

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA  
IN COMMON LAW  
SUIT NO. C.L. H 064 of 1978

BETWEEN

RICHARD WINCHESTER HARRIS )  
HAROLD WINCHESTER FOX HARRIS )  
ROBERT DUNSCOMBE HONIBALL )  
(Executors of Estate Jessie Lavina Harris) )  
PLAINTIFFS

AND

STAMP COMMISSIONER )  
and )  
ATTORNEY GENERAL )  
DEFENDANTS

Dr. L.G.Barrett for Plaintiffs  
E. Harris for Defendants

JUDGMENT

Hearing: May 8, 9, 1980. ?

WRIGHT J:

Under penalty of Criminal Prosecution Section 18 of the Transfer Tax Act imposes upon the transferee the obligation of paying to the Stamp Commissioner the Transfer Tax payable by the transferor upon any transfer to which the Act applies. And in order to ensure that funds are available to enable compliance with this provision Section 18 (4) of the Act stipulates that in the case of a contract for the sale of land there shall be paid a deposit of not less than 5% of the consideration for the transfer out of which the tax is to be paid. This is really provision for accelerated payment of tax due on a completed transaction. Hence, if the transaction is aborted reason would contend that the sums so paid should be refunded. Indeed, Section 16 of the Act recognises this and provides for a refund.

Section 16(1) states:-

- 1) If, upon the application of any person regarded by virtue of Section 10 as transferor in the case of any contract of transfer or of assignment, the Commissioner is satisfied that -
  - a) the contract is discharged, in the case of a conditional contract, failing satisfaction of the condition, or in any case, by mutual consent or operation of law; or
  - b) default has been made in carrying out the contract and, by reason of that default there is no conveyance or transfer to implement the contract (whether by or to the person originally making the contract or another)

then, subject to the provisions of sub-section (4) of Section 11, the Commissioner shall grant relief from liability to pay any tax imposed on the applicant as such transferor or if paid, shall refund to the applicant such payment of the tax so imposed and no property shall thenceforth for the purposes of this Act, be regarded on account of the contract as having been transferred and any amount so refunded shall be dealt with according to the rights of the parties to the contract (including any requirement of a deposit implied therein under Sub-section (4) of Section 18.

Section 11 of the Act deals with options.

Section 11(3) provides -

" The exercise or abandonment of an option by the person for the time being entitled to exercise it is not a disposal of property "

Section 11(4) (supra) provides -

" The foregoing provisions of this section shall apply in relation to a forfeited deposit of purchase money or other consideration money for a prospective purchase which is abandoned as they apply

" in relation to the consideration for an option which binds the grantor to sell and which is not exercised. "

Section 76(1) of the Stamp Duty Act makes it clear that the duty payable on any contract or agreement for sale of any equitable estate or interest in any property is payable as if there were an actual conveyance on sale of the estate, interest or property contracted or agreed to be sold and in lieu of the duty payable on such conveyance. Accordingly, if there is no actual conveyance it is difficult to see why any tax paid in accordance with the provisions of the Act should be retained by the Stamp Commissioner. To this end Section 76(3) of the Stamp Act provides:

" The ad valorem duty paid upon any contract or agreement in accordance with Subsection (1) shall be returned by the Stamp Commissioner where the contract or agreement is afterwards rescinded or annulled, or where for any reason it is found to be or becomes void. "

The plaintiffs as executors of the estate of Jessie Lavina Harris on the 3rd October, 1973 entered into an Agreement ("the Principal Agreement") with Joseph's Development Company Limited whereby they agreed to sell<sup>to</sup> the said company a parcel of land containing approximately fourteen (14) acres in the parish of Manchester at the rate of \$12,000 per acre.

The purchase price was payable as follows:

- a) a deposit of \$30,000 upon the execution of the contract;
- b) the balance in exchange for title under the Registration of Titles Law, but in any event the purchaser would not be required to pay such balance earlier than one year from the date of the execution of the contract.

