SUPREME COURT OF QUEENSLAND

CITATION:	*Johnston v Ball & Ors* [2002] QSC 110
PARTIES:	**IAN LEONARD JOHNSTON and NANCY JOSEPHINE JOHNSTON** (Plaintiffs) **SHIRLEY EVELYN BALL, VERONICA ANN VIELLARIS, SHARON MAY BALL, KAY MARIE BALL, VIOLET MARY PERRY and HESTER SUSAN DEVERELL** (Defendants)
FILE NO/S:	68 of 2000
DIVISION:	Trial Division
PROCEEDING:	Claim
ORIGINATING COURT:	Supreme Court, Cairns
DELIVERED ON:	26 April, 2002
DELIVERED AT:	Cairns
HEARING DATE:	8, 9, 10 April 2002
JUDGE:	**Muir J**
ORDER:	
CATCHWORDS:	AGENCY – AUTHORITY – NATURE OF AUTHORITY CONTRACT – INTENTION TO BE BOUND – SALE OF LAND – SPECIFIC PERFORMANCE VENDOR & PURCHASER – AUCTINEERS & AGENTS – BETWEEN CONTRACT AND COMPLETION Where property offered for sale and knocked down by auctioneer at auction – where four of six co-owners were present at auction and signed contract – where evidence given of pressure by misleading statement to accept offer – whether binding contract for sale and purchase of land was formed – whether conduct of purchasers constitute acts of part performance.
COUNSEL:	A. Collins for the plaintiffs K.J. McGhee for the defendants
SOLICITORS:	Lilley Grose & Long for the plaintiffs MacDonnells for the defendants

[1] The central issues in this case are: whether a binding contract for the sale and purchase of land was formed when a parcel of land offered for sale at public auction was knocked down by the auctioneer to the plaintiffs, the highest bidders; whether,

if there is no or no sufficient, memorandum in writing evidencing the contract, the doctrine of part performance renders the contract enforceable; alternatively, whether the form of contract signed by the plaintiffs and four out of the six co-owner defendants immediately after the auction constitutes a binding contract or, alternatively, a memorandum in writing of an oral contract formed when the property was knocked down to the plaintiffs.

The background facts

[2] The late Joseph Ball was the registered proprietor of two parcels of land at Peeramon; Lot 1, a parcel of some 35.72 hectares which had been used previously for dairy farming but which was overgrown with tobacco weed and lantana and Lot 2, a parcel of some 48.35 hectares on which the plaintiffs conducted part of their quarrying business.

[3] Commencing with an instrument of lease dated 10 May 1990 Mr. Ball leased Lot 2 to the plaintiffs upon terms that the plaintiffs, in consideration of payment of a royalty, had the right to quarry and remove rock from the land.

[4] Mr. Ball died on 15 September 1998. The term of the last lease granted by him expired on 31 March 1999. On 6 May 1999 Mr. James Arnell and the defendant Shirley Ball, Mr. Ball's executors, granted a lease of Lot 2 in favour of the plaintiffs for a term expiring on 31 March 2000.

[5] The plaintiffs attempted, without success, to obtain a further lease with a 5 year term. Mr. Arnell offered a tenancy from month to month stating that the beneficiaries under Mr. Ball's will wanted to sell the property free of any lease. In response, Mr. Johnston advised him that the plaintiffs would vacate the property. The beneficiaries are the defendants in the action, Mrs. Shirley Ball and Mrs. Ball's five daughters Veronica Viellaris, Sharon Ball, Kay Ball, Violet Perry and Hester Deverell.

[6] Mr. Arnell is a principal of the firm of solicitors Arnell and Cooper which has its offices in Innisfail. He had instructions from the defendants to act on their behalf in the sale of Lots 1 and 2 ("the land"). Acting on those instructions he engaged Richardson and Wrench, Atherton, to advise in relation to the sale, and ultimately to conduct a sale by auction. At that time the legal title to the land was vested in the executors.

[7] The principals of Richardson & Wrench were Mr. Souter and Mr. Shepherd. Both had dealings with Mr. Arnell, Mrs. Ball and Sharon Ball concerning the proposed sale. After the pre-auction advertising had been undertaken, Mr. Arnell informed Mr. Souter that one or more of his clients were insisting on a reserve for the land of some millions of dollars. He said, in effect, that he regarded that figure as ridiculous and spoke to Mr. Souter about calling off the auction and reimbursing Richardson and Wrench for its expenses.

