IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. B059 OF 1978

BETWEEN	OLIVER BAILEY and INEZ DAVIS	PLAINTIFFS
AND	LINDA S. HAMILTON	DEFENDANT

W.B. Frankson for Plaintiff
Dennis Goffe for Defendant

June 9, 10, 11, 1980
November 6, 1980
February 16, 17, 18, 1981
October 5, 1981
July 7, 1983
April 11, 1986

WRIGHT, J.

The plaintiff's claim endorsed on his Writ of Summons dated 23rd February, 1978 and amplified in the Statement of Claim is as follows:

> "The plaintiffs' claim is against the defendant for an order for Specific Performance of a contract reduced into writing between the plaintiffs and the defendant whereby the defendant agreed to sell to the plaintiffs five (5) acres of land more or less part of Williamsfield in the Parish of St. Catherine on the 10th day of July, 1976. Alternatively the plaintiffs claim damages for breach of the said contract. In the further alternative the plaintiffs claim a rescission of the said contract damages and costs."

Despite the pleadings the claim actively pursued was the claim for Specific Performance.

The document evidencing the contract is a receipt dated 10th July, 1976 issued by the defendant admitted in evidence as Exhibit 1. It reads:

> "I Linda S. Hamilton do agree to accept an advance of three thousand dollars as part payment on one Parcel of Land containing five acres more or less situated at Williamsfield, St. Catherine total value five thousand five hundred dollars ($5,500). Balance two thousand five hundred ($2,500) also agree to accept Balance in full at the end of a six months period from the 10th July, 1976 to the

10th of January, 1977 from Mr. Oliver Bailey and Miss Inez Davis Partner.

L.S. Hamilton (Rita)

Witness - Herbert Ferris.

The Boundary of Lot begins from the western and marked by quick-stick pegs continuing along S.E. 8 Roadway to Mc ? line Boundary and to the Eastern and the Eastern side of the River."

The defence is crystallized in paragraphs 8, 9 and 10 of the defence filed which read:-

"8. That as to paragraphs 10 and 11 the Plaintiffs have never in accordance with the agreement for sale of the said land paid the balance purchase price and their share of the costs of obtaining Title neither have they given suitable and adequate undertakings for these sums. In the premises the Defendant states that she is not obliged to produce or tender Certificate of Title for the said parcel of land.

9. Further in or about the 7th October, 1977 the first-named Plaintiff requested the Defendant to return all the money paid on account purchase price in pursuance of the Contract. The Defendant told the first-named Plaintiff to communicate with her agent about this.

10. In the premises the Defendant states that the Plaintiffs are not entitled to the reliefs claimed in the Statement of Claim or at all."

An important factor in the case is the differing levels of intelligence of the parties as it affects the formation of the contract and their subsequent conduct. The second plaintiff did not testify so the real contest of intelligence was between Oliver Bailey (who will be referred to as the plaintiff) and Linda Hamilton. Of the two Miss Hamilton is undoubtedly the more intelligent and sophisticated. Indeed, Mr. Bailey would disclaim any pretensions at sophistication. But so far as witnesses in the case are concerned everyone but Mrs. Tomlinson, an Attorney-at-Law, must defer to Mr. Herbert Ferris the defendant's fidus Achates whose occupation as occasion warranted would be driver, farmer, mason or shoemaker. But undoubtedly his main feature was as a "Village Lawyer" which engendered problems without which the parties would still have had enough on their hands. But of this more anon.

Linda Hamilton in or about 1972 acquired 43 acres 1 rood 27 perches of land, part of Williamsfield Estate in the parish of St. Catherine, registered at Volume 311 Folio 48 of the Register Book of Titles and

