Mason v Clarke* UK)

STEP 6 - UNCONSCIONABLE IF DENIED INTEREST

- It would be unconscionable for the person to deny the beneficial interest, or that there was an agreement of the type alleged
- *Prima facie*, this is made out if the unequivocally referable conduct (and detriment to that effect) are made out
- In *ANZ* - Hill J argues that the bank had altered its position on the faith of the oral agreement and that it would be **fraud** on the borrower to set up the legal invalidity of the oral contract on the faith of which he induced the bank to act and expend its money.

RESULT

- Per Lord Selborne in *Maddison v Alderson:* The **equities arising** from the acts of part performance will be enforced.
- The ultimate result, in the context of real property (eg mortgage in *ANZ*) to essentially ***give effect to the oral agreement*** through the mechanism of a **constructive trust** - the result is a ***specifically enforceable contract*** that gives rise to a **constructive trust**.
- The constructive trust is ***institutional*** and arises from the date of detriment

Priorities Checklist

Prior Interest	Subsequent Interest	Prevailing Interest
Registered Legal Interest	**Registered Legal Interest**	The first registered legal interest prevails pursuant to ***TLA s 42(1)(a)***
Equitable Interest	**Registered Legal Interest**	This is usually an application of the *in personam*: where the Registered Proprietor has created the equitable interest through their own actions. Where it is not created by the Registered Proprietor, the prior RP prevails unless the RP did something to warrant loss: eg, estoppel in *Barry*.
Registered Legal Interest	**Equitable Interest**	Straight forward application of ***exceptions to indefeasibility*** (legal and equitable)
Equitable Interest	**Equitable Interest**	Notice of first interest gives it better priority (*Moffett*) or postponing conduct applies to render the prior interest postponed to after subsequent interest (*Heid*). Else, first in time, all other things being equal, has priority (*Rice*).
Mere Equity	**Registered Legal Interest**	In principle, the second registered legal interest prevails unless an exception to indefeasibility applies
Mere Equity	**Equitable Interest**	Subsequent equitable interest will prevail if it is secured as a ***bona fide purchaser for value without notice*** (*Latec*). If not, first in time prevails (*Kitto J in Latec*)

PRIOR LEGAL INTEREST V SUBSEQUENT LEGAL INTEREST

- **Section 42** of the *Transfer of Land Act* provides that the first registration has priority. A later registered proprietor's interest will be subject to earlier interests on the register.
- **Section 34(1)** requires that registration proceed in the order in which documents are lodged with the Registrar at the titles office. This sometimes leads to a 'race to the register'.
- **Note** the various exceptions to indefeasibility in section 42: if a prior registered interest is defeasible (eg for fraud) and then a later interest will regain priority because the first interest will not be indefeasible but instead subject to such interests as may exist or may be created.

PRIOR EQUITABLE INTEREST V SUBSEQUENT LEGAL INTEREST

- The subsequent legal interest will prevail by virtue of **section 42** of the *Transfer of Land Act*.
- This is so even if the registered proprietor has **notice** of a prior equitable interest, as notice does not constitute fraud (**section 43** of *TLA*)
  - For example, in *Mills v Stockman*: the purchase was not bound by a pre-existing equitable interest (profit a prendre) over the Torrens part of the land, even though the purchaser had notice of that interest.
- Unless one of the **exception to indefeasibility** applies (fraud, statutory exception, volunteer, or in personam), the legal interest is **indefeasible.**

PRIOR LEGAL INTEREST V SUBSEQUENT EQUITABLE INTEREST

- The first legal (registered) interest prevails
- Unless the legal owner is fraudulent or arms another with the authority to create an equitable interest, a prior legal interest take priority over that of a subsequent equitable interest.
- The ***in personam exception***, however, remains applicable (*Barry v Heider*)
  - In *Barry v Heider*: Barry's prior interest was subject to Mrs. Heider's equitable mortgage - Barry had made ***positive representations*** to Mrs. H that she had relied on in creating the equitable interest: therefore, he was ***estopped*** (which is effectively in personam) from departing from that representation.

