Judgement Book

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 79/91

BEFORE: THE HON. MR. JUSTICE ROWE, PRESIDENT
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE GORDON, J.A.

BETWEEN	OTHNEIL BERNARD COLLEY BEVERLEY NOREEN COLLEY	DEFENDANTS/APPELLANTS
A N D	CAROL ANTHONY PRATT	PLAINTIFF/RESPONDENT

Maurice Frankson instructed by Gaynair and Fraser for Appellants

C.M.M. Daley and Miss Carol Vassell for Respondent

February 15-18 and April 28, 1993

ROWE P.:

By his judgment delivered on October 4, 1991, Morris J. (Ag.) ordered the appellants to quit and deliver up possession of premises known as 11 Bronzewing Place on or before January 31, 1992, to the respondent, to pay to him the sum of $42,300.00 for rent and/or mesne profits and to remove the caveat which they had lodged in respect of 11 Bronzewing Place. The defendants appealed. No respondent's notice or cross-appeal was filed by the plaintiff. When the appeal came on for hearing other matters had to be interposed and this led to the lengthening of the appeal process. In the end, however, we allowed the appeal, set aside the judgment and order of the Court below, and granted an amendment of the defence to include a counter-claim for Specific Performance of the contract pleaded in the defence, upon payment to

the plaintiff/respondent of the balance of the purchase money with interest fixed at 15% per annum. These now are reasons which persuaded me to arrive at that decision.

In 1979, Mrs. Winnifred Cecelia Pratt, widow, aged between 80 and 82 years, a retired mid-wife lived alone at 11 Bronzewing Place, St. Andrew. Her son Carol Pratt, now a retired steel fabricator, living in Florida, U.S.A. had migrated to the U.S.A. in 1968. He last lived in Jamaica for fourteen months between November 1976 and March 1978. It appears that the late Mr. Alty Sasso, an insurance executive and a very active official of the Jamaica Cricket Board of Control was a friend and business-advisor of Mrs. Pratt.

Mr. Pratt, whose evidence on this aspect of the case was not challenged, said that before migrating from Jamaica he bought premises 11C Emerald Road which was registered in the names of his mother and himself as joint tenants. His mother was living in those premises in 1970 when he visited Jamaica and it was there that he first met Mr. Alty Sasso. I can indulge myself for a moment in thinking that the Cricket Board wished to acquire 11C Emerald Road to include it in their plans for the extension of the famous Sabina Park Cricket Ground, but be that as it may, an exchange was arranged in 1974 whereby 11C Emerald Road was transferred to the Jamaica Cricket Board of Control and premises 11 Bronzewing Place was transferred into the names of Mrs. Pratt and her son, whose address was given as in Los Angeles, California, as joint tenants. A balancing sum of less than $1,000.00 was due to the Cricket Board and that accounted for the fact that the title registered at Volume 1011 Folio 413 of the Register Book of Titles remained with the attorneys-at-law for the Cricket Board, until June 1980 when after a great deal of enquiries, it was forwarded to Livingston, Alexander and Levy on their undertaking to pay the outstanding amount.

Mrs. Pratt went to live at 11 Bronzewing Place and remained there until the latter part of 1979. It was about August 1979 that Mrs. Pratt took the decision to sell 11 Bronzewing Place. The appellants got wind of this probability and Mrs. Colley negotiated on behalf of her husband and herself. Mrs. Pratt wished to migrate to live with her son in the U.S.A. It was a time said Mrs. Colley "when people were running away" from Jamaica, and she found the asking price of $30,500.00 reasonable. Mrs. Pratt directed her to Mr. Alty Sasso who collected the deposit of $5,500.00 in three instalments between 3rd August and 3rd October 1979 for and on behalf of Mrs. Pratt.

A formal Agreement for Sale was prepared and was eventually signed on February 21, 1980. In it the vendor was named as "Winnifred Pratt" and the two appellants were the purchasers. Some significant clauses of this Agreement were:

(a) the Purchase Money of $30,500.00;

(b) an acknowledgement that the deposit of $5,500.00 was paid prior to the date of the Agreement direct to the vendor;

(c) the date of completion on or before 30th April, 1980; and

"Special Condition 2" - to this effect:

> "This Agreement is subject to the Purchasers raising a first legal mortgage on the security of the premises in an amount of not less than $21,000.00 through the Jamaica National Building Society at a rate of interest not exceeding 12% per annum for not less than 15 years on that Society's usual terms and conditions. The Purchasers hereby agree to use their best endeavours to obtain a Commitment for such Mortgage and to communicate same to the Vendor's Attorneys-at-Law on or before the 31st March 1980 failing which the Vendor shall be at liberty to cancel the Agreement and refund the deposit to the Purchasers free of interest less $100.00 being the costs of preparing this Agreement."

Although the vendor and purchasers signed the Agreement before Mr. Afeef Lazarus at Livingston, Alexander and Levy, it appears that the document was prepared presumably by Mr. Sasso, and presented to the parties for signature. All the evidence indicates that from an early time in the negotiations, Mr. Sasso suggested that it would be more advantageous to Mrs. Pratt if she carried the mortgage herself as thereby she would obtain a secure income in excess of what she could receive from an investment of the mortgage money in a bank account. The appellants accepted the proposal as they would not have to find all the purchase money then to complete the sale. This understanding was firmly held before and after the signing of the Agreement for Sale and it will be essential for me to refer later in this judgment to the relevant correspondence in that regard.

At this point the parties were acting as if Mrs. Pratt had full authority to sell and convey 11 Bronzewing Place. Indeed she gave possession to the purchasers at the end of 1979 on condition that they paid a peppercorn rental of $100.00 per month and were asked to pay land tax and to insure the premises.

The respondent introduced himself to Messrs. Livingston, Alexander and Levy by letter dated February 2, 1981, Ex. 3, as the son and caretaker of his mother's affairs. In that letter he did not claim to be beneficially or legally entitled to premises 11 Bronzewing Place but he sought copies of the documents dealing with the mortgage transaction and a statement of account. The attorneys replied promptly. They pointed out in their letter of February 24, 1981, Ex. 2, that on perusal of the title for the property his name appeared as a joint owner and attached an Instrument of Transfer for his execution.

