Is there really any question about the test for part performance in Alberta?
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G 400 Holdings Ltd. v. Yeoman Development Company Limited, 2008 ABQB 667
http://www.albertacourts.ab.ca/jdb%5C2003-%5Cqb%5Ccivil%5C2008%5C2008abqb0667.pdf

I apparently spoke too soon. In March 2008, I noted that the Alberta Court of Appeal decision in *Booth v. Knibb Developments Ltd*., 2002 ABCA 180 had settled any doubts about which test for part performance applies in Alberta: see "The Doctrine of Part Performance: Still Strict After All These Years". There are two tests for determining what acts of part performance are sufficient to allow enforcement of an oral agreement concerning land, both originally formulated by the House of Lords. The older and stricter test was set out in *Maddison v. Alderson* (1883), 8 App. Ca. 467 at 478 (H.L.); it requires that the acts relied upon by the claimant as part performance "be unequivocally, and in their own nature, referable to some such agreement as that alleged." That test was relaxed considerably in England in 1976, with the decision in *Steadman v. Steadman*, [1976] A.C. 536. In *Steadman*, the House of Lords held that the acts of part performance need refer only on the balance of probabilities to some contract to which the claimant was a party. Although a number of Alberta courts applied the more relaxed test from *Steadman* in the 1980s, in 2002 the Alberta Court of Appeal unequivocally adopted the traditional, stricter test from *Maddison v. Alderson*. That was the end of the influence of *Steadman* in Alberta — until the October 30, 2008 decision of Madam Justice Barbara Romaine in *G 400 Holdings Ltd. v. Yeoman Development Company Limited*.

The *G 400 Holdings* case concerned a commercial lease. The issues were whether the parties had entered into an oral agreement to lease the commercial premises and, if they had, whether part performance of that agreement provided relief from the requirements of section 4 of the *Statute of Frauds*, (1677) 29 Car. II c.3.

G 400 Holdings was a tenant in the Silver Springs Shopping Mall in Calgary and operated a fitness centre in that mall. (There was a second company owned by the same people operating the same kind of business in a different mall owned and operated by the same landlord and agents under a lease with the same term, but I will refer only to the one tenancy in this comment.) In 2004, G 400 Holdings wanted to renew the fitness centre lease to make the business more attractive for sale as a going concern. The original lease between G 400 as tenant and Yeoman Development Company Limited as landlord was due to expire in October, 2007.

After a meeting between an agent for the landlord and G 400 Holdings in early December, 2004, the tenant sent the landlord's agent an e-mail setting out the terms for a new ten year lease with a five year option to renew. The new lease would commence on May 1, 2005 and the rent would be $7.00 per square foot. The tenant's agent testified that the landlord's agent told G 400 Holdings that she took the terms to the landlord but the landlord wanted $7.50 per square foot in rent, a figure the tenant immediately agreed to.

On December 8, 2004, G 400 Holdings e-mailed the landlord's agent, asking when they could expect a draft of the new lease. On or about January 4, 2005, the landlord's agent delivered an

"Offer to Lease" which she had prepared. It incorporated the terms that had been set out in the December 2004 e-mail, except that the rent was stated to be $7.50 per square foot.

The Offer to Lease included all the essential terms of a lease. It also included a provision that the parties would execute the landlord's standard form lease. The Offer to Lease stated that it would be a binding agreement when accepted by the landlord. The Offer to Lease also said it was irrevocable and open for acceptance by the landlord within ten days following its date, otherwise it will be null and void. G 400 Holdings made some minor changes to the Offer to Lease prepared by the landlord's agent, signed it and gave it back to the landlord's agent.

The agent for G 400 Holdings testified that the landlord's agent told him that the landlord had accepted the Offer to Lease. The landlord's agent testified that she had discussed the Offer to Lease with the landlord, and that she then advised G 400 Holdings that the arrears of rent owing on the current leases had to be addressed. The main issue on the arrears was the amount charged by the landlord as an adjustment to occupancy costs as against the amounts budgeted for occupancy costs, the latter of which G 400 Holdings Ltd appeared to have paid.

G 400 Holdings kept after the landlord's agent, looking for the new formal lease. They sent cheques for the rent using the amounts in the new lease. Then the landlord-tenant relationship started to fall apart. The landlord did not cash the cheques, an apparent agreement about the occupancy cost arrears fell apart, and so on. Meetings ensued but the contentious issues were not resolved.

The landlord served written notice to vacate the premises by December 31, 2007 on G 400 Holdings sometime prior to November 19, 2007. The tenant responded by obtaining an interim injunction allowing them to remain in possession of the leased premises until the end of the trial.

