CA SALE OF LAND — Agreement for Sale — Special condition "subject to purchaser obtaining a mortgage" — discovery of annexed breach of restrictive covenant by appellant (vendor) — appellant of two not to modify restrictive covenants — notification by appellant to rescind contract — no notice by appellant making time the essence of the contract — and calling upon respondent to complete — Suit by purchaser for specific performance successful.

JAMAICA

IN THE COURT OF APPEAL

On appeal — whether special condition a condition precedent — whether contract in existence — whether purported rescission operative — whether respondent had elected — whether funds available.

SUPREME COURT CIVIL APPEAL NO: 33/87

Appeal dismissed.

BEFORE: The Hon. Mr. Justice Kerr, J.A.
The Hon. Mr. Justice Campbell, J.A.
The Hon. Mr. Justice Forte, J.A.

BETWEEN	KELSIE GRAHAM	DEFENDANT/APPELLANT
AND	LURLINE EUGENIE PITKIN	PLAINTIFF/RESPONDENT

Cases referred to
Aberfoyce Plantations Ltd v Cheng (1959) 3 All ER 910
Lee-Parker v Izetta (1972) 2 All ER 800

Mr. C.M.M. Daley & Mr. L. Heywood for Appellant
Mr. D. Morrison for Respondent

May 30, 31, June 1, 2, 3 & July 14, 1988

CAMPBELL, J.A.

The documentary evidence in this case disclosed that the appellant and her husband under an agreement for sale dated April 20, 1978 agreed to sell property No. 33 Morningside Drive, Kingston 8 to the respondent for a purchase price of $38,000.00 of which $5,700.00 was to be paid by the respondent on the signing of the agreement and the balance on completion. Completion was fixed for May 31, 1978. The appellant's attorneys-at-law had the carriage of the sale and acted for both the appellant and the respondent until about February 15, 1980 after which date the respondent was represented by other attorneys-at-law. The agreement for sale did not in its opening clause expressly recite that it was subject to the special conditions even though it contained a special condition worded thus:

"Subject to the purchaser obtaining
a mortgage from VMBS of $19000.00
for 10 years.

The respondent received from Victoria Mutual Building Society the designated prospective mortgagees hereafter called the "mortgagees" a commitment letter, dated May 1, 1978 for a loan of $16,000.00 and on May 4, 1978 she paid to the appellant's attorneys-at-law from her own resources the deposit of $5,700.00.

On May 26, 1978 the attorneys-at-law for the mortgagees wrote to the appellant's attorneys-at-law requesting of them certain relevant documents including a registrable transfer and a discharge of mortgage (if any) in respect of 33 Morningside Drive in order that the processing and registering of a mortgage on the property could be done and disbursement of the mortgage loan effected.

Completion was not effected on May 31, 1978 for reasons revealed in subsequent correspondence. By letter dated September 24, 1980, the appellant's attorneys-at-law wrote to the mortgagees requesting them to have prepared and executed a discharge of mortgage in favour of the appellant and to submit the same together with the duplicate Certificate of Title to their own attorneys-at-law to enable the latter to prepare the new mortgage from the respondent. The appellant's attorneys-at-law at the same time forwarded to the mortgagees' attorneys-at-law an executed transfer of 33 Morningside Drive from the appellant to the respondent and advised that the death of Herman James Graham a joint proprietor would have to be registered on the title prior to registration of title of the respondent. On November 25, 1980 the respondent obtained a new commitment for a loan of $10,000.00 from the mortgagees in substitution for the original commitment. On December 2, 1980 she paid to the appellant's attorneys-at-law towards the purchase price of the property, from her own resources, the sum of $10,912.13.

By letter dated February 5, 1981, the attorneys-at-law for the mortgagees notified the appellants' attorneys-at-law of apparent breaches of restrictive covenants which would have to be satisfactorily rectified before the mortgage finance could be disbursed. On February 10, 1981 the appellant was informed by her attorneys-at-law of the contents of the letter dated February 5, 1981 and suggestions were made to her of alternative courses of conduct open to her one of which was that she could advise the respondent that she the appellant was not prepared to effect any necessary modification of the restrictive covenants and that the respondent 'must either take the premises as they are or rescind the contract."

The appellant opted for this course of conduct and on February 19, 1981 advised her attorneys-at-law to notify the respondent of her decision.