PRIOR EQUITABLE INTEREST V SUBSEQUENT EQUITABLE INTEREST

- Where the equitable interests are equal, ***then the first in time prevails*** (*Rice v Rice*). This is the **starting presumption** in Australia.
  - Gibbs CJ in *Abigail* stated that priority in time is a presumption of better interest, not a final consideration as in *Rice*. Nevertheless, the *Rice* statement of rule - as if equities are equal in all other aspects - means the *qui prior* rule applies. This is rebuttable.
  - **RULE:** In Australia, therefore, the **first in time presumption** applies, subject to whether the conduct of the interest holder warrants postponement. (*Abigail; J & H Just Holdings*)
- [1] **NOTICE REBUTTAL:** If the subsequent interest holder has **notice** of the prior interest, the first interest prevails (**notice analysis**)
  - Notice can be both **actual** or **constructive** (i.e. imputed) notice of the prior interest.
  - **Actual knowledge**
    - Actual knowledge means actual knowledge of the relevant facts giving rise to a prior equitable interest
    - Though rumors do not amount to actual knowledge, clear and relevant information relating to the property - even if obtained from a third party to the transaction - cannot be ignored (*Abigail*)
    - *Possession of land by a person other than the vendor is notice of the interest that the possessor has with respect to that land (think *Perpetual Trustees* and the **tenant in possession** exception)
  - **Constructive knowledge**
    - Courts will infer knowledge where:
      - A **caveat** that has been registered under **section 89** of the *Trade Law Act* will serve as notice of the interest (*Abigail*)
      - The caveat will serve as notice **even** if the party did not actually **search** the register (*Just Holdings*)
        - However, a caveat lodged after the second interest is created cannot be notice (*Abigail*);
      - It 'would have **come to their knowledge** if such **inquiries** and **inspections** had been made as ought reasonably to have been made by them (*PLA* **section 199(1)(a)** - this also applies to legal reps. and agents (199(1)(b).
      - Possession of land by a person other than the vendor is notice of the interest that the possessor has with respect to that land (*Perpetual Trustees*).
- **Note:** The different judgments in *Moffett v Dillon*
  - In *Moffett*: Dillon cannot afford to purchase land from Moffett - they agree to charge over Dillon's Essendon home. After this charge, Dillon goes and gets a mortgage from Westpac. Contract of sale cannot be abided to by Dillon - Moffett rescinds from the contract and

sells property. Moffett is claiming the difference between sale prices from Dillon and enforce the charge - question about which equitable interest (M or W) comes first.

  - **Brooking JA (majority)** held that a priority dispute between equitable interests should be resolved by a separate and **independent** rule that the earlier interest (almost) always gains priority if the holder of the later interest had notice of the earlier one. In this way, **notice is fatal** to the contention that the later equitable interest should prevail over an earlier equitable interest.
  - **Ormiston JA (minority)** focuses on postponing conduct: if it exists, (and no notice applies) the later interest prevails; otherwise, notice is irrelevant because the first in time prevails as of right. **Notice** is in this way is part of a **greater enquiry of postponing conduct**.
    - **Hypo-Tip:** If the later equitable interest has notice of a prior interest, use this to look at notice in broader context!