Time was made of the essence of the contract and it was provided that the deposit would be forfeited upon failure of

the Purchaser to make any payment in whole or in part.

The Purchaser paid the deposit of \$30,000 on the 9th October, 1973.

By a Supplemental Agreement dated December 9, 1974 the vendors (the Plaintiffs in this action) agreed at the request of the Purchaser to extend the time by which the Purchaser should pay the balance of the purchase price on condition, inter alia, that -

- a) the Defendant paid to the Plaintiffs a further sum of \$40,000 on account of the purchase price, and
- b) the Purchaser pay interest on the balance of the purchase price at the rate of 10½% per annum as from October 3, 1974.

The Purchaser was let into possession as tenant-at-will as from October 3, 1974 and was required to re-imburse to the Vendor seven-ninths of the total taxes payable with respect to the said lands with effect from the said date. Failure on the part of the Purchaser to make any such payment would result in forfeiture of all moneys paid by the Purchaser pursuant to the said Agreement,

In the meantime, in keeping with the provisions for making accelerated payment of the Stamp Duty as well as the Transfer Tax which would eventually become due the Plaintiffs had paid the Stamp Commissioner the following amounts:-

Stamp Duty	-	\$4,459.37
Transfer Tax	-	<u>4,200.00</u>
TOTAL	-	<u>\$8,659.37</u>

The Purchaser defaulted and the Plaintiffs sued and obtained judgment awarding, inter alia -

1. Specific Performance of the Agreement for Sale;
2. a lien in favour of the Plaintiffs freehold property involved for the unpaid balance of the purchase money, interest,

proportion of rates and taxes,  
costs and other moneys payable  
under the Agreement for Sale.

Still, the Purchaser defaulted. The prospects of the Contract ever being brought to its normal conclusion became dimmer and dimmer. The Purchaser apparently appreciated this. The agony was piling on. In an effort to ease the situation the Purchaser approached Mr. Honiball, one of the vendors and a Plaintiff in this action who grabbed at the opportunity to salvage what/<sup>he</sup>could and after discussion with the Purchaser he concluded an agreement which was calculated to settle the matter between the parties finally. But ironically enough, though the matter between the parties was concluded by this settlement that was not to be the end of the matter. Issues arose which had not been contemplated this present action being the most prominent.

The settlement negotiated between Mr. Honiball and the Purchaser on the 15th day of June, 1977 may conveniently be set out here:

WHEREAS

1. By Agreement made the 3rd day of October, 1973 as amended by Supplemental Agreement made the 9th day of December, 1974, the Vendors agreed to sell and the Purchaser agreed to buy all those parcels of land containing approximately 14 acres in extent part of Bloomfield in the parish of Manchester and being parts of the land comprised in Certificates of Title registered respectively at Volume 897 Folio 9 and Volume 1051 Folio 929 (formerly Volume 16 Folio 2) of the Register Book in the Office of Titles at the rate and upon the terms and conditions mentioned and referred to in the said Agreement and Supplemental Agreement.
2. The Purchaser has paid to the Vendors by way of deposit the sum of \$30,000 and certain other monies payable under the said Agreement and/or Supplemental Agreement.

3. The Purchaser having defaulted under the said Agreement and Supplemental Agreement, the Vendors instituted proceedings against the Purchaser in Suit No. C.L. H094 of 1976 claiming specific performance and other relief.
4. On the 19th day of May, 1977 on the hearing of a Motion for Judgment on behalf of the Vendors against the Purchaser in default of defence in the said Suit No. C.L. H094 of 1976 the Honourable Mr. Justice Wright ordered and declared that the Agreement for Sale in the Statement of Claim mentioned ought to be specifically performed and carried into execution and did order and adjudge the same accordingly and did make certain other declarations and orders as prayed for by the Vendors.

