NMLS

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 101/92

BEFORE: THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE WOLFE, J.A.

BETWEEN	CARL HENRY	DEFENDANT/APPELLANT
AND	BLOSSOM ASHMAN	PLAINTIFF/RESPONDENT

Pamela Benka-Coker, Q.C., and Dianne Edwards, instructed by Stanbury & Co., for appellant

D. A. Scharschmidt, Q.C., and Paula Blake, instructed by Hilholland, Ashenheim & Stone, for respondent

November 9, 11, 1993; May 30, 31; June 2 and July 13, 14, 15, 20 and 29, 1994

WRIGHT, J.A.:

Having read the judgment in draft of Downer, J.A., I am satisfied that the central issue in the appeal, that is, whether a contract was indeed formed between the parties, has been adequately dealt with. The resolution of that issue effectively disposes of the appeal and there is no need for me to do more than make a brief comment.

First, I must say that the industry of counsel on both sides has left us with a valuable collection of about forty authorities on the relevant law and for this I am grateful.

Also attracting comment is the amount of judicial time unnecessarily spent, occasioned largely by the quality of the pleadings on both sides, for which no encomiums can be handed out and which may have induced Marsh, J. to construe two documents as constituting the contract when one of those documents was not even pleaded. However, let me hasten to add that counsel who appeared

before us were not involved at the pleading stage.

I agree that the appeal should be allowed with costs to the appellant here and in the court below to be taxed if not agreed.

DOWNER, J.A.:

The plaintiff, Blossom Ashman an intending purchaser of an apartment at 'Stilwell Manor' in Stony Hill entered into an agreement with defendant Carl Henry. Marsh, J. was persuaded that the agreement was enforceable to compel a sale and he awarded damages amounting to $600,000 in lieu of specific performance. As a result, the defendant has instituted appeal proceedings. The purpose of this appeal is to determine whether the order made by Marsh, J. was correct as the plaintiff Ashman contends.

Ashman was attracted by an advertisement Exhibit 2 inviting her to treat with the defendant Henry. The upshot was that both signed a document (Exhibit 1) which is of such importance in determining the contested issue that it is necessary to set it out. The relevant part reads:

"June 26, 1984

Mrs. Blossom Ashman
30 Hall Boulevard
Kingston 8

Dear Mrs. Ashman:

Re: 'Stilwell Manor', Stony Hill

We acknowledge receipt of your cheque dated June 26, 1984, payable to Workers Bank Trust Co. Ltd. in the amount of $6,125.00 representing a deposit on Unit No. D2 (upper a 1 bedroom, 1 bathroom unit in the captioned development). Please be advised that this deposit has been accepted by me under the terms and conditions set out below:

(1) This deposit shall be held in Escrow at the Workers Bank Trust Co. Ltd.

(2) This deposit shall be non-interest bearing.

(3) This deposit is refundable at anytime upon request, providing that up until such time a binding Agreement for Sale has not been entered into between yourself and the Vendors.

Details such as the Sale Contract, duration of construction works together with all other relevant information shall be made available to you on or before July 15, 1984 or as soon thereafter as is possible.

Yours truly,

sgd/CARL HENRY

I, BLOSSOM ASHMAN accept the foregoing conditions

sgd/BLOSSOM C. ASHMAN - PURCHASER/S

On the plain reading of this agreement, it is evident that it stipulates how the deposit of $6,125 is to be treated. The terms of condition 3 expressly state that the deposit is refundable at any time prior to entering into a binding contract for sale. In the meantime it was held in escrow at the Workers Bank Trust Co. Ltd.

Additionally, the final paragraph of the agreement sets out specific details which a binding contract would contain and importantly states that such a sales contract would be made available to the plaintiff Ashman on or before July 15, 1984 or as soon thereafter as was possible.

The meaning of this, must be that if the proposed agreement was not forwarded to the plaintiff Ashman soon after July 15, 1984, she could have recovered her deposit. It is safe to suggest that three months after July 15 would have been a reasonable period for waiting. After that, the plaintiff ought to have reclaimed her deposit. It is common ground that the defendant Henry never forwarded a written draft contract to the plaintiff Ashman.

