IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. E201 of 1999

BETWEEN	**LUCILLE ELLIS** **Administrator of the Estate of** **DAVID URIAH ELLIS, deceased** **also known as SAMUEL ELLIS)**	**PLAINTIFF**
AND	**RODERICK COMPASS**	**DEFENDANT**

Mr. Maurice Manning instructed by
Nunes, Scholefied Deleon & Co. for the Claimant.

Mr. Ransford Braham and Miss J. Scott instructed by
Clinton Hart & Co. for the Defendant.

Heard: 20th, 27th April, and 26th July, 2005

McDonald J. (Ag.)

There are two applications before the Court for determination. The first one has been filed by Mr. Roderick Compass the defendant who seeks an order:-

1. That the time for filing the Defence herein be extended and that the applicant be granted permission to file and serve the defence within 7 days of the date hereof.

2. That there be such order as to costs as this Honourable Court deems fit.

The second application has been filed by Lucille Ellis the claimant who seeks the following order:-

1. Specific Performance of the Agreement for sale dated the 17th day of September, 1973 for the land and dwelling house, part of the Spring Ground Subdivision in the parish of Manchester containing by estimation 3½ acres.

2. That the Defendant execute and deliver to the Claimant an Instrument of Transfer or such documents as required for the said property within six weeks, failing which, the Registrar of the Supreme Court be empowered to sign all such documents as required for the transfer of the said property and generally to complete the said Agreement for sale.

3. Liberty to Apply.

4. Costs of the Application to the Claimant's to be agreed or taxed.

I will now deal with the first application. This application is made pursuant to Rule 10.3(9) of the CPR 2002 which states that the Defendant may apply for an order extending the time for filing a defence.

The Defendant has filed three affidavits deponed to by Roderick Compass, Paul Hanna and Jennifer Scott in support of this application.

The affidavit of Paul Hanna sets out the chronology of facts-

1. That on the 13th November 2001 the Claimant filed Suit.

2. That in or around February 2002 CH & Co. were retained by Delroye Salmon, Attorney-at-law to represent the Defendant in the matter.

3. That CH & Co, upon receiving the Writ of Summons and Endorsement and Statement of Claim was instructed by the Defendant to enter on Appearance.

4. Appearance was entered on April 26, 2002.

5. That on the 26th July 2002 CH & Co. obtained from the Claimant's Attorneys a Consent to extend the time to file the defence out of time by 14 days.

6. That no defence was filed.

7. That on the 3rd November 2004 Notice of Application for extension of time for the filing of the defence was filed.

The Defendant's Case

Delay

The reasons for this delay are set out in paragraphs 8 – 12 of the affidavit of Paul Hanna dated 25th October, 2004.

Paragraph 8 – 12 read:-

8. "That during the period 2000 to 2003 the partners of the firm were under tremendous stress and pressure arising from:-

   (a). extensive unmeritorious (and ultimately unsuccessful) lawsuits brought against the firm by a former partner, Phillip E.J. Forrest; and

   (b) other burdensome litigation with former partners and other third parties.

9. That the defence and prosecution of these various matters was necessary in the protection of the interests of the clients of the Firm and to ensure the continued existence of the Firm.

10. That these extraordinary pressures were very demanding of the partners' time, created considerable uncertainty and greatly distracted the partners from the firms daily practice.

11. That the problem was particularly acute in respect of the Firms litigation department, where it was compounded by frequent changes in professional and clerical personnel.

    By way of example, from 2000 to 2003, there was a succession of no less than ten persons acting as the personal secretary to the partner responsible for the litigation department from time to time.

12. That unfortunately due to the factors mentioned thismatter was inadvertently overlooked in relation to the filing of the Defendants Defence prior to the expiration of the time consented to by the Claimant's Attorneys-at-law.

In response Mr. Manning submitted that the delay in filing a defence is extraordinary and is not explained by the affidavit of Mr. Paul Hanna. He said that a period of 27 months expired from the expiration of the 14 days consented to file defence to the time when Notice of Application for Court orders was made i.e. 3rd November, 2004.

Mr. Manning submitted that the affidavit of Paul Hanna was vague in its language. He pointed out that the Defendants Attorney-at-law who had conduct of the matter and took instructions requested a consent to file a

defence. He said that the critical question is 'what happened in the 14 days from the 25th July, 2002?