NOW THIS AGREEMENT WITNESSETH:-

1. The Vendors will retain for their own account and use all monies already paid by the Purchaser pursuant to the said Agreement and Supplemental Agreement.
2. In addition to all monies referred to in Clause 1 hereof the Purchaser:-
  - a) Will on the execution hereof pay to the Vendors the sum of \$50,000.00 together with a further amount of \$1,100.00 for costs and will give and return to the vendors possession of all those parcels of land agreed to be sold pursuant to the said Agreement and Supplemental Agreement; and
  - b) Hereby rescinds the said Agreement and Supplemental Agreement and hereby frees, releases and discharges the Vendors from any obligations, liabilities and responsibilities on their part to be performed or observed under the said Agreement or Supplemental Agreement.
3. In consideration of the foregoing, the Vendors hereby rescind the said Agreement and Supplemental Agreement and hereby free, release and

discharge the Purchaser from any obligations, liabilities and responsibilities on its part to be performed ~~or~~ observed under the said Agreement or Supplemental Agreement and will file Notice of Discontinuance of Suit No. C.L. H094 of 1976.

4. The said Agreement and Supplemental Agreement are hereby by mutual consent rescinded and the said Suit No. C.L. H094 of 1976 is hereby by mutual consent settled.

The Plaintiff's attorneys submitted this Agreement to the Stamp Commissioner to be stamped, assessing the stamp duty at twenty cents (20¢) treating the document as a discharge under the head "Receipt" in the schedule to the Stamp Duty Act. To this the Stamp Office demurred and their assessment of five cents (5¢) was duly paid.

By letter dated January 6, 1977 the said attorneys wrote to the Deputy Stamp Commissioner -

" Dear Sir,

We enclose herewith a photocopy of agreement for sale dated 3rd October, 1973 between Richard Winchester Harris, Harold Winchester Fox Harris and Robert Dunscombe Honiball of the one part and Joseph's Development Company Ltd of the other part. You will observe that Stamp Duty of \$4,459.37 and Transfer Tax of \$4,200.00 was paid in respect of this agreement.

We also enclose herewith the originals and duplicate Transfer Tax Certificates numbered A No. 26086.

This agreement has now been rescinded and we would ask you to refund to us the amount of the Stamp Duty and Transfer Tax which should be repaid to the Vendors. "

Having regard to the history of the events and the provisions for refund referred to earlier this request seems logical and reasonable. But before he could possibly comply the

Deputy Stamp Commissioner had to properly advise himself. Accordingly, by letter dated 11th July, 1977 he requested the return of the original stamped Agreement for Sale and concluded -

" Also please send me a statement signed by both parties saying whether the Agreement has been rescinded by mutual consent and whether any portion of the deposit has been forfeited "

In response the attorneys sent him -

1. The original Agreement for Sale dated 3rd October, 1973.
2. The Supplemental Agreement dated 9th December, 1974.
3. The Memorandum of Agreement dated 15th June, 1977 agreeing to settle the action which had been brought in the Supreme Court.

But no sooner had the Deputy Stamp Commissioner set eyes on item No. 3 than he saw, or thought he saw, an avenue for the collection of more revenue. He shelved the request for refund and assumed a new stance which he communicated by letter dated 18th August, 1977 -

" The agreement dated 15th June, 1977 has not been properly stamped. The instrument appears to attract Stamp Duty and Transfer Tax as under:-

a)	Conveyance Duty on \$51,000 being the consideration for the release of an interest in land	-	\$1,351.56
b)	Transfer Tax on \$51,000	-	2,550.00
			<u>\$3,901.56</u>
	Less paid	-	.05
			<u>\$3,901.51</u>

As soon as you forward your cheque for this amount, I will go into the question of refund of Stamp Duty and Transfer Tax on the Sale Agreement. "

295



It is obvious that at this point the boundary had been crossed from mere collection of revenue to interpretation of documents and that the Deputy Stamp Commissioner should avail himself of legal opinion on the matter. Whether or not <sup>he did</sup> I cannot say because, before me, the contention of the attorney for the defendants was the same as had been communicated to the plaintiff's attorneys. Indeed, so tenaciously did the defendants maintain this posture that Mr. Harris submitted that the Agreement dated 15th June, 1977 could not be put before the court until the tax demanded had been paid. But this submission sought to pre-empt the Court because this is one of the very issues which the Court is asked to decide; namely, whether the amount demanded for stamping is correct.