within months of the acquisition, so she said, she obtained a loan of $17,000 from the Agricultural Credit Board, secured by a mortgage on this property. Difficulties arose due, no doubt in part, to the fact that whereas the loan was for development a portion had to be used to pay off a previous loan. And these difficulties have never left her. Quite apart from not being able to re-pay any portion of the loan she was unable to keep up with her interest payments and fell into arrears. Mrs. Beryl Tomlinson, then Senior Legal Officer at the Agricultural Credit Board, who had much to do with the defendant rated her as, a perfectly straight-forward, hardworking and determined woman, who frequently sought advice at the Board as to how best she could handle her arrears. Whether from advice or emanating from her own contemplations the idea was born to sell a portion of the land in order to deal with the arrears. Mrs. Tomlinson is not sure when the matter was first broached but it was during 1976 and the defendant did make a submission in writing dated 1st August, 1976 on the matter. It is thus not clear whether the submission in writing was a mere formalising of a matter which from oral canvassing offered hope but Mrs. Tomlinson was in no doubt that approval would be forthcoming. This will be dealt with more fully but it is important to put this question in focus because the bona fides of the defendant when she entered into the contract with the plaintiffs has been put under much pressure and it remains to be seen whether her straight-forwardness was reflected in her dealings with the plaintiffs.

This, therefore, appears to be the context into which this sale fits. Mr. Ferris, who stated that he was a frequent visitor to Miss Hamilton's home to ascertain whether she required his services in any of his several capacities and whom she regards as her agent, was informed of the intention to sell the piece of land in question which, bounded by river and road forms a natural sub-division. A survey done by Mr. Stewart Hemming, Commissioned Land Surveyor on 3rd October, 1977 shows the acreage to be 4 acres 2 roods 17.5 perches. Mr. Ferris contacted

Mr. Bailey, the plaintiff, who along with Mr. Ferris went to see the defendant. Discussions ranged over two days and by the 10th July, 1976 Mr. Bailey managed to have the asking price of $1,500 per acre reduced to $1,100 and he paid $3,000 as is evidenced in Exhibit 1 (supra). In keeping with the agreed terms the balance was to be paid in full on 10th January, 1977. However, the pressure for funds appears to have been so great that by October, 1976 the defendant requested and was paid a further $500, leaving a balance of $2,000 to be paid on 10th January, 1977. But in the meantime, Mr. Bailey claims he had information that Miss Hamilton was in no position to sell the land because it was mortgaged and as a result he contacted an attorney-at-law, Mr. Salmon, upon whose instructions Mr. Bailey invited her to accompany him to see Mr. Salmon with a view to solving the problem. But then a new problem arose. So far no lawyer had been involved in the transaction. The only reference to a lawyer, says the plaintiff, was a promise by Miss Hamilton to go to a "lawyer lady in town" when the title came to be prepared. But even the precise provisions in this regard are not free from dispute. Consequently, Miss Hamilton felt that in consulting an attorney, at that stage at any rate, the plaintiff had acted sneakingly and refused to go. Moreover, she did not feel obliged to speak with his lawyer. This was on Sunday, January 9, 1977, the day before the balance was due to be paid. This aspect of the case will have to be more closely examined inasmuch as the defendant's claim of discharge from liability to complete is based on the stand taken by the plaintiff on this occasion.

On the very day that the deposit was paid the parties went to a Mrs. Case, a Justice of the Peace and a Common-Law Conveyance (Ex. 2) prepared and witnessed by Mr. Ferris was executed in favour of the purchasers who then went into possession. So far as vesting title in the purchasers is concerned this document is a worthless piece of paper and Mr. Ferris confessed this knowledge. Mr. Frankson's view of this aspect of the matter is that it evidences an intention on the part of the defendant to cheat the plaintiffs since it was known that it could not produce the purported effect. To this charge Miss Hamilton enters a plea of complete innocence. And to

demonstrate how honest is the plea she stated that that was the first time in her life she was hearing about a Common-Law Title and from Mr. Bailey at that. This must be viewed against the background that her agent Mr. Ferris has no compunction about his "Village Lawyer", status and claims to being widely experienced in such matters. Indeed, the form used was loaned by him to Miss Hamilton from those he kept at home. Despite the patent dishonesty in her disclaimer the matter merits further examination. Mr. Bailey does not agree but I accept the defendant's evidence that Exhibit 2 was created to meet his expressed fear that should death intervene before completion the receipt (Exhibit 1) alone would not provide sufficient protection of his interest. But the defendant with her superior intellect harboured other ideas which were extracted in cross-examination. Having allayed his fears with Exhibit 2 she made it clear that the provision of a proper title would not be a priority. Said she in answer to a question which had to be repeated before she would answer:-

> "Yes I did intend to take all the purchase price on the bare promise to give a proper title sometime in the indefinite future."