That the plaintiff must have understood the agreement, can be seen from the letter of October 30, 1987 (Exhibit 3) sent to her by the Attorneys-at-law for the defendant Henry. The relevant passage states:

> "We are instructed that on the 26th July, 1984 our client paid a deposit of $6,125.00 on account of the purchase price of a one bedroom, one bathroom unit in 'Stilwell Manor.' We are further instructed that the development was under construction at that time.
>
> We are also instructed that you undertook in writing to present the Sale Contract along with all other relevant information on or before the 15th July, 1984 or as soon thereafter as is possible. Our client has been monitoring the development since then and has noticed that the development is now complete and units are occupied.

> It has been over three years since our client contracted to purchase a unit in the development, which unit she can identify. We are instructed to request from you the Sales Contract for execution by our client who is now ready willing and able to complete."

Further this understanding was reiterated by the plaintiff Ashman when she was cross-examined. She said at page 10 of the notes of evidence:

> "I knew the sale contract had to be drawn. I know because I am intelligent. I read the document and understand everything when I signed."

This construction of the agreement and the legal effect of the written and oral admissions by the plaintiff Ashman, seems to have been overlooked by the learned judge. Had these factors been taken into account, the order below would have been for the defendant/appellant Henry and not for the plaintiff Ashman as the learned judge found. In this context the following passage from Lord Denning's judgment in Tiverton Ltd. v. Wearwell Ltd. (1974) 2 WLR 176 at 180 is apt:

> "These courts are masters of their own procedure and can do what is right even though it is not contained in the Rules..."

This statement recognizes the inherent jurisdiction of the court to control procedure. Once the agreement in exhibit 1, the admission in exhibit 3 and the oral admission were adverted to, Marsh, J. or this court could have ruled in favour of the defendant Henry that there was no binding contract. It is clear therefore, that his Lordship's statement:

> "I accept that the authorities show a more modern and common sense approach to the Statute of Frauds cases. The approach is more liberal and is a return to the true purpose of the Court of Equity. I have come to the conclusion and so hold that Exhibits 1 and 2 are sufficient to take the case outside of the Statute of Frauds,"

is wrong and cannot be supported in the light of the construction of Exhibit 1 which demonstrates that it is unenforceable.

The Pleadings and the Authorities

Apart from the construction of the contract and the admissions, this case could also have been resolved in favour of the defendant Henry by examining the relevant pleadings and the principal authorities cited by counsel on both sides in this case. This stance was also open to the defendant both in the court below and on appeal.

As for the pleadings, paragraph 3 of the amended statement of claim in referring to exhibit 1, avers:

> "1. By a Memorandum in writing dated the 26th day of June, 1984 made between the Plaintiff and the Defendant, the Defendant agreed to buy certain freehold property situate and known as Unit No. D2 "Stilwell Manor", Stony Hill in the parish of Saint Andrew now registered at Volume 1193, Folio 107 under the Registration of Titles Act.
>
> 2. The Memorandum of the Agreement evidences that the Plaintiff paid a deposit of $6,125 on the purchase price of the unit which purchase price was agreed between the Plaintiff and the Defendant as One Hundred and Twenty-five Thousand Dollars ($125,000.00).

Then paragraphs 3 and 4 reads:

> 3. On or about the 26th day of June, 1984 when the Plaintiff entered into the contract with the Defendant the unit was under construction and the Plaintiff visited the premises on a number of occasions in the presence of the Defendant.
>
> 4. The unit has now been completed since on or about 1986 and the Plaintiff at all material times has been and is now ready and willing to fulfill and perform all her obligations to complete the purchase at the agreed price of $125,000.00."

Since the memorandum was identified and formed part of the record, it was open to the court to interpret it so as to decide its force and effect. Had the pleader indicated in the statement of claim which sections of the memorandum enabled the plaintiff to complete her obligations at the agreed purchase price, this case might never have got off the ground.

The amended defence recognized this gap in paragraphs 3 and 4 of the statement of claim and stated:

> "1. The Defendant admits the allegation contained in paragraph 1 of the Statement of Claim but says that the said memorandum in writing was expressly made by the parties to expire thirty (30) days later on the 25th of July, 1984 at which date a proper Contract of sale was to be made and executed by the parties."

This initial paragraph confesses to the existence of the memorandum. But it avoids by denial, that it was effective to complete the purchase of the property. So it avers by way of avoidance, that the agreement was to expire by July 25; that there was an expectation of a proper contract of sale was to be made and executed by the parties. Although the form of the pleading is confession and avoidance, the substance is that an issue of law was raised as to the interpretation of the memorandum as dealt with previously.