The first issue was whether the parties had entered into an oral agreement to lease the premises. No formal lease was prepared or signed. The landlord did not sign the Offer to Lease. However, Justice Romaine found that the agent for the landlord advised G 400 Holdings that the landlord had agreed to the Offer to Lease and she had the authority to bind the landlord to an agreement. Therefore, Justice Romaine found there was oral contract on the terms set out in the 2005 Offer to Lease.

The second issue was the *Statute of Frauds* issue. Several sections of that act applied, including section 4 which 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.

In other words, G 400 Holdings could not sue to enforce the oral agreement to lease.

There is a way around section 4 the *Statute of Frauds*. Shortly after it was passed late in the 17th century, the Chancery Courts in England determined that they would not allow the *Statute of Frauds* to be used as an instrument of fraud. Although it had been designed to prevent perjury and other fraudulent claims, mainly by requiring that agreements be put in writing, the courts of equity realized the Act could also provide a technical defence to someone who just wanted out of their contractual obligations. The principal response of the Chancery Courts was the doctrine of part performance. If a claimant could show that he or she had acted under the contract — had "partly performed" their part of the contract — then a court of equity would enforce the contract even though a court of the common law would not.

In 2002, the Alberta Court of Appeal, in *Booth v. Knibb Developments Ltd.,* acknowledged (at para. 25) that "[t]he leading decision on the doctrine of part performance is *Maddison v. Alderson* (1883), 8 App. Ca. 467 (H.L.)." They quoted the most often quoted formulation of the test for acts done in part performance, expressed in that case at 478-79, namely, that "the acts relied upon as part performance must be unequivocally, and in their own nature, referable to some such agreement as that alleged ...". The Alberta Court of Appeal noted that the test for part performance articulated in *Maddison* had been accepted as the law in Canada, relying on four Supreme Court of Canada cases: *Deglman v. Guaranty Trust Co. of Canada and Constantineau*, [1954] S.C.R. 725; *McNeil v. Corbett*, [1907] 39 S.C.R. 608; *Brownscombe v. Public Trustee of Province of Alberta*, [1969] S.C.R. 658; and *Thompson v. Guarantee Trust Co*., [1974] S.C.R. 1023. The Alberta Court of Appeal then quoted the test for part performance articulated by Cartwright J. (at 732), concurring in the leading Canadian case of *Deglman*:

> ... In order to exclude the operation of the Statute of Frauds, the part performance relied upon must be unequivocally referable to the contract asserted. The acts performed must speak for themselves, and must point unmistakably to a contract affecting the ownership or the tenure of the land, and to nothing else.

In her decision in the *G 300 Holdings* case, Madam Justice Romaine notes that counsel for the landlord argued that the acts the tenants relied upon to prove part performance were not unequivocal. Justice Romaine, however, disagreed. Without referring to any authority in connection with the idea that the acts had to be "unequivocal" or quoting the actual test, she found (at para. 55) that "[t]he acts relied upon in the context of the evidence as a whole are unequivocally referable to the Offer to Lease" (emphasis added). The test from *Maddison* actually requires that the "the acts relied upon as part performance must be unequivocally, and in their own nature, referable to some such agreement as that alleged ..." Is "in the context of the evidence as a whole" in keeping with "in their own nature"? "In their own nature" suggests the acts must speak for themselves and not derive their meaning from the circumstances as a whole. The point is not discussed, and it is not discussed, at least in part, because the test Justice Romaine applied was only alluded to.

Justice Romaine then goes on, in a passage that might be considered *obiter* had there been enough law referred to on the "unequivocal point" to make those reasons the type of reasons required of a court of law, to note (at para. 56) that "English jurisprudence appears to be moving to a less rigorous test." This is a reference to the more relaxed test from *Steadman* that the Court of Queen's Bench of Alberta had flirted with in the 1970s and 1980s, before the Court of Appeal

decision in *Booth v. Knibb Developments Ltd.* Justice Romaine notes that *Steadman* is the leading modern English authority — as it is — and quotes the actual test formulated by Lord Reid in that case: "you take the whole circumstances, leaving aside evidence about the oral contract, to see whether it is proved that the acts relied on were done in reliance on a contract; that will be proved if it is shown to more probable than not." Justice Romaine, relying on John D. McCamus's *Law of Contracts* (Toronto: Irwin Law, 2005), notes that the Supreme Court of Canada has not considered the *Steadman* test, that the British Columbia Court of Appeal has adopted it, and that one 1981 Court of Queen's Bench of Alberta decision also adopted it (*Canadiana Gifts Ltd. v. Friedman* (1981), 15 Alta. L.R. (2nd) 237; (1981), 32 A.R. 354 at paras. 46-47). Justice Romaine then uses the *Steadman* test to conclude that "taking the circumstances as a whole, the tenants have proved on a balance of probabilities that their payment of rent between February, 2005 and the late summer or early fall of 2006 was done in reliance upon the new lease they thought had been agreed to by the landlord."