[8] On a subsequent occasion, possibly in a meeting in Mr. Arnell's office, a prospective reserve of $600,000 was suggested by one of the defendants. No instructions though were given to Mr. Souter or Mr. Shepherd that there was to be a reserve of $600,000 or of any other amount.

[9] In Mr. Souter's opinion the market value of the land was about $400,000. A registered valuer retained by Mr. Arnell valued the land in January 2000 at $450,000.

[10] At a subsequent meeting in Mr. Arnell's office on about 26 April attended by Mrs. Ball, Sharon Ball and Veronica Viellaris, Mr. Shepherd gave his views about the value of the land. There was discussion about the difficulty presented by the expected absence from the auction of the defendants, Violet Perry and Hester Deverell. The former resided on the Gold Coast and the latter in Western Australia. The defendants present were advised that it would be necessary to ensure that those present at the auction had authority to enter into a contract or that, failing such authority, any of the defendants who were not present had to be able to be contacted during the auction so that they could consent to a sale. One of the defendants present at the meeting said words to the effect that the absent defendants were contactable by telephone and that the defendants would ensure that the defendants at the meeting would be able to communicate with the others.

The auction on 28 April 2000

[11] The auction was held in a lounge room of the Malanda Hotel on 28 April 2000. Mr. Souter was the auctioneer. Also present at the auction were Mr. Shepherd, Mr. Burton (a principal of Richardson and Wrench, Malanda), Mrs. Maloney, the plaintiffs, Mr. Arnell and the defendants, other than Violet Perry and Hester Deverell.

[12] Mrs. Maloney, a real estate agent, had been engaged by the plaintiffs to bid at the auction on their behalf and had given notice of her agency to Mr. Souter.

[13] Only one other person submitted bids in the course of the auction. After Mrs. Maloney submitted a bid of $410,000 Mr. Souter halted the proceedings and informed those present that he would seek instructions from the vendors.

[14] The defendants present at the auction, Mr. Shepherd, Mr. Arnell, Mr. Burton and Mrs. Viellaris' husband went into an adjoining room, the door of which was four or five metres from where Mr. Souter had stood to conduct the auction. As discussions were taking place Mr. Souter or Mr. Shepherd advised that Mrs. Maloney had increased her bid to $415,000. Mr. Shepherd expressed the opinion that this was the market value of the land.

[15] Sharon Ball said words to the effect that she would contact the absent defendants and get their approval for acceptance of the bid. She and Veronica Viellaris then left the room. Sharon Ball had a mobile telephone which she took with her. Mr. Burton and Mr. Shepherd also went outside to smoke at about the same time. Mr. Burton overheard Sharon Ball having a conversation on her mobile phone. He was told by Sharon that she was experiencing difficulties with her mobile phone and he gave her his mobile phone to use. Mr. Shepherd also recalls something being said by one of the defendants about a phone "dropping out". He recalls that both he and Mr. Burton offered his mobile phone. He does not recall his own offer being accepted. It may have been or a public telephone may have been used.

[16] Sharon Ball and Veronica Viellaris then rejoined those remaining in the side room as did Messrs. Shepherd and Burton. Some further discussion took place, in the course of which it is probable that Sharon Ball said words to the effect that everything was "fine" or "ok" with the absent defendants. The decision was then taken that the defendants would instruct Mr. Souter to "put the properties on the market at $415,000", attempt to obtain a higher bid but accept $415,000 if no higher bid eventuated.

[17] Mr. Souter was instructed accordingly. Mr. Burton, Mr. Arnell, Mr. Shepherd and at least some of the defendants went back into the room where the auction was being conducted. If any remained behind, the proceedings in the adjoining room would have been audible to them through the door which, by this stage, was open. Any such person could also have observed proceedings if she had been so inclined.

[18] Mr. Souter announced that there was a bid of $415,000 and that the property was "on the market at $415,000". He sought further bids, unsuccessfully. The land was knocked down to Mrs. Maloney on behalf of the plaintiffs at $415,000. The plaintiffs went to the auctioneer's table, signed the contracts and handed over a cheque for the deposit. The defendants present then signed. They had observed the plaintiffs sign the contract.

[19] Mrs. Ball, who was with Mr. Arnell, congratulated the plaintiffs on being the successful bidders.