I find the respondent's reply of March 7, 1981, Ex. 4, to be curious. He showed anxiety about the sum of $5,500.00 which was paid over to the attorneys as well as to the interest on the outstanding purchase price which should have been covered by the mortgage and after severely reprimanding the attorneys for their tardiness in completing the transaction, Mr. Pratt wrote:

"At this point in time my conclusions are that:

(1) An agreement of sale for this property was made, signed and dated Feby 21st 1980, in which, under Schedule there is shown varying items not the least of which is:

'Deposit of $5,500.00 having been paid directly to the vendor' etc., etc.,

and as you will recall that this full amount has been turned over to you by my mother, and with the exception of the cost of preparation of that document, it is my hope that the balance has been accruing bank interest? Also there is the item of "Special Conditions" under which the #2 par., to me seem quite conclusive, and my deduction is that at this time either this document is void, or we (the vendors) are due a lot of mortgage payments?

(2) I have no intention of rushing into signing this Instrument of transfer, and until I (as a valid participant), get the information requested in my original letter, and I am satisfied with the existing state of this transaction, then I shall process this document."

The lawyers were offended at the tone of the respondent's letter and on April 1, 1981, Ex. 10, replied in a challenging manner. It was confirmed that Livingston, Alexander and Levy were acting as attorneys for Mrs. Pratt, a statement of account was forwarded to Mr. Pratt and for the first time it appeared in writing that the vendors would provide the mortgage. Mr. Pratt did not accept the invitation to seek independent advice from other attorneys but wrote back on May 4, 1981, Ex. 11, expressing regret for his previous indiscretions, but informed the attorneys that he and his mother wished to cancel the sale. He wrote:

> "However, at this time my mother and me desire to cancel the sale of this property, as the purchaser has informed me by letter that she has made other mortgage arrangement, and my mother has decided to return to Jamaica to live, for her health and medical reasons."

Mr. Pratt went on to give consequential instructions:

The attorneys were in a quandary. As is permitted by Jamaican conveyancing practice, the attorneys were also acting on behalf of the purchasers. This practice which proved to be very convenient in times past when property values were low and fluctuations in the price of money were unusual, needs urgent review by the responsible organizations of the legal profession and if they fail to act, there should be regulatory legislation. I am able to say this because of the increasingly large number of cases which have come before me or of which I am aware in which the problems could have been avoided if this conveyancing practice did not exist. Be that as it may, Mr. Afeef Lazarus of Livingston, Alexander and Levy wrote in clear and explicit terms to Mr. Pratt on May 28, 1981.

He said in part:

> "I cannot at this stage negotiate the cheque which you sent me for the reason that I can see no way in which you could cancel the Contract with Mr. & Mrs. Colley without being liable to them for breach of contract, and it is therefore likely that if litigation ensues the Court will more than likely grant to them an Order against you for specific performance of the Contract.
>
> The Application by Mr. & Mrs. Colley for a mortgage from the Jamaica Teachers' Association Housing Co-operative Ltd. was, I think, prompted by the delay in completing this matter and unless Mr. & Mrs. Colley agree to cancel the Contract and so advise me in writing, I cannot advise you to attempt to back out of the Agreement. As I understand it, Mr. & Mrs. Colley have been ready, willing and able to complete the Contract and the delay in producing Transfer and Mortgage inconvenienced them to a great extent. I do not feel that we can ever justify an attempt to cancel the contract at this stage."

Mr. Pratt's reply, dated June 5, 1981, Ex. 9 showed his uneasiness at accepting the attorney's advice. His first choice was for cancellation of the Contract but if that could not be achieved he wished completion on the terms of the Agreement for Sale of February 21, 1980 with special reference to Special Condition 2.

He continued:

> "Regretably at this time I must again refuse to return the completed Transfer Document, and I am sure that you can understand why, yet if and when agreement is reached on the matter of the mortgage, I will only be too happy to comply."

Was it that Mr. Pratt was leaving a negotiating door open? The attorneys prodded him once more in their letter of July 23, 1981, Ex. 13:

"I must admit that I am not really quite sure what you want Mr. & Mrs. Colley to do. The Agreement stipulated that Mr. & Mrs. Colley would be obtaining a Mortgage from the Jamaica National Building Society. This did not materialise for the simple reason that your mother indicated that she would prefer to have her moneys invested for a reasonable return than having it deposited into a bank account. I can only reiterate that Mr. & Mrs. Colley have at all times been ready, willing and able to complete the purchase of the premises on the terms of the Agreement, and when it seemed unlikely that your mother was going to give the Mortgage, they went elsewhere and procured commitment for finance. I cannot now understand your trend of thought, and I would like some clarification from you, preferably by forwarding the transfer executed by yourself and your mother so that I can bring this long outstanding matter to a close."

The final letter in this series was written by the respondent on August 1, 1981, addressed to Messrs. Livingston, Alexander and Levy. I set it out in full:

"**RE: 11 BRONZEWING PLACE, ST. ANDREW**

This is to acknowledge receipt of your latest letter dated July 23, 1981 and to thank you for the return of U.S. $1600.00 Treasurer's Cheque.

In answer to your question and to repeat an original request, we will give the mortgage and we require that you prepare the necessary documents for our approval, and at which time I shall complete and return the transfer document.

Anything to the contrary continues to be acceptable (sic).

On the matter of rental, it is our intention that you receive all rental due and put this to the credit of our account, thank you."

A Mortgage Deed was prepared and forwarded to the respondent, Ex. 7. It provided that the appellants would be the mortgagors, the respondent and his mother would be the mortgagees; the amount of the mortgage loan would be $21,000.00 and the rate of interest 12½% per annum. There was provision for the variation of the rate of interest wholly at the instance of the mortgagees. Mr. Pratt refused to accept the terms of the mortgage. On February 15, 1982, Mrs. Pratt gave the appellants a Notice to Quit and this was followed by a Writ on June 5, 1985 seeking recovery of possession and consequential remedies.

Oral evidence was received at the trial which went to confirm the statements in the written documents, to most of which I have already made reference. However, Mr. Pratt did maintain that at no time did he have an intention to sell the property at 11 Bronzewing Place.