By letter dated March 20, 1981 the appellant's attorneys-at-law notified the respondent in these terms:

> "Mrs. Kelsie Graham the vendor has instructed us to say that she is not prepared to take the steps necessary to rectify the above breaches.
>
> You must therefore make up your minds whether you will take the premises as they are or whether you wish to treat the contract as rescinded by mutual consent. .....
>
> We would be very grateful if you could give this matter your consideration and let us have your further instructions."

The respondent's response to that letter was conveyed to the appellant by her attorneys-at-law in a letter dated April 28, 1981, which so far as is relevant is in these words:

> "Mrs. Pitkin attend on us today in response to our letter to her of the 20th March, 1981 in which we had set out your instruction. Mrs. Pitkin's problem is that the Mortgage Society will not lend the mortgage in the present state of the covenants. However, she is anxious to acquire the premises and will let us know in about 7 days if she can arrange to buy for cash and avoid taking a mortgage." (emphasis mine)

By a notification contained in a letter dated July 9, 1981, the appellant through her attorneys-at-law purported to rescind the contract of sale. The relevant part of that letter is as hereunder:

> "We refer to our letter to you of the 20th March last wherein we asked for your further instructions. Up to the present time you have not given us further instructions. We have now been instructed by Mrs. Graham to advise that it is clear from your conduct that you do not wish to complete the contract and that by so doing the contract has been rescinded and is at an end."

The reaction to this notification was predictable. By letter dated July 23, 1981 the respondent's attorneys-at-law informed the appellant's attorneys-at-law thus:

> "We take this opportunity of informing you that the Purchaser has always been and is now still willing to complete the sale. The purchaser is ready and willing to pay the balance of purchase money in cash on demand if necessary. Please ensure that the vendors, therefore move to complete the sale within fourteen (14) days of the date hereof, failing which we are instructed to issue suit for Specific Performance immediately thereafter without any further reference to you."

The respondent commenced suit for specific performance. The appellant stoutly defended on the ground that no contract had come into being because the "special condition" therein was void for uncertainty, alternatively even if the special condition was not void for uncertainty it was never fulfilled and the respondent had failed and or neglected to make alternative arrangement for completing the agreement, finally the contract, if it was still in existence, was rescinded by the conduct of the respondent in failing to elect between taking the premises without

insisting on the modification of the restrictive covenants or rescinding the contract.

Judgment having been given in favour of the respondent, the appellant appeals therefrom on the ground that the learned trial judge failed to deal adequately or at all with the issues of fact raised by the defence.

Mr. Daley submitted that, as disclosed in the appellant's pleading, the contention is that the agreement for sale was a conditional agreement based on the special condition. This special condition not having been performed by the date fixed for completion, the agreement never crystallised into a legally enforceable contract. Alternatively, the special condition was never fulfilled at anytime and the respondent had failed to make alternative arrangments for payment. Alternatively the agreement for sale was rescinded by the conduct of the respondent and finally the agreement for sale was void for uncertainty.

In the light of these contentions, Mr. Daley submitted that the issues of fact which the learned trial judge was required to determine and which he had failed to do were as follows:

1. Was the special condition timeously fulfilled or at all so as to bring into existence a contract?

2. Did the respondent at anytime during the subsistence of the contract (if one came into being) obtain the necessary funds to complete the contract and expressly advise the appellant thereof;

3. Was the agreement for sale (assuming its continued validity) rescinded by the conduct of the respondent as particularized in the defence;

4. Was the agreement for sale void for uncertainty.

In relation to issues (1) and (2) above Mr. Daley submitted that the oral and documentary evidence taken together disclosed that the respondent was at no time in a position to raise the purchase price. She was, he said, unable to secure a mortgage of $19,000.00 as specified in the special condition on or before May 31, 1978 or at any subsequent time. The failure to fulfil this special condition within the time limited therefor, prevented any contract from coming into being because the special condition was in the nature of a condition precedent. Equally, the evidence did not show that the respondent could find the purchase price other than through mortgage finance.

Mr. Morrison, to the contrary, submitted that the special condition was a condition subsequent and therefore a contract did come into being albeit voidable at the option of the respondent if there was non-fulfilment of the special condition due to no default on her part. The special condition was inserted in the contract for the benefit of the respondent who could waive the same. By seeking a mortgage commitment of $16,000.00 instead of $19,000.00 and communicating this fact to the attorneys-at-law for the appellant, the respondent not only waived her privilege under the special condition in respect of the quantum of the mortgage but communicated this fact to the appellant.