- **THEREFORE**: IF there is notice, cite Brooking JA in *Moffett* and say you could stop there - however, keep going to postponing conduct:
- [2] **POSTPONING CONDUCT:** If the interests are in some way **unequal**, the **best** equitable interest takes priority (*Rice v Rice*)
  - **OUTSET: [**Postponing conduct arises where the possessor of a prior equity 'has been guilty of some **act or omission** which has conducted or contributed to a belief on the part of the holder of the subsequent equity, at the time when he acquired it, that the prior equity was no longer in existence' (Brooking JA in *Moffett*)
  - **RULE:** There are two possible approaches available to the court to determine whether there has been any '**postponing conduct'** by the first equitable interest holder (per *Heid*). The Court will likely invoke both approaches (see eg *Jacobs v Platt Nominees*) ~ [In the present case, it seems that irrespective of which approach is applied, the same outcome is reached (*apply*)]:
    1. **Narrow Estoppel by representation:** The holder of the earlier interest is estopped from asserting his or her priority because of a representation made through dealings with their title that their interest does not exist or will not be enforced (Gibbs CJ in *Heid*)
       - Two requirements:
         - (1) There must have been a **representation** (by words or conduct) inducing the other party to believe that that they did not have an interest in the land; (**induced assumption**)
         - (2) Representee must have relied upon that assumption to their **detriment** (**detrimental reliance**)
       - First in time will prevail, unless there has been a ***representation*** by prior interest holder and subsequent interest holder has acted to the ***detriment***.
       - Such a representation will only usually be if the earlier party arms another (usually their solicitor) with the title deeds or a blank transfer and evidence of payment (eg *Breskvar*)
       - In *Heid*, the holder of the first equitable interest armed holders of the second equitable interest with documents to represent that they did not owe a first mortgage to someone else.
    2. **Broad (Negligence) Theory:** The parties' conduct, assiduousness and other circumstances, including estoppel, will determine whether the later interest is to be preferred. In essence, the Court will consider the **parties' conduct**, the **normal conveyance practice** in the situation, and the **circumstances** and manner of acquisition. (Mason and Deane JJ in *Heid*)
       - ***Matrix of Circumstances*** test is employed, mainly because estoppel is **too narrow** an interpretation (not all cases have a direct representation sufficient to give rise to estoppel by representation).
       - Postponing conduct is about the negligence of the prior interest holder and whether it is ***reasonably foreseeable*** that later equitable interests will be created and that the holder of the later interest will assume the non-existence of an earlier interest.
       - Essentially, it is about the negligence of the prior interest holder. In assessing what would be 'reasonably foreseeable' to the prior interest holder, almost all conduct of both parties is relevant, especially in contrast to normal conveyance procedure and the circumstances of the acquisition (*Rice*)
  - Several ***types*** of **postponing conduct** exist:
    - **Arming conduct:**
      - **ASK:** *Has the earlier equity holder 'armed the purchaser with ability to represent they were absolute owner and thus created a later interest?'* (*Rice*)
      - *Rice v Rice*: The vendors chose to leave their money unpaid but executed a conveyance and endorsed it anyway. They thus **voluntarily armed** the purchaser with the means of dealing with the estate as the absolute legal and equitable mortgage. They therefore armed the unpaid purchaser with false colors to conceal the vendors' lien by signing a declaration that the purchase price had been paid and **giving title deeds** to purchaser.
      - *Abigail v Lapin* 1943: Lapin armed Heavener to present themselves as the absolute legal and equitable owner of the land (with 'false colors') by transferring the certificate of title.
      - *Barry v Heider*: Vendor acknowledges receipt of purchase price that hasn't yet been received, arming the purchaser to conceal the existence of the vendor's lien.
      - *Heid v Reliance Finance Corporation* CLR: False declaration that the purchase price had been received, and dealt with a company employee purporting to be a solicitor without reasonable ground to accept that belief (i.e. he should have known better - he was impersonating). In this way, Heid was **arming** the employee with the **means to commit fraud** by falsely representing that he had received the purchase money; moreover, the risk of this occurring was **reasonably foreseeable** (per Mason and Deane JJ) - the party was liable to its **negligence**
      - *Just Holdings*: A failure to caveat was not postponing conduct, in circumstances where "retaining the certificate of title was a reasonable means of protecting one's own title against subsequent mortgages being created (because of conventional practice)".
      - *Latec*: The unreasonable delay of five years between the sale to MLG and bringing the matter to Court
    - **Estoppel**
    - **Fraud**
    - **Agreement**
    - **Failure to caveat***
      - Generally, a failure to lodge a caveat is a factor that courts will consider when deciding whether to postpone an older equitable interest in favor of a new equitable interest, but failure to caveat alone, absent of other forms of conduct, is usually **not decisive postponing conduct** (*Jacobs; Heid*)