In a very patient letter dated August 29, 1977 the plaintiffs' attorneys for the enlightenment of the Deputy Stamp Commissioner set out their understanding of the situation. In the process they put forth in their letter the provisions for refund which they claim obtain <sup>in</sup> the instant circumstances.

They achieved a remarkable result. The Deputy Stamp Commissioner was forced to review his position and by letter dated 11th October, 1977 advised the attorneys that -

" On review of the matter, I am of the opinion that the release would attract Stamp Duty under the heading, 'Settlement' which amounts to the same as that

charged under the heading 'conveyance'."

In effect this really meant - "lets get on with the war."

Not unnaturally the attorneys' patience began to wear thin but they were forced to take up the cudgel on the question of "Settlement" and in a very interesting letter dated 16th December, 1977 they wrote in part -

" There is no conceivable way in which the Release can attract stamp duty under the heading "Settlement" in the schedule of the Stamp Duty Act. This heading relates to a settlement of property not to the Settlement of an action in Court.

In the present case, there is certainly no question of any voluntary payment. What was involved here was a commercial transaction and a payment in settlement of a case brought in court which had gone as far as an Order by the Court in favour of the plaintiffs on a motion for judgment in default of a Defence filed by the defendants. The payment was in consequence a payment in settlement of liability which had already been adjudged by the Court.

Furthermore, there is here no settlor who is disposing of property to be enjoyed by persons in succession.

In this case, there is no certain and definite sum of money which had been settled.

Finally, in this case there is a bona-fide pecuniary consideration.

In consequence of all the foregoing, there can be not the slightest doubt that the form of release does not, in any way constitute a settlement within the meaning of the schedule in the Stamp Duty Act.

We would refer you, if authority be needed, to the case of Ensom City Finance Company Limited v. the Attorney General with which case we have no doubt you are familiar.

Furthermore, as we pointed out to you in our letter of August 29, 1977 any question of the stamping of the form of Release has nothig whatsoever

" to do with the claim for the refund of stamp duty and transfer tax which we made on our clients' behalf and which under the Stamp Duty and Transfer Tax Act you are in duty bound to refund.

In the circumstances, please let us have the refund of stamp duty and transfer tax without any further delay. "

But all this only provoked what appears to be a very lay man's view of the law as it relates to "settled" in the Stamp Duty Act. This was set out in letter dated 27th 27th January, 1978. The attorneys' reply was dated January 31, 1978 the final paragraph of which rejected the construction put on "settlement" and demanded the refund without further delay. But the fact that they had cited authority for their contention moved the Deputy Stamp Commissioner not at all. His reply was a fresh demand for the Stamp Duty and Transfer Tax to which he maintained the instrument dated 15th June, 1977 was liable. His persistence bore some fruit. In their final letter dated March 7, 1978 the attorneys conceded that the deposit of \$30,000 which had been forfeited would attract Transfer Tax of \$750 and accordingly adjusted their demand for refund to \$7,909.37.

It is obvious that the obstinacy emanating from the Stamp Office persisted. The plaintiffs filed their writ on June 13, 1978 claiming -

1. A declaration that an agreement dated June 15, 1977 made between the plaintiffs of the one Part and Joseph's Development Company Limited of the other Part is chargeable to duty under the Stamp Duty Act as an agreement, discharge or receipt and not as a conveyance or settlement;

2. A declaration that the plaintiffs are entitled to the refund of the sum \$7,909.37 as Stamp Duty and Transfer Tax on an agreement dated October 3, 1973 which was subsequently cancelled or rescinded;
3. An Order for the repayment by the First Defendant to the Plaintiff of the said sum of \$7,909.37.
4. Such further or other relief as to the Court may seem just.