But Exhibit 2 was to prove her insincerity in another regard. From its wording from which neither she nor Mr. Ferris can demur, she clearly expressed the intention to convey the parcel of land described in the document to the plaintiffs as beneficial owners. Having been put into possession the plaintiff cultivated the land, built a pig pen, levelled a building site and built a road to the site. However, in order to show that the terms of his being on the land did not entitle him to do as he did she claimed that he was merely allowed to tether his animals on the land and that no rights were conferred upon him. And apparently forgetting her evidence as to how Exhibit 2 came to be created she insisted that it was in fact intended to give him permission to have his animals on the land. As can be seen from Exhibit 1, the subject matter of the sale was marked out by pegs inserted even along the road which bounds the land on the East and South and the defendant was embarrassed to reconcile the pegs along the road with the purpose of indicating the area where the animals could be tethered.

This was merely an unsuccessful effort to resile from a clearly expressed intention to put the plaintiffs in possession as purchasers. It must be remembered that this is a situation from which the niceties of a formal contract are absent. The only written term relates to the defendant's interest, that is, securing payment of the purchase price for the parcel of land described. Accordingly, the conduct of the parties in a face to face transaction must be interpreted to give business efficacy to the affair. Indeed, the written provision seems to indicate how desperately she needed the money. She admitted -

> "Yes, I did need the money to pay the accumulated interest on the mortgage loan."

But let me continue the narrative. Because of the defendant's stand on 9th January, 1977, Mr. Bailey did not pay the balance of $2,000 due on 10th January, 1977 and thereafter the relationship soured. An employee of the defendant uprooted the pegs delineating the parcel of land on 10th January, 1977, the day after the plaintiff had spoken with the defendant, and they were never replaced. Communication between the parties broke down. However, it will be useful at this stage to interpose a piece of evidence emanating from Mr. Ferris which serves to dismiss him from being seriously considered in any matter in issue. Although it is agreed between the plaintiff and the defendant that the last confrontation about the payment of the balance was on 9th January, 1977 - Mr. Ferris being absent - Mr. Ferris testified that on 10th January, 1977 he fetched Mr. Bailey from his shop and accompanied him to Miss Hamilton's home where they had a meeting of which he gave the details. Had he been mistaken about the date of a meeting which had actually taken place he could be pardoned but to be able to give details of a meeting that never was in a context where credit is important serves to eliminate him from any serious consideration.

According to the plaintiff his next move following the confrontation on 9th January, 1977 was to contact another attorney-at-law who wrote to the defendant a letter dated 24th March, 1977, admitted in evidence as Exhibit 5. It reads:-

"Dear Madam,

We have been consulted by Mr. Oliver Bailey, who on the 10th day of July, 1976 contracted to purchase Five Acres more or less land at Williamsfield in the Parish of Saint Catherine from you on behalf of himself and Miss Inez Davis for the sun of $5,500.00c. We are further instructed that a Deposit of $3,000.00c was paid to you on the date aforesaid, and a further payment of $500.00c was made to you on 8th October, 1976. On the 10th day of July, 1976, you handed to Mr. Bailey a document purporting to be a Conveyance to himself and Miss Inez Davis, but which is useless, in view of the fact that subsequent investigations reveal that there is a Registered Title for the land which forms part of a larger run of land which is mortgaged by you.

In January this year, you admitted to Mr. Bailey that the land was mortgaged to a female Attorney-at-Law in Kingston, and that you would take steps to arrange that Title be issued to him, so that the balance of the Purchase Money can be paid.

We now call upon you to take steps to obtain a Registered Title in the names of Mr. Oliver Bailey and Miss Inez Davis as JOINT TENANTS, and the Purchasers are ready and willing to pay one-half costs of Survey and of obtaining a Registered Title.