The defendants' evidence concerning the Auction

[20] The above version of the events at the auction is inconsistent, to varying degrees, with the evidence given by Veronica Viellaris, Sharon Ball and Kay Ball. Mrs. Ball did not give evidence and neither did Mr. Viellaris. Mr. Arnell, although present at Court during the defendants' case, did not give evidence either. The absence from the witness box of the latter two persons was unexplained. The reason advanced for Mrs. Ball's failure to give evidence was her poor short term memory and lack of understanding of business matters.

[21] All of the defendants who gave evidence asserted, in effect, that they had been pressured into agreeing to accept the offer of $415,000 by misleading statements made by Mr. Shepherd about a quarrying licence, its cost and renewability and by his aggressive advocacy of the desirability of accepting the offer. That conduct, it was said or implied, denied them the opportunity of properly considering the merits of accepting the offer. I do not accept that Mr. Shepherd behaved inappropriately or that he gave the defendants misleading information. He was not joined as a party to the action and there is no suggestion even of any threatened claims or complaints concerning his conduct. Mr. Arnell was present at the time the alleged misconduct took place. If Mr. Shepherd had behaved as alleged it is probable that Mr. Arnell would have intervened. The evidence does not suggest that any such intervention occurred and Mr. Arnell remained the defendants' solicitor for weeks after the auction.

[22] My assessment of the defendants who gave evidence is that they are strongly and independently minded women. Veronica Viellaris, Sharon Ball and Kay Ball, in my estimation, would be unlikely to succumb to pressure of the type described by

them, particularly as they had each other's support and were in the presence of Mr. Viellaris and Mr. Arnell. Furthermore, the defendants' reasons and motivations for accepting the price offered and the communication between them and their agents are generally of little relevance to the issues to be decided. They are relevant, however, in determining credibility.

[23] Sharon Ball gave evidence that when she went outside the hotel to telephone her sisters she couldn't contact Violet because the number she was given as Violet's work number was incorrect. She said she spoke to Hester who said "please don't accept it" before being cut off. On her account she made no attempt to ring back or to find out the correct number of Violet's place of work. She explained this by saying she didn't know the name of the medical centre at which her sister worked, but Veronica was near her when the calls were made and her mother and Kay were also readily accessible. She said that when she went back into the room she said "I can't get Violet" and "I got cut off from Hester half-way through a conversation. I didn't get an answer out of her." She and the other defendants present, on their own versions of events, then proceeded to accept the offer. Veronica Viellaris said that when Sharon came back into the room she didn't say anything about her phone calls and, seemingly, no one enquired about them. Kay Ball's version of what was said by Sharon Ball when she came back into the room substantially accords with that of Sharon Ball.

[24] Generally, I do not find the evidence of any of the defendants credible. It is contradicted in part by the evidence of Mr. Shepherd and Mr. Burton. Mr. Burton's evidence was admitted in an affidavit tendered pursuant to s 92 of the *Evidence Act* 1977. I regarded Mr. Shepherd as a credible witness. In my view there is much about the defendants' evidence concerning the auction and surrounding circumstances which is inherently improbable. I have already identified some such matters.

[25] Having regard to the emphasis placed on the need for the absent sisters to be available over the telephone to provide their consent to a sale price, it is remarkable that Sharon Ball did not ring Hester back if she had not succeeded in obtaining her instructions to sell and that she made no attempt to ascertain Violet's phone number if the number she had proved to be wrong.

[26] It is even more remarkable that Mr. Arnell and Mr. Shepherd would permit a bid to be accepted if they had been told that the missing defendants had not given their consent. On the version of events of Veronica Viellaris and Sharon Ball the inability to obtain the consents was not even deemed worthy of discussion.

Findings in relation to the auction

[27] I find that Sharon Ball or Veronica Viellaris probably did speak to Violet Perry in the course of the auction and obtain her consent to the sale. If, which I do not accept, Violet Perry was not contacted by telephone during the auction, it is probable that she authorised Sharon Ball in the course of a 14-minute telephone conversation earlier that day to proceed with a sale of the property. That would explain Sharon Ball's lack of persistence in attempting to make contact with her sister and her lack of concern at having failed to do so. I find that Hester Deverell communicated her consent to the sale to Sharon Ball. I am supported in these

conclusions also by the evidence of the circumstances in which the defendants attempted to avoid proceeding with the sale.

