JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 8/91

BEFORE: THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE BINGHAM, J.A. (Ag.)

BETWEEN	SANDRA ATLAS-BASS	
AND	ROBERT S. ZABELLE	DEFENDANTS/APPELLANTS
AND	AVALON INVESTMENTS LTD.	PLAINTIFF/RESPONDENT

Dr. Lloyd Barnett instructed by
Wendell Wilkins and Michalene Lattore
of Clinton Hart & Co. for the defendants/appellants

Crafton Miller and Nancy Anderson
instructed by Crafton Miller & Co.
for the plaintiff/respondent

May 20, 21, 22 and July 8, 1991

WRIGHT, J.A.:

This is an appeal from the judgment of Panton, J. dismissing a "Motion Applying for an Order to Stay Proceedings and Enforce Compromise" which said Motion by the appellants is in the following terms:

> (1) All further proceedings in this action be stayed upon the terms set forth in the schedule to the Minutes of Order attached hereto which the parties have agreed except for the purpose of carrying this Order and the terms thereof into effect and for this purpose the defendants are to be at liberty to apply;
>
> (2) In the event of the default by the plaintiff in complying with the said terms or any part thereof, the defendants shall be at liberty to sign Final Judgment against the plaintiff in the

said terms or any part thereof which has not been performed by the plaintiff;

(3) The costs of the defendants in this application be taxed if not agreed and paid by the plaintiff to the defendants.

Crucial to the granting of the motion is the identifying of "the terms which the parties have agreed". But the failure so to do is the reason why the learned judge dismissed the motion. Said he:

> "It seems to me that, on a balance of probabilities, the various sums for payment have not been divorced or isolated from the time for their payment. There being no agreement on the time for payment, there does not seem to be any genuine compromise.
>
> I note that the attorney-at-law for the defendants was advised on December 10, 1990, of a change of attorney-at-law by the plaintiff. I note further that on the day following the notification of this change, the attorney-at-law for the defendants decided to formally respond to the letter of October 8. This hesitancy in responding formally to the letter of October 8 further indicates to me that up to the time of the notification of the change of attorney-at-law, the position being advanced by the defendants had not crystallized - as discussions were still in progress."

Against this finding the appellants complain that -

"(1) The learned trial judge erred on the facts and misdirected himself in law in that, he held that there was no genuine agreement between the parties because of the continuance of negotiations after October 8, 1990 although all the essential terms of the settlement had been agreed by the parties as it had been proposed in March 1990 and the parties communicated their agreement to all the points raised with respect to the draft Terms of Settlement by the latest October 8, 1990.

(2) The learned Judge erred in law in regarding negotiations subsequent to agreement as inconsistent with a genuine or a concluded agreement between the parties.

> "(3) The learned Judge erred in law and misdirected himself on the facts in failing to accept that there was a concluded agreement despite the fact that there was uncontradicted evidence that as at October 8, 1990 the parties had agreed and communicated their agreement with all the Terms of the proposed Settlement."

The question, therefore, for this Court is to ascertain whether in fact the agreement contended for exists. And, if it does, then the answers to Grounds 2 and 3 will become clearer. The search for the answer takes a long trail.

The pleadings in the original action are not before us but it appears from the affidavit evidence that there was before Panton, J., on March 19, 1990, an action by the plaintiff/respondent seeking Specific Performance of a contract for the sale of land. The opening of the case by Mr. Muirhead, Q.C., counsel for the plaintiff/respondent, indicated a solution to the problem which, up to now, has eluded the parties. He indicated that his clients would no longer be pursuing a claim for damages for reduced acreage and would accept the land with the existing acreage and any occupants thereon. The matter was thereupon adjourned pending negotiations. After adjournments on March 20, 21, 22, 23 and 26 the matter was adjourned pending settlement. The intention was that the agreed terms would be endorsed on counsel's brief and a Consent Judgment be entered in like terms.

In process of time, Mr. Peter Millingen, attorney-at-law and Partner in the legal firm of Clinton Hart and Company, attorneys-at-law, having conduct of the case on behalf of the defendants/appellants, forwarded to Mr. Michael Hylton, attorney-at-law and Partner in the legal firm of Myers, Fletcher & Gordon, attorneys-at-law for the plaintiff/respondent, a draft proposal of the terms to be agreed to be endorsed on counsel's brief, which reads:

"1. The balance of purchase price of US$264,472.52 be paid by the Plaintiff to the Defendant within 45 days of the date hereof.

2. The Plaintiff pay to the Defendant a further sum of US$208,000.00 within 180 days of the date hereof.

3. The Defendant deliver to the Plaintiff the duplicate Certificate of Title registered at Volume 1203 Folio 671 duly transferred to the Plaintiff and proof of payment of water rates and taxes to the date hereof in exchange for the payment referred to at paragraph 2 above.

4. Time shall be of the essence in respect of the aforesaid.

5. The Plaintiff will accept title to and possession of the said land 'as is' which would include but is not limited to any reduction in acreage caused by encroachment by the sea and with all or any occupants thereon.

6. In the event of the failure by the Plaintiff to make any of the aforesaid payments, the Defendant shall be entitled to forfeit the deposit of US$45,000.00 originally paid but shall refund to the Plaintiff any other sums paid, and the Plaintiff's right to Specific Performance shall cease and determine.

7. The parties agree that upon completion each shall be released and fully discharged of all or any liability including but not limited to costs, damages, expenses and/or any claims of any kind or nature arising out of or in connection with this suit and the Agreement for Sale dated 5th January, 1987.

