C.A. SALE OF LAND — truck and shares) — specific performance —
Application to strike out/dismiss action — dismissed by Master —
Whether any agreement — whether any act amounting to part performance — whether any note or memorandum required by Statute of Frauds. JAMAICA
No reasonable cause of action disclosed on pleadings
(Appeal allowed — Order of Master set aside — Costs).

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 87/87

BEFORE: The Hon. Mr. Justice Rowe - President
The Hon. Mr. Justice Wright, J.A.
The Hon. Mr. Justice Downer, J.A.

BETWEEN	ARTHUS GEORGE McCOOK NOEL HOWARD TOMLINSON IVY TOMLINSON WEST INDIES FURNISHING CO., LTD.	DEFENDANTS/APPELLANTS
AND	HOLDEN HAMMOND RONALD BROWN	PLAINTIFFS/RESPONDENTS

Emile George, Q.C., & Maurice Tenn for appellants

Dennis Morrison for the respondents

5th, 6th & 22nd July, 1988

DOWNER, J.A.:

The respondents, Holden Hammond and Ronald Brown have filed a Writ and Statement of Claim for specific performance of an alleged oral agreement for the sale of freehold property situated in Kingston and Mandeville, as well as a 1971 Ford motor truck and the shares in West Indies Furnishing Co., Limited. West Indies Furnishing Co., Ltd., carried on its business at West Street in Kingston at one of the properties in issue in this case. The defendants/appellants Arthur George McCook and Noel & Ivy Tomlinson and West Indies Furnishing Co., Ltd., have entered a defence denying that any agreement was reached and further in the alternative, they aver that even if there was an agreement, there were no act amounting to part performance as alleged by the plaintiffs. Since the most important term of the alleged agreement relates to two parcels of land, the defendants have pleaded that Section 4 of the Statute of Frauds 1677 (29 Car 2 C 3) applies, and there was no note or memorandum in writing signed by them as required by the relevant section of that Statute.

The defendants/appellants went before the learned Master and sought an order to have the action dismissed or struck out as disclosing no reasonable cause of action. The grounds on which they relied were as follows:

> "(i) That the Agreement for the sale of the Real Estate is Unenforceable by virtue of the provisions of the Statute of Frauds, 1677, there being NO NOTE OR MEMORANDUM IN WRITING signed by the DEFENDANTS or any of them:
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> (ii) That the Acts relied on as amounting to PART-PERFORMANCE are INSUFFICIENT:".

After hearing the parties, the Master ordered that the application be dismissed with costs, and the defendants gave an undertaking not to deal in part with the freehold property in dispute in a manner prejudicial to the plaintiffs claim pending the outcome of these proceedings. The effect of the learned Master's order is that the issues raised on the pleadings would go to trial. Regrettably, she gave no written reasons, but she granted leave to Appeal.

To succeed before this Court the appellants must assume that the facts stated in the pleadings are true. The effect of this is that it is assumed that an oral contract pleaded was formed and that the acts averred as amounting to part-performance were carried out. The legal issue to be determined therefore is whether the alleged acts amounted to part-performance. If they do not, then the appellants have a right to succeed as the plaintiffs would have no reasonable cause of action to be litigated.

Equity permits part-performance to be a substitute for a written note or memorandum if the acts of part-performance are only intelligible if there was some prior agreement. The relevant section of the Statute of Frauds refers to a contract for sale or other disposition of land and the most frequent act of part-performance is where the purchaser is allowed to enter into possession of the land. The equitable remedy available to such a purchaser is specific performance so that a vendor is compelled to convey the land and deliver up the title or a purchaser compelled to carry

out the undertaking to purchase. See Rawlinson v. Ames (1925) 1 Ch. 96 where a defendant who had given instructions to have alterations carried out on the plaintiff's flat was ordered to take up the lease; and Broughton v. Snook (1938) 1 Ch. 505 where an executor was compelled to convey an inn to a purchaser who had spent money on alterations.

The starting point of the modern law on the equitable doctrine of part-performance is Maddison v. Alderson (1883) 8 H.L. (E) 467, considered in a recent House of Lords decision of Steadman v. Steadman (1976) A.C. 536. In Daulia Ltd. v. Four Millbank Nominees Ltd. & Anor. (1978) 2 W.L.R. 621, Steadman v. Steadman was applied. The approach in Daulia's case is an appropriate one for testing whether the acts alleged in a statement of claim ought to be regognized as acts of part-performance and it is also relevant to the issue as to whether if there is no reasonable cause of action, that the action should be struck out. On part-performance Goff, L.J., stated the test at page 629. After referring to the apparently divergent views of Lord Reid and Lord Salmon, he said: (page 630)

> "....., but both Viscount Dilhorne at p. 553 and Lord Simon at p. 561 accepted the statement in Fry, Specific Performance of Contract (1921) 6th ed., p. 278, section 582:
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> > 'The true principle, however, of the operation of acts of part performance seems only to require 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,'
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> approved by Upjohn, L.J., in Kingswood Estate Co. Ltd v. Anderson (1963) 2 Q.B. 169, 189."

