

## **The Doctrine of Part Performance: Still Strict After All These Years**

by Jonnette Watson Hamilton

### ***Varma v. Donaldson*, 2008 ABQB 106**

<http://www.albertacourts.ab.ca/jdb%5C2003%5Cqb%5Ccivil%5C2008%5C2008abqb0106.ed1.pdf>

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This was an application under section 141 of the *Land Titles Act*, R.S.A. 2000, c. L-4 for the discharge of a caveat registered against a rental property in Calgary. The owners of the property in this case were Mr. and Mrs. Varma. The caveator was their daughter, Ms. Donaldson. She claimed she had an interest in the rental property under an agreement for its purchase and sale made between herself and her parents. Master K.R. Laycock disagreed and ordered that her caveat be discharged.

Ms. Donaldson had two insurmountable problems with her claim, one of them being the 350 year old imperial statute, the *Statute of Frauds*, (1677) 29 Car. II c.3. As Ms. Donaldson acknowledged, there was no written agreement with her parents concerning her alleged purchase of the property. Section 4 of the *Statute of Frauds* states:

No action shall be brought ... upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them, . . . unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized.

This action had been brought by the Varmas, and not by Ms. Donaldson, and so it might be thought that section 4 did not apply. Master Laycraft did not deal with the issue of the statute's application directly. However, an application to discharge a caveat brought under section 141 of the *Land Titles Act* is an application that calls "on the caveator to show cause why the caveat should not be discharged". In order to resist her parents' application to discharge her caveat, Ms. Donaldson had to prove that she had an enforceable agreement. Her position was, in effect, a cross-claim to buy the rental property. The burden was on her to make out a claim and not on her parents to disprove her claim. In this way, Ms. Donaldson could be seen to have an "action" caught by section 4 of the *Statute of Frauds*.

Ms. Donaldson's main argument was that she did not have to comply with the requirements of section 4 of the *Statute of Frauds* because the equitable doctrine of part performance applied. Her second insurmountable problem was the vagueness of her evidence as compared to the strictness of the test for proving part performance.

The traditional test for being able to enforce an alleged oral agreement concerning land so as to avoid application of section 4 is the test found in the 125 year old House of Lords decision,

*Maddison v. Alderson* (1883), 8 App. Cas. 467. It must be shown that the acts of the person seeking to enforce the alleged oral agreement were, in the words of Lord Selbourne L.C., "unequivocally, and in their own nature referable to some such agreement as that alleged." This is a very tough test to meet.

The test used by Master Laycraft was a rather vague version of the adaptation of the traditional test set out in *Brownscombe v. Public Trustee of Alberta*, [1969] S.C.R. 658. In that case, the Supreme Court of Canada stated the test was whether the acts relied upon by the claimant were acts which were "unequivocally referable in their own nature to some dealing with the land which is alleged to have been the subject of the agreement sued on." In this formulation, they were following two of their older decisions, *McNeil v. Corbett* (1907), 39 S.C.R. 608 and *Deglman v. Guaranty Trust Co. of Canada and Constantineau*, [1954] S.C.R. 725. The Supreme Court's version of the test is at least as strict as that in *Maddison v. Alderson* and some have argued that it is even tougher. Master Laycraft, at paragraph 8, stated the test was whether "some acts can be unequivocally traced to the contract," a formulation which omits whose acts they must be and, in its use of the idea of "traced to the contract," fails to highlight that the claimant's acts must not only be referable to a contract such as the one alleged, but to be referable to no other contract. Nevertheless, in his application of the test, it is quite clear that Master Laycraft was applying the strict, traditional test as he refers to Ms. Donaldson's acts as being equally consistent with agreements other than the agreement of purchase and sale that she alleged.

One thing that *Varma v. Doanldson* illustrates is that the Alberta Court of Appeal decision in *Booth v. Knibb Developments Ltd.*, 2002 ABCA 180 has settled any doubts about whether the traditional *Maddison v. Alderson* test for part performance applies in Alberta. Ironically, that strict test was relaxed considerably in England in 1976, with the House of Lords decision in *Steadman v. Steadman*, [1976] A.C. 536. In that case, the House of Lords held that the acts of part performance necessary for enforcement of an oral agreement need refer only on the balance of probabilities to some contract to which the claimant was a party. The *Steadman* version of the doctrine of part performance is so lax that some commentators said it virtually repealed section 4 of the *Statute of Frauds*.

The Supreme Court of Canada did not have an opportunity to comment on the change of direction in the House of Lords with the *Steadman* decision. Several decades of uncertainty followed as the courts in various provinces tried to anticipate whether the test for application of the doctrine of part performance would be relaxed in Canada or not. The usual assumption was that the test has been at least somewhat relaxed. This was, for example, the assumption of Mr. Justice Chrumka in *Conmac Western Industries v. Robinson* (1993), 9 Alta. L.R. (3d) 232 at 310 (Q.B.).

In Alberta, the matter was resolved, as noted, with the 2002 decision of the Alberta Court of Appeal in *Booth v. Knibb Developments Ltd.* There, the Court of Appeal unequivocally stated, at paragraph 25, that "[t]he leading decision on the doctrine of part performance is *Maddison v. Alderson* (1883), 8 App. Ca. 467 (H.L.)" and quoted at length from that case and from the Supreme Court of Canada case of *Deglman v. Guaranty Trust Co. of Canada and Constantineau*. They did not even mention the 1976 House of Lords decision in *Steadman v. Steadman*.

What evidence of acts of part performance did Ms. Doanldson allege? First, she initially located the rental property to be purchased by her parents. She signed the purchase agreement which described the buyer as herself or her nominee. After her parents repaid her for the \$5,000 deposit and paid all of the cash required to complete the purchase of the rental property, Ms. Donaldson located a tenant for the rental property and signed the lease which described the landlord as her father/herself. These were the four acts that she argued pointed unequivocally to an agreement for sale of the rental property made between herself and her parents. However, as Master Laycraft noted, all of these acts were equally or more consistent with the daughter helping her parents to acquire and manage a rental property for their own use and as part of their existing portfolio of rental properties. The doctrine of part performance did not apply. Therefore, section 4 of the *Statute of Frauds* did apply and Ms. Donaldson could not enforce the oral agreement that she had alleged.