You would therefore be well advised to consult an Attorney-at-Law immediately, because if we do not hear from you within the next fifteen (15) days, Action will be filed in the Supreme Court against you without further notice.

Yours faithfully,
GAYNAIR & FRASER "

There appears to have been no response to this letter so in order to demonstrate his willingness and ability to complete upon the instructions of his attorneys on 29th November, 1977, the plaintiff said he purchased a Manager's Cheque for $2,000 at Barclays Bank payable to the defendant, photocopied it, mailed the copy to the defendant and handed the original to his attorney-at-law (see Manager's Cheque No. 033147 for $2,000 admitted in evidence as Exhibit 3). He stated that this letter was not returned to him but the defendant denies receipt thereof. Riversdale P.O. where the letter was mailed is the postal address of the parties. The plaintiffs' reason for mailing the letter is that they were not on speaking terms so had he handed it to her she could have denied receipt.

The combination of such factors as the absence of a written contract specifying the various terms for the guidance of the parties, the low-level of intelligence on the part of the plaintiff with its associated suspiciousness, the "Brer Anancy-like" role played by Mr. Ferris together with the lack of forthrightness on the part of the defendant provided ground for trouble and trouble there was. One such area related to the surveying of the land the subject-matter of the contract. This would obviously be within the defendant's control but the plaintiff expected to have notice of any survey to be done so that when a surveyor arrived without notice to him he suspected that the defendant planned to survey less than the contract acreage. He did not physically obstruct the survey but the voicing of his feelings was sufficient to make the surveyor wish not be involved. The plaintiff testified under cross-examination that when he questioned the defendant as to her reason for bringing the surveyor to cut off the land without notice to him she rejoined that if the purchaser were in England or America would she have to give him notice? To this he replied that he is right here. Thereafter, they both got heated under the collar. Eventually, the land was surveyed by Mr. Hemmings without notice to the plaintiff and, as if to justify his fears, it transpired that the acreage surveyed is less than 5 acres by almost one-half acre.

The date is uncertain but it is agreed that Mr. Ferris went to the plaintiff with a message he should send $100 to pay his one-half share of the surveyor's fees. He refused not only on the basis that he had no notice of the survey but he was not presented with the bill from the surveyor so he could satisfy himself as to the accuracy of the amount being demanded of him. Though he claims he was ignorant of the charges attendant upon the purchase of land he did from the witness box express his willingness to pay one-half the relevant fees. The plaintiff may well be excused for not complying with a request conveyed by Mr. Ferris, who at the outset was on amicable terms with both parties but had before long given the plaintiff reason to believe his loyalty really favoured the defendant.

Another problem area has to do with the arrangements made for the provision of a title. It is clear that despite the existence of the Common Law Conveyance the plaintiff knows he is due a registered title, though it was not disclosed when he became so informed. Cross-examination drew from him "From I demanded my title she has not been speaking to me. She has passed me on the road and did not speak to me". This could probably be referring to the letter from his attorney-at-law demanding a Registered Title. The crux of the defence is that the plaintiff not having paid the balance of the purchase price, nor the relevant fees, the defendant is not obliged to tender Certificate of Title and accordingly the plaintiff is not entitled to the remedies sought. This leads me to a consideration of what the defendant contends were the arrangements regarding title. She said she told the plaintiff that her title was not with her and that she would have to go to Kingston to get it. It was with a lady lawyer. Whereupon he said he did not wish to involve any lawyer then because he didn't have any money to pay a lawyer. DSaid she,

> "So I said how did you expect to get a title? He said Miss Rita, there is such a thing called Common Law Title. I did not know this and Mr. Ferris said, "yes Miss Rita if both of you agree to buy and sell it can be done because this is something going on in the district for ages. I said Mr. Ferris, how you go about that? He said Miss Rita all you have to do is get a J.P. to sign a title form which you can buy at Times Store. I said Mr. Ferris is that legal seeing I have a registered title? Is it right? Mr. Ferris remarked "Miss Rita a lot of people in the district have only Common Law title and if that is all you have it is quite right to sell on it but if your title is registered, which is what I believe you have,then the Common Law title would not be a valid title."