Notwithstanding the fact that the respondent did not sign the original Agreement for Sale, or the Instrument of Transfer or the Mortgage Deed, Morris J. (Ag.) found that there was in existence some memorandum or note signed by the respondent, Mr. Pratt, which was referable to the Agreement of Sale, Ex. 1 dated February 21, 1980 sufficient to satisfy the provisions of Section 4 of the Statute of Frauds, 1677, which is by virtue of Section 40 of the Interpretation Act, incorporated into the Law of Jamaica.

On the third day of the hearing of the appeal, Mr. Daley told the Court that he had come into the case prepared to support the judgment of Morris J. (Ag.) for the reasons given by him but on reflection he was of opinion that larger issues arose which ought to be addressed and decided by the Court. He then applied for leave to file a respondent's notice which would challenge the correctness of the finding of Morris J. (Ag.) that the respondent had become a party to the original Agreement for Sale, that the

purported variation of the contract to provide for a vendor's mortgage was invalid, and that the original contract was terminated and no new contract had come into being. This application was strenuously resisted by Mr. Frankson on the ground that so to do would be to change the entire character of the appeal.

Rule 14(2) of the Court of Appeal Rules, 1962, provides that:

> "(1) ...
>
> (2) A respondent who desires to contend on the appeal that the decision of the Court below should be affirmed on grounds other than those relied upon by that Court shall give notice to that effect specifying the grounds of that contention."

The Rules further provide that such a respondent's notice shall be filed and served within fourteen days after the service of the notice and grounds of appeal and that without the leave of the Court, the respondent should not be entitled upon the hearing of the appeal to contend that the decision of the Court should be affirmed upon any grounds not relied upon by the Court.

We refused the application for leave to file the respondent's notice at that time. We were of the view that the findings of the trial judge on that issue were so clearly and succinctly set out, that it could not have escaped the attention of counsel for the respondent and that in the light of the supporting evidence, it would be an act in futility to grant the application. As the attorney for the appellants submitted, the amendment would indeed change the character of the issues raised on appeal, would lead to a lengthy adjournment, and in the peculiar circumstances of the adjudicating panel, necessitate the re-hearing of the arguments before a different panel. Mr. Daley was therefore not permitted to challenge the finding of the trial judge on this issue.

A second question was posed by the trial judge and this he answered in favour of the respondent. He asked:

> "Is there in existence a valid and enforceable contract between Mr. Pratt and the Colleys?

To enable him to answer his own question, Morris J. (Ag.) made one important positive finding. He said:

> "It is clear from the evidence that Mr. Pratt agreed to give the Colleys a vendor's mortgage."

This finding was compelling and is in keeping with the express language of the respondent in his letter of August 1, 1961 to Livingston, Alexander and Levy. Morris J. (Ag.) however, found that the Agreement to provide the vendor's mortgage was void for uncertainty. He cited in support Re. Rich's Will Trusts [1962] 106 Sol. Jo. 75; Lee-Parker v. Izzet (No. 2) [1972] 2 All E.R. 803 and Scammell v. Ouston [1941] A.C. 251.

In Re Lee-Parker v. Izzet (No. 2) [1972] 2 All E.R. 800, Goulding J. held that a stipulation in a Contract for Sale which provided that:

> "This sale is subject to the purchaser obtaining a satisfactory mortgage"

was void for uncertainty. At page 803 of the Report he explained his reasoning thus:

> "I agree moreover with the submission of the plaintiffs' counsel that the condition is void for uncertainty. I bear in mind the numerous warnings of great judges against too ready an acceptance of submissions of that character. ... Nevertheless it seems to me that in the circumstances of the present case the concept of a satisfactory mortgage is too indefinite for the Court to give it a practical meaning. Everything is at large, not only matters like rate of interest and ancillary

> "obligations, on which evidence might establish what would be usual or reasonable, but also these two most essential points - the amount of the loan and the terms of repayment."

Brown v. Gould and Others [1971] 2 All E.R. 1505 had been cited to Goulding J, in Lee-Parker v. Izzet (supra) and he was able to distinguish that case on the facts, but he expressly acknowledged that one should not repose too easily on the pillow of uncertainty in order to dispose of the question of construing a written document. Meggary J. from the wealth of his great experience, said in Brown v. Gould (supra), that in construing a clause in a contract which is said to be void for uncertainty, the proper approach is that the Court is reluctant to hold void for uncertainty any provision that was intended to have legal effect.

To my mind it is clear beyond a peradventure that after the fast and furious correspondence between the respondent and Livingston, Alexander and Levy from February to August 1981, when the respondent wrote in August agreeing to grant to the purchasers a vendor's mortgage he intended that this would give business efficacy to the transaction between himself and the purchasers and that his acceptance of the position long advocated by the purchasers was intended to have legal effect.

Unlike the situation in Lee-Parker v. Izzet (No. 2) (supra), all the terms of the mortgage were known. The vendors were simply substituting themselves for Jamaica National Building Society. The Mortgage Deed which the attorneys prepared at the request of the respondent was more favourable to the vendors than the original stipulation in that the rate of interest was raised from 12% to 12½% per annum. I cannot conceive of any reasonable mortgagee acting reasonably rejecting such a mortgage out of hand without making any counter proposals. Such a proposed mortgagee cannot approbate and reprobate at the same time. I therefore hold that the condition which provided for a vendor's mortgage was not void for uncertainty and consequently the Agreement for Sale was enforceable.

Morris J. (Ag.) had refused an application by the appellants to amend their defence to add a counter-claim for Specific Performance. He did this on two bases. Firstly, the appellants did not serve notice upon the respondent to complete within a stipulated time. Secondly although the defence was settled by leading counsel there was no claim for Specific Performance and no amendment of the defence had been applied for until the second day of the trial, which he considered to be later even than the 11th hour. It appears from a submission of counsel for the defence that the appellants' attorney's attention had been drawn to this defect in the pleadings by the Court about a year before the case came on for hearing and yet no action had been taken in that regard.

It seems to me that the allegations in the defence especially those appearing at paragraphs 12 and 13 make it unmistakably clear that the appellants were saying they were entitled to have their contract specifically performed but that this has been frustrated by the act of the respondent in not signing the Transfer. I do not think that the appellants should suffer from the negligence of counsel who failed to seek the appropriate relief, provided that they approached the Court while it was still seized of the matter. I respectfully differ from the learned trial judge who categorised the delay as abominable laches and I am of opinion that he ought to have granted the amendment sought.