Mr. Manning submitted that Hanna's affidavit does not speak to this and is therefore not explanatory of the failure to file a defence in accordance with the consent or otherwise.

He said the affidavit is also silent as to why nothing was done by the Defendants Attorney in 2004.

On the limits of delay alone, the Defendants Attorney submitted that the Court must exercise its discretion in favour of the claimant, and refuse the relief sought by the Defendant.

I find that even if the explanation proferred could be accepted for the 14 day period, the fact that nothing was done for 26 months after i.e. from the expiration of the time consented to(9th August, 2002 to 3rd November, 2004) and no explanation given for the 10 month delay in 2004, the explanation and the lack thereof is totally unacceptable.

The ill fortunes of Clinton Hart & Co. as outlined in the affidavit of Mr. Paul Hanna certainly do not account for nor is it a good reason why the defendant failed to seek the Court's leave to file a defence for such an inordinate period of time.

In addition, no affidavit has been filed by the Defendant indicating his interest in the litigation and what steps he took, if any, in pursuing the matter.

I find that the delay is inordinate and inexcusable. It is evident that the service of Notice for judgment by the Claimant on the Defendants on 15th September, 2004 spurred them into action, hence the filing of their application for Court Orders on 3rd November, 2004.

Rule 10.3(9) of the CPR is silent as to the criteria, the Court should use when exercising its discretion to extend the time for filing a defence. On the question of extension of time, the Court is guided by the Civil Court Service 2002 at page 517 which states that the Court has a general discretion as to what, if any, extra time to allow. It states that the Court should consider a properly arguable defence, however tardy the defendant may be in making his application for further time. ***Johnson & Anor. V. Coburn (1999) unreported 24 November CA.***

In light of the fact that the Court also has to consider the application for summary judgment, the Court will not go into the merits of whether there is a properly arguable defence but consider first the higher bar of whether the Defendant has a realistic prospect of success.

I find that the application for summary judgment has been properly made pursuant to Rule 15.4 CPR and that specific performance is not one of the exceptions listed in Part 15.3 for which summary judgment is not available.

Whether the Defendant has a realistic prospect of success

Defendants Case

Mr. Braham referred the Court to the affidavits filed in this matter and to the proposed draft defence. He argued that there were a number of issues raised by the Defendant in his affidavit which show that he has a real prospect of succeeding at trial.

Issue (1)

Whether or not Mr. Compass and Mr. Arnold Ellis has in fact entered into an Agreement on 17th September, 1973 to sell part of Spring Ground subdivision containing 3½ acres for $128,000 and later on the same day entered into another agreement to sell the said premises for $28,000.

Mr. Braham submitted that this is not a matter that the Court can determine on the affidavits without cross-examination. He submitted that there are 2 agreements on the face of it and the Court must consider what was the express purpose for entering into them.

He answered this by referring to the agreement for the $128,000 – coined "the parallel agreement" where it states-

> "In this agreement both the purchaser and the vendor agrees to keep this part of contract separate, private and confidential to save expenses. A hundred thousand dollars of the sale price must not be mention on any other documents, but must be given official receipt, upon final payment by the vendor.
>
> It is to be noted that this agreement form part of any and all transactions pertaining to the sales of the property, situated at Spring Ground in the parish of Manchester."

This agreement is signed by R. Compass as vendor and Arnold Ellis as purchaser. Mr. Braham asked the Court to consider the reference in the Agreement for $128,000 "to all other agreements" where it states:-

> "The price of the said land ONE HUNDRED AND TWENTY EIGHT THOUSAND ($128,000) to be paid right to the vendor by the purchaser Arnold Ellis, then money should be paid no later than twelve months from the date above, in this agreement and all other agreements."

Mr. Braham opined that the agreement for $28,000 contains matters which are suggestive of another agreement. He referred to paragraph 1 of Special Conditions in the Schedule which states:-

> "It is further agreed that in the event of failure by the purchaser to pay the $25,000 above-mentioned within the time stated, the agent, Arnold Ellis shall be personally liable to pay same within one month thereafter."

Mr. Braham said that if Samuel doesn't pay Arnold will pay, supports the contention of Mr. Compass who states in paragraph 6 of his affidavit that Arnold told him he was purchasing the property for his son, and that this has not been contradicted or challenged.