8. Payment of the aforesaid amounts shall be made on the directions of the Defendants Attorneys, Clinton Hart & Company.

9. The parties shall execute all relevant documents necessary for completion."

The fact that these were indeed no more than proposals is underscored by the fact that on April 3, 1990, Mr. Hylton returned the Draft Proposals with amendments and a covering letter both of which are set out below:

"WITHOUT PREJUDICE

April 3, 1990

Clinton Hart & Co.
Attorneys-at-Law
58 Duke Street
KINGSTON

ATTENTION: MR. PETER MILLINGEN

Dear Sirs,

RE: SUIT NO. C.L.A. 118 of 1987
AVALON INVESTMENTS LTD. V.
SANDRA ATLAS-BASS AND ROBERT ZABELLE

We refer to our many discussions in relation to the above matter and enclose a further draft of the proposed settlement agreement. You will note that we have amended paragraphs 6 and 7 as suggested by you. Please note the amendment which we propose to paragraph 2 and let us have your comments thereon. Please note also that we have not yet had our client's instructions on the amendments proposed by you in paragraphs 6 and 7.

Yours faithfully,
MYERS, FLETCHER & GORDON

PER:
B. ST. MICHAEL HYLTON

Enc.

c. Avalon Investments Ltd."

"1. The balance of purchase price of US$264,472.52 be paid by the Plaintiff to the Defendant within 45 days of the date hereof.

2. The Plaintiff pay to the Defendant a further sum of US$208,000.00 within 180 days of the date hereof. The aforesaid sums shall be held in escrow in an interest bearing account until the completion or earlier termination of the agreement. In the event that the sale is duly completed, any interest earned will be the defendants'. In the event that the aforesaid sums are refundable to the Plaintiff pursuant to paragraph 6 hereof or otherwise, any interest earned will be the Plaintiff's.

3. The Defendant deliver to the Plaintiff the duplicate Certificate of Title registered at Volume 203 Folio 671 duly transferred to the Plaintiff and proof of payment of water rates (if any) and taxes to the date hereof in

" exchange for the payment referred to at paragraph 2 above.

4. Time shall be of the essence in respect of the aforesaid.

5. The Plaintiff will accept title to and possession of the said land as is at completion, which would include but is not limited to any reduction in acreage caused by encroachment by the sea and with all or any occupants thereon.

6. In the event of the failure by the Plaintiff to make any of the aforesaid payments, the Defendant shall be entitled to forfeit the deposit of US$45,000.00 originally paid, but shall refund to the Plaintiff any other sums paid under paragraphs 1 and 2 above, and the Plaintiff's right to Specific Performance shall cease and determine the contract shall be deemed cancelled and null and void.

The parties agree that upon completion or upon failure to make payments under paragraphs 1 and 2 above each shall be released and fully discharged of all or any liability (save and except the repayments of any of the above amounts) including but not limited to costs, damages, expenses and or any claims of any kind or nature arising out of or in connection with this suit and the Agreement for Sale dated 5th January, 1987.

8. Payment of the aforesaid amounts shall be made on the directions of the Defendants Attorneys, Clinton Hart & Company.

9. The parties shall execute all relevant documents necessary for completion."

It is patent that Mr. Hylton regarded Mr. Millingen's proposals as not being sufficiently explicit hence the amendments to paragraphs 6 and 7 as proposed by Mr. Millingen (see covering letter) and the proposed amendments to paragraph 2. What must be borne in mind is that the covering letter makes it abundantly clear that Mr. Hylton had to await his client's instructions regarding paragraphs 6 and 7. It is clear that endeavours were being made

to achieve a settlement and Mr. Hylton's letter dated April 24 reflects the position then. It reads:

"Mr. Peter Millingen,
Attorney-at-law
Clinton Hart & Co.
58 Duke Street
KINGSTON

Dear Peter,

RE: SALE - ESTATE SOL ATLAS, DECEASED
TO AVALON INVESTMENTS LIMITED

I acknowledge receipt of your letter dated April 20, 1990 and your telephone calls. I am still awaiting my clients instructions and will let you know as soon as I get them. There is no question of any payment being made until those instructions are received, and my client is aware of the concerns expressed in your letter.

I don't know why your client should think that the plaintiff is playing games. Remember that it is my client who brought and pursued this action, and that my client is not solely to blame for the fact that we spent a week arguing back and forth without being able to announce a settlement.

Yours faithfully,
MYERS, FLETCHER & GORDON

PER:
B. ST. MICHAEL HYLTON."

The next letter exhibited dated October 8, 1990 from Mr. Hylton brought welcome news. It reads:

"Mr. Peter Millingen
Clinton Hart & Co.
Attorneys-at-law
58 Duke STreet
KINGSTON

Dear Peter,

RE: SALE - ESTATE SOL ATLAS, DECEASED
TO AVALON INVESTMENTS LIMITED

I am pleased to confirm my client's agreement to the terms set out in the last draft agreement, a copy of which is enclosed for easy reference. Please confirm your clients agreement also, so that we can take the necessary steps to have a consent order filed.

Yours sincerely,

B. ST. MICHAEL HYLTON

Enc.

c.c. David Muirhead, Q.C.
Avalon Investments Ltd."

It is observed that apparently because the parties reside abroad their attorneys-at-law do not seem to be in ready contact with them. But even so, it was now over six months since Mr. Hylton's letter dated April 3 and he was still awaiting a response. And yet the expected conclusion, now that Mr. Hylton's client had at last agreed to the terms submitted by Mr. Hylton, was not to be. Instead, there were counter-proposals as appear from Mr. Millingen's letter of December 11. There was no alteration of the amounts but the time for payment of the agreed amounts posed a problem. Up to then the times stated in the proposal and the counter-proposal were as follows:

US$264,472.52	to be paid within forty-five days of the date hereof
US$208,000.00	to be paid within one hundred and eighty days of the date hereof.