In the light of this illumination she then asked the plaintiff why would he want a title that is not valid to which he replied that he had no money to pay a lawyer as yet but if anything should happen to either of them he wanted Inez to be protected and at least she would have that. Mr. Ferris then counselled -

> "Mr. Dailey you realize this doesn't value much but if that was what he wanted she should let him have it."

According to her -

> "We decided on that title but it was not drawn up that day. I said to him now that I am going to sell you piece you will have to stand one-half cost of survey to which he agreed."

Further relevant testimony about the title ran thus -

> "After I told him I am going to Kingston he came with Mr. Ferris to find out which day we would make the appointment to sign the document (i.e. the Common-Law Title) and pay the money. I handed him a document and said to him Mr. Oliver this is my title - not the original but a copy because the original is with a lady lawyer who I owe some money. - - - - - - - - - He said, "Cho Miss Rita me no want see no paper just now you just tell me when you ready to go and sign up things. Mr. Ferris took the document and said "Mr. Bailey the lady is right. Suppose after you buy the place you hear that somebody else's name is to the title apart from hers. He remarked to Mr. Ferris "You read it Mr. Ferris and Ferris did - silently."

Cross-examined on this aspect, she said:

> "I had the intention to take him where my title was at the time of transaction."

But a consideration of the evidence relating to the title would not be complete without Mr. Ferris' contribution. On his version there were several meetings prior to the conclusion of the transaction and at one of those meetings the defendant offered to get for the plaintiff a photostat copy of the title which she said was with a legal officer in Kingston where she owed a little money. There ended that meeting. His account of the next meeting at Miss Hamilton's house is as follows:

> "At this point the definite price property to be sold was concluded. Miss Hamilton presented a copy of her title. Mr. Bailey did not really show any great interest. He did not really wish to see it. I looked at it and called his attention to the point from which he would get his parcel of land - 5 acres. I showed him the copy document annexed, i.e. the diagram. but he did not understand. He agreed and he and Miss Hamilton came to a decision on the price in Miss Inez' presence. An agreement was made to meet 10.7.76 when the deposit-ment would be paid. After depositment was paid receipt was given - 10.7.76 - for the money paid."

It will be seen that he has gone even beyond the defendant herself in the effort to establish her position. In further conflict with her he said that at her request he did go to the plaintiff and inform him that

"the land was surveyed and a diagram was being prepared so she would appreciate if he would tender his part being one-half of the cost. I did not know what the one-half amounted to". According to him the plaintiff repudiated the survey and said, with the aid of expletives, that "the woman better tek back her land and give me back me money". This he faithfully reported to the defendant. He further confirmed his untrustworthiness by testifying that he knew that both the plaintiff and defendant had given evidence of the meeting which he said was held on 10th January, 1977 and that both confirmed his presence at that meeting. At that meeting he said the question of the mortgage was raised by the plaintiff and the defendant insisted that from the beginning she had told him. To this the plaintiff said nothing.

This evidence was given on 11th June, 1980 on which date the trial was adjourned for a date to be fixed when his cross-examination would be continued. However, when the hearing resumed on 6th November, 1980, the witness was absent and Mr. Goffe announced that witness had decided not to return to Court because he had been threatened. There was no evidence to substantiate the claim so that could only pass as an unsubstantiated charge. But what was obvious was that he did not fare well under cross-examination. There were members of his community in Court who witnessed him being stripped and exposed as a liar of convenience and I rather incline to the view that this factor above anything else determined his course of action. He did however grace the Court with his presence on 17th February, 1981, when he persisted in giving details about which nobody else spoke. Making ample use of his legal jargon he testified that apart from the receipt (Exhibit 1) and the Indenture (Exhibit 2) there was a third document -- an agreement which "embodied sanctions between the two parties as to how and when the balance was to be paid". Experienced though he claimed to be in land matters when tested on land values in the area he said he had no idea of the value of lands in the area apart from his own land.

"Enough is enough" is a sufficient basis for concluding the consideration of the testimony of this remarkable and unconventional witness.

