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It may be useful to observe here that there is no rule of law or practice that the attorney for the defence should in every criminal case make submission of no case to answer at the end of the case for the prosecution—as many attorneys appear to think. Such a submission should be made only when at the end of the case for the prosecution there is no evidence to go to the jury in support of the charge against the accused, or such evidence is so tenuous or has been so discredited in cross-examination that no reasonable jury, properly directed, would convict on it.

As the cases referred to above show, the question of whether what was done was part of a joint enterprise was a question of fact for the jury and in the light of the evidence adduced the learned trial judge quite rightly ruled that there was a case to answer. It is desirable that grounds of appeal should be clearly stated, Grounds 2 and 4 lack clarity. Attorneys should always ensure that each ground of appeal is set out clearly and precisely.

The nature of the misdirection referred to in ground 2 is not clear but it seems that the applicant complains of a misdirection on the law relating to common design. After dealing with the question of intent, the learned trial judge went on to say this (at p. 63):

> "The Crown must go further and satisfy you to the standard I have already told you of, that these two persons, if you can draw that inference, and if you do draw that inference, were acting as part of a common design. The doctrine operates in this way: Where two or more persons acting together in furtherance of a common purpose, a common plan, then those who are present, actively assisting or engaged in carrying out this common plan, this common enterprise, are equally guilty of it in the eyes of the law. The act of one becomes the act of the other and it doesn't matter in that case who inflicted, who fired the fatal shot. The shot which turned out to be fatal. The mere presence is not sufficient in law. You must be satisfied so that you feel sure that both these men were actually engaged in carrying out this common enterprise which the Crown asks you to say, in this case, was the shooting at these persons, one of whom got fatally shot. If you entertain a reasonable doubt as to whether the men were acting in common design, you must acquit the accused man, because there is no evidence before you based on the Crown's case as to who actually did the shooting. The Crown is asking you to infer that both men were involved in the shooting from the whole circumstances."

In the light of the authorities referred to above this was an adequate direction on the law relating to common design and a reminder that they should be satisfied beyond a reasonable doubt that the men were acting in concert before they could convict. Further at p. 66, he tells the jury that they must be satisfied that "he was not only present but actively partook in the events of this shooting," and elsewhere in the summing-up he repeats that they must be satisfied as to common design.

In regard to the third and fourth grounds of appeal the learned trial judge reminded the jury of the inconsistencies in the evidence of the witness Cooper and directed the jury fully as to how they should deal with them. We therefore find no merit in these grounds of appeal.

In the fifth and final ground of appeal the applicant complains that the summing-up was unbalanced and unfair. Here Mr. Edwards suggested that the direction of common design was inadequate and that the jury were not given sufficient assistance on this important aspect of the case. Again, we would say that on a careful reading of the summing-up there is no merit in this ground of appeal. It seems to us that not only was the summing-up quite adequate but at times it was overly favourable to the applicant. Thus at p. 67 of the record the learned trial judge in dealing with the question of identification said this:

> "So as I said, you need to approach the evidence on the question of identification with caution, extreme caution. Now, it is also my duty to warn you because this is a case where Cooper's evidence on this question of identity is not supported, that it is dangerous to convict an accused man on the unsupported evidence of a sole eye witness for the reason I have already outlined to you, but if on examining the evidence of the witness you believe the witness as having spoken the truth and you are also satisfied on this question of common design, then it is open to you to find the accused man guilty."

There is no requirement in law or in practice that in a case such as this the evidence of a sole witness should be supported or corroborated before a jury can find an accused guilty because it would be dangerous to convict on the evidence of a single witness. Such a direction is required to be given only in cases where corroboration is required in law or in practice, as for example, in the case of a sexual offence.

We treated the application for leave to appeal against his conviction for murder as the hearing of the appeal and for the reason set out above the appeal is dismissed and the conviction affirmed.