Issue 1(a)

Was Arnold Ellis acting as agent of Samuel David Ellis when he entered into these agreements.

The parties to the $28,000 agreement are Roderick Compass and Samuel Ellis c/o his agent Arnold Ellis; and the agreement is signed by Arnold Ellis for Samuel Ellis. Samuel is the son of Arnold Ellis.

Mr. Braham submitted that the two agreements are signed by Arnold Ellis and there exists uncontraverted evidence that Arnold claimed he was acting as agent for principal Samuel Ellis o/c David Ellis at all times.

He opined that the fact that Samuel Ellis name does appear on the $128,000 agreement is not an impediment as Mr. Compass stated in his affidavit that all his dealings have been with Arnold Ellis and that he has had no dealings or even met David Ellis. Mr. Braham said that the question of an undisclosed principal does not arise because Arnold at all times indicated that he was acting as agent for Samuel.

Mr. Braham stated that if the Court was of the view that there was any doubt in this regard, that issue ought not to be resolved on these applications but at trial.

Issue 1(b)

Were the Agreements entered into with the intention of evading lawful taxes and duties?

Mr. Braham submitted that the document the claimant is seeking to enforce is the $28,000 agreement, whereas on the defendant's case the evidence is that the real consideration was not $28,000 but $128,000.

This he submits squarely places the $28,000 agreement within the four corners of section 37 of the Stamp Duty Act – thus rendering it null and void.

He maintained that this is an issue of defence before the Court, and that the defendant is entitled to have his day in Court and have this issue

tried. He said that if the Court accepts the facts as put forward by the Defence, at a trial, the claim brought by the Claimant must fail.

Issue 2

The issue as to whether or not in 1973 the premises could be valued at $128,000.

Mr. Braham submitted that it is the trial judge who would have to hear from witnesses and determine if an agreement of that magnitude was entered into. He submitted that the plaintiff by exhibiting tear sheets from Gleaner advertisements for properties on 30th June, 1980, 7 years after the Agreement for sale do not assist the Court.

Issue 3

Whether or not the Ellis' were put into possession is a matter to be resolved.

Mr. Braham said that the Ellis' are saying that they took possession not physical possession but by putting a tenant, Mr. Reid there, who was paying rent to them. Mr Braham says there is a problem because Mr. Reid is saying that Ellis fooled him up, made him believe that they owned the property and made him start to pay rent, and when he discovered otherwise he started to pay it back to the rightful owner.

Issue 4

Whether Mr. Reid is a tenant of Compass or Ellis.

Mr. Braham said this is a matter to be resolved at trial.

Issue 5

This being a case of specific performance – the Court must consider all equitable defences.

Mr. Braham said that the 2 contracts were entered into 32 years ago the question of delay in seeking to enforce the contract so many years having passed before a claim was filed is one of those situations where the Court is very likely to refuse specific performance to this claim.

He referred to the Court to **Snells Principles of Equity 27th Edition page 596 (e)** – Delay by Plaintiff

> *"Even when time is not of the essence of the contract, the plaintiff may have been guilty of such delay as to evidence an abandonment of the contract on his part, thereby precluding him from obtaining specific performance. For a plaintiff to obtain specific performance, he must have shown himself ready, desirous, prompt and eager. Where, however, the plaintiff has been let into possession under the contract and has obtained the equitable interest, so that all he requires is a mere conveyance of the legal estate, even many years delay in enforcing his claim will not prejudice him."*

Mr. Braham opined that the plaintiff will argue that he was put into possession, and so the exception will apply; but he reminded the Court that this is a hotly disputed issue which the Court will have to determine.

Issue 6

Special condition 3 of the $28,000 Agreement makes time of the essence of the contract, yet under that agreement the entire purchase price has not been paid.

Mr. Braham argues that this is another issue that requires adjudication by the Court.

Plaintiff's Case

Mr. Manning submitted that what the defence has put forward as triable issues are issues which have no real prospect of success at trial.

He said that the purpose of the power given to this Court under Rule 15.2 CPR allows for the determination of these issues.

Mr. Manning pointed out that there were several material inconsistencies and contradictions in the affidavits of Compass and Reid and that the draft defence varied materially from the two affidavits.

He summarized the proposed defence as follows-

(i) A denial that Title to the property was to be under the Registration of Titles Act.