The appellants have been in possession of 11 Bronzewing Place for some thirteen years and made it their home. So far as I am aware, the respondent still resides outside of Jamaica. It would be fruitless to ask the respondent to provide a vendor's mortgage

at this stage. I would order that the appellants pay the balance of the purchase price within twenty-one days of the end of the arguments. There has been much fluctuation in interest rates since 1981 and I would therefore order that the balance of the purchase price bear interest at the rate of 15% per annum from June 1980 to 18th February 1993. I would give leave to the parties to apply so that consequential orders could be made to work out the order made herein.

FORTE, J.A.

In an agreement for sale, dated the 22nd January 1980, Winnifred Pratt, the mother of the respondent, agreed to sell premises 11 Bronzewing Place, in St. Andrew to the appellants for the price of $30,500.00. As the content of this agreement formed an important element in the determination of this appeal it will be referred to in greater detail later. It is sufficient to state now, that subsequent to the signing of the agreement it was discovered that the respondent was registered at the offices of the Registrar of Titles, as a joint tenant, (with Winnifred Pratt) of the property. That fact not having been disclosed by Winnifred Pratt, the respondent had not been required to sign the agreement. Several communications made thereafter between the respondent and the Attorneys, and his conduct thereafter, suggest, however that the respondent did in fact acquiesce to and subsequently became a party to the transaction. Nevertheless, the contract not having been performed, the respondent brought an action for recovery of possession of the property, the appellants having taken possession by consent of his mother prior to the signing of the agreement, and in pursuance of an arrangement to pay $100 per month rental until the completion of the contract of sale.

In support of his claim, the respondent in his statement of claim alleged that he had never been a party to nor had he ever consented to any such alleged agreement for sale. He further averred that he had refused to sign an Instrument of Transfer sent to him by the Attorneys, Messrs. Livingston, Alexander & Levy, on the basis that he had never agreed to the alleged agreement of sale, and that it (the agreement) was void for uncertainty as to its terms. He claimed also that the appellants, having taken possession of the property, had not made any payment for its use and occupation, since 20th June 1980,

and prayed for judgment for $6,300 specifically for the use and occupation of the said premises.

The defendants/appellants relied in their defence on the agreement for sale, maintaining its validity, and at the trial applied to amend the defence to include a claim for specific performance of the contract. This application was refused by the learned trial judge, and that refusal grounded one of the complaints to be determined in this appeal.

In giving judgment for the plaintiff against both appellants, the learned trial judge made the following orders:

> "1. Recovery of possession of premises 11 Bronzewing Place in the parish of Saint Andrew. Defendants to quit and deliver up possession of the said premises on or before the 31st January, 1992.
>
> 2. Defendants to pay Plaintiff the following sums for arrears of rental and/or mesne profits and/or use and occupation of the said premises:
>
> | | | |
> |---|---|---|
> | Amount claimed in Statement of Claim | - | $6,300.00 |
> | A further sum of $36,000.00 made up as follows based on the evidence of Mr. Henriques. Writ was issued 5th June 1985. | | |
> | July 1985 to June 1988 36 mths @ $250 p.m. | - | 9,000.00 |
> | July 1988 to June 1990 24 mths @ $500.00 p.m. | - | 12,000.00 |
> | July 1990 to June 1991 12 mths @ $800 p.m. | - | 9,600.00 |
> | July to September 1991 3 mths @ $1,800 p.m. | - | 5,400.00 |
> | | | $42,300.00 |

"3. Declaration that the Plaintiff is entitled to an order for the removal of Caveat No. 94738 lodged by the Defendants in the Registry of Titles against the Certificate of Title for the said lands.

4. An order that the said Caveat be removed.

5. Costs to the Plaintiff including Plaintiff's airfare awarded on 21st March, 1990 and further sum awarded on the 1st October, 1990 to be agreed or taxed."

It is from these orders, that the appellants brought this appeal. On the 18th February 1993, after three days of argument, we **allowed** the appeal, set aside the order of the Court below, and ordered **that** the Defence be amended to include a counterclaim for Specific Performance of the contract for sale of the said property. The respondent was ordered to specifically perform the contract to sell and transfer the said property to the appellants for the sum of $30,500 upon the appellants paying to him the balance of the purchase price together with interest thereon at the rate of 15% per annum commencing June 1980 to the date of judgment of the Court of Appeal, within 21 days hereof (i.e. 18th February 1993). Liberty was given to apply and the costs of the apellants both here and in the Court below were ordered to be paid by the respondent, such costs to be taxed if not agreed.

At that time, we promised to put our reasons in writing, and in keeping with that promise I now do so.

In the appeal, three questions were material in determining the fate of the parties -

(1) Was the appellant a party to the agreement dated 21st February 1980, which he did not sign, but which was executed by his mother the joint owner of the property?

(2) Is there in existence an enforceable contract? and

(3) Was the learned trial judge correct in refusing the application of the appellant to amend the Defence so as to add therein, a counterclaim for specific performance?

1. Was the appellant a Party to the Agreement

In relation to this question the learned trial judge approached it in the following form -

> "1. Is there in existence some memorandum or note signed by Mr. Pratt referable to the Agreement for Sale Exhibit 1 to satisfy the relevant provisions of Section 4 of the Statute of Frauds 1677 which became applicable in Jamaica by virtue of U.K. Statute 21 James 1 Chapter 16 now incorporated in Section 46 of the Limitation of Action Act."

He found the answer in words used by the respondent in several letters which he wrote to the Attorneys concerning the sale transaction, these letters having been written by him from his home in Atlanta, where his mother was at that time, also residing. The learned judge found as follows:

> "Dealing with the first question I will quote from the various exhibits in order to arrive at a determination thereof.
>
> (i) Exhibit 4 - we the participants regret having this matter handled in this manner ..." "I (as a valid participant)"
>
> (ii) Exhibit 5 - "as of the 30th April 1981 we will not be interested in selling this place and all previous arrangements will be cancelled re the sale"
>
> (iii) Exhibit 9 - "my share of any monies which may result is the equivalent of $1.00"
>
> (iv) Exhibit 11 - "However at this time my mother and me desire to cancel the sale of this property, as the purchaser has informed

" - me by letter that she has made other mortgage arrangements"
"in anticipation of a refund of deposit I am enclosing a bank draft for the amount of U.S. $1,800"

(v) Exhibit 14 - "In answer to your question, and to repeat an original request, we will give the mortgage, and we require that you prepare the necessary documents for our approval."