> "2. The Defendant admits that a deposit of $6,125 was paid by the Plaintiff and that a sale price of $125,000 was agreed but says that there were special conditions and stipulations as to the sale which were integral to the contract in particular the condition that upward adjustments to the price would be made in specified circumstances which were to be included in the final deed."

Again the defendant admits that a deposit of $6,125 was paid and reiterated that the special conditions called for a sales contract. Then the defence continues thus:

> "3. Paragraph 3 of the Statement of Claim is admitted."

So here the defendant admits the written agreement but the construction of that agreement must be determined by the court. The role of the court in this regard was recognized in two of the cases cited. See **Becketh v. Nurse** (1948) 1 All E.R. 81 and **Pioneer Plastics Containers Ltd. v. Commissioners of Customs and Excise** (1967) 1 All E.R. 1053.

An important paragraph of the amended defence reads:

> "(4) Save that it is admitted that the unit has now been completed the Defendant makes no admission as to the allegation contained in paragraph 4 of the Statement of Claim."

The averment in paragraph 4 of the Statement of Claim relates to the plaintiff being ready and willing to fulfil all her obligations and to complete the purchase at the agreed price.

Further, paragraph 13 of the amended defence avers the facts which are the basis of the legal defence. It reads:

> "13. The Defendant pleads that the said agreement should not take effect to be operative or enforceable until the fulfillment of a certain condition, viz. that a proper and detailed contract be executed between the parties thirty days later, i.e. by the 25th July, 1984. The said condition has never been fulfilled."

So the enforceability of the contract was recognized by the defendant, Henry as the issue to be determined on the pleadings, and was emphasized by the plaintiff Ashman in the Amended Reply at paragraph 2 which stated the issue thus:

> "2. As to paragraph 13 the Plaintiff says that the Memorandum in writing dated the 26th of June, 1984 constituted a binding contract between the parties, the enforceability of which was not subject to any condition subsequent."

It is manifest that the legal issue raised on the pleadings was whether the Memorandum Exhibit 1 was an enforceable contract as the plaintiff Ashman contended, or that there was no contract as the defendant Henry averred.

It is now pertinent to refer to some of the authorities cited to see how the courts have treated contracts which in substance are similar to Exhibit 1. It is convenient to set out the final paragraph of the agreement again to demonstrate that, although the words "subject to contract" were not expressly mentioned, it ought to have been necessarily implied from the construction of the contract. An

enforceable contract could come into being if the intending purchaser received and accepted the proposals forwarded to her within the time expressly stated. Here again for emphasis is the final clause:

> "Details such as the Sale Contract, duration of construction works together with all other relavant information shall be made available to you on or before July 15, 1984 or as soon thereafter as is possible."

To appreciate the authorities, it is necessary to recognize that the prospective vendor, Carl Henry, in paragraph 16 of his amended defence contended that:

> "16. The Statute of Frauds has not been complied with."

Section 4 of that statute insofar as is material states:

> ".... no action shall be brought.....
>
> "(4) or upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them (6) unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

In the light of the requirement of section 17 of the Statute of Frauds which is similar to section 4, Lord Denning MR in **Tiverton Ltd. v. Wearwell Ltd.** (1974) 2 WLR 176 at 181 said this:

> "So it was essential that the writing should contain an admission of the existence of the contract and of all the terms of it. If it failed to do so, it was not sufficient to satisfy statute. That is plain from the decision of this court in Thirkell v. Cambi (1919) 2 K.B. 590, when Bankes L.J. said at p.595.
>
> > 'If Mr. Bevan could have established that the letter of January 2 recognized that a contract had been made and that its terms were correctly stated in the appellant's letters, I agree it would be immaterial that it also contained a refusal to perform the contract so recognized.'"

As Scrutton L.J. said, at p.597:

> "... In order to make that position good (i.e. a sufficient writing) it is necessary to prove two things, which may be one thing containing two elements, a signed admission that there

> was a contract and a signed admission of what that contract was."

Finally on the sale of goods, the last word was said by Parker J. in Societe Capa Societe a Responsal ilite Limitee v. Acatos & Co. Ltd. (1953) 2 Lloyd's Rep. 185, 191:

> "... In order that such a letter can amount to a note or memorandum it is in my view essential that there should be a recognition and admission of the contract. It is not enough, as it seems to me, that the letter of repudiation should admit the letters and say that those letters do not amount to a concluded contract."