I return briefly to the evidence of Mrs. Tomlinson with reference to the defendant's application to sell a portion of the security to meet the mortgage interests. She said that she recommended the application and as a consequence a Credit Officer from the Board visited and inspected the property and upon his report the Senior Credit Officer recommended the proposed course which was endorsed by the Assistant Credit Manager. The matter should then have gone before the Meeting of the Board. But because this was not done before Mrs. Tomlinson left the Board on 9th March, 1977 she was unable to say what further action had taken place. The defendant had testified that of the money paid by the plaintiff she had paid $2,000 to her account. However, a perusal of the file by this witness up to when she testified on 17th February, 1981 - over 3 years later - did not disclose any record of such a payment. It also appears that the sale to the plaintiff was not disclosed to the credit officer who was mandated to inspect the farm, ascertain the area intended for sale, the proposed sale price and whether there was any prospective purchaser. But his report is silent on those matters. Indeed, it seems unlikely that the Board would remain apathetic to such disclosure seeing that the security was being diminished to its dis-advantage. A dark cloud is detected hovering over the defendant's credit and lends support to Mr. Frankson's view that inasmuch as the defendant did not intend to give title promptly she had proposed to use the unsuspecting plaintiff to shore up her weak finances. However, it must be borne in mind that she had gone so far as to have the area surveyed which was a step in the right direction though, as it seems, a lone step in a long journey. It is clear, however, that the Board did not raise any objection to a sale. Mrs. Tomlinson also said that in order to reduce cost she had assisted in sales of the nature in question and so it is quite likely that she could have promised to assist the defendant with whom she had much to do.

Claiming that she had been given oral permission to sell parts of the property, the defendant said, she had sold a quarter-acre of the land adjoining the plaintiffs' portion to an old lady. It wasn't even so much a sale, she said. She just took $1,000 from the old lady, but the land

can be sold for much more than $10,000 per acre! What has happened is that since the sale to the plaintiff electricity has been brought into the area so that without any evidence of any development the price, at least in her mind, has shot up like electricity to more than 10 times the price the plaintiff was charged. There is no doubt in my mind that this escalation of the price being charged for the land has to a great measure influenced the attitude of the defendant. She had been asked and answered as follows:-

> Q: Has it always been your intention to give the plaintiffs a proper title for the land you agreed to sell them?
>
> A: Of course, of course. Sir, I had no idea there was any other title. If the Court rules it is still my intention. I would prefer at this stage not to sell him the land after all the threats he has used, but if I have to sell him I am prepared to give him a proper title.. Yes, I last spoke with Mr. Bailey in October, 1977.
>
> Q: So the threats about which you speak were uttered between 10.7.76 and October 1977?
>
> A: I did not up to now speak about any threats in that period."

Further questioned she responded -

> "Yes I did say because of the threats I don't feel like selling him the land again. No, the disinclination to sell him the land has not developed since October, 1977.
>
> Q: Did it develop before?
>
> A: I don't know what to answer. No, I did not have such intention before or after October 1977. I became fed up. Yes, I formed the intention not to sell after I got the Writ of Summons. He was making a fool of me."

Be it noted that the writ was not issued until 23rd February, 1978, after she had failed to reply to the letter from the plaintiffs' attorney up to which time she had done nothing to allay the plaintiffs' fear that she could not give title because of the undisclosed mortgage.

Here then is her evidence of her reason for not carrying forward the sale. It bears no resemblance to her pleading and in particular in paragraphs 8, 9 and 10. But neither her pleading nor in her evidence

dared she give the real reason which is that she thinks she can get much more for the land she agreed to sell the plaintiff. On her pricing she could get at least $44,500 more. If that is so she would indeed attract sympathy. But that is not to say she would be justified. For how could she be allowed on the basis of disappointed desire to avoid a valid contract already part-performed. There is no question as to whether the parties entered into a valid contract.

