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Two cases concerning the Statute of Frauds (1677, U.K.)

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Cases Considered:
Leoppky v. Meston, 2008 ABQB 45,
Wasylyshyn v. Wasylyshyn, 2008 ABQB 39

A statute enacted over 350 years ago by a Parliament sitting in London, England was the basis of two decisions of the Alberta Court of Queen's Bench handed down the week of January 21, 2008. The decision of Madam Justice D.C. Read in *Leoppky v. Meston*, 2008 ABQB 45, was released January 17. The decision of Mr. Justice E.A. Marshall in *Wasylyshyn v. Wasylyshyn*, 2008 ABQB 39, was released January 18.

In Alberta, the *Statute of Frauds: An Act for the prevention of frauds and perjuries*, 29 Charles II, c.3 (1677, U.K.), imposes requirements for agreements involving land to be in writing and signed by the party to be sued. The statute dates back to the English civil war and the original intent, as the name implies, was to eliminate the widespread fraud that resulted from the use of false witnesses to prove claims to disputed property. Most common law jurisdictions have adopted the provisions of the Statute of Frauds in some form which generally requires contracts for the sale of land to be in writing and signed by the party to be charged. In Alberta, it is the original English statute that is in force.

The Statute of Frauds has attracted a great deal of litigation, but there tends to be only three types of issues raised in all of these cases:

1. Whether a transaction comes within the provisions of the statute;
2. Whether there is sufficient evidence in writing to comply with the provisions of the statute; and
3. Whether, even if a transaction is unenforceable under the statute, alternative relief is available to the person trying to enforce the transaction.

Both of the 2008 Alberta cases involved alleged agreements to settle disputes that involved parcels of land. In Wasylyshyn v. Wasylyshyn, the focus was on whether the alleged agreement came within the provisions of the statute. However, in *Leoppky v. Meston*, the issue was whether there was sufficient written evidence.

In *Wasylyshyn v. Wasylyshyn*, a mother willed her entire estate to one of her three children, Lillian Wasylyshyn, the defendant in this action. After the mother died, the two siblings who had been left out of the will, Steve Wasylyshyn and Vera Bociurk, threatened to challenge its validity. They claimed that the three siblings had reached an agreement to settle their dispute by

the defendant transferring one of the two houses owned by the estate to them. The transfer never happened and so Steve Wasylyshyn and Vera Bociurk sued for specific performance of the agreement to settle the dispute. The defendant claimed no agreement had been reached but, if it had been, the agreement was not in writing and therefore section 4 of the Statute of Frauds applied.

The first issue was whether an agreement existed. Here, Mr. Justice Marshall relied upon the words of the Court of Appeal in *Ron Ghitter Property Consultants Ltd. v. Beaver Lumber Co.* (2003), 330 A.R. 353 at paragraph 9: "the parties will be found to have reached a meeting of the minds . . . where it is clear to the objective bystander, in light of all the material facts, that the parties intended to contract and the essential terms of that contract can be determined with a reasonable degree of certainty." In this case, there were numerous telephone conversations and letters between both the parties and their lawyers. Mr. Justice Marshall had little difficulty finding that the parties were ad idem and that the essential terms – the parties, the property and the money to be paid – could be determined.

The main issue in *Wasylyshyn v. Wasylyshyn* was the second issue, namely, whether section 4 of the Statute of Frauds applied. That provision applies to "any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them." As the British Columbia Law Institute (formerly the Law Reform Commission of British Columbia) noted in its 1977 Report on the Statute of Frauds (LRC 33), "[o]ver three hundred years of judicial interpretation have yielded but an imprecise notion, to say the least, of what agreements will be construed as 'concerning an interest in land.'"

Difficult issues arise when the main purpose of the contract is seen to be other than the disposition of land. Agreements which in substance appear to be made for other purposes have been held to fall outside the statute despite including a peripheral disposition of an interest in land. In *Wasylyshyn v. Wasylyshyn*, the defendant agreed to transfer the parcel of land with the small house to the plaintiffs and the plaintiffs accepted that land in consideration of their giving up any claim against their mother's estate.

Mr. Justice Marshall doubted the application of the Statute of Frauds for two reasons. First, because it was a case about the enforcement of a settlement agreement and contract, he thought the statute was inapplicable based on the authority of *Ritland v. Ritland*, [1980] 3 W.W.R. 577 (Alta. Q.B.) and *Rimer v. Rimer* (1981), 119 D.L.R. (3d) 579 (Alta. Q.B.).

The facts in Ritland were very similar to those in Leoppky v. Meston. In the 1980 case, the plaintiff sued for specific performance of an alleged property settlement arrived at in the course of a divorce proceeding. The defendant denies that a valid and binding settlement agreement was ever reached. In Ritland, after finding a settlement agreement had been reached, Justice Miller held the statute did not apply, based on the fact the action was one to enforce a settlement agreement. Although the settlement involved a transfer of real property, he saw it as an action in contract and not an action on land. The question of whether a settlement terminating an action that was announced in open court ever falls within the Act had been broached in several cases, but never decided. The cases were more easily resolved in favour of enforcing the settlement agreements by applying the equitable doctrine of part performance to hold that section 4 of the Statute of Frauds did not apply.

In *Rimer v. Rimer*, the court thought section 4 had ceased to be relevant. The court focused on the purpose of the Statute of Frauds and noted that proceedings in which the terms of a

settlement are recounted into the courts' record and made a consent judgment of the court do not attract that purpose. Enforcement would no longer be a matter of contract.