The real strength of the defences is set out at paragraph 8 of the defence:-

" As to paragraph 8 of the Statement of Claim the defendants say the purported agreement or releases attracts stamp duty as a settlement/conveyance/or transfer and that the Purchaser Joseph's Development Company Limited gave up, inter alia, its beneficial interest in the said Estate - Bloomfield Property - under agreement of 15th June, 1977 in consideration of the Vendors (Executors) not enforcing the Order for Specific Performance dated 19th May, 1977; the vendors derived benefit from the release of the purchaser's interest in the land they being entitled under the 'Order' only to the balance of the purchase money and costs incidental to the sale and of the action for good and valuable consideration of forbearing to enforce the Order. Tax on sums forfeited under the Agreement are not refundable and accordingly, there must be full disclosure of the sum retained.

The payment of the amounts in respect of which the refund is sought was admitted but the claim to refund was rejected in paragraph 6 of the Defence which states:-

" Paragraph 6 of the Statement of Claim is admitted but say that the plaintiffs are not entitled to the refund claimed in that the purported agreement dated 15th June, 1977 had not been properly stamped that is to say, insufficiently stamped and contrary to the requirements of the Stamp Act as set out in the first defendants' letter dated 18th August, 1977".

At first blush there is an aspect of the defence, reflecting the attitude adopted by the Deputy Stamp Commissioner, which attracts close scrutiny. It is this. The relevant laws provide for a refund of sums paid in advance of the date when they are actually due. But in order to secure such refund the Deputy Stamp Commissioner insists on extracting a heavy price. To obtain a refund of \$7,909.37 he demands a payment of \$3,901.51 before he will even give consideration to the claim for refund. That seems a very high price to pay. But if indeed the Agreement dated 15th June, 1977 is of the nature contended for by the Deputy Stamp Commissioner and rejected in the Defence there will be no option but to pay the stamp duty assessed.

What then is the true nature of this document? Is it a settlement, a conveyance or Transfer?

To focus attention on the extent to which the defence sought to maintain its claim before the Court it is convenient to set out here what was submitted by Mr. Harris for the defence:-

" This case is substantially different from the cases cited in that those involved the Commissioner for Internal Revenue. Here, it is the parties. Hence, "Settlement" would be given a different construction. Be it noted that this case is aimed at avoiding the Commissioner's construction. The Order for Specific Performance recognised the equitable interest of the developer. The out-of-court settlement is the giving up of that equitable interest as established by the order.

In Equity the Purchaser had an interest which was transferred by the Settlement Agreement - see *Cheshire Modern Real Property - 9th Ed. p.629* 'The immediate effect of a binding contract for sale is to pass an equitable interest to the purchaser'.

" The purchaser acquired an equitable interest which was re-inforced by the order for Specific Performance and such interest persisted up to the time of the out-of-court settlement to give up that interest 'Settlement'

'In general means disposition of property real or personal which creates an enjoyment in succession.'

The Executors had an immediate binding trust for sale - they had the legal estate. Not the strict type of settlement referred to in Plaintiff's letter of 29th August, 1977.

The binding trust for sale under the Will gave rise to a settlement and the purchaser in dealing with the property acquired an equitable interest which he surrendered under the Compromise Agreement of 15th June, 1977.

Court to look at word 'Settlement' not necessarily in the same context as in other countries but in our setting and give an extension to its meaning.

'Conveyance' -

There was a transfer of an equitable interest from the Purchaser to the Vendor under the Compromise of 15th June, 1977.

Commissioner to be removed from the proceedings in accordance with Section 13 of the Crown Proceedings Act. "

I regarded this latter submission as flippant and refused to entertain it.