(ii) a denial that the agreed purchase price was $28,000

(iii) a denial that the deceased or anyone, paid the purchase price required under the Agreement for Sale.

(iv) A denial that the Defendant vacated the property in 1974 or any time at all. He always retained possession.

(v) A denial that Mr. Eric Reid ever rented the property from the deceased and he exhibits a letter from Mr. Reid to that effect.

(vi) A contention that the Agreement for sale is void because of the existence of a parallel Agreement for Sale.

A denial that title was to be under the Registration of Titles Act.

Mr. Manning asserted that whether or not the Sale Agreement provided for Title under the Act does not hinder the due performance of the Agreement by the parties and is therefore not a defence.

A denial that the agreed purchase price was $28,000-

Mr. Manning said that the Defendant admitted to receiving the sum of $21,000 in paragraph 4 of the draft defence. Further that the tenant, Mr. Reid, said in his letter to Mrs. Ellis that Mr. Compass was asserting that $7,000 was owed on the property. He pointed out that there was never a claim for payment of $100,000 pursuant to an alleged parallel agreement.

Mr. Manning referred the Court to exhibit 'RC 3' attached to the Defendant's affidavit. This receipt dated September 22, 1976 showed that the deceased Samuel Ellis had paid $27,624 of the $28,000. It is made out by the Defendant acknowledging the sum owed on the transaction and the balance due.

Mr. Manning asserted that Mr. Compass cannot look beyond his signature made on the 22nd September 1976 and say that he is owed more than $376.

He urged the Court to find that the agreed price of $28,000 was the only price agreed by Compass and the deceased

Mr. Manning submitted that if an alleged parallel agreement existed, it was made by Mr Arnold Ellis on his own behalf and not for his son, the deceased. He said that this is a fact that the Defendant cannot contradict since he never once spoke or dealt with the deceased.

Mr. Manning asserted that the parallel agreement contemplated possession whether or not the $100,000 was made and spoke to repossession if the agreement was not kept.

A denial that the Defendant vacated the property in 1974 or any time at all

Mr. Manning submitted that this was demonstrably false. The Agreement provides for possession and the Claimant asserts that Ellis received possession in or about 1974. He said the Defendants exhibit 'RC3' gives formal possession to the purchasers as at January 22, 1977.

Mr. Manning asserted that the documentary evidence 'ALT 1' and 'ALT 2' show that the deceased, while in England, insured the premises at least from the early 1980's. Further that he rented, the premises to Mr. Reid and rental receipts were issued. Rent receipts were exhibited for 1980, 1986 and 1989.

Mr. Reid was in 1990 and 1991 writing letters to Mrs. Ellis in which he styled himself as tenant and requesting his being given first option to purchase the property.

Mr. Manning submitted that these documents stand by themselves and that there is no need for cross-examination. He said that they support Mrs. Ellis contention that possession was given to the plaintiff by the Defendant as they exercised right of ownership.

He submitted that, there is no prospect of the defendant establishing that he at no time gave possession to the claimant.

A denial that Eric Reid ever rented the property from the deceased.

Mr. Manning referred the Court to a statement from Mr. Reid. Exhibit 'C' attached to the draft defence in which he asserted that he has resided on the property since 1980 and has been a tenant of the Defendant from that time. He knows no one else as owner of the property and when asked to pay rent to the deceased, he refused. He said this happened before 1990.

Mr. Manning said that these assertions are relied on by the Defendant in further proof that he never gave possession. However documentary evidence namely letter from Mr. Reid to Mrs. Ellis - 'Exhibit ALT 5' and rental receipts, prove otherwise.

Mr. Manning pointed to the fact that Mr. Reid has now sworn to an affidavit on March 29, 2005 stating a completely different story after Miss Thomas affidavit was filed. He submitted that Mr. Reid cannot be relied on to support the contention that at all material times the defendant retained possession.

A contention that the Agreement for Sale is void because of the existence of a parallel Agreement for Sale.

Mr. Manning submitted that section 37 of the Stamp Duty Act is not applicable as the section speaks to the intention of the parties, and in the instant case there is no evidence as to the intention of David Ellis.

He said that even if Arnold Ellis was purportedly acting on behalf of the deceased, he cannot bind the deceased to the commission of an illegal act which is the intended effect of the parallel agreement.

He said that there is no evidence that the deceased knew of or intended for his agent to enter into the so-called parallel agreement. The agent would have been acting outside the scope of his authority and therefore could not bind the deceased to the parallel agreement.