Stamp LJ was of the same mind. He said at p. 192:

> "As was said in the judgment of Bowen LJ in In re Hoyle (1893) 1 CH. 84, 99, which I have already quoted:
>
> > 'The court is not in quest of the intention of parties, but only of evidence under the hand of one of the parties to the contract that he has entered into it.'
>
> And see also the judgement of A.L. Smith LJ in that case, at p.100:
>
> > 'is there a note or memorandum of the promise signed by the party to be charged?'"

Another case of relevance is **Eccles v. Bryant and Pollack** (1948) 1 CH 93 at 94. During the course of argument Lord Greene MR said:

> "When the expression 'subject to contract' is used I have never known a case where it has been suggested, much less held, that this did not import that there is nothing binding till the exchange of parts of the formal contract has been made."

Then at p. 99, Lord Greene further states in his judgement:

> "...when you are dealing with contracts for the sale of land, it is of the greatest importance to the vendor that he should have a document signed by the purchaser, and to the purchaser that he should have a document signed by the vendor. It is of the greatest importance that there should be no dispute whether a contract had or had not been made and that there should be no dispute as to the terms of it."

Be it noted these observations were made against the background of the Statute of Frauds and it must be stressed that in the instant case, no contract for the sale of the apartment was ever drafted, let alone agreed to.

There is a contrary authority on the meaning of the phrase "subject to contract" which Mr. Scharschmidt urged this court to accept. It is to be found in the majority judgment of **Law v. Jones** (1973) 2 All E.R. 437. Since this case was fully considered in **Tiverton v. Wearwell** by the Court of Appeal (Lord Denning, M.R., Stamp, Scarman, LLJ), it is apposite to cite one passage from the judgment of Lord Denning, M.R. at pages 103-104 and to note that Stamp and Scarman, LLJ, arrived at a similar conclusion after a painstaking analysis of the authorities. Referring to the majority decision in **Law v. Jones** (supra), Lord Denning said:

> "The court said that the words "subject to contract" are a suspensive condition which can be waived by subsequent oral agreement between the parties. They can be removed from the document by oral evidence: see **Griffiths v. Young** (1970) Ch. 675 by Widgery L.J. at p.685; by Cross L.J. at p. 686 and by Russell L.J. at 687 and **Law v. Jones** (1973) 2 W.L.R. 994, 1004 by Buckley L.J.
>
> This court acknowledged that a letter which denied the very existence of a contract would not satisfy the statute: see **Law v. Jones** (1973) 2 W.L.R. 994, 1003 by **Buckley** L.J. But it held that the words "subject to contract" were not to be treated as a denial of the contract, but only as imposing a suspensive condition, the subsequent waiver of which could be established by oral evidence: see p. 1000 by Orr L.J.
>
> **Law v. Jones** has sounded an alarm bell in the offices of every solicitor in the land. And no wonder. It is everyday practice for a solicitor, who is instructed in a sale of land, to start the correspondence with a letter"subject to contract" setting out the terms or enclosing a draft. He does it in the confidence that it protects his client. It means that the client is not bound by what has taken place in conversation. The reason is that, for over a hundred years, the courts have held that the effect of the words "subject to contract" is that the matter remains in negotiation until a formal contract is executed: see **Eccles v. Bryant** (1948) Ch. 93. But *Law v. Jones* has taken away all protection from the client. The plaintiff can now assert an oral contract in conversation with the defendant before the solicitor wrote the [illegible] and then rely on the letter as a writing to satisfy the statute, even though it was expressly "subject to contract":

> or, alternatively, the plaintiff can assert that after the solicitor wrote the letter, he met the defendant and in conversation orally agreed to waive the words "subject to contract." If this is right, it means that the client is exposed to the full blast of "frauds and perjuries" attendant on oral testimony. Even without fraud or perjury, he is exposed to honest difference of recollections leading to law suits, from which it was the very object of the statute to save him."

Then Lord Denning continued thus on page 184:

> "The decision in Law v. Jones (1973) 2 W.L.R. 994 cannot be, however, justified on other grounds. Was it correctly decided? I do not think it was. Russell L.J. dissented from the majority. I find his reasoning convincing."