WALTER HOILETT ET UX *v.* VINCENT M. CLARKE

[COURT OF APPEAL (Kerr, Carberry, White, JJ.A.) February 19, 20, 1981; March 25, 26, 27, 1981; May 11, 12, 1981; July 20, 1982; June 3, 1983

Sale of Land—Contract for sale of landed property—Specific performance—Purchasers already in possession as tenants prior to date of agreement—Effect of non-completion on instalmental payment already advanced to vendor—Deposit—Test to determine—Forfeiture—Relief in equity

The plaintiffs/appellants were tenants of the defendant/respondent in respect of a property known as 17 Duhaney Drive, St. Andrew. By an agreement dated the 25th February, 1971, the defendant/respondent agreed to sell the property to the plaintiffs/appellants "as purchasers already in possession as tenants of the vendor" for a consideration of $14,600.00 on the following terms of payment: "Deposit of $200 on signing hereof; further deposit of $6,000.00 on or before the 15th April 1971; balance on completion". The date fixed for the completion was 30th April, 1971. The agreement also contained a special condition that "the sale shall be subject to the purchasers raising a mortgage of $6,800.00 to enable them to complete."

The plaintiffs/appellants paid the deposit of $200 on signing the agreement on the 25th February 1971, but then paid haphazardly as follows: $3,000.00 on 5th May 1971, $1,500 on the 10th August 1971, and thereafter ceased making further payments. There was neither express stipulation in the agreement as to payment of interest on the agreed sum nor as to payment of further rent on the property.

As a result of delays (but repeated assurances) on the part of the plaintiffs/appellants to complete the agreement, several correspondence were exchanged between the parties and repeated concessions allowed by the defendant/respondent. Then the defendant/respondent treated the contract as abortive and offered to refund the sum of the further payment of

$4,500 less the sum of $2,000 claimed for rent on the premises for the period June 1971 to January 1973, at the rate of $100.00 per month as hitherto being paid by the plaintiffs/appellants as tenants before the abortive sale.

The plaintiffs/appellants objected to the termination of the contract of sale as well as the claim of the defendant/respondent for rent in lieu of completion. The plaintiffs/appellants sued (at the lower court) for several reliefs including an order of specific performance of the agreement for sale; an injunction restraining the defendant/respondent (as vendor) from selling or otherwise dealing with the property; a claim for damages for breach of contract. The learned trial judge gave judgement for the defendant, inter alia, in the sum of $6,300.00 as follows: $3,900 for rent and $2,400.00 for use and occupation, with interest at 10% on the outstanding balance of $1,800 up to the date of the judgement. He also ordered possession. He further held that the whole of the amount in the defendants (vendor's) hand paid by the plaintiffs (purchasers) as deposits has been forfeited to the defendant (vendor) as a result of non-completion of the contract of sale by the plaintiffs.

The plaintiffs/appellants then appealed to the Court of Appeal. They contended both in this appeal and (as in the court below) that the contract of sale was void for uncertainty and so the amounts of $200.00 and $4,500 (but more especially the amount of $4,500.00) should be refunded to them, and finally that the signing of the agreement of sale as "purchasers already in possession as tenants of the vendor' terminated the landlord/tenant relationship hitherto existing between the parties, and that the appropriation of the sum of $4,500 in reduction of the rent was wrong. The defendant/respondent through his counsel on the other hand, submitted that he was entitled to revoke the agreement on the ground of the inordinate delays by the plaintiffs/appellants to complete the contract of sale.

Held: (i) Where the party seeking an order of specific performance of a contract of sale of property is found to have displayed attitudes amounting to inordinate delays resulting in the avoidance or non-completion of the contract, such an application for specific performance will be refused by the court. In the present case, the delay of three years exhibited by the plaintiffs/appellants amount to such inordinate delay.

(ii) In a contract of sale of property which contract was discharged for non-completion where there was stipulation for initial payments of sums of money as deposit and other payments in installments, the question whether or not such deposit shall be forfeited and what amounts to such deposit will depend on the interpretation of the whole of the agreement of sale and the conduct of the parties. In the instant case, only the sum of $200 paid as "deposit" may be forfeited.