I therefore answer the first question in the affirmative."

This finding remained unchallenged before us. It should be noted, however, that an application made by counsel for the respondent, late in the hearing of the appeal, and at a time when he was in the middle of his submissions, for leave to file a respondent's notice was refused.

In any event, in my view the reasons given by the learned trial judge for his conclusions in respect of that issue are sound, and could not be successfully challenged.

The appeal therefore developed on the issues outlined in paragraphs (ii) - (iii) (supra).

2. Was there an enforceable contract?

In order to determine this question some reference to the evidence is necessary.

The agreement for sale stipulates as far as relevant, the following -

Purchase Money - Thirty Thousand Five Hundred Dollars ($30,500)

How Payable - (a) Deposit of $5,500 having been paid directly to the vendor prior to the execution hereof (the receipt whereof is hereby acknowledged by the vendor) ...

Carriage of Sale - Messrs. Livingston, Alexander & Levy

Then it stipulates a special condition which reads:

> "2. This Agreement is subject to the Purchasers raising a first legal mortgage on the security of the premises in an amount of not less than $21,000.00 through the Jamaica National Building Society at a rate of interest not exceeding 12% per annum for not less than 15 years on that Society's usual terms and conditions. The Purchasers hereby agree to use their best endeavours to obtain a Commitment for such Mortgage and to communicate same to the Vendor's Attorneys-at-law on or before the 31st March, 1980 failing which the Vendor shall be at liberty to cancel the Agreement and refund the deposit to the Purchasers free of interest less $100.00 being the costs of preparing this Agreement."

In spite of the date upon which the agreement was executed, it is revealed in the evidence that there was an understanding prior thereto, for the purchase of the property, which caused the appellant to pay $5,500 as a deposit in respect of the sale.

We look therefore on the history of the transaction which began in August 1979. The Colleys having heard of the intended sale of these premises went there and met Mrs. Pratt, who was as it turned out the mother of the respondent. The selling price was $30,500 and being interested, the Colleys were referred by Mrs. Pratt to Mr. Alty Sasso whom she informed them, was dealing with the property. As a result of the meeting with Mr. Sasso, the Colleys paid a total of $5,500 as a deposit on the purchase. This amount was paid in three different tranches as follows:

3rd August, 1979	-	$1,000
8th August, 1979	-	$1,000
3rd October, 1979	-	$3,500

On one of these occasions, when Mr. Sasso and Mrs. Pratt were present, Mr. Sasso suggested to the appellants that rather than getting the mortgage from a financial institution, Mrs. Pratt

should give the appellants the mortgage and this was agreed. This was the evidence in that regard given by Mrs. Colley:

> "I tendered the money eventually to Mr. Sasso. Mrs. Pratt was present. There was a discussion about mortgage. Mr. Sasso suggested that Mrs. Pratt give us mortgage. Mrs. Pratt agreed and Mr. Sasso explained to me only suggestion was made. The four of us were in the dining room. Vendors would get more money than if money were in the bank. I would not be required to pay as much as if I had gone through monetary places. I agreed to accept proposal."

Mr. Colley in his testimony substantiated the evidence given by his wife when he said:

> "We were going to finance it through a financial corporation. In the initial stages I approached Jamaica National. We made an enquiry. We did not make application for mortgage. This was because when I met Mr. Sasso and Mrs. Pratt for the second time Mr. Sasso said Mrs. Pratt should take the mortgage as it would be more profitable for her I talked it over with my wife and eventually we agreed. Mrs. Pratt was there when we agreed. I communicated this to her."

Both Mr. & Mrs. Colley also testified that as a result of the agreement for the vendor to give the mortgage they refrained from proceeding with the application for mortgage to any financial institution and in particular, the Jamaica National Building Society, as stipulated in the special condition in the contract. This evidence established that certainly with regards to Mrs. Pratt there was an agreement that the vendor would give the purchasers a mortgage so as to facilitate the completion of the contract. However, the respondent was not at that stage, a party to such an agreement and in fact did not become aware of the agreement for sale, until March or April 1980, when his mother was living with him in Atlanta. He nevertheless, admitted that he was aware that an offer had been made to the appellants that the vendor would give them the

mortgage. As his mother had told him that it would be beneficial to both of them if they give the Colleys a mortgage, he had written to the Attorneys - Messrs. Livingston, Alexander & Levy, agreeing to sign the transfer, which they had earlier sent to him, if an agreement could be reached on the question of the mortgage. In a letter dated 5th June 1981, he addressed the Attorneys thus:

> "Regrettably at this time I must refuse to return the completed Transfer Document, and I am sure that you do understand why, yet if and when agreement is reached on the matter of the mortgage, I would be only too happy to comply."

Apparently, in pursuance of this, he again wrote to the Attorneys on the 1st August 1981, on this occasion giving instructions for the mortgage documents to be prepared. He wrote:

> "In answer to your question and to repeat an original request, we will give the mortgage and we require that you prepare the necessary documents for our approval, and at which time I shall complete and return the transfer document."

The respondent in giving those instructions was expressing acquiescence with the original agreement entered into by his mother with the appellants i.e. to provide the mortgage to the Colleys.

In keeping with the instructions in his letter, the Attorneys prepared and sent for his approval mortgage document which was exhibited at the trial. The schedule of the mortgage document described the mortgagors as Othniel Bernard Colley and Beverley Noreen Colley, and the mortgagees as Winnifred Cecelia Pratt and Carol Pratt. The sum of $21,000 was the amount of the mortgage to be advanced by the mortgagees jointly at an interest rate of 12½% per annum. Significantly the terms of this proposed mortgage compares with the mortgage specified in the Agreement to be applied for to Jamaica National Building Society, the latter also being for the sum of $21,000 but requiring an interest rate of 12% per annum

being ½% per annum less than asked for by the former. Nevertheless, the respondent refused to sign the document.

On the background of this evidence, the learned trial judge came to a negative finding on this issue on the apparent bases of (i) uncertainty and (ii) that the parties were not ad idem "that the plaintiff should give the defendant a vendor's mortgage."