The problem with the question of performance in this case is not confined to the parties. It may be said that the plaintiff acted with reasonable diligence after he claims to have been alerted to the fact that "the land was loaned" as he puts it. Can the defendant make a similar claim? This is not obviously so. Even counsel found themselves affected by the time factor so much so that Mr. Goffe's address which began on 18th February, 1981 was not concluded until 8th July, 1983 when Mr. Frankson made his address and then it was the Court's turn to be affected due to pressure of work.

The plaintiff had admitted that he knew that when land is mortgaged it is liable to be sold but he denied telling the defendant that he was waiting for her land to be sold because she couldn't pay off the loan and then he would buy out the whole property and send her to poor house. The suggestion that evoked the denial was at the least unfortunate in that there was no indication of the size of the loan or of the defendant's ability to manage the loan or indeed of the plaintiffs' ability to purchase the property of 43 acres. This merely bears the mark of the fervour with which the protagonists prosecuted their cause.

Mr. Goffe presented a rather ingenious interpretation of the non-payment of the balance of the purchase money by the plaintiff. He has attributed to the plaintiff a level of sophistication which is not justified on the evidence. Said he, the plaintiff has had the free use of the land and so it is to his advantage to delay payment of the balance for as long as he can while the defendant stood to gain nothing. If the evidence is ignored this submission becomes very attractive but in the face of the evidence it is untenable. There is the physical evidence of the plaintiff having gone ahead and prepared a building site and cut a roadway.

This is hill-side land so the effort and the impact of the plaintiffs' action cannot be ignored. Further, he gave evidence that he has been waiting to build his house which he cannot do until sale has been completed. How then could it be to his advantage to delay payment indefinitely?

Let me say that the preponderance of the evidence is against a finding for which Mr. Goffe contends, that is, that the defendant had advised the plaintiff at the very outset that the property was mortgaged. If that were so then the conduct of the plaintiff would be passing strange. He paid $3,000 but raised no question about the mortgage. Three months later when no payment was due he acceded to the defendant's request and paid a further $500 stating at the time that he could, but for some other debt pay the whole balance. Again, he made no mention of the mortgage. Why, then having paid the greater part of the purchase price should he now present an obstacle to the smooth conduct of the matter? This was certainly not one of Mr. Goffe's better submissions. I accept the plaintiff's evidence that it was not until December 1976 that he heard of "the land being loaned" and obviously fearing for his investment he consulted an attorned-at-law and invited her to go with him to have the question resolved. She refused the invitation stating that "same way she start her business is same way she going finish it". Whereupon he responded "No, Miss Hamilton, as long as the land mortgaged I can't finish it that way without my barrister". It was the very next day that the stakes delineating the portion of land were uprooted by the defendant's agent. I accept his evidence that she never told him of the mortgage until he asked her about it - six (6) months after they had entered into the contract. How then must the plaintiffs refusal to pay in those circumstances be regarded? As a frustrating act? Certainly not. He was becoming aware for the first time that his investment - his very first land purchase save for the uncomplicated acquisition some long time before of 1/4 square chain of land in which no lawyer was involved - might be in jeopardy. He would have been imprudent to have paid his money without legal assistance in clearing up the matter. Accordingly, the defendant can derive no comfort from that situation. Since she meant to act above board why did

she not confer with the attorney who could then give the purchaser the needed assurance? Further, whatever misgivings she could possibly have had about the plaintiff's intention to complete were put to rest by the lettef from his attorneys dated 24th March, 1977 - a bare ten (10) weeks after he had raised the issue. She did not even dignify that letter with the courtesy of a reply. Indeed, her only reply appeared in her defence filed 18 months after that letter. Why did she take no action and as a result necessitated the filing of a Writ some 11 months after the letter? Even if she did not receive the photocopy of the Manager's Cheque evidencing the purchaser's ability to complete it was competent for her, who had to give title to ascertain the legal costs involved, fix a date for completion, render the plaintiff a bill of his outstanding indebtedness and serve him notice making time of the essence. Instead she did nothing.

It is conceded that an agreement for sale does not warrant title in the vendor at the date of entering into the contract but that at the time for completion such will be the case. Accordingly, where, subsequent to the date of the agreement for sale there is good reason to doubt whether the vendor will be able to complete authority favours caution on the part of the purchaser. (See 3 Hals. Vol. 34 at para. 492). And since there was no date fixed for completion it was incumbent upon the vendor to resolve the difficulty to the purchasers satisfaction. See 3 Hals. Vol. 34 para. 577, which provides inter alia -

> "Where a vendor contracts to sell land which is in fact encumbered, though this is not shown by the contract, the purchaser can require the vendor at his own expense to obtain a discharge of the encumbrance by separate deed."

In the instant case, neither the written evidence of the contract nor the discussions revealed the encumbrance. Accordingly, it was not unreasonable on the part of the plaintiff to raise the issue when he became aware of it and it was incumbent on the part of the defendant vendor to take the necessary action.

The conduct of the parties fall for consideration in the light of the following provision in 3 Hals. Vol. 34 para. 492 which states - inter alia:

> "In the ordinary course, completion consists in the purchaser paying the purchase money, or the balance thereof and the vendor at the same time executing a conveyance and delivering possession to the purchaser; when these incidents are separated, the construction to be put upon a reference in the contract to the date for completion depends on the terms and subject matter of the contract, though it seems that the reference is as a general rule to be taken to be a reference to the complete conveyance of the estate and the final settlement of the business.
>
> The completion of the contract is conditional on the vendor making out his title. Until the vendor makes out his title, the purchaser is not safe in paying the purchase-money and taking possession. Hence the date when the vendor makes out his title is the earliest date at which completion should take place, and it is the proper date for completion if no date is fixed by the contract.
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> If the contract fixes a date for completion, this is the proper date, and if this stipulation is of the essence of the contract the vendor must make out his title by that date; otherwise the purchaser cannot be required to complete either then or subsequently. If it is not of the essence of the contract and the title has not been made out, the purchaser can be required to complete as soon as the title has been made out. In case of undue delay either party may fix a reasonable time for completion, and this time then becomes of the essence of the contract."

In the light of these provisions the confronting of the defendant on 9th January, 1977 was an act of commendable prudence which required action by the defendant. It is also clear that the defendant was never in a position to call upon the plaintiff to complete on any fixed date within a reasonable time, though on the evidence she could put herself in such a position.

As I find the mortgage was not disclosed at the time the contract was entered into but the existence of the mortgage, as Mr. Goffe submitted, is not a defect in the vendor's title. Accordingly, there is no basis for Mr. Goffe's submission as to hardship or impossibility on the part of the defendant. Indeed, quite contrary to any suggestion of impossibility on her part the defendant insists she can give good title. The ground on which the question of hardship was raised by Mr. Goffe was that to decree Specific Performance would be to land the defendant with a difficult neighbour. As an act of charity I will not comment on this beyond saying it betrays great imagination. He, therefore, contended for rescission of

the contract and an award of damages but not even his ingenuity could identify the evidence on which damages could be awarded. The simple fact is that although the plaintiff did include such reliefs in his statement of Claim he did not adduce even a scintilla of evidence in support thereof. The entire effort has been to secure Specific Performance.

In response to the submissions regarding the award of damages Mr. Frankson cited two cases (which I need not consider) which merely emphasize the task that would be undertaken to endeavour to make an award of damages without the necessary evidence. The cases are Johnson v. Agnew (1979) 1 ALL. E.R. 883; (1980) A.C. 367; Malchoutra v. Choudhury (1979) 1 ALL E.R. 186; (1978) 3 W.L.R. 825.

Mr. Frankson submitted that insofar as the provision for time for completion being excluded from the contract is concerned, the contra preferentem rule operates to afflict the defendant with the consequences for the omission. It is her document. Accordingly, the submission runs, the plaintiff is not in breach. He has demonstrated his ability to pay the balance of the purchase-money and has, through his attorney-at-law agreed to meet his moiety of the attendant costs of providing a registered title, which is what the plaintiff seeks.

I am in entire agreement with Mr. Frankson's submissions and accordingly enter judgment for the plaintiffs. It is ordered that the contract entered into between the parties on the 10th day of July, 1976, be specifically performed within six months from the date hereof.

The plaintiffs are to have their costs to be taxed if not agreed.