We are of the view that Mr. Morrison is plainly right. A contract of sale clearly came into being on the execution of the agreement for sale. A deposit was called for under this agreement and was duly paid. The balance of the purchase price was payable on completion. The special condition for the obtaining of mortgage finance was for the benefit of the respondent. She timeously obtained mortgage finance which she considered was needed by her. Her evidence, which was not challenged, is that she took the commitment letter dated May 1, 1978 to the appellant's attorneys-at-law and showed it to him. The said attorneys-at-law were also subsequently informed of the mortgage finance by letter dated May 26, 1978 from the

attorneys-at-law for the mortgagees. There can be no doubt that the special condition had been fulfilled to the extent suited to the needs of the respondent prior to the date fixed for completion and this fact was communicated to the appellant.

Mr. Daley relied on Aberfoyle Plantations Ltd v. Cheng (1959) 3 All E.R. 910 in support of his submission that the special condition was in the nature of a condition precedent non-fulfilment of which (as contended) prevented a contract from coming into being. We do not find the above case helpful since on the facts of that case the parties expressly agreed that unless renewal of certain leases were obtained by the vendor of the rubber plantation by a certain date, so that the renewed leases could be included in the properties sold, the agreement was to be null and void. That is what clause 4 of the agreement in Aberfoyle's case (supra) stated in express terms. Besides, clause 1 of the aforesaid agreement made the said agreement subject to clause 4. The two clauses are for clarity of understanding of their combined import, stated hereunder:

> "Clause 1 - Subject to the condition contained in cl 4 the vendor will sell and the purchaser will buy the property known as the Harewood Estate which includes the land comprised in the seven expired leases.
>
> Clause 4 - The purchase is conditional on the vendor obtaining at the vendor's expense a renewal of the seven (7) leases ..... so as to be in a position to transfer the same to the purchaser and if for any cause whatsoever the vendor is unable to fulfil this condition this agreement shall become null and void."

Their Lordships of the Privy Council referring to the submissions made on behalf of the purchaser/respondent said, per Lord Jenkins at page 916:

> "This agreement rightly stresses the fact that at the very outset of the agreement, the vendor's obligation to sell and the purchaser's obligation to buy were, by cl. 1, expressed to be subject to the condition contained in cl. 4. It was thus made plain beyond argument that the condition was a condition precedent on the fulfilment of which the formation of a binding contract of sale between the parties was made to depend."

In the Agreement for Sale now under consideration the vendor's undertaking to sell is not made subject to any conditions the performance of which is necessary to bring the contract into being. It recites that the "vendor agree to sell and the Purchaser to purchase the land ..... upon the terms and conditions set out in the schedule." These terms and conditions state the purchase price, manner of payment and date of completion. The special condition relates to mortgage finance. The purchaser is given the privilege to seek mortgage finance to assist her in performing the contract on the date fixed for completion. It would be of no moment to the vendor if the purchase money came from some other source, once the purchaser was able to provide the same on the date fixed for completion. This special condition, as we have earlier said, was certainly not a condition precedent the non-performance of which prevented the coming into being of a contract. It was a condition subsequent expressly granted by the appellant to the respondent which was capable of being invoked in good faith by the latter at her option to determine the contract if without the expected mortgage finance, which she was unable to procure, she could not otherwise complete. She made such use of it as she considered needful, consistent with her continued willingness to perform her obligations under the contract. The appellant can never say that the respondent was unable to come up with the purchase money in the absence of a demand for her to complete, which demand was never made. The deposit of $5,700.00 was demanded of her by letter dated May 1, 1978. She paid on May 4, 1978. On November 3, 1980 she was informed of the balance namely $23,212.13 which she would be required to pay, in

addition to the mortgage finance of $10,000.00 which she had applied for and obtained. On December 2, 1980 she made a payment out of her own resources of $10,912.13. As at that date the evidence does not disclose that the appellant was in a position to give the respondent a 'registered' title because the registration of the death of Mr. Herman Graham had not yet been effected so to enable the appellant to register in the name of the respondent, a transfer executed by her alone. The appellant could thus not call on the respondent to complete when she was not herself ready. But in the absence of a notice to the respondent demanding completion, the appellant cannot contend that the respondent would not have been able to provide the balance of $13,000.00 approximately from her own resources.