He disposed of (i) by stating:

> "It is clear from the evidence that Mr. Pratt agreed to give the Colleys a vendor's mortgage. Indeed, from the outset it appears that both Mrs. Pratt and Mr. Sasso explained to the Colleys that it would be in the interest of all concerned if a vendor's mortgage were given. It must be remembered that the terms of Special Condition 2 in Exhibit 1 were spelt out. It has been held in Re Rich's Will Trusts (1962), 106 Sol. J. 75 that where a contract for sale providing that the vendor's solicitors should "be instructed to obtain and fix a suitable mortgage advance on this property" there was a failure for uncertainty, following Scammell v. Ouston 1941 A.C. 251. In Lee Parker v. Izett No. 2 (1972) 2 A.E.R. 803 where the parties agreed for the provision of a 'satisfactory mortgage' there was no valid contract."

Apart from making this statement, however, it is unclear whether on the basis of the cited cases, the learned judge was concluding that the contract was void for uncertainty. In the case of Lee Parker v. Izzet (No. 2) (1972) 2 All E.R. 800, on which the learned trial judge appears to have relied, the special condition in that contract specified "This sale is subject to the purchaser obtaining a satisfactory mortgage." Goulding J, held that the condition was void for uncertainty and gave the following reasons:

> "it seems to me that in the circumstances of the present case the concept of a satisfactory mortgage is too indefinite for the court to give it a practical meaning. Everything is at large, not only matters like rate of interest and ancillary obligations, on which evidence might establish what would be usual or reasonable, but also on these most essential points - the amount of the loan and the terms of repayment."

In the 4th Edition of the text "Contract & Conveyance" by J.T. Farrand, the author in commenting on the dicta of Goulding J, (supra) expressed the view that "he swam rather against the more recent tide in the courts which shows a growing reluctance to hold void for uncertainty any provision that was intended to have legal effect."

In making this comment, the author had in mind the dicta of Megarry J, in the case of **Brown v. Gould** [1971] 2 All E.R. 1505. In that case Megarry J, stated the basic principles applicable in cases of uncertainty, and which is consistent with my own views. He said:

> "I think the starting point on any question of uncertainty must be that of the court's reluctance to hold an instrument void for uncertainty. Lord Hardwicke LC once said 'A court never construes a devise void, unless it is so absolutely dark, that they cannot find out the testator's meaning': Minshull v. Minshull [1737] 1 **Atk** 411 at 412 Lord Brougham said: 'The difficulty must be so great that it amounts to an impossibility, the doubt so grave that there is not even an inclination of the scales one way': Doe d Winter v. Perratt [1843] 9 CL & Fin 606 at 689. In a well known statement, Sir George Jessel MR said that the court would not hold a will void for uncertainty' ... unless it is utterly impossible to put a meaning upon it. The duty of the Court is to put a fair meaning on the terms used, and not ... to repose on the easy pillow of saying that the whole is void for uncertainty': Re Roberts, Repington v. Roberts-Gawen [1881] 19 Ch D 520 at 529. That this is not a doctrine confined to wills but is one which applies to other instruments, such as planning permissions, is shown by cases such as Fawcett Properties Ltd v. Buckingham County Council [1960] 3 All ER 503. The second question is that of the types of uncertainty. The basic type (and on one view the only true type) is uncertainty of concept, as contrasted with mere difficulty of application ... If it is **impossible,** on construction of the condition, to reach a conclusion as to what was in the draftsman's mind the condition is meaningless and must be read as pro non scripto.'

> "Putting it another way, the question is one of linguistic or semantic uncertainty, and not of difficulty of ascertainment: see McPhail v. Doulton [1970] 2 All E.R. 228 at 247, per Lord Wilberforce."

In support of his view that the Courts are always reluctant to render a condition bad for uncertainty Megarry J, called in aid dicta in the case of **Greater London Council v Connolly** [1970] 1 All E.R. 870, by Lord Denning MR:

> "The courts are always loath to hold a condition bad for uncertainty. They will give it a reasonable interpretation whenever possible."

and that of Lord Pearson:

> "As Lord Denning MR has said, the courts are always loath to hold a clause invalid for uncertainty if a reasonable meaning can be given to it, and it seems to me easy to give a reasonable meaning to this condition."

Where a clause in a contract is intended to have legal effect the Court will always be reluctant to hold the contract void for uncertainty, and will only do so where no reasonable interpretation or reasonable meaning can be given to the impeached clause. Mere difficulty in ascertaining the meaning of the clause, cannot void the contract - it must be impossible so to do.

On that background, I now examine the factual basis for the complaint. The specific condition in the contract has already been recorded (supra). It subjects the agreement to the purchasers raising a first legal mortgage and thereafter gives particulars i.e. an amount not less than $21,000 at an interest rate of 12% per annum for a period of not less than 15 years. An examination of the agreement discloses that though dated the 22nd February 1980, it was signed on the 22nd January 1980, and of more significance, drawn up on a date prior to the 12th November 1979. This is evidenced from the fact that a completion date of 31st December 1979, was amended to read 30th April 1980, and the

amendment duly initialled. In addition, the special condition required the purchasers to obtain a Commitment for the mortgage and to communicate same to the vendors "on or before the 12th November 1979" that date though being amended to read 31st March 1980.

These amendments are consistent with the appellants' testimony that very early in the transaction they were requested to consent to a vendor's mortgage to replace the mortgage condition specified in the contract. Having accepted that offer, the vendor's mortgage to which they agreed, being a substitution for the original arrangement must necessarily relate to a mortgage in the same terms as that which is contained in the special condition i.e. a mortgage of not less than $21,000 for not less than 15 years at an interest rate of 12% per annum. In my view, no uncertainty exists in relation to the agreement for the vendor's mortgage, as the essential terms are clear, and are not such that it is impossible to give a meaning thereto. Indeed, it appears that the Attorneys who drew up the mortgage document at the request of the respondent followed closely the details of the mortgage required in the special condition of the agreement i.e. specifying an amount of $21,000 at a rate of interest of 12½% per annum which is ½% per annum in excess of that contained in the original agreement. In my view, the respondent's refusal to sign the mortgage was unreasonable in the circumstances, the terms in relation to the interest payments, being more favourable to him than that which was originally contracted. For those reasons I concluded that neither the special condition nor the agreement for a vendor's mortgage which was substituted therefor is uncertain, as there was an intention on both sides for the contract to have legal effect, and far from embodying a concept which can be voided for uncertainty, the terms are clearly and easily ascertained and

can therefore be given legal effect.