Apart from this opening submission the defence was sought to be advanced by -

- a) a brief cross-examination of Robert Dauscombe Honiball who was called to put in evidence the Agreement dated 15th June, 1977 and to amplify the story told by the agreed bundle of documents. Such cross-examination yielded nothing of value to the defendants.
- b) Adducing<sup>\*</sup> evidence from the Deputy Stamp Commissioner that he was not satisfied with the stamp duty paid on the Agreement dated 15th June, 1977. This had already

been made abundantly clear  
from the correspondence.

c) finally submitting -

" no need for further address.  
The facts are before the Court."

If anything emerges from Mr. Harris' submission it is the basis for the contention that when the Purchaser was seeking to mitigate his obligations under the Order for Specific Performance he was in fact transferring to the vendors an equitable interest.

The submission would not be totally devoid of merit if the Purchaser were ever in the position to sue for Specific Performance on the basis that he had performed his obligations under the contract. Here, for his continued default he found himself crowded with liabilities to escape full weight of which he sought the accomodation of the Vendors. It is only an uninformed view that could seek to equate his position with that dealt with by the Authority cited.

It is to be noted that apart from the fact that it would suit the cause of the defendants no basis is even hinted for giving an extended meaning to "Settlement" nor, indeed, the limit of the extension.

Re "Settlement"

It is a fact that there is no definition of settlement in the body of the Stamp Act. In the Schedule "settlement" is explained as -

" any deed or any order ----- or instrument whatever ----- whereby any certain and definite sum or sums of money or whereby lands ----- or other property ----- shall be settled -----either absolutely or conditionally ----- or in any other manner whatsoever."

It is not abundantly clear what canons of construction were prayed in aid by the defence but one thing is beyond peradventure

of any doubt and that is that at the date of the original Agreement for Sale ownership of the lands in question was vested in the plaintiffs and up to and including the date of the document dated 15th June, 1977 it had not moved to any other person or persons. There had been no transfer of the beneficial interest (See Inland Revenue vs. Oliver [1909] A.C. 427).

In support of his contention that the document in question is not a settlement Dr. Barnett cited the case of Onslow vs. Commissioners of Inland Revenue (1891) 1 Q.B.D. 239 but I find little assistance here. That case dealt with what was a marriage settlement in the common acceptance of that term and the question to be resolved there was whether a settlement of contingent reversionary interests in certain specified amounts of stock which were vested in trustees with power to vary the securities was liable to an ad valorem duty under a provision of the Stamp Duty Act, 1870 similar to the provision under consideration. The question was answered in the affirmative.

Cited also was the case of The Commissioner of Stamp Duties (Queensland) vs Hopkins 71 C.L.R. 351

The head note reads:

" A document expressed to be an indenture recited, inter alia, that a person therein named as the settlor intended to transfer certain shares and money on loan from a company to a person therein named as trustee, to be held by the latter upon certain trusts to the intent that the settlement thereby made should be irrevocable.

The document was executed by the trustee in Queensland on 18th May, 1907 and by the settlor in London in September 1907. The shares and money were transferred to the trustee on 22nd May, 1907. The document was kept in England by the settlor until his death in 1919 and was brought to Queensland by the trustee in 1920. "



In order to determine the amount of stamp duty to which it was liable the true nature of the document had to be decided. Was it or was it not a settlement? The High Court of Australia held by a majority that it was a settlement and liable to Stamp Duty as such. In the course of his judgment Dixon, J., one of the majority, in discussing the nature of a settlement at page 376 cited Griffiths CJ, in Davidson v Chirnside (1908) 7 C.L.R. 324 where he says -

" In order that an instrument may be a settlement in the ordinary acceptation of that term it is clearly not necessary that the instrument should itself operate as a transfer of the property settled. "

This passage was cited for support of the view that the term settlement is a conveyancing term and must be understood in its ordinary acceptation. Therefore, contending that this is the correct approach Dr. Barnett submitted that the instrument in question is subject to stamp duty as a settlement only if it contains and provides for the essential characteristics of a settlement as so understood, viz

1. a disposition of property by a settlor:
2. A number of instruments or one instrument which effects the disposition and creates the trust which limits or controls the disposition:
3. The trust so created must provide for the enjoyment of the property disposed of by beneficiaries in succession.