This court has no hesitation in preferring the reasoning of **Tiverton Ltd. v. Wearwell** (supra) which is in accordance with settled conveyancing practice.

It is clear that on that aspect of the case the plaintiff must fail notwithstanding the judgment in her favour in the Supreme Court. The approach of this court suggests that this case could have been decided on a preliminary point of law.

Since there was no enforceable contract, could the equitable doctrine of part performance avail the plaintiff?

Once again it is relevant to return to the pleadings and refer to pargarph 5 of the amended statement of claim which sets out the alternative averment on the doctrine of part performance:

> "Further, and or in the alternative the Plaintiff relies on certain acts of part performance which evidences an agreement by the Defendant to sell the aforementioned premises to the Plaintiff, particulars whereof are as follows:

The particulars are set out:

> "(a) the Defendant accepted a deposit of $6,125 from the plaintiff from the 20th June, 1984 and has retained the same for onwards of eight (8) years and has not made any attempt to refund the same;

(b) the Plaintiff requested the Defendant to change the location of the drying yard in relation to the said premises and the Defendant complied with the Plaintiff's request;

(c) the Plaintiff requested the Defendant to make the bathroom in the premises pink and the Defendant agreed so to do;

(d) the Plaintiff requested the Defendant to change the louvre blades of the windows in the premises as she was not satisfied with those which were installed and he agreed so to do;

(e) the Plaintiff visited the premises during construction on a number of occasions in the presence of the Defendant who identified Unit D2 as the Plaintiff's and the Plaintiff agreed to accept the same as her (sic)."

It was never contended that the agreement in the memorandum was not related to the deposit. That issue has been disposed of, so that is no longer a live issue in this case, as relevant to the issue of part performance. The remaining acts alleged to be in part performance, pertain to requests made of the defendant by the intending purchaser; and contains the allegation that the intending purchaser visited the premises during construction. As for the deposit to reiterate, it was in escrow and could be reclaimed at any time after June 15, 1984.

These pleadings could have been struck out by the court by relying on its inherent jurisdiction or the defendant could have argued it pursuant to section 238 of the Civil Procedure Code. The basis would have been that they were incapable of showing a cause of action based on the doctrine of part performance.

This was grasped by the pleader, though not argued on that basis either here or below. The relevant paragraph is 18 of the amended defence. It reads:

"18. Further or alternatively, the Defendant says, if, which is not admitted, there was an oral agreement, the acts pleaded by the Plaintiff (and which are hereinbefore specifically denied) are also insufficient to take the case outside of the relevant section of the Statute of Frauds relating to writing."

It is convenient to refer to the cases which examine the scope of the doctrine of part performance. An instructive case is **Dickinson v. Barrow** (1904) 2 Ch. 339 where the headnote reads:

> "The defendant entered into a verbal contract with the plaintiffs for the purchase from them of a plot of land with a house upon it, which they were to build for her. During the progress of the building she frequently visited the site, and made suggestions for material alterations and improvements which were carried out by the plaintiffs at her request. In an action for specific performance of the contract she relied on the Statute of Frauds as a defence:
>
> Held, that the acts done by the plaintiffs at the request of the defendant were acts of part performance taking the case out of the Statute of Frauds, and that the plaintiffs were entitled to judgement for specific performance."

Note in this case the defendant was the intending purchaser and it was the plaintiff who effected alteration and improvement which made it inequitable for the defendant to rely on the Statute of Frauds. It is different in the instant case where suggestions for alterations were made by the plaintiff Ashman. She did not part-perform and so has raised no equity which would make it unconscionable for the defendant Henry to rely on the Statute; so her requests, even if admitted, cannot qualify as acts of part performance.

Similar reasoning was applied in the case of **Rawlinson v. Ames** (1925) 1 Ch. 97 at 144-115 and **Brough v. Nettleton** (1921) 2 Ch. 25. The headnote to the latter case emphasising that the part performance must be that of the plaintiff summarised the decision thus:

> "Held, that the possession taken by B. was an act of part performance which enabled him to give evidence of all the terms of the parol agreement for tenancy, and entitled him to specific performance of that agreement including the option to purchase."