(iii) The appropriate test employed by the courts to ascertain whether or not a particular part-payment in a contract of sale amounts to a "deposit" is by ascertaining the proportion of the part-payment in relation to what damage the vendor is likely to suffer by reason of the purchaser's breach of contract. In the case herein, the sum of $4,500 is wholly disproportionate as a deposit to the purchase money.

(iv) The general rule in a contract of sale of property in which the purchaser was already in possession as tenant prior to the date of the agreement is that pending completion the tenancy continues.

(v) For the general rule to be dispensed with, there must be clear indications in the contract of sale which outweigh the operation of the ordinary (general) rule. Such indications may include a clause in the agreement suspending further payment of rent *or* a clause for charging interest on the agreed purchase money from a stated date until completion.

Per incuriam:

(vi) in a contract of this nature, the time when the agreement for sale is entered into is the appropriate point at which the matter of the real character and position of the

tenant/purchaser should be defined. If this is done, it will enable the parties to have a clear and unambiguous understanding of the contract they have entered into.

(vii) Even where there is a forfeiture clause in the agreement, the court can invoke its jurisdiction in a proper case to exercise an "equity of restitution".

Appeal dismissed. Specific performance refused. Judgement on the defendant/respondent's counterclaim affirmed with variation.

Cases referred to:

(1) *Kilmer v. British Columbia Orchard Lands Ltd* [1913] A.C. 319
(2) *Howe v. Smith* [1884]27 Ch. D. 89; 53 L.J. Ch. 1055
(3) *Soper v. Arnold* [1889] 14 App. Cas. 429; 59 L.J. Ch. 214
(4) *Stockloser v. Johnson* [1954] 1 Q.B. 476; [1954] 2 W.L.R. 439; [1954] 1 All E.R. 630
(5) *MacDonald v. Dennys Lascelles Ltd* [1933] 48 C.L.R. 457
(6) *Doe D. Gray v. Stanion* [1836] 1 M & W 695; 150 E.R. 614
(7) *Turner v. Watts* [1928] 97 L.J. K.B. 403; 138 L.T. 680
(8) *Leek & Moorlands Building Society v. Clark* [1952] 2 Q.B. 788; [1952] 2 T.L.R. 401; [1952] 2 All E.R. 492
(9) *Nightingale v. Courtney* [1954] 1 All E.R. 362; [1954] 1 Q.B. 399
(10) *Lewis v. Beard* [1811] 13 East 210; 104 E.R. 350
(11) *Steadman v. Drinkle* [1916] 1 A.C. 275; 85 L.J. C.P. 79; 114 L.T. 248
(12) *Brickles v. Snell* [1916] 2 A.C. 599; 86 L.J.P.C. 22; 115 L.T. 568

Appeal against judgement in the Supreme Court (Carey, J.) giving judgement for defendant in action by plaintiff for specific performance of agreement for sale of land.

H.G. Edwards Q.C. and *M. Williams* for the plaintiffs/appellants.

B. Macaulay Q.C. and *Dr. Edwards* for the defendant/respondent.

WHITE, J.A.: This appeal is against the judgement of Carey, J. (as he then was), relating to freehold property known as 17 Duhaney Drive, St. Andrew, and registered at volume 1013 folio 236 in the Register Book of Titles. The action by the plaintiffs/appellants (purchasers) was one for specific performance of an agreement of sale dated the 25th of February 1971, of the said freehold property as well as for an injunction restraining the defendant (vendor) from selling the said property in breach of the said agreement, and preventing the defendant, his servants or agents from entering upon the said property in the possession of the plaintiffs. They also asked for damages for breach of contract, and lastly for further and other relief.

The learned trial judge gave judgement for the defendant in the following terms:

"1. On the plaintiffs' claim judgement for the said defendant with costs to be taxed or agreed.

2. Judgement on the counter-claim for the defendant for $6,300 being as to $3,900 for rent and $2,400 for use and occupation with costs to be agreed or taxed. Interest at 10% from 1st June 1974 on $1,800 to date of judgement.

Order for possession on or before 15th December 1976. Stay of execution for six weeks granted on terms that:

1. $6,300 to be paid into court within 21 days of the date hereof.
2. There is an order for stay of execution as to the order for possession herein pending the hearing of the plaintiff's appeal provided the sum of $100 be paid into court at the end of each month beginning on the 31st October 1976.

I confirm that the amount in the defendant's hand by the plaintiffs as deposits have been forfeited to the defendant."

This judgement was delivered after considering the oral evidence of the male plaintiff and his Attorney-at-Law, Mr. Michael Williams of Messrs Williams and Williams, Attorneys-at-Law (who in early stages of the transaction acted for both parties). This oral evidence was supplemented by documentary evidence in the form of the agreement for sale made on the 20th February 1971, and several letters written by and to Mr. John W. McFarlane, Attorney-at-Law who acted for the defendant-vendor, and who came into the picture on the 23rd September 1971, when he first wrote to Messrs Williams and Williams who acted for the purchasers, enquiring what was the cause of the delay in relation to the sale of the property, 17 Duhaney Drive.

The defendant-vendor by his defence denied that the plaintiffs were entitled to such relief claimed or to any other relief. By way of counterclaim, the defendant claimed against the plaintiffs for rent of the said premises due and owing. Also for possession of those premises and damages for continued use and enjoyment.

A statement of fact is necessary as a background to the reasons for the judgement which we delivered on July 30, 1982.

It was a term of the aforementioned agreement for sale that the plaintiffs who were described therein as "purchasers already in possession as tenants of vendor" were to pay to the vendor as consideration for the sale of the property to them, the sum of $14,600 and the transaction should be completed on or before the 30th day of April, 1971. Within that time, the terms of payment were stated to be: "Deposit $200.00 on signing hereof. Further deposit of $6,000 on or before the 25th day of April 1971. Balance on completion". It would therefore mean that on simple arithmetical calculation the balance of $8,400.00 as payable on the 30th day of April 1971, the date fixed for completion.

The agreement for sale also contained a "*special* condition". The sale shall be subject to the purchasers "raising a mortgage of $6,800.00 to enable them to complete." A simple calculation will show that assuming mortgage was raised, the purchasers would have to put up some $7,800.00 in cash.

The plaintiff/appellant, Walter Hoilett, paid the amount of $200.00 on the signing of the agreement on 25th February 1971, and in evidence he admitted that the next payment made by him was $3,000.00 on the 5th May 1971; a second payment of $1,500.00 was made on the 10th August 1971. Since then he has paid nothing towards the price, the interest on it, or by way of rent.

From this, it is clear that the sum of $6,000 was not paid on the 30th April 1971, nor was it or any other amount paid up to the 11th October 1971, nor had the proposed mortgage been raised when Mr. McFarlane wrote in blunt terms to the purchasers' attorneys: "It is quite clear that the purchaser is unable to obtain a mortgage, therefore the contract is abortive. In view of this, Mr. Clarke will be refunding the amount of $4,500 which he received by the 31st inst and thereafter he will resell the premises." Despite this, and the continued failure of the plaintiffs/appellants to meet their obligation under the agreement for sale, the defendant took no further action in the matter until the 223rd day of January 1973 when Mr. McFarlane again wrote to Mr. Hoilett stressing the latter's evident inability to complete the sale, offering at the same time to refund to the plaintiff/appellant the sum of $2,500.00 which would be the balance remaining after deducting from the $4,500 in hand the sum of $2,000.00 computed at $100.00 per month for rent for the premises for the period June 1971 to January 1973. This amount proposed to be deducted as rent was assessed on the basis of the rent of $100.00 per month paid by the plaintiff/appellant before the sale and in view of the fact that as the plaintiff/appellant Hoilett admitted in evidence, he had not paid any rent for the period. His failure to do so was due to his belief that as tenant/purchaser in possession he need not pay rent. This was the expressed legal view of Mr. Michael Williams when he gave evidence.

Two things are here noteworthy. Firstly, that no mention is made of the sum of $200.00 paid as a deposit; and although this offer is much less favourable than that contained in the letter of the 11th October 1971, it still regards the $4,500.00 as refundable to the plaintiff. The second thing which is noteworthy is that the defendant is here asserting and insisting that the plaintiff who was a tenant in possession at the time of the contract of sale, was liable to pay rent for the period he occupied the premises, considering that there had been no completion, due wholly to the plaintiffs' failure to comply with the terms of the agreement for sale. This formed the basis of much argument and pro and con before this court.

The matter was brought to a head when Mr. McFarlane served on the plaintiffs a notice making time of the essence "by reason of the defaults and breaches made by you with respect to the completion of your contract for the purchase of no. 17 Duhaney Drive in the parish of St. Andrew." The notice dated 19th March 1973, fixed the 31st March 1973 as the date for completion of the said contract. In response thereto the late Mr. Eugene C.L. Parkinson Q.C. on behalf of the plaintiffs wrote to Mr. John McFarlane by letter dated 16th April 1973 requesting an extension of time "for another month so as to enable me to obtain a loan of $10,100 to complete. My client appears to have been let down by his former legal representatives who undertook to raise the necessary loan for him."

Although by letter dated 17th April 1973, Messrs Williams and Williams undertook, in view of the notice, that the sum of $10,100.00 being balance of purchase money would be paid upon receipt of the stated and requisite documents, and in a subsequent letter dated 19th April 1973, advised that "we stand ready, willing and able to complete the transaction", nothing was done to carry out this declaration of intention. But they requested the withdrawal of the notice making time of the essence to allow proper investigations of title to be made. Further correspondence followed and on two occasions thereafter on the 29th May 1973 and the 16th July 1973, the plaintiffs/appellants were informed not only of what was owing on the purchase money, but also the amounts the vendor sought for additional rent.

Up to this stage it is fair to describe the relation of the plaintiffs/appellants to the defendant/respondent in the following way. The latter through his Attorney-at-Law was complaining that the plaintiffs/appellants were in great delay by not performing their obligations under the agreement for sale. Clearly, they had not paid the amount of $6,000.00 on or before the 25th day of April 1971, and indeed up to the date of trial had not paid that sum. Nor had they been able to raise any mortgage and it could not be gainsaid that the plaintiffs/appellants were in breach of the provisions in the agreement of sale. The plaintiffs/appellants had acknowledged that their position was delicate, in the premises had repeatedly requested, and as repeatedly had been granted, the indulgence of the other party, who at all material times had taken the stand of threatening to enforce all his rights consequent on the breach but had shown a remarkable willingness to waive his rights in exchange for actual completion by the purchasers. It is therefore incomprehensible when Messrs Williams and Williams' letter dated 31st July, 1973 to Mr. McFarlane, expressed surprise at the vendor's proposal to cancel the sale and act on the Notice making time of the essence of the ground that despite their having undertaken to pay the balance of the purchase money they have not yet been supplied with the registrable transfer and title under the Registration of Titles Law thus impeding the necessary inspection. Their counter attack was as follows:

> "In the circumstances we do not understand how you now seek to act under your Notice as, with respect, we feel that your refusal or neglect to avail us of an opportunity to inspect Title leaves your client in breach of the agreement. Further, we have already given you an undertaking to pay the appropriate sums on receipt of registrable transfer.

Although, strictly, the purchasers could insist that the balance of purchase money be paid after registration of the mortgage to which the contract is subject."

This unblushing volte face is underlined by the second paragraph of this letter which reads:

"Our clients repudiate your clients' claim for rent as they have been purchasers in possession from 25th February 1971. Consequently they will pay interest on the balance of purchase money outstanding at the rate of interest required by law, and we hereby give you our undertaking to pay in addition to the balance of purchase money and adjustments, such sums as may be found due by the purchasers to your client for interest on balance of purchase money by virtue of possession." All this is backed up by