He submitted that the only way that the defendant could rely on the parallel agreement was if the defendant had evidence that David Ellis knew about the parallel agreement while he was alive and either ratified it or supported it in some shape or form.

Mr. Manning stated that the Defendant cannot rely on section 37 because he would be seeking to rely on his own wrongdoing as a ground of defence. He referred the Court to the case of ***Holman v. Johnson (1775 – 1802 ALL ER pg. 98)***

He concluded by saying there be no evidence that the Claimant knew of the parallel agreement or had authorized the signing of it, the Defendant is

bound to fail in establishing that the claim is based on an illegality or that section 37 of the Stamp Duty Act applies.

Mr. Manning submitted that in the event that this Court were to find that the Agreements for sale were invalid, the doctrine of part performance would apply to the instant case. The claimant having paid the sum of $27,627, and having been put into possession, rented the premises, insured the premises and paid taxes, the Claimant is entitled to seek specific performance. He relied on the decision in ***Mason v. Clarke (1955) 1 All ER 914 HC.***

He referred the Court to Snells Principles of Equity 26th edition pages 663 – 664 and Contract and Conveyance by JT Farrard at page 253 for the principle that delay is not a bar to specific performance if the purchaser has taken possession and all that is necessary to convey is the legal estate in the property.

He referred the Court to the affidavit of Miss Ayana Thomas filed on the 26th April 2005 to support the reason why completion had not been insisted on by the claimants, bearing in mind that the claimant was to get a registered title and letters exhibited show that the Certificate of Title was not ready in June 1997.

The Court has to consider whether the Defendant has demonstrated a real prospect of successfully defending the claim by examining the affidavits and draft defence.

The cases of ***Swain v. Hillman (2001) 1 All ER 91 and ED and F Man Liquid Products v Patel and Anor Times Law Reports*** 18th April 2003 are instructive.

Based on these authorities the Court has to look for a 'real' as opposed to a fanciful prospect of success.

I adopt the dicta of Mangatal J, in ***Harry Abrikian, and Ors. V. Arthur Wright and Vera Wright CL 1994/A083*** at page 21 where she stated:-

> ***"In ED and F Man Liquid Products v Patel, Lord Justice Potter referred to the case of Swain v. Hillman, and indicated that he regarded the distinction referred to in the latter between a realistic and a fanciful prospect of success as approximately reflecting the observation in the well-known Saudi Eagle case (1986) 2 Lloyds Report 221, that the defences sought to be argued had to carry some degree of conviction. The Defendant was required to have a case that was better than merely arguable, as obtained formerly under 0.14 of the UK Rules of the Supreme Court. His Lordship went on to indicate that although the Court was not to engage in a mini-trial that did not mean that the Court has to accept without analysis everything said by a party in his statements before the Court. In some cases it might be clear that there was no real substance in factual assertions made, particularly if contradicted by contemporary documents."***

The Court has to bear in mind the reasoning of Lord Justice Ward in ***Day v. RAC Ltd. (1999) 1 All ER 1007*** that a real prospect of succeeding ought not to be elevated into a "real likelihood" of the Defendant succeeding.

It is also established under the Rules that where there are vital disputes as to facts to be resolved, it is inappropriate for the Court to make a finding that there is no real prospect of success.

The Court finds that this case cannot be tried on affidavits and draft defence, cross-examination is necessary to assist the Court in determining certain issues and disputes of fact.

There is no affidavit from David Ellis deceased and the Court has been informed by Counsel that Arnold Ellis is also deceased. Mrs. Ellis cannot speak to the timing of the Sale Agreements. She is not in position to dispute that the parallel agreement was signed first, and at this stage the Court cannot make a determination on this issue.

There is no agreement between the claimant and defendant that the Agreement for $28,000 was first in time/the original.

It is the Court's view that if the parallel agreement was in existence first as it maintained by Mr. Compass in his affidavit, then this would taint and colour the second agreement for $28,000.

The reference in the parallel agreement to the $128,000 being paid "no later than twelve months from the date above in this agreement, and all other agreements" and further reference to "it is to be noted that this agreement form part of any and all transactions pertaining to the sale of the property situated at Spring Ground in the parish of Manchester" lends credence to this contention.