These payments are set against the background of the provision that "Time shall be of the essence". Mr. Millingen's new position was stated thus:

> "December 11, 1990
>
> Messrs. Myers, Fletcher & Gordon
> Attorneys-at-Law
> 21 East Street
> Kingston
>
> Attention: Mr. B. St. Michael Hylton
>
> Dear Sirs:
>
> RE: Estate Sol Atlas, deceased and Avalon Investments Limited.
>
> We would refer to previous correspondence in this matter and in particular to our telephone conversation on Friday, 7th instant when you informed the writer that your client had agreed to the settlement as proposed, that is, the Consent Order as well as terms endorsed on Counsel's brief with the amendment (suggested by the writer) that the US$264,472.52 would be paid within sixty (60) days and a further US$208,000.00 would be paid within one hundred and twenty (120) days of the date of settlement and that the settlement would be

"announced on the 10th December, 1990. This was also agreed by the writer. You also indicated that you were then only awaiting your client's formal instructions.

Please confirm that we have accurately set out what was agreed between your Mr. Hylton and the writer.

Yours faithfully,
CLINTON HART & CO.

PER:
PETER MILLINGEN."

But this letter of Mr. Millingen, if not evidencing an irregularity, is at least strange for the reason that he disclosed in an affidavit that on December 10 he was advised by Mr. Hylton that his client (the plaintiff/respondent) had changed representation and the new attorneys were Messrs. Crafton Miller & Company. In those circumstances, the propriety of seeking to have Mr. Hylton confirm that they had arrived at a settlement at a time when Mr. Hylton could no longer speak for his former client seems highly questionable. But although Mr. Hylton could no longer affect his erstwhile client he at least, by letter dated December 18, defended his professional integrity. Here is what he wrote:

"December 18, 1990

Mr. Peter Millingen
Clinton Hart & Co.
Attorneys-at-Law
58 Duke Street
KINGSTON

Dear Peter:

Re: Sale - Estate Sol Atlas, deceased
to Avalon Investments Limited

I acknowledge receipt of yours dated December 11, 1990. It is not correct to say that I told you that my client 'had agreed to the settlement as proposed'. Indeed, since the proposal was made during that same conversation, my client obviously did not yet know about it, and could hardly have agreed. What in fact happened is that after a great number of proposals over the previous few days, you made the suggestion set out in your letter and I said I thought

"that it would be an acceptable settlement and that I would get my client's instructions. You indicated that you would do the same.

I have seen a copy of your letter of the same date to Crafton Miller & Co. In view of the fact that after my letter of October 8, 1990, various counter offers were made, including the one set out in your letter to me, referred to above, it seems clear that the offer set out in the October 8 letter had long been revoked, and I am surprised that you should now be seeking to revive it.

Yours sincerely,

B. ST. MICHAEL HYLTON

c.c. Crafton S. Miller & Co."

And the limited extent of the attorneys referred to in paragraph 1 (supra) is again mentioned in paragraph 9 of Mr. Hylton's affadavit dated January 25, 1991, which has not been denied.

On December 11 also, Mr. Millingen had written to Mr. Crafton Miller contending that there was a legally binding agreement between the parties. But Mr. Millingen was not deterred by Mr. Hylton's disclaimer and on December 19 and 28 he wrote lengthy letters to Mr. Hylton as though Mr. Hylton was still his opponent. No confirmation of a settlement was to be had from Mr. Miller, who found himself confronted with the prospect of an early trial. This was not to be the trial of the original action brought by his client but of the purported compromise.

A compromise is by nature a settlement of a dispute by mutual concession. It follows that it cannot be imposed by one of the parties upon the other but must evidence that the minds of the parties are ad idem on the terms by which they are to be bound. The terms which were set forth in the schedule to "The Motion applying for the Order to Stay Proceedings and Enforce Compromise" which were alleged to evidence the agreement are as follows:

" S C H E D U L E

(1) The balance of purchase price of US$264,472.52 be paid by the Plaintiff to the Defendant within 60 days from the 10th day of December, 1990.

"(2) The Plaintiff pay to the Defendant a further sum of US$208,000.00 within 120 days from the 10th day of December, 1990. The aforesaid sums shall be held in escrow in an interest bearing account until the completion or earlier termination of the agreement. In the event that the sale is duly completed, any interest earned will be the Defendants'. In the event that the aforesaid sums are refundable to the Plaintiff pursuant to paragraph 6 hereof or otherwise, any interest earned will be the Plaintiff's.

(3) The Defendant deliver to the Plaintiff the duplicate Certificate of Title registered at Volume 203 Folio 671 duly transferred to the Plaintiff and proof of payment of water rates (if any) and taxes to the date hereof in exchange for the payment referred to at paragraph 2 above.

(4) Time shall be of the essence in respect of the aforesaid.

(5) The Plaintiff will accept title to and possession of the said land as is at completion, which would include but is not limited to any reduction in acreage caused by encroachment by the sea and with all or any occupants thereon.

(6) In the event of the failure by the Plaintiff to make any of the aforesaid payments, the Defendant shall be entitled to forfeit the deposit of US$45,000.00 originally paid, but shall refund to the Plaintiff any other sums paid under paragraphs 1 and 2 above, and the Plaintiff's right to Specific Performance shall cease and determine the contract shall be deemed cancelled and null and void.

(7) The parties agree that upon completion or upon failure to make payments under paragraphs 1 and 2 above each shall be released and fully discharged of all or any of the above amounts including but not limited to costs, damages, expenses and or any claims of any kind or nature

" arising out of or in connection with this suit and the Agreement for Sale dated 5th January, 1987.

(8) Payment of the aforesaid amounts shall be made on the directions of the Defendants Attorneys, Clinton hart & Co.