A further illustration of the nature of the doctrine comes from the Court of Appeal in **Kingswood Estate Co. Ltd. v. Anderson** (1962) 3 All E.R. 593. Willmer L.J. in explaining the principle stated at p. 599:

> "On the question of part performance, I do not think that there is any room for doubt. Where the question is whether there was an agreement for a tenancy, I cannot imagine any better evidence of part performance than the fact of the tenant going into actual occupation. It is said, however, that the act of the tenant in going into occupation was equivocal, in that it might be referable to any kind of tenancy agreement. I do not understand, however, that part performance must necessarily be referable to the agreement, and only the particular agreement, relied on. I cite from **Anson's Law of Contract (21st Edn.)(1959), p.75.** where the principle is stated, as I think correctly, in the following terms:
>
> > 'The acts of performance relied upon must of themselves suggest the existence of a contract such as it is desired to prove, although they need not establish the exact terms of that contract.'"

Upjohn L.J. at p. 604 in stating the requirements of an oral contract and an act by the plaintiff to rely on the doctrine of part performance said:

> "The true rule is, in my view, stated in **Fry on Specific Performance (6th Edn.)**, p. 278. s. 582:
>
> > 'The true principle, however, of the operation of acts of part performance seems only to require that the acts in question be such as must be referred to some contract, and may be referred to the alleged one; that they prove the existence of some contract, and are consistent with the contract alleged.'"

Russell L.J. was of the same mind. He stated at p. 607:

> "I agree, therefore, that the evidence discloses a contract such as I have mentioned. I agree further that the contract was partly performed by the tenant's move from No. 91 to No. 46; this is quite clear."

Perhaps the most important modern authority on the doctrine of part performance is Steadman v. Steadman (1974) 2 All E.R. 977. It is instructive to examine what Lord Reid held was capable of constituting part performance. At page 980 His Lordship said:

> "The sole question for your Lordships' decision is whether the admitted facts amount to part performance within the meaning of s. 40(2). In my view it is clear that the oral agreement of 2nd March, 1972 is indivisible and not severable. The whole must stand or fall. Indeed the contrary was not seriously argued. And it is clear that the payment of £100 to the wife as ordered by the Magistrates' court was taking the words in their ordinary sense, in part performance of the agreement. The husband also relies on the following other acts by him or his solicitor as being further part performance: (1) the intimation of the agreement to the justices and his abandonment of his attempts to have all arrears of maintenance remitted, and (2) sending to the wife the transfer which she refused to sign and incurring the cost of its preparation. I am very doubtful about the first of these but I am inclined to think that the second could be regarded as part performance. It is the universal custom that a deed of transfer of an interest in land is prepared by the solicitor of the transferee so the wife or her solicitor as her agent must have known that the husband would incur the cost of preparation of the deed in carrying out the agreement."

Then in expressing the appropriate approach to this issue, His Lordship continued on page 981:

> "You must not first look at the oral contract and then see whether the alleged acts of part performance are consistent with it. You must first look at the alleged acts of part performance and see whether they prove that there must have been a contract and it is only if they do so prove that you can bring in the oral contract."

In applying this approach to the instant case, the equivalent of the oral contract, the memorandum has no effect as an agreement for the sale of land. Further requests by the plaintiff Ashman of the defendant Henry were negotiations with a view to arriving at a contract which was never made. This is so despite the allegation that the apartment was identified by the defendant Henry to the intending

purchaser Ashman. She qualifies as one of those "many people who are neither prudent nor reasonable and they might often spend money or prejudice their position not in reliance on a contract but in the optimistic expectation that a contract would follow" Lord Reid pages 981-982 of Steadman v. Steadman.

These authorities make it quite clear that the intending purchaser's pleadings were inadequate and could have been struck out had the point been taken. It is, therefore, manifest that Marsh's J. reasons in his judgment which states:

> "...I find in the alternative that certain acts by both the Plaintiff and the Defendant were consistent with the formation of a contract between them for sale of the premises. In other words, that they constituted acts of Part Performance."

was wrong in principle and is not supported by the authorities. I must acknowledge my debt to Mrs. Benka-Coker, Q.C. and Mr. Scharschmidt, Q.C. for the many helpful authorities cited in their submissions.

In the light of all this, the appeal must be allowed, the order below set aside and the respondent Carl Henry is entitled to taxed or agreed costs both here and below.

WOLFE, J.A.:

I agree.

ORDER

WRIGHT, J.A.:

Appeal allowed with costs to the appellant here and in the court below to be taxed if not agreed.