It is clearly to be implied from the Defendant's case that the Agreement for $28,000 came into being as a result of the parallel agreement, it is an off-shoot of the parallel agreement and not an isolated agreement and it does not stand alone.

When one looks at the language of the affidavit of Mr. Compass in conjunction with the language of the Sale Agreement for $28,000 which names Samuel Ellis as purchaser and Arnold Ellis as agent, it states that in the event of failure of the purchaser to pay $25,000 within the time stated, Arnold Ellis shall be personally liable to pay same within one month thereafter, which in my opinion blurs the line between father and son in respect of both agreements.

This seems to tie in with Mr. Compass' affidavit paragraph 5 & 6, that he would get the $28,000 of the purchase monies from his son, David Ellis aka Samuel Ellis and the remaining $100,000 of the purchase monies from

the proceeds of sale of some lands that he was in the process of selling. Further, that Mr. Ellis told him that he was planning on purchasing the property for the benefit of his son and would act as agent for his son in the sale of the property.

The claimant has not contradicted Mr. Compass postion that he at all times acted as agent for Samuel.

I find that the Defendant has a realistic prospect of success in defending the case on the basis that the Agreement for sale together with the parallel agreement are both null and void for illegality.

I am of the opinion that the case of Holman v. Johnson (supra) does not prohibit a defendant from relying on an illegality however caused as a defence, and that what it does is prohibits the bringing of an action based upon that illegality. The defendant in the instant case can therefore rely upon the illegality if it exists. Where the contract is illegal in its inception even the defendant can successfully plead the turpis causa.

I find that the issue as to whether or not the Ellis' were put in possession via Mr. Reid is a matter to be resolved at trial.

The Claimant's case is that the Defendant vacated the property and put the deceased in possession in or about 1974. That the deceased through his servant and/or agent Arnold Ellis rented the property to Mr. Eric Reid

and that Mr. Reid continued as a tenant for upwards of 20 years paying rent to the deceased, or Mr. Arnold Ellis or Mr. Ronald Ashley, the deceased's servants and/or agents.

On the other hand the Defendant's case is that Mr. Reid rented the property from him and has paid rent up until 2002 directly. At paragraph 12 of Mr. Compass affidavit he stated that he asked Mr. Reid to watch the vacant property when he moved out and in 1984 he rented it to him and he move into it.

There is conflict between Mr. Reid's affidavit and his statement attached to the draft defence, but irrespective of this, in both he is saying that it was Mr. Compass who put him in possession, at no time has he said that it was Mr. Ellis.

The Court cannot in my opinion at this stage determine who is telling the truth.

In respect to Exhibit RC 3, the receipt for $27,624.00 from Compass to David Ellis which contains a further agreement by Mr. Compass to give possession of land and house to the purchaser on the 22nd January 1977, Mr. Manning submitted that this document stands by itself, there is no need for cross-examination. He said that it supports Mrs. Ellis contention that

possession was given to the Plaintiff by the Defendant and that Mr. Compass cannot say that he is owed more than $376.00.

Mr. Compass for his part in paragraph 17 of his affidavit states that he did not allow Mr. Ellis to take possession of the property at this time or anytime because the amount of $100,000 remained unpaid. This was not expressed in the receipt as Mr. Ellis and himself were still keeping the parallel agreement for sale a secret.

I find that these are facts in dispute, which ought to face the searchlight of cross-examination.

Mr. Manning submitted that if the Court should find that the Agreements for sale were invalid, the doctrine of part performance would apply, the claimant having paid the sum of $27,624.00 having been put in possession, rented the premises, insured the premises and paid taxes, the claimant is entitled to seek specific performance. He relied on the case of Mason v. Clarke (supra).

Mr. Braham's response was that part performance does not apply to a situation of illegality and if the agreement is null and void, part performance cannot resurrect it.

The Court is of the opinion that in Mason v. Clarke (supra) the contract was lawful in its inception but later illegally exploited or performed,

whereas in the instant case the defence has a real prospect of success in that it was illegal from its inception and further that there is no innocent party in this case. If the two agreements are illegal being all part and parcel of one fraud then part performance would not arise.

Notice of application for Court Orders filed on 22nd March, 2004 dismissed. Order granted in terms of paragraph 1 and 2 as amended of Notice of Application for Court Orders filed on 3rd November, 2004. Leave to appeal granted, if necessary.