(9) The parties shall execute all relevant documents necessary for completion."

Now, I have set out the terms of the Draft Proposal presented by Mr. Millingen as well as the amended form returned by Mr. Hylton which is said to be the last draft to which Mr. Hylton, by letter dated October 8, 1990, signified his client's agreement. The schedule is in keeping with neither of those set of terms. Rather it reflects, in critical areas, what Mr. Millingen, in his letter dated December 11, contends that Mr. Hylton had agreed which the latter stoutly repudiated. How then could these terms be presented as having been agreed on? Where there is no single document evidencing the agreement contended for then such agreement must clearly appear from the documents which piece-out the agreement. It is my opinion that Mr. Millingen's letter to Mr. Hylton on December 11, when Mr. Hylton no longer represented the plaintiff/respondent, is not one such document. Nor, in my opinion, should reference be made to the affidavits filed to determine whether there was an agreement. The letters are what the Court must look at to resolve the question whether a settlement had been arrived at. I think the unanimous decision of the Court of Appeal in **Knowles v. Roberts** (1888) 38 Ch. D. 263 supports this view. That was an action brought for the specific performance of a compromise of an action regarding water rights. The Court struck out that portion of the plaintiff's pleading, as embarrassing and unnecessary, which sought to re-litigate the questions raised in the former action and confined the plaintiff to the compromise. Said Cotton, L.J. at page 269 concerning the judge's position regarding the compromise:

> "He must look at the physical facts existing, not at the disputed rights or disputed facts."

Bowen, L.J. was far more cryptic. Said he at page 272:

> "As soon as you have ended a dispute by a compromise you have disposed of it."

The earlier case of **Hart v. Hart** (1881) 18 Ch. D. 670 was for specific performance of the compromise of a Divorce Suit. In that case the paramountcy of the terms of the compromise was emphasized when it was held -

> "That it was no answer to a suit for specific performance for Defendant to say that though he understood what the words of the agreement were he was under a mistake as to their legal effect."

See also **Harmony Shipping Co. S.A. v. Saudi-Europe Line Ltd.** (1981) 1 Lloyd's Reports 377 at 416 per Ackner, L.J. -

> "If a contract is alleged to be contained in a document or in one of a series of documents or letters exchanged between the parties it is impermissible, as the law stands, to take account of what is contained in subsequent documents and letters as an aid to construing that document. It is equally impermissible to take account for that purpose of any other kind of subsequent statement or conduct of the parties."

So, then, the question remains as to whether an agreement has been evidenced. Dr. Barnett thinks so. He submitted that Mr. Hylton's letter of October 8 is, at least, an acceptance of the offer already contained in the correspondence and, indeed, is a confirmation of the respondent's agreement to the terms set out in the Draft Agreement which had been agreed between the attorneys and incorporated in the last Draft Agreement. But such a submission is valid only on the basis that the attorneys had unlimited authority in the conduct of the case. Mr. Hylton, in his letters of April 3 and 24, made it plain that he was awaiting his client's instructions and it is significant that in the important letter of October 8, in which he announced

his client's agreement to the terms, he also sought to be assured that Mr. Millingen's clients had also agreed. This must be regarded as strong proof that it was known to both attorneys that each other's authority was limited. Accordingly, Dr. Barnett's submission that once Mr. Millingen had agreed to the terms it was no concern of Mr. Hylton whether the former's clients had also agreed is not well-founded. Indeed, in the circumstances contended for by Mr. Hylton it would have been reckless of him to have proceeded without being expressly advised that Mr. Millingen's clients had given their confirmation to the proposals. What was up for agreement by both clients was the Draft Proposal submitted by Mr. Hylton. But I am yet to see a correspondence from Mr. Millingen conveying the required confirmation by his clients. Indeed, the next letter on record is his letter of December 11 purporting to reflect a settlement which he represented, only awaited "your clients formal instructions". Although Mr. Hylton could not, on December 18, write as attorney for the plaintiff/respondent he did, in protection of himself, expose the absurdity of the conclusion mentioned by Mr. Millingen, viz., that inasmuch as his client was not yet aware of the proposal made during their telephone conversation, he could not have said that his client had agreed thereto. But what is even more significant is that Mr. Millingen's letter made absolutely no reference to the agreement notified in the letter of October 8. It is my opinion that, rather than proceeding along the lines indicated in the last Draft Proposal to which Mr. Hylton's client had now agreed, Mr. Millingen had quite clearly repudiated it with new proposals which were themselves not accepted.

Dr. Barnett cited several cases in which the formation of contracts based upon correspondence was involved. Those dealt with sale of land contracts and, to my mind, are unhelpful to resolving the question whether a compromise was arrived at. Similarly, propositions by him based on the assumption that there

was an agreement are not to the point. I accept as correct two principles cited from the judgment of Ackner, L.J. in **Harmony Shipping Co. S.A. v. Saudi-Europe Line Ltd.** (supra) at page 414:

> "To my mind the following principles are well settled: (1) The Court is usually not concerned with the parties' actual intention but only with their manifested intention. It does not peer into the minds of the parties but must be content with external phenomena. Accordingly the Court looks at what the parties said or did and then considers objectively whether this has resulted in a concluded contract. A contract established by letters may sometimes bind parties who, when they wrote those letters, did not imagine they were finally settling the terms of the agreement by which they were to be bound.
>
> (2) .....
>
> (3) Although when a contract is alleged to be contained in letters the whole correspondence should be looked at, yet if once a definite offer has been made and accepted without qualification, and it appears that the letter of offer and acceptance contains all the terms agreed on between the parties at the date of the acceptance, the complete contract then arrived at cannot be affected by subsequent negotiation. When once it is shown that there is a complete contract, further negotiations between the parties cannot, without the consent of both, get rid of the contract already arrived at (see **Perry v. Suffields Ltd.**, [1916] 2 Ch. D. 187)."