In the recent New Brunswick Court of Appeal case cited by Mr. Justice Marshall, *Grant v. McKnight*, it was held the Statute of Frauds had no application to a motion for judicial recognition of a binding settlement agreement but no authority was cited for this proposition. The court also relied upon the equitable doctrine of part performance to get around the act's requirements for writing and a signature.

Second, Mr. Justice Marshall thought the Statute of Frauds did not apply because "the gist of the agreement was neither a contract respecting nor a sale of lands. It was an agreement to modify the terms of the will and distribution of the Estate, and the means of effecting that revised distribution was to provide for the small house to be transferred to the Plaintiffs" (at para. 32). He noted that G.H.L. Fridman in The Law of Contract in Canada, 5th ed., at 209, stated that an agreement to settle an action for a declaration that certain land was held on a resulting trust was an agreement to which the Statute of Frauds did not apply.

Nevertheless, Mr. Justice Marshall did go on to deal with the Statute of Frauds and the writing requirement. He was able to find fairly easily that, although the agreement began as an oral one over the telephone, it had been refined and concluded by the parties' lawyers and confirmed in writing by their correspondence. Section 4's requirement that "the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing" was met, as was the statute's requirement that the writing be " signed by the party to be charged." The defendant's lawyer was her agent and his signature on the correspondence met the statute's signature requirement.

Finally, Mr. Justice Marshall also dealt with an argument that section 4 of the Statute of Frauds did not apply because of the doctrine of part performance. This equitable doctrine was developed by the English Courts of Chancery shortly after the Statute of Frauds was enacted. When one party has relied upon and acted pursuant to an alleged oral agreement concerning land, it is seen as unfair and even fraudulent for the other party to be able to rely on the Statute of Frauds to keep the benefits of the other's performance of the contract while not performing his or her own part. 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 ABCA 180. Mr. Justice Marshall found that in this case, "the Defendant stood by and allowed the Plaintiffs, to their detriment, to fulfil their part of the oral contract, being the forbearance to sue exercised by them."

Therefore, whether because the Statute of Frauds did not apply, or because the Statute of Frauds' writing requirements had been fulfilled, or because the equitable doctrine of part performance applied instead of the Statute of Frauds, the plaintiffs were successful in *Wasylyshyn v. Wasylyshyn*.

In *Leoppky v. Meston*, an unmarried couple had purchased a home in Edmonton. After living together for six years, differences arose between them and they attempted to negotiate a settlement of their respective interests in the home and its furnishings and improvements. The Plaintiff, William Leoppky, claimed the couple did negotiate a settlement and that while he performed his side of the agreement, the Defendant, January Meston, refused to honour her part of the bargain. He asked the court to order the defendant to perform her part. The Defendant denied that any agreement had been reached and, in particular, denied that they had agreed on the

value of the house. She asked the court for an order to sell the home and divide the proceeds between the couple. She also pled the Statute of Frauds as a defence to the Plaintiff's claim that an enforceable agreement had been reached.

When they separated in March of 2006, Meston had left the home. Leoppky continued to live there and make mortgage payments. Shortly after they separated, the couple began to negotiate a resolution of their financial affairs, usually via e-mail and both directly and through a mutual friend.

As was the case in *Wasylyshyn v. Wasylyshyn*, the first issue was whether an agreement existed. Madam Justice Read applied the same test from the same Alberta Court of Appeal case ? *Ron Ghitter Property Consultants Ltd. v. Beaver Lumber Co.* ? to determine that there was indeed an agreement and that all its essential elements were determinable.

The second issue was therefore whether that agreement complied with the Statute of Frauds. Madam Justice Read held that there was sufficient writing to satisfy its requirements, even though the writing was computer generated and in emails. There have been quite a number of decisions by this time holding that electronic correspondence can satisfy statutory writing requirements and she cites a few of them. One might think it odd that electronic equivalence has not been dealt with statutorily by this time. Alberta does indeed have an Electronic Transactions Act, S.A. 2001, c. E-5.5. However, section 7 of that statute specifically states: "This Act does not apply to . . . (e) records that create or transfer interests in land, including interests in mines and minerals . . ".

As already noted in connection with Wasylyshyn v. Wasylyshyn, the Statute of Frauds also requires that the writing be signed by the party being sued. Madam Justice Read concluded that the emailed signature of Ms. Meston was sufficient to meet this requirement as well. This conclusion was made easier because Ms. Meston had not argued that the emails were from anyone other than her and had not argued the typed words "January" at the bottom of the e-mails was not her signature. A signature is essentially evidence of a person's connection with a document and of the intention of that person with respect to the document. This suggests that such evidence in electronic form could be satisfactory at common law, without a specific statutory provision. Initials, printed names and rubber stamps have all been held to satisfy signature requirements on the basis that the method achieved the same purpose as a personal signature. That was exactly the approach Madam Justice Read took to the issue.

The Plaintiff failed in the Leoppky v. Meston application, but not because of any Statute of Frauds requirement. Instead, it was the third issue, namely, whether the writing set out the entire agreement. Ms. Meston had alleged that there was a condition precedent to the settlement agreement that she have the agreement reviewed by and approved by her lawyer. Because Mr. Leoppky's application was heard in special chambers on affidavit evidence and because the existence of the condition precedent was mainly a matter of credibility that could not be assessed in a chambers application on affidavit evidence, the court denied Mr. Leoppky's application. However, because of the court's conclusions on the Statute of Frauds issues, the court also denied Ms. Meston's application. Instead, Madam Justice Read ordered that the condition precedent issue be tried.