[28] The defendants present at the auction and the plaintiffs, at the conclusion of the auction, were of the understanding that a contract for the sale of the land had been entered into. They later attempted to resile from the transaction but why they did so is not entirely clear.

Events following the auction

[29] Within days of the auction Mr. Viellaris telephoned Mr. Shepherd and told him that the defendants were not interested in proceeding with the contract. He said something to the effect that "they'd looked into environmental issues and spoke to parties with regards to quarrying licences." Mr. Shepherd telephoned Mr. Arnell and relayed the conversation to him. Mrs. Viellaris overheard her husband's conversation with Mr. Shepherd and it took place with her approval.

[30] I infer that Sharon Ball and Kay Ball became aware of Mr. Viellaris' phone call shortly after it took place. Mrs. Ball became aware of the phone call at about the same time. She and Sharon lived together and Sharon assisted her with her financial affairs. Whether the remaining two sisters were aware of the phone call is unclear but I think it probable that they were and that all defendants were in frequent contact in the days and weeks following the auction.

[31] Mr. Arnell's instructions however were not terminated by the defendants until much later. Nor does it appear that he was given instructions to attempt to terminate the contract. He advised the defendants that they were contractually bound and he proceeded on that basis, in accordance with his instructions, for some time. On 3 May 2000, probably before he had any intimation of his clients' change of heart, he wrote to the plaintiffs' solicitor enclosing a "copy of the relevant contract", stating that "We are arranging the signatures of the other two vendors….".

[32] On 17 May 2000 he wrote to Mrs. Ball concerning the transmission of title of the land into the names of the defendants. He concluded the letter by noting that Hester had not returned the signed contract and stating –

> "The family is, of course, bound to the contract and you should give us some positive instructions as to what is happening."

[33] On 20 June 2000 Mr. Arnell wrote to the plaintiffs' solicitors advising –

> "We appreciate what you say about date and confirm –
>
> (a) We have not yet received the contract signed by the remaining two (2) sisters;
>
> (b) We cannot obtain instructions as to if and when it will be so signed."

[34] The foregoing referred to the plaintiffs' solicitors' letter of 7 June 2000 and, in particular, to a discussion in the letter about the dating of the contract and the due date for settlement.

[35] On 27 June 2000 the plaintiffs' solicitors attended at Mr. Arnell's office and tendered the balance of the contract price. The tender was not accepted.

[36] These proceedings were commenced by claim on 4 July 2000. A notice of intention to defend and a defence were filed on behalf of the defendants by Pescott Reaston Solicitors on 29 August, 2000.

Whether a contract came into existence at the auction

[37] Mr. McGhee, who appeared for the defendants, conceded that "…it seems open for the Court to imply the necessary authority to sell the land by auction from the conduct of the parties and the general circumstances of the case." He accepted also that an auctioneer has implied authority to bind a vendor and that, consequent upon the auctioneer exercising his powers, a concluded contract between the vendor and the highest bidder could arise upon the fall of the hammer.[1] He further accepted that a vendor, as principal, could not avoid liability by relying upon an undisclosed limitation on the auctioneer's authority[2].

[38] The defendants sought to avoid the conclusion that the contract had come into existence when the land was knocked down to the plaintiffs, by asserting that the signatures of the defendants on the contract were conditional on the signing of the contracts by the absent defendants and by reliance upon clause 1 of the terms and conditions of Auction read out by Mr. Souter to those present at the auction at the commencement of proceedings. The clause provides:-

> "1.The highest approved bidder will be the buyer subject to:
> (a) the reserve price; and
> (b) the seller's approval."

[39] Conditions 5 and 8 provide:-

> "5. The auctioneer has the discretion to refuse/accept any bid from any person. A bid will be taken to be accepted and irrevocable unless the Auctioneer, immediately after it is made, refuses it.
>
> …
>
> 8. Immediately on the fall of the hammer, the bidder of the highest bid accepted must sign, as buyer, the Contract of Sale in the form displayed or circulated with these conditions of sale and pay the deposit to the nominated stakeholder."

[40] It was not argued that a reserve was set and was not reached. A reserve was not in fact set. It was argued however that clause 1(b) had not been complied with as the approval of Violet Perry and Hester Deverell had not been forthcoming. That submission is inconsistent with the facts as I have found them. The defendants present at the auction or, at least Sharon Ball, had her missing sisters' authority to accept either the actual bid which was accepted or a bid in such a sum.