The problem in this case is finding the agreement to which these principles may be applied.

Insisting that no consensus emanates from the correspondence, Mr. Miller drew attention to certain aspects of the case not previously emphasized and which would make the suggested compromise more onerous than the original contract:

> 1. The payment of US$208,000 was a new feature it being an amount in addition to the balance of the purchase price which was US$264,472.52.

2. There was no provision for forfeiture of the deposit in the original contract.

3. Failure to meet any of the payments on time (time being of the essence) would visit the plaintiff/respondent not only with forfeiture of the deposit but with a cancellation of the contract which would then become null and void.

It is clear, therefore, that Mr. Hylton was now operating outside the bounds of the original contract and must, in those circumstances, have his client's prior agreement. There can be no question, therefore, as to the importance of the time element in agreeing to the terms of the compromise. Indeed, submitted Mr. Miller, the question of time is the only factor which has kept the case in Court and that is so because of the stringent obligations. And, said he, since the suggestion of a settlement only conflict and turmoil has resulted.

I agree, therefore, with Panton, J. that there was no concluded agreement and that the negotiations were not subsequent to agreement but were continuing negotiations with a view to arriving at a consensus. It follows that there was no agreement which could be enforced by Motion.

In my judgment, the appeal is dismissed with costs to the respondent to be taxed if not agreed.

DOWNER J.A.

Sandra Atlas-Bass and Robert S. Zabelle the appellants in this case brought a motion before Panton J to enforce an alleged agreement for US$472,472.52 to be paid to them by Avalon Investments Limited who is the respondent. There is a main action which was adjourned pending negotiations for a settlement, and the issue to be resolved on this appeal was whether there was an agreement averred in the motion which ought to have been enforced or whether the negotiations were inconclusive as the respondent Avalon Investments contends.

It is instructive to refer briefly to the action below in order to understand how this appeal came about. Here is the relevant part of the affidavit of Mr. Peter Millingen in the Supreme Court on that aspect of the matter:-

> "BETWEEN AVALON INVESTMENTS LTD. PLAINTIFF/RESPONDENT
>
> A N D SANDRA ATLAS-BASS DEFENDANTS/APPELLANTS
> ROBERT S. ZABELLE
>
> (4) That on the 19th March, 1990 this matter came before Mr. Justice Panton. The Plaintiff at that time was represented by Mr. David Muirhead Q.C. and Mr. D. St. Michael Hylton of Messrs. Myers, Fletcher & Gordon. Mr. Muirhead began his opening and during his opening stated that the Plaintiff would not be pursuing the claim for damages in respect of the reduced acreage and would accept the land as is with the existing acreage and occupants thereon. Before completing the opening the matter was adjourned part-heard pending negotiations. The matter was subsequently adjourned on the 20th, 21st, 22nd, 23rd and 26th March, 1990 pending a settlement between the parties."

Perhaps paragraph 3 of this Affidavit should also be cited so that issues are fully grasped -

> "(3) As appears from the pleadings herein the Plaintiff is claiming Specific Performance and Damages for a reduced acreage as well as alleging that the Defendants demanded that the Plaintiff accept the reduced acreage and the land with occupants. The amount being claimed for the reduced acreage being US$45,000.00. The Defendants, inter alia, stated that the contract provided for the reduced acreage and also deny being liable to the Plaintiff and stated that time was amde the essence of the contract and the Plaintiff in breach thereof failed and/or refused to complete within the specified time. The Defendants also counter-claim for a Declaration that the sale had been rescinded."

As far as the Defendants/Appellants Sandra Atlas-Bass and Robert S. Zabelle were concerned the litigants during the adjournment had negotiated an enforceable agreement and they sought to enforce it by a stay of proceedings in the main action and the enforcement of the compromise on the motion. Here are the terms of the motion captioned:-

> "Motion applying for order to stay proceedings and enforce compromise
>
> (1) All further proceedings in this action be stayed upon the terms set forth in the schedule to the Minute of Order attached hereto to which the parties have agreed except for the purpose of carrying this Order and the terms thereof into effect and for this purpose the Defendants are to be at liberty to apply;
> (Emphasis supplied)
>
> (2) In the event of default by the Plaintiff in complying with the said terms or any part thereof, the Defendants shall be at liberty to sign Final Judgment against the Plaintiff in the said terms or any part thereof which has not been performed by the Plaintiff;

Nowhere in the motion was there exhibited an agreement to which both parties had subscribed, and that issue could have been raised as it concerned the validity of the motion. The basis of a valid motion must be admissions that there was an agreement and that the dispute would centre on the interpretation of the agreement to be enforced. In order to appreciate the gist of the appellants contention below and in this court it is necessary to refer to their grounds of appeal -

> "(1) The learned trial judge erred on the facts and misdirected himself in law in that, he held that there was no genuine agreement between the parties because of the continuance of negotiations after October 8, 1990 although all the essential terms of the settlement had been agreed by the parties as it had been proposed in March 1990 and the parties communicated their agreement to all the points raised with respect to the draft Terms of Settlement by the latest October 8, 1990.
>
> (2) The learned Judge erred in law in regarding negotiations subsequent to agreement as inconsistent with a genuine or a concluded agreement between the parties.
>
> (3) The learned Judge erred in law and misdirected himself on the facts in failing to accept that there was a concluded agreement despite the fact that there was uncontradicted evidence as at October 8, 1990 the parties had agreed and communicated their agreement with all the Terms of the proposed Settlement."

(Emphasis supplied)

The gist of the appellants case is that on October 8 there was a settlement and it is highlighted in the emphasised words. As it was put below by Panton J -

> "The terms alleged to be agreed between the parties include the payment by the plaintiff of a total of US$472,472.52 by the expiration of 120 days from December 10,1990. Failure to do so would give the defendants the right to forfeit the deposit of US$45,000.00."

Presumably the motion was instituted pursuant to Section 238 of the Civil Procedure Code which states:-

> Striking out pleadings.
>
> "238. The Court or a Judge may order any pleading to be struck out on the ground that it discloses no reasonable cause of action or answer; and in any such case, or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the Court or a Judge may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just."

There are two useful cases in regard to this type of motion. In Hart v Hart (1881) 38 Ch. D. 670 there was a compromise in a Divorce Suit and the issue to be determined in the Chancery Division was whether the wife was entitled to specific performance of the separation deed. Knowles v Roberts (1888) 38 Ch. D 263 on the other hand was litigated on the basis that there was a compromise, and the issue to be determined was the scope and effect of it. In their motion below and in this court the appellants Sandra Atlas-Bass et al aver that there was a compromise while the respondent Avalon Investments Limited denies it. It was therefore open to the respondent Avalon Investments Limited to take the point at the threshold, or at the beginning of its defence that there could have been no basis for this motion, because the respondent did not admit that there was an agreement by which it could be bound as in Knowles v Roberts. Nor was there a consent judgment as in Hart v Hart.

But the application to stay the main action must be based on an agreement to which both sides have subscribed. In those circumstances it would have been appropriate to have stayed the main action on the ground that it could not have shown a reasonable cause of action in the face of the agreement.

The allegations raise an issue of law. The issue of law is to be determined from the correspondence between the lawyers on both sides and not by the affidavits which have been filed.

What was the effect of the correspondence between the parties?

To determine whether an agreement could be inferred from the correspondence between the lawyers representing the parties, the letter of October 8, 1990 written by the lawyer for the purchasers to the vendors' solicitors was important. It was important because Dr. Barnett for the vendors put it in the forefront of his submission. The submission was that it was evidence of a concluded contract. It is as follows:-

> "RE: SALE - ESTATE SOL ATLAS, DECEASED TO AVALON INVESTMENTS LIMITED
>
> I am pleased to confirm my client's agreement to the terms set out in the last draft agreement, a copy of which is enclosed for easy reference. Please confirm your clients agreement also, so that we can take the necessary steps to have a consent order filed."

To my mind, in the language of contract law this purports to be an offer so it must be assessed. It should be noted that this covering letter speaks of a draft agreement and so it suggests that if there were a concluded agreement a consent order would have been filed in Court.

The next aspect to be examined is the terms of the draft agreement which it was proposed would be endorsed on Counsel's brief. It was also the basis for the proposed consent order. As Clause 1 and 2 are of great importance, they ought to be set out. They are as follows:-

> "(1) The balance of purchase price of US$264,472,52 be paid by the Plaintiff to the Defendant within 45 days of the date hereof.

> "2. The Plaintiff pays to the Defendant a further sum of US$208,000.00 within 180 days of the date hereof. The aforesaid sums shall be held in escrow in an interest bearing account until the completion or earlier termination of the agreement. In the event that the sale is duly completed, any interest earned will be the defendants'. In the event that the aforesaid sums are refundable to the Plaintiff pursuant to Paragraph 6 hereof or otherwise, any interest earned will be the Plaintiffs'."

As for Clause 1 no date was stipulated within which the 45 days should commence although Clause 4 provides that -

> "(4) Time shall be of the essence in respect of the aforesaid (i.e Clause 1,2 and 3)."

So the conclusion must be that as regards the time there was no period when the considerable sum of US$264,472.52 was to be paid. There was therefore no definite offer, but a mere proposal.

Nor was any time stipulated to determine from when would 180 days commence, nor any period with which to compute interest if the payments in Clauses 1 and 2 were made. Be it noted that the substantial sum of US$208,000.00 was to be paid under Clause 2. In this regard Clause 6 is of great importance. It reads -

> "(6) In the event of the failure by the Plaintiff to make any of the aforesaid payments, the Defendant shall be entitled to forfeit the deposit of US$45,000.00 originally paid, but shall refund to the Plaintiff any other sums paid under paragraphs 1 and 2 above, and the Plaintiff's right to Specific Performance shall cease and determine (and) the contract shall be deemed cancelled and null and void."

It is now appropriate to examine the previous correspondence so the legal consequences of the letter of October 8th can be seen in its true light. There were two letters exhibited, one of April 24, 1990 and the other April 3, 1990. Here is the initial letter of April 3rd written by the purchasers' Lawyers.

> "We refer to our many discussions in relation to the above matter and enclose a further draft of the proposed settlement agreement. You will note that we have amended paragraphs 6 and 7 as suggested by you. Please note the amendment which we propose to paragraph 2 and let us have your comments thereon. Please note also that we have not yet had our client's instructions on the amendments proposed by you in paragraphs 6 and 7."

There are two features to be observed in this letter, firstly that Attorneys for the purchasers had to await instructions and secondly both parties were then negotiating. It is useful to refer to paragraph 7 of the proposed terms on Counsel's brief. It is as follows:-

> "(7) The parties agree that upon completion or upon failure to make payments under paragraphs 1 and 2 above each shall be released and fully discharged of all or any liability (save and except the repayments of any of the above amounts) including but not limited to costs, damages, expenses and or any claims of any kind or nature arising out of or in connection with this suit and the Agreement for sale dated 5th January, 1987."

As for the letter of April 24th it is clear that the negotiations were still continuing. Here is how that letter was worded:-

> "I acknowledge receipt of your letter dated April 20, 1990, and your telephone calls. I am still awaiting my clients instructions and will let you know as soon as I get them. <u>There is no question of any payment being made until those instructions are received, and my client is aware of the concerns expressed in your letter.</u>
>
> I don't know why your client should think that the Plaintiff is playing games. Remember that it is my client who brought and pursued this action and that my client is not solely to

> "blame for the fact that we spent a week arguing back and forth without being able to announce a settlement."
>
> (Emphasis supplied)

When the letter of October 8th which followed the letter of April 24th and the reference therein to a draft agreement is mentioned without any specific time or date, it is fair to conclude that there was no definite offer. Furthermore the letter of October 8th makes no mention as to instructions as to when payment would be made. It was also requested that the vendors confirm this agreement of the draft so it was clear that a contract was contemplated and that contract if it was completed would have been the basis of the consent order. That agreement would have been filed in Court. All in all it was a matter of construction and this is how the correspondence ought to be construed. Panton J must have so construed it as a proposal, for after he had examined the letter of October 8th this is what he said -

> "The defendants are relying heavily on a letter dated October 8, 1990, as being evidence of an agreement. They say that subsequent efforts to seek clarification have not destroyed that consensus.
>
> The plaintiff is challenging the defendants' stance as it claims that time is an essential ingredient and there was no specific agreement on that aspect. In any event, says the plaintiff, its Attorney-at-Law had always stressed to the Attorney-at-Law for the defendants the need for the former to consult with the plaintiff."

Are there any cases which support this construction of the correspondence up to October 8th that there was no offer to [illegible] contract.

Harvey v Facey (1893) A.C. 552 a Jamaican case suggests the appropriate analysis. Here is how it is summarised

in Cheshire and Fifoot, The Law of Contract 7th edition at page 30 -

> "Thus in Harvey v Facey
>
> 'the plaintiffs telegraphed to the defendants, "Will you sell us Bumper Hall Pen? Telegraph lowest cash price." The defendants telegraphed in reply, "Lowest price for Bumper Hall Pen, £900." The plaintiffs then telegraphed, "We agree to buy Bumper Hall Pen for £900 asked by you. Please send us your title-deeds." The rest was silence.
>
> It was held by the Judicial Committee of the Privy Council that there was no contract. The second telegram was not an offer, but only an indication of the minimum price if the defendants ultimately resolved to sell, and the third telegram was therefore not an acceptance."

On the same page there was a précis of Clifton v Palumbo (1947) 2 All E.R. 797 which reads thus -

> "So too, in Clifton v Palumbo, the plaintiff and the defendant were negotiating for the sale of a large, scattered estate. The plaintiff wrote to the defendant:-
>
> > "I...am prepared to offer you or your nominee my Lytham estate for £600,000...I also agree that a reasonable and sufficient time shall be granted to you for the examination and consideration of all the data and details necessary for the preparation of the Schedule of completion."

The Court of Appeal held that this letter was not a definite offer to sell, but a preliminary statement as to price, which especially in a transaction of such magnitude was but one of the many questions to be considered. In the words of LORD GREENE -

> "There is nothing in the world to prevent an owner of an estate of this kind contracting to sell it to a purchaser, who is prepared to spend so large a sum of money, on

> "terms written out on a half sheet of notepaper of the most informal description and even, if he likes, on unfavourable conditions. But I think it is legitimate, in approaching construction of a document of this kind, containing phrases and expressions of doubtful significance, to bear in mind that the probability of parties entering into so large a transaction, and finally binding themselves to a contract of this description couched in such terms, is remote. If they have done it, they have done it, however unwise and however unbusinesslike it may be. The question is, Have they done it?"

The previous letters were all written by Mr. Michael Hylton and they were addressed to Mr. Peter Millingen. As for Mr. Millingen's letters after October 8th they confirm that negotiations continued and that Mr. Hylton could only have made a definite offer if he was given instruction by the purchasers. They were still in the state of negotiations up to December 11th. Here is the letter of that date:-

> "Re: Estate Sol Atlas, deceased
> and Avalon Investments Limited.
>
> We would refer to previous correspondence in this matter and in particular to our telephone conversation on Friday 7th when you informed the writer that your client had agreed to the settlement as proposed, that is, the Consent Order as well as terms endorsed on Counsel's brief with the amendment (suggested by the writer) that the US$264,472.52 would be paid within sixty (60) days and a further US$208,000.00 would be paid within one hundred and twenty (120) days of the date of settlement and that the settlement would be the 10th December, 1990." This was also agred by the writer. You also indicated that you were then only awaiting your client's formal instructions.
>
> Please confirm that we have accurately set out what was agreed between your Mr. Hylton and the writer."
>
> Yours faithfully
> CLINTON HART & CO.
>
> PER:
> PETER MILLINGEN

This was the letter in response to that of October 8th. Mr. Miller for the purchasers assumed that the letter of October 8th was an offer, but pointed out that it would require an acceptance for a contract to be formed and that neither the letter of 11th December to Myers, Fletcher & Gordon (supra) nor the subsequent letter of the same date to Crafton Miller & Co. were capable of being treated as an acceptance. It is convenient to set out this latter letter also to show that it was rightly rejected as a letter of acceptance:-

> "Dear Sir:
>
> RE: Suit No.C.L. A 118 of 1987
> Avalon Investments Ltd. v
> Sandra Atlas-Bass and Robert
> Zabelle
>
> Enclosed is a copy letter dated December 11, 1990 to Messrs. Myers, Fletcher & Gordon which is self-explanatory.
>
> We are of the opinion that there is a legally binding agreement between the parties and we expect your client to pay the sum of US$264,472.52 within sixty (60) days of the 10th December, 1990, and comply with all aspects of the terms agreed failing which we will be amending our Defence with a view of incorporating the terms of settlement.
>
> In the alternative and without prejudice to the compromise agreed on the 7th December, 1990 we are instructed to confirm the terms which your client agreed to and as evidenced by the letter dated 8th Octber, 1990 from Myers, Fletcher & Gordon. Therefore, your client may elect to proceed either as agreed on Friday 7th December, 1990 or upon the terms which provides for the first payment being made within forty five (45) days and the balance in one hundred and eighty (180) days provided that such election is made within seven (7) days of the date of this letter failing which we will proceed as mentioned above.
>
> We enclose for your files a copy letter from Myers, Fletcher & Gordon dated 8th October, 1990.
>
> Yours faithfully,
> CLINTON HART & CO.
>
> Per: Peter Millingen "

Before December 11th the purchasers changed their Attorneys from Myers, Fletcher & Gordon to Crafton Miller & Co. This is reflected in the second letter of 11th December. There does not seem to be any good reason to have continued to address Myers, Fletcher & Gordon.

The appellants case as developed by Dr. Barnett having posited the letter of October 8th as evidence of a concluded agreement, relied on Butler Machine Tool v Ex-Cello Corporation Ltd. (1979) 1 All E.R. 965 for the proposition that when dealing with a contract by correspondence the matter ought not to be approached on a mechanical basis of identifying the precise moment of when the offer is made. But with respect the issue was whether the proposal made by lawyers for the respondent Avalon Investments Limited was capable of amounting to an offer in law. Since I found the answer to be in the negative it was not necessary to examine the other authorities Dr. Barnett cited to show the authority of Counsel acting on general instructions. Furthermore I reiterate that even if there were an offer there was no acceptance.

CONCLUSION

Panton's J approach was admirable. It was 'quick courteous and right' for he found there was no contract and that view is affirmed. He could also have found that the motion was incompetent and there was no offer which could have been accepted. I therefore have no hesitation in dismissing this appeal and awarding costs to the respondent to be agreed or taxed. It is now open to the respondent Avalon Investments Limited, to resume the hearing of the main action in the Supreme Court.

BINGHAM J.A. (AG.)

Following some six months of negotiations between the Attorneys-at-Law for the parties with the objective of effecting an out-of Court settlement in the above matter, the Attorney-at-Law having the conduct of the matter on behalf of the plaintiff wrote in the following terms:

"October 8, 1990

Mr. Peter Millingen,
Clinton Hart & Co.
Attorney-at-Law
58 Duke Street
Kingston

Dear Peter,

Re: Sale Estate Sol Atlas, Deceased to Avalon Investments Limited.

I am pleased to confirm my clients agreement to the terms set out in the last draft agreement, a copy of which is enclosed for easy reference. Please confirm your clients agreement also; so that we can take the necessary steps to have a consent order filed.

Yours sincerely,

B. St. Michael Hylton."

(Emphasis mine)

The terms referred to were the draft terms of a proposed settlement to be endorsed on Counsel's brief, that is assuming this proposal found favour with the defendants as up to that stage it remained at most an offer for a settlement conditional on the receipt of the confirmation of the defendants agreement to it. Until that stage was reached it could not by any stretch of imagination be contended that the parties had reached an agreement.It is common ground that when the pending action was adjourned on 19th March, 1990 for an attempt to be made to effect a compromise agreement the outstanding matters left to be resolved were:

1. The balance of the purchase price.

2. The terms of payment.

There is nothing in the Record of Appeal to show that (1) above presented any difficulty. It was the terms of payment that had since then engaged the attention of the Attorneys-at-Law over the intervening months leading up to the letter of October 8, 1990. Although the Attorney-at-Law for the defendants had been pressing for a conclusion to the negotiations he did not on receipt of the letter of the 8th October grasp the opportunity to bring the matter to a finality there and then. The proposal and the offer to settle on the terms set out therein were not accepted by the defendants. I say this as there is nothing based upon their conduct or in the correspondence from their Attorneys-at-Law signifying their confirmation of the draft proposals which accompanied the letter of the 8th October, and negotiations had continued between the Attorneys-at-Law for the parties relating to the terms for payment. Up to 11th December, 1990 when the plaintiffs changed legal representation this matter still remained unresolved.

The grounds of appeal at (1) and (3) have sought to contend that there was an agreement in existence consequent upon the letter of 8th October to which the draft proposed terms of the settlement to be endorsed on Counsel's brief was annexed. Even assuming that this letter amounted to an offer to settle on the terms as set out in the draft there was no acceptance of the offer by way of confirmation of the defendants agreement to the proposals as set out therein. This was conditional to a consent order being entered.

The terms of payment were an integral part of the terms to be endorsed on Counsel's brief. In the absence of any response by the defendants Attorneys-at-Law to the letter of 8th October expressing their clients agreement to settle on those terms, there was accordingly no concluded compromise.

The submissions of Dr. Barnett for the appellants and the authorities relied upon by him posited as they were on the assumption that there was a concluded agreement in existence are in the light of my conclusion as to the main question of no assistance in the determination of the matter.

The motion brought was also misconceived as the terms of payment~~were~~ inextricably bound up with the terms of the proposed settlement to be endorsed on Counsel's brief. As this matter which at the date of the filing of the motion, still remained unresolved there was therefore no valid procedural basis for the course that was taken.

Panton's J remarks were ~~that~~:-

> "It seems to me that on a balance of probabilites, the various sums for payment have not been divorced or isolated from the time for payment. There being no agreement on the time for payment there does not seem to be any genuine compromise."

This conclusion was on the material he had before him well founded. It was for these reasons that I am in agreement with the views expressed by my learned brethren that the Appeal be dismissed with the order for costs as proposed.