Parties not ad idem

The learned trial judge in coming to his conclusion posed the following question -

> "However, an additional question arises based on the foregoing. Were the parties ad idem that Plaintiff should give the Defendants a vendor's mortgage. Here I quote from the evidence of Mrs. Colley:
> 'I asked Plaintiff on the phone if he was still giving me mortgage. He said, yes but I did not believe him.'
> 'I went to Jamaica Teachers Association Housing Corporation in April because I did not trust the Plaintiff.'
> 'Even since I have been sued I have not got a mortgage commitment.'
> Despite this she said she felt she had an enforceable agreement. She had lawyers acting for her and has at all times had the balance of the purchase money."

As no specific answer is given to the question posed, it is assumed that the learned trial judge's references to the evidence led him to conclude that the parties were not ad idem that the respondent should give the appellant a vendor's mortgage. It is difficult to understand this conclusion, as the respondent wrote to the Attorneys instructing them to prepare the vendor's mortgage for his signature. The evidence reveals that the telephone conversation alluded to by the learned trial judge, was as a result of a letter written by the respondent to the appellants, implying that he was not giving the vendor's mortgage. The relevant section of the letter dated 20th March 1981 reads:

> " On the 2nd Feby 1981, due to an aniversary concern, I sent a letter of enquiry into the state of the situation to the Lawyers, and in return on the 4th March 1981 I received the Transfer of Registration of Titles, to be signed by me, and I have since written to the lawyers to inform them that I have no intention of doing so, I know how the property

"is going to be paid for and this is to be concluded by the mid April 1981, and this brings me to the point where I know that you share my concern and want to have this indefinite situation ended, so I am now stating that as of the 30th April 1981 we will not be interested in selling this place and all previous arrangements will be cancelled re the sale, and should this become necessary then there will be further communication on the matter.

I find this to be a necessary yet regrettable action but as you are aware that this matter has been pending for more than a year, and I am sure that you are as disgusted with the whole thing as we are. Your comments will be welcome, also any suggestions you may wish to make."

In relation to this letter (Exhibit 5), and her reaction to it, Mrs. Colley gave the following testimony:

"I next received a letter from Mr. Pratt Ex. 5. I responded to this letter by calling him in Atlanta. This letter had upset me. I asked him if he were not going to give us the mortgage again as letter was different. He said I was not to trouble myself about letter as it was just to spur lawyers on. I told him he should therefore speak with lawyers. He said he had also written to them. I went to Jamaica Teachers' Association before I spoke to him. I made certain arrangements with JTA Housing Corporation."

And in cross-examination:

"Approached Jamaica Teachers' Association Housing Corporation despite the fact that I had agreed to a vendor's mortgage because I did not want time for completion to come and I did not have money. I asked plaintiff on the telephone if he was still giving me mortgage. He said yes but I did not believe him. (Ex. 5 shown to witness). He told me on the phone after I got this letter that he was going to give me the mortgage ...

I went to J.T.A. Housing Corporation in April because I did not trust plaintiff. I did not get impression he was selling the property but I did not like tone of letter."

In my view, this evidence demonstrates that the respondent and the appellants were agreed that the respondent would give a vendor's mortgage, but that the respondent had written that letter (Ex. 5) merely to cause the lawyers to act upon the matter with greater expedition. The appellants, given the content of the letter, however, decided not to take any chances, and to have money in place in the event that the respondent would renege on his agreement, and in their understanding that would mean an end to the sale. The evidence shows unambiguously that the appellants were of the understanding that the respondent would offer a vendor's mortgage, and that the respondent per the evidence of the conversation with Mrs. Colley, and his instructions to the lawyers to prepare the mortgage document also had the same understanding. Mrs. Colley's action in seeking financing elsewhere was merely an act done out of caution in the event that the respondent failed to perform the agreement. In these circumstances, a conclusion that the parties were not ad idem, must be in error. The learned trial judge was therefore wrong when he came to that conclusion.

In my view, for the reasons detailed above, there was an enforceable contract between the parties.

3. Refusal to Amend Defence to Include Counterclaim for Specific Performance

In the course of the trial the learned trial judge refused an application made by counsel for the defendants/appellants to amend the defence so as to include a counterclaim for specific performance of the contract. In his judgment he gave the following reasons:

> "Before disposing with this aspect of the matter, may I be permitted one final observation. Despite the view of the relevant law expressed by the then Attorney-at-law for the Defendants in the 2nd paragraph of his letter dated 18th May 1981, Ex. 12, there has been no attempt to file a counterclaim for specific performance until the eleventh hour had passed viz the second day of the hearing of this matter. It follows there-

> "fore that even if there had in fact been a valid and enforceable contract the equitable remedy of specific performance would be defeated by, as Mr. Daley put it, abominable laches."

In advancing his arguments to support his contention that the learned trial judge erred in refusing the application to amend, Mr. Maurice Frankson for the appellants relied on the provisions of Section 259 Title 27 of the Judicature (Civil Procedure Code) Act which provides -

> "The Court or a Judge may, at any stage of the proceedings, allow either party to alter or amend his indorsement or pleadings in such manner, and in such terms as may be put just, and all such amendments shall be made as may be necessary for the purpose of determining the real question in controversy between the parties."

The section, permits any amendment necessary for the Court's determination of the dispute between the parties and amendments should be granted so long as it will not do injustice to the other party.

The words of Bowen LJ in **Cropper v. Smith** (1884) 26 Ch. D. at pages 710-711 explains the proper approach:

> "It is a well established principle that the object of the Court is to decide the rights of the parties and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights ... I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or grace ... It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected if it can be done without **injustice**, as anything else in the case is a matter of right."

As the case dealt with an agreement for the sale of property, and in particular the enforceability of the agreement, a finding that there was an enforceable agreement, especially having regard to the fact that the defendants/ appellants were and had been in possession for a long period, would necessarily give rise to the question of the performance of the contract. In the statement of claim, the respondent asked for an Order for recovery of possession, and in response the appellants relied on the agreement to defeat the claim. The real question must have related to who was entitled to ownership of the property. There can be no doubt therefore that an order for Specific Performance, were the contract found to be enforceable, would resolve the real controversy between the parties.