We did not consider that the appellant's complaints against the learned trial judge on the latter's purported failure to resolve (1) and (2) of the issues crystallised by Mr. Daley were well founded. In our view the learned trial judge came to the correct conclusion that the respondent was ready, willing and able to complete.

The next issue was whether the contract was void for uncertainty. Mr. Daley's submission was that the contract was made subject to mortgage but had not set out the essential terms of the mortgage namely interest and terms of payment.

Mr. Daley relies on Lee-Parker v. Izette (1972) 2 All E.R. 800. In that case a contract of sale was entered into on 16th February, 1967 by the prospective purchaser. The contract price was £4,750.00. There was no stipulation for a deposit. The prospective purchaser was let into possession under an oral agreement under which he paid to the prospective vendor £5.00 per week. The contract of sale contained a special condition worded thus "This sale is subject to the purchaser obtaining a satisfactory mortgage." Down to 9th September, 1970 no mortgage had been obtained and

the prospective purchaser at no stage had sufficient means to effect the purchase of the property. The prospective vendor had in the meantime executed an equitable mortgage in favour of another person who, as against the prospective purchaser, claimed possession of the property. The prospective purchaser resisted the claim asserting rights as a purchaser in possession.

Goulding, J. held that the special condition was void for uncertainty because the concept of a "satisfactory mortgage" was too indefinite for the court to give it practical meaning. It left out essential matters such as the amount and the terms of repayment. We agree with the learned judge but in our view that case is clearly distinguishable. In our case the mortgagees are designated. The amount of the mortgage and the mortgage term are specified. The interest would obviously be the current rate, and payments would be a matter of computation based on the amount of the mortgage and the term thereof. There was nothing uncertain about this special condition and the learned trial judge was right in not holding that the contract was void for uncertainty.

Finally, Mr. Daley submitted that the letter of the appellant's attorneys-at-law dated March 20, 1981 as pleaded in defence required the respondent to "elect between taking the premises in its present state or treating the contract as being rescinded by mutual consent." He submitted that, as pleaded, the "plaintiff attended on the said attorneys-at-law on the 28th April, 1981 and agreed to make her election within a period of seven (7) days from 28th April, 1981. The plaintiff failed, neglected or refused to make the said election within the time specified by her or at all or to make any arrangements for completion of the said agreement."

It is the above conduct that constitutes rescission by the respondent. This entitled the appellant to write the respondent on 9th July, 1981 "determining the agreement as being rescinded by the conduct of the plaintiff."

Mr. Morrison submitted that firstly the appellant who was in breach of the restrictive covenants was in no position legally to put the respondent to an election. Secondly, even if appellant was legally competent to put the respondent to an election, the evidence disclosed that the respondent did make her election.

The evidence of the appellant's attorneys-at-law given by Mr. Allan Rae relative to the issue of respondent's election is stated thus:

> "She seemed anxious to get the place and would organize her resources to get the cash and contact in about 7 days time to let me know.
>
> Mrs. Pitkin came in to see me as a result of Exhibit 5. This was when she said she could get the money without mortgage and needed about 7 days.
>
> The 7 days mentioned I never understood it mean exactly 7 days - 7 days more or less. The time frame of 7 days was expressly discussed between plaintiff and myself."

The document Exhibit 5 is the letter dated April 28, 1981 which was dispatched to the appellant by her attorneys-at-law. It is set out in extenso elsewhere in this judgment. This together with the evidence mentioned above indicated in our view a clear election by the respondent to have the premises and that she required time, not to elect, but to implement the election made by her. The respondent by intimating that she would in about 7 days organize her resources to get cash to complete, did not expressly or impliedly make her election conditional on her securing cash within 7 days. Thus, time for organizing cash by the respondent had not become of the essence of her undertaking to secure finance aliunde, and no rescission of the contract could legally result from her failure to raise the cash within 7 days. The appellant would of necessity have had to make time of the essence by calling on the respondent to complete within a reasonable time pursuant to her election. This the appellant has not done.

Accordingly, the appellant's purported determination of the contract was inoperative. The learned trial judge was correct in holding that there was no rescission of the contract by the respondent. It was for the above reasons that we dismissed the appeal on June 3, 1988 and confirmed the judgment of the court below.