Lord Morris in his dissenting judgment in Steadman v. Steadman expressly agreed with the principle stated by Fry (supra) as he cited it with approval and continued at page 546 of the Report:

> "That I take to be in full accord with the first of the four circumstances which Fry states, at p. 276, must concur to withdraw a contract from the operation of the statute. The acts of part performance must be such that they point unmistakingly and can only point to the existence of some contract such as the oral contract alleged. But of course the acts of part performance need not show the precise terms of the oral contract: see Kingswood Estate Co. Ltd. v. Anderson (1963) 2 Q.B. 169. The terms of the oral contract must be proved by acceptable evidence but effect to them can only be given if and when acts of part performance establish that there must have been some such contract."

The test laid down by Lord Reid in Steadman v. Steadman (supra) at page 541 is in accord with the statement by Fry. He said:

> "You must not first look at the oral contract and then see whether the alleged acts of part performance are consistent with it. You must first look at the alleged acts of part performance to see whether they prove that there must have been a contract and it is only if they do so prove that you can bring in the oral contract."

The purchase price referred to in the oral agreement as set out in the statement of claim, amounted to just under two million dollars and the terms called for a sale of real estate valued at $943,000. The other items were shares in West Indies Furnishing Co., Ltd., and a Ford Truck. There were eight acts pleaded as amounting to part-performance and Mr. George for the appellants submitted that not one of these cacts can survive the test laid down by Lord Reid.

The plaintiffs/respondents alleged that they obtained a Banker's guarantee. This guarantee was exhibited and nowhere does it mention the purchase of real estate; in fact, it refers to purchase of West Indies Furnishing Co. Ltd., West Street, Kingston. There is no indication that it refers to the contract alleged and can refer to and anticipate a contract rather than performance of an act under a contract. It is a guarantee for $1.5 million; $750,000.00 was for overdraft facilities and the $750,000.00 for the purchasing of inventory. Even when the guarantee refers to Security, no mention is made of the freehold alleged. The second act refers to commitment fees incurred for the Bank guarantee from Century Bank referred to in the first act and must, therefore, fail Lord Reid's test as the principal act failed.

The third act pertains to the plaintiffs/respondents employmnet of a contractor subsequent to 1st August, the date of the alleged oral contract. The contractor prepared estimates for refurbishing and renovating the premises. Such actions are consistent with an anticipated contract and any prudent man of business would undertake such a survey before entering into a contract, to ensure that the right price is determined.

In pleading the fourth act, it is stated that the plaintiffs entered into a binding agreement to employ a specific person as Manager. This seems to be a clear instance where the agreement looks to the future when a contract would be formed and property conveyed or when the respondents acquired equities. This act does not point unequivocally to a contract formed to purchase land.

The fifth act pleaded by the plaintiffs/respondents was that they made a contract with Sears Roebuck Inc., to be their sole agents in Jamaica for electronic equipment. It is difficult to understand how this necessarily refers to a contract to purchase land from the appellants as they could carry out their functions as sole agents by renting a warehouse anywhere in Jamaica and distributing the merchandise when required.

As for the sixth act pleaded as amounting to part-performance, the plaintiffs/respondents aver that they have entered into a contract for the supply of furniture valued at $1,378,076.00 from Caribbean Woodcraft Limited. The pleader states, "It was for the business to be carried on by the plaintiffs in the name of the fourth defendant". This points to the supply of furniture in the future and for business in the future. The alleged act does not point to the probable existence of a contract for the sale of freehold premises.

The plaintiffs/respondents also averred that they carried out a detailed stock-taking after 18th August, the date of the alleged agreement. It was a prudent exercise to carry through such an exercise in order to determine the correct price to pay for the shares of the company. There was therefore, no necessary connection with a prior contract to purchase freehold.

It was also averred that the respondents travelled overseas to purchase goods for additional stock and in so doing incurred considerable costs. But the respondents also averred in the first paragraph of their statement of claim that one is a company director and the other is a business man. The purchase of stocks would be part of their normal commercial life and has no necessary connection with the contract for the purchase of freehold. It is useful to set out the relevant part of section 40 (1) of the Law of Property Act (1925) U.K. which replaced section 4 of the Statute of Fraud to show how impossible it was for respondents to succeed in this appeal. It reads:

> "40 (1) 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."

It is difficult to find any connection with land in the alleged act of part performance in this case. That land is essential was emphasised in Steadman v. Steadman (supra). At page 569 Lord Salmon puts it thus:

> "We have certainly been referred to no reported case, and I have found none, in which an act of part performance which did not point to the existence of a contract concerning land has been held sufficient to take the case out of the statute."

The thrust of the appellants' case before this Court was that if the acts alleged in the statement of claim did not amount to or were not likely to amount to acts of part performance, there was no warrant for the Master to have refused to strike out the statement of claim. This submission was well founded. However, Mr. Morrison for the respondents reminded us that the Master was exercising a discretion but the answer must be that she exercised it on the wrong principles. The action ought, therefore, to have been struck out on the ground that it disclosed no reasonable cause of action. The test is stated as follows in order 18/19/7 of the Vol. 1 of the 1988 edition of the White Book page 315:

> "A reasonable cause of action mean a cause of action with some chance of success when only the allegations in the pleading are considered (per Lord Pearson Drummond-Jackson v. British Medical Association (1970) 1 W.L.R. 688."

In the instant case, none of the allegations had any chance of success in being recognized as acts of part performance. The appeal is therefore allowed, the order of the Master set aside and the appellants to have their costs both here and below.

Rowe, P.

I agree.

Wright, J.A.

I agree.