There is merit in this submission. What is under consideration here is a settlement by way of compromise of a legal action and mutual releases of contractual obligations. There is no provision for the beneficial enjoyment of property in succession. Accordingly, I hold that the instrument is not a settlement as understood in the statutes dealing with Property Law and

Revenue Law.

The next question to be considered is whether the document in question is a conveyance or transfer. Critical to the solution of this issue is the answer to the question: "Did any property pass by this document?"

Under the Stamp Duty Act a conveyance as set out in the schedule is liable to duty. It is set out thus -

" Conveyance, whether grant bargain and sale, assignment, transfer, release or any other kind ~~or~~ description whatever ..... operating as a conveyance upon the sale of any land, tenement, rents, annuities or other property real or personal or any right title, interest or claim into out of or upon any lands, tenements, rents, annuities or other property; .....etc:

It seems abundantly clear that this provision is dealing with property. It is also equally clear that the Development Co. had no property to transfer nor any right or interest it could enforce. What ~~it~~ had in abundance was liabilities compounded of contractual obligations, obligations arising out of an adverse judgment for Specific Performance and costs incurred by its default. Nothing here closely resembles anything dealt with by the provision under the Act.

The compromise of the 15th June, 1977 allowed the developer an escape from the burden from which there was otherwise no easy way out. Had the conditions - precedent been fulfilled by the developer rights and interests would doubtless have accrued, but not otherwise. Accordingly, I conclude that the document is not a Conveyance or Transfer. Among cases cited and considered are - I.R.C. vs Angus & Co (1889)23 Q.B.D. 579 at p. 582 -

Gt. N. Rly vs I.R.C. (1899) 2 Q.B.D. 652

I.R.C. vs Lilltewood Mail Order Stores Ltd (1962) 2 All. E.R. 279

William Cary and Sons Ltd vs I.R.C. (1965) 1. All. E.R. 917

The point that must be stressed is that the provision under the Stamp Duty Act contemplates a conveyance on sale which cannot take effect in the absence of the relevant property.

See also the judgment of Melville, J. (as he then was) in C.L. 922/69 Ensom City Finance Company Limited vs Attorney General (unreported).

In the result therefore I hold that the defence put forward is untenable and that the plaintiffs are entitled to the relief sought. Be it noted, however, that the thrust of the submissions on behalf of the plaintiffs was to deny that the document dated 15th June, 1977 qualifies as a conveyance or settlement rather than to show that it is an agreement, discharge or receipt. I find that it is not a conveyance or settlement. A declaration is also sought that the plaintiffs are entitled to a refund of the sum of \$7,909.37 paid as Stamp Duty and Transfer Tax on an Agreement dated October 3, 1973 which was subsequently cancelled or rescinded and I declare accordingly.

It is further ordered, as prayed, that the first Defendant repay to the plaintiffs the said sum of \$7,909.37. On the question of interest it was pointed out that the sums involved are trust funds and that the Building Society rate of interest has been 12 $\frac{1}{2}$ % for the past three years. In the circumstances it was submitted that interest at a similar rate is just.

But for the intransigence of the First Defendant based on an obviously uniformed or ill-informed view of the law the trustees would have had the funds to invest at the

most advantageous rates. I see no reason why they should not have the rates they could have obtained. Interest will be payable at the rate of ~~12~~<sup>1</sup>/<sub>2</sub>% from the date when the amount to be refunded was finally adjusted i.e. 7th March, 1978.

Costs to the plaintiffs to be taxed or agreed.