[41] Furthermore, the sellers' approval was communicated to Mr. Souter, the auctioneer, by Mr. Shepherd, the defendants' agent and, probably, also by Mr. Arnell. Mr. Arnell was present when Mr. Shepherd conveyed his instructions to Mr. Souter and, if he did not positively confirm those instructions, he acquiesced in them by his conduct. Most if not all, of the defendants other than Violet Perry and Hester Deverell were also present and also acquiesced.

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1 *Futuretronics International Pty Ltd v Gadzhis* (1992) 2 VR 217 AT 232

2 *Rainbow v Howkins* (1904) 2 KB 322

[42] Mr. Arnell and Messrs. Souter and Shepherd were instructed by the defendants to act on their behalf in the sale of the land. The absent defendants were content to have their instructions conveyed to their agents by those of them who were present in conferences and who were to be present at the auction. There is no suggestion that the plaintiffs had any notice of any limitation on the authority of the defendants present at the auction or of any of the defendants' agents.

[43] The absent defendants, by conduct, permitted it to be represented that the other defendants (or, at least, Sharon Ball) had authority to act on their behalf in advising whether or not a bid could be accepted. Consequently, even if, contrary to my findings, those defendants did not agree to the sale at the price of $415,000 they would have been bound by the acts of the other defendants, or Sharon Ball, to the same extent as if the defendants, or Sharon Ball, had the authority that they, or she, were or was represented to have.[3]

[44] I return now to the defendants' reliance on condition 1(b). It is construed by the defendants as if "the seller's approval" is synonymous with the execution of a contract by the vendors. The clause, however, does not state that and nor, in my view, is it implicit that the vendors' approval may be given only by the signing of a contract by the vendors. The vendors' approval was communicated when Mr. Souter announced that the property was on the market for $415,000. It was communicated also by the signing of the contract by the plaintiffs and those of the defendants present at the auction. It was further communicated or given by the words and conduct of the defendants and their agents and, subsequently, by Mr. Arnell in correspondence.

[45] The defendants' reliance on *Martinez v Rowland* [4] is misplaced. In that case it was held that the signature on a contract of one of a number of co-vendors did not give rise to a separate contract between that person and the purchaser as the signature was conditional on signature by the other co-vendors. In this case the contract was concluded at the auction and was not dependant on the signing of any written instrument.

The existence of a sufficient memorandum in writing

[46] The defendants contend that even if a contract came into existence as a result of proceedings at the auction there is no memorandum in writing which would satisfy the requirements of s 59 of the *Property Law Act* 1974 which provides:-

> "No action may be brought upon any contract for the sale or other disposition of land or any interest in land unless the contract upon which such action is brought, or some memorandum or note of the contract is in writing, and signed by the party to be charged, or by some person by the party lawfully authorised."

[47] Mr. Collins, for the defendants, submits that it is sufficient that the contract be signed by Mrs. Ball and that it be put together with Mr. Arnell's letter of 3 May 2000. The basis for that contention being that at the time of the auction they were the executors of Mr. Ball's estate and legal title in the land resided in them. The

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3 *Hely-Hutchinson v Brayhead Ltd* (1968) 1 QB 549.

4 (1983) 1 QdR 496

difficulty with this argument is that s 59 is not concerned with a contract or memorandum signed by the person in whom title is vested, its requirements must be met by the party to the contract against whom the contract is to be enforced.

[48] Another contention, which I reject, is that the defendants present at the auction had authority to execute a contract on behalf of the absent defendants. I have found that the absent defendants gave authority for the sale to take place. The surrounding circumstances however suggest that there was never an intention on the part of any of the defendants or their agents that the contract be signed by anyone else on behalf of the absent vendors. When the defendants present at the auction signed the contract they did so in the belief that the contract would be sent to the absent defendants for execution. There had been some previous discussion of the possibility that a power of attorney would be executed but nothing was done to prepare or execute the necessary documents.

[49] On 3 May 2000 Mr. Arnell wrote to the plaintiffs' solicitors enclosing a "copy of the relevant Contract". The letter acknowledged receipt of the plaintiffs' solicitors letter of 28 April, 2000 in which the plaintiffs' solicitors had stated that they acted for the plaintiffs

> "…in connection with the purchase at auction of the Estate properties at Ball Road and note that you act for the executors. Would you please let us have a contract for consideration by our clients as soon as possible."

[50] The copy of the contract forwarded by Mr. Arnell under cover of his letter was one dated 28 April 2000 signed by the plaintiffs and the defendants, other than Mrs. Deverell and Mrs. Perry. The letter bore the incorrect reference "Estate J I Ball – sale to I L and N J Johnston" but the enclosed signed contract showed the correct contracting parties. The error, it would seem, arose from the same erroneous reference in the plaintiffs' solicitors letter of 28 April, 2000.

[51] A sufficient note or memorandum in writing for the purposes of s 59 may be comprised of more than one document. It is sufficient for a memorandum relied on, which does not contain in itself all necessary information, to refer to another document, which when read together with the memorandum, contains all the terms of the bargain.

[52] In *Elias v George Sahely & Co.* (Barbados Ltd)[5] it was said:-

> "If, therefore, a document signed by the party to be charged refers to a transaction of sale, parol evidence is admissible both to explain the reference and to identify any document relating to it. Once identified, the document may be placed alongside the signed document. If the two contain all the terms of a concluded contract, the statute is satisfied."

[53] Here, there is no doubt that Mr. Arnell was acting for the defendants in relation to the sale of the land. The letter of 3 May was sent by him within the scope of his authority as solicitor for the defendants. When the letter is put together with the enclosed copy of the contract signed by four of the defendants, the two documents

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5 (1983) A.C. 646 at 655

comprise a sufficient memorandum in writing for the purposes of s 59.[6] Even if Mr. Arnell lacked authority to sign a contract, having been engaged to represent the defendants in a sale of the land generally, it was within the scope of his authority to affirm, on behalf of his clients, the existence and validity of the contract he was instructed to carry out.[7] It is immaterial that neither he nor his clients adverted to the possible legal consequences of his acts.[8]

Part performance

[54] Having regard to the foregoing conclusions it is not necessary to decide whether, if the contract is unenforceable as a result of s 59 of the *Property Law Act*, the plaintiffs nevertheless have available to them the protection afforded by the equitable doctrine of part performance. It is desirable however that I make some findings of fact and express some views in this regard in case the matter goes further. The acts of part performance relied on by the plaintiffs are:-

1. The taking of possession of Lots 1 and 2 by the plaintiffs with the acquiescence or consent of the defendants;

2. The recommencement of quarrying activities on Lot 2 by the plaintiffs;

3. The undertaking of improvements to the quarry by the plaintiffs;

4. The clearing of Lot 1;

5. The payment of the rates on Lots 1 and 2.

[55] It will be recalled that the plaintiffs had been advised by Mr. Arnell that the extension of their lease would not be granted, that the defendants wished to sell the land free of any lease and that the plaintiffs had communicated their intention to cease activities on Lot 2 and vacate it.

[56] There was extensive cross-examination by Mr. Collins directed to ascertaining whether the defendants were aware of the activities conducted on the land by the plaintiffs. In order for the doctrine of part performance to operate it may not be necessary that the defendants be aware of the carrying out of the acts relied on by the plaintiffs.[9] But knowledge assumes additional importance in this case as one of the acts of part performance relied on is the giving and taking of possession. There was no formal giving of possession by the defendants but the plaintiffs assert that the giving of possession was effected by conduct.[10] I find that although the defendants may not have been aware of the detail of what was happening on the land they were aware that the plaintiffs were working the quarry and that they were in the process of clearing Lot 1.

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6 See e.g. *Horner v Walker* (1923) 2 Ch 218 and *Kalnenas v Kovacevich* (1961) W.A.R 188 at 192

7 *North v Loomes* (1919) 1 Ch.378 at 383. See also *Daniels v Trefusis* (1914) 1 Ch.788 at 799.

8 *Daniels v Trefusis (supra) at 798-9.*

9 Spry, The Principles of Equitable Remedies 6th ed at 285-6 but c.f. *McBride v Sandland* (1918) 25 CLR 69 at 79; *Cooney v Burns* (1922) 30 CLR 216 at 226 and *Kalnenas v Kovacevich* (1961) W.A.R. 188 AT 193.

10 The taking of possession may be sufficient to support part performance. *Regent v Millett* (1976) 133 CLR 679 at 682.

[57] Shortly after the date of the auction on 28 April the defendants began to have second thoughts about proceeding with the contract. In those circumstances, I think it likely that they would have had a heightened, rather than a lessened, interest in what was happening on the land. Mrs. Ball and Sharon Ball regularly made trips past the subject land in order to visit friends and relatives. The land was also readily accessible to Kay Ball and Veronica Viellaris. Having regard to the focus of interest of those persons in the land I find it probable that they would have found occasion to visit it and observe activities on it in the weeks after 28 April. There is little doubt that the defendants were in frequent communication amongst themselves about matters pertaining to the contract and the land. Accordingly, it is probable that those defendants who observed activities on the land reported on them to the others.

[58] In *Darter Pty Ltd v Molloy*[11] the acts sufficient to constitute part performance were discussed in the following terms:-

> "The classical formulation of the doctrine of part performance is that of Lord Selborne L.C. in *Maddison v Alderson* (1883) 8 App.Cas. 467, 479, where it was said that to constitute part performance "the acts relied on must be unequivocally, and in their own nature, referable to some such agreement as alleged". It is settled, however that the act or acts in question need not point to the "very" contract alleged: *Francis v Francis* [1952] V.L.R. 321, 331, 340; *Kingswood Estate Co. Ltd v Anderson* [1963] 2 Q.B. 169. Possession of land by a stranger is referable to an agreement to dispose of an interest in land. In the case of an agreement to purchase, giving and taking possession is a sufficient act of part performance: *Regent v Millett* (1976) 133 C.L.R. 679, 683. The same is true of an agreement for lease. Retention of existing possession is enough, if coupled with an increase in rent: *Nunn v Fabian* (1865) L.R. 1 Ch.App. 34; *Miller & Aldworth Ltd v Sharp* [1899] 1 Ch. 622; cf. also *Saint v Adams* [1921] St.R.Qd. 41. Without such an increase, it is said that the act of continuing in possession is or may be referable only to the pre-existing lease and not to some new agreement: *Kalnenas v Kovacevich* [1961] W.A.R. 188; cf. also *Miller & Aldworth Ltd v Sharp*, at 626; *Thomas v The Crown* (1904) 2 C.L.R. 127."

[59] It is submitted on behalf of the defendants that the activities on Lot 2 cannot be relied on by the plaintiffs as they are referable to a holding over under the lease. The plaintiffs, in answer to this, point to: their stated intention to vacate; the "virtual cessation" of quarrying activities; the resumption and increase in scope of quarrying, cessation of rental payments and the payment of rates.

[60] The plaintiffs ceased paying rent after 28 April 2000 and commenced paying rates on 22 June 2001. After signing the contract they recommenced quarrying activities on Lot 2, and engaged another employee to work in the quarrying business.

[61] It is not necessary for me to decide whether such conduct on the part of the plaintiffs constitutes acts of part performance. The taking of possession of Lot 1 with the knowledge and acquiescence of the defendants and the carrying out of

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[11] (1993) 2 QdR 615

work on it constitutes clearer acts of part performance. The work done on Lot 1 essentially consisted of the progressive clearing of lantana, tobacco weed and other rubbish by use of a bulldozer and end loader. The rubbish was placed in heaps and subsequently burnt. On 18 and 19 May 2000 the plaintiffs purchased a slasher and tractor respectively for use in keeping Lot 1 cleared. The clearing work commenced very shortly after 28 April and continued at a rate of about 15 hours a week for many weeks. By 27 June at least half of Lot 1 had been cleared.

[62] In the course of argument I queried whether the plaintiffs could rely on acts as part performance if, before doing those acts, the plaintiffs were aware that the defendants were refusing performance. I had in mind that in such circumstances it may not be unconscionable of the defendants to rely on the lack of a memorandum in writing.[12]

[63] Any such difficulty, however, would not prevent the plaintiffs from establishing part performance as there were plainly acts on which the plaintiffs could rely prior to 27 June, the due date for settlement. Even on that date the defendants did not assert that the contract was at an end or that they would not be performing their obligations under it. The first occasion on which the defendants or their legal advisors informed the plaintiffs of their contention that there was no binding agreement on foot was when the defence and counter-claim were filed and served. Before that time the plaintiff had an intimation that there was some dispute between the defendants but believed that the contract was on foot and would be settled.

Conclusion

[64] Having regard to the above findings it is unnecessary for me to address the plaintiffs' estoppel allegations.

[65] There will be judgment for the plaintiffs on the plaintiffs' claim and on the defendants' counter-claim. I will hear submissions on the precise form of any order and as to costs.

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[12] cf. Spry, *The Principles of Equitable Remedies* 6th Ed 285-7