Justice Romaine does not mention the Alberta Court of Appeal decision in *Booth v. Knibb Developments Ltd.* Perhaps it is not included in Professor McCamus's book and perhaps it was not cited by counsel. She also does not refer to any other Alberta Court of Queens Bench decisions, beyond the 1981 *Canadiana Gifts Ltd. v. Friedman* decision, even though there are numerous cases since the 2002 Court of Appeal decision in *Booth v. Knibb Developments Ltd.* that acknowledged the binding nature of that Court's adoption of the *Maddison* test. Consider, for example, the following recent cases that discussed the doctrine of part performance:

- *Atir Enterprises Ltd. v. Briault*, 2008 ABQB 520 at para. 66, where Madam Justice Moen noted:

  > "The evidence of part performance must be unequivocal. The Alberta Court of Appeal most recently examined the doctrine of part performance in *Booth v. Knibb Developments Ltd*., 2002 ABCA 180 . . . where it was held that the evidence of part performance must unequivocally refer to the oral contract alleged. That is, the actions must be capable of no other interpretation than that the contract as alleged existed. The proof of the contract must be convincing as no agreement is available in writing. Our Court of Appeal further noted that actions contrary to the alleged agreement ought to be taken into consideration . . ."

- *Wasylyshyn v. Wasylyshyn*, 2008 ABQB 39 at para 40, where Mr. Justice E.A. Marshall acknowledged:

  > "The case law shows the acts relied upon must be unequivocally in reference to the contract and must be acts carried out by the Plaintiff: *Booth v. Knibb Developments Ltd.*, [2002] A.J. No. 957, 2002 ABCA 180 at para. 19."

- *1247532 Alberta Ltd. v. Valpy Corp*., 2007 ABQB 547 at para. 30, where Mr. Justice Macklin held:

  > "The part performance must be unequivocally referable to the contract alleged; no lesser standard will suffice: *Booth v. Knibb Developments Ltd*., [2002] A.J. No. 957, 2002 ABCA 180 at para. 19."

- *William Choy Investments Ltd. v. Hervey*, 2006 ABQB 621 at para. 14, where Mr. Justice Sanderson held:

  > "Oral agreements for the sale of land may be enforceable if part performance is unequivocally referable to the contract alleged. No lesser standard will suffice. (see *Booth v. Knibb Developments Ltd.* (2002), 312 A.R. 173 (Alta. C.A.)).

- *Pena v. Kocian*, 2006 ABQB 602 at para. 75, where Mr. Justice Chrumka relied upon Mr. Justice Lee's discussion of the *Statute of Frauds* in *Jusza v. Dobosz* [2003] A.J. No. 761 at para. 41:

  > "The acts of the person providing the alleged oral agreement for the sale of land must be found to be unequivocally referable to the alleged oral sale agreement and nothing less. By their own nature the conduct must be referable to the alleged contract. The acts must speak for themselves and must point unmistakably to a contract affecting the ownership or the tenure of the land and to nothing less: *Booth v. Knibb Development Ltd*., [2002] A.J. No. 957, 2002 ABCA 180."

Would the following of precedent and the use of the older and stricter test from *Maddison* have made a difference in *G 400 Developments*? After all, Justice Romaine did find (at para. 55) that "[t]he acts relied upon in the context of the evidence as a whole are unequivocally referable to the Offer to Lease." Nevertheless, it appears that the result would have been different had the test articulated by the House of Lords in *Maddison* or by the Supreme Court of Canada in *Deglman* or by the Alberta Court of Appeal in *Booth v. Knibb Development Ltd.* been adopted, articulated and applied. Justice Romaine's hedging references to "in the context of the evidence as a whole" and "taking the circumstances as a whole" suggest the more demanding *Maddison* test could not have been met.

And, as Justices Sanderson and Macklin have put it, in light of the Alberta Court to Appeal decision in *Booth v. Knibb Developments Ltd*., the older and stricter *Maddision* standard must be used — "no lesser standard will suffice."