Would an amendment, especially at that late stage, cause injustice to the respondent? To answer that question a look at the Defence filed is necessary:

Paragraph 12 reads:

> "Notwithstanding repeated requests and enquiries by the Defendants since the execution of the said agreement the plaintiff and Mrs. Pratt have failed, neglected and refused and continued to fail, neglect and refuse to take any steps towards completion of the said agreement for sale. More particularly, they have failed, neglected and refused to present to the Defendants an executed registrable Transfer."

Paragraph 13:

> "The Defendants have at all material times been and are now ready, willing and able to fulfil all their agreed obligations."

The defendants in those two paragraphs alleged the plaintiffs' refusal to meet their obligations under the contract, and maintained their (the defendants') ability and willingness to meet their obligations, factors which if proven, demonstrated an

intention on their part to have the contract performed. The Defence contained in my view all the ingredients upon which a prayer for specific performance could be based, but alas - fell short of asking for it.

In those circumstances, the plaintiff/respondent would have been certainly on notice, that the defendants were maintaining a right to the property based on an enforceable agreement which should be performed. Consequently, in my view, an amendment given the pleadings, could not have caused any injustice to the plaintiff/respondent and would have enabled the Court below to resolve the real issue between the parties. For those reasons I agree with the decision that the Defence should be amended to include a counterclaim for Specific Performance.

As there was sufficient evidence to base a conclusion that the appellants were ready and willing to perform the agreement, and that the respondent was so informed by the Attorneys and despite of that, failed to perform the contract by refusing to execute the vendor's mortgage and the transfer, I also agreed to the order for Specific Performance in the terms detailed in the Order.

GORDON, J.A.

I have seen the draft judgments of Rowe, P and Forte, J.A. I agree with the reasons they advance and the conclusion. I will make brief comments.

Mrs. Winnifred Pratt who lived at 11 Bronzewing Place Kingston 20 desired to go to the United States of America to reside with her son, the respondent, at his invitation. She, in furtherance of her desire, had to dispose of the house she owned and occupied. She undertook to sell same to the Colleys and accepted from them a deposit of $5,500 paid in three instalments $1,000, $1,000 and $3,500 on 3rd August, 6th August and 3rd October 1979 respectively. Mrs. Pratt was anxious to secure her house in her absence from the Island. She wanted the Colleys to take possession and occupy same promptly. The Colleys had a problem in that they were selling their house in order to acquire Mrs. Pratt's and had no desire to leave theirs unoccupied and insecure. Mrs. Pratt offered the solution to this problem. She offered her handyman to be used by the Colleys as caretaker of 11 Bronzewing Place until the Colleys were able to occupy same.

In furtherance of the said agreement the Colleys undertook to pay to Mrs. Pratt rental of $100 per month until the contract was completed. The first receipt for rental is dated 12th October 1979. The negotiations for sale were conducted by the Colleys with Mrs. Pratt and Mr. Alty Sasso who acted as Mrs. Pratt's agent and advisor. Prior to the execution of the formal contract Mrs. Pratt agreed to grant the purchasers a mortgage for the balance of the purchase price yet when the contract was formalised special condition 2 required this amount to be secured by a mortgage given by the Jamaica National Building Society.

The vendor's Attorneys subsequently discovered that the title to 11 Bronzewing Place was in the names of Mrs. Pratt and her son the plaintiff as joint tenants. Mrs. Pratt dealt with the

property as if she was the sole beneficial owner. The evidence discloses that the plaintiff knew of the existence of the contract from about March 1980 when his mother had taken up residence with him and he, by exhibit 3, wrote to the Attorneys for the vendor on 2nd February 1981 seeking a statement of account. He never indicated disapproval of the agreement. In his letter of the 7th March 1981, exhibit 4, the plaintiff referred to his mother and himself as "we the vendors" expressly confirming his approval of the contract for sale. His complaint in this and the previous and subsequent letters was dissatisfaction with the accounting for the sums outstanding.

The evidence could lead one to conclude that the manner in which Mrs. Pratt conducted the negotiations clearly indicated that she was the beneficial owner of the property albeit that the legal estate was vested in herself and the plaintiff jointly. He held in trust for her. This conclusion is fortified by the declaration against interest made by the **respondent** in the letter he wrote on 5th June 1981, ex. 9. In the second paragraph he states:

> "With reference to the Approval given by the Exchange Control, it is my intent to express the gratitude of my mother and myself, although I may add that my share of any monies which may result is the equivalent of $1.00, also it was not the original intent to remove the money from Jamaica even at this time, but on the contrary this was to have been reinvested there." [Emphasis added]

There is further support for this conclusion in the fact that on his evidence he prepared for his mother's signature the letter dated 15th February 1982, ex. 8, purporting to be a notice to quit.

However special condition 2 is viewed the purchasers were to have the balance of the purchase money secured by a mortgage on the premises. This could only be achieved by a transfer making the title available to be charged. The respondent's failure to comply thwarted the appellants' efforts to complete.

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However special condition 2 is viewed the purchasers were to have the balance of the purchase money secured by a mortgage on the premises. This could only be achieved by a transfer making the title available to be charged. The respondent's failure to comply thwarted the appellants' efforts to complete.

The letters written by the respondent show that he was keenly interested in obtaining the maximum returns possible from the sale of the house. He agreed to give a mortgage and indeed he instructed his Attorneys to prepare the mortgage deed yet he refrained from executing same. He apparently was dissatisfied with a term or terms yet he never said what he desired. Having invited his mother to leave her home to reside with him it is inconceivable that he was unaware of the disposition she had made of this singular asset, her home, before she left Jamaica.

It is odd that after a flurry of correspondence in 1981 ending with ex. 8 of the 15th February 1982, there was no further correspondence exhibited. Alas, his mother died in October 1984 and he was free of any restraint she might have exercised. He filed his writ on 15th June 1985. The respondent's interest in the return he could get from the house is exhibited in his attempt to have same valued.

In **Alele vs. Brown** S.C.C.A. No. 111/89 dated 14th March 1991, (unreported) this court recognized the significant upward movement of real estate values that commenced in the 1960s.

Mrs. Pratt knew that the Colleys parted with their home in order to purchase her property. The contract is valid and enforceable. The Colleys are justly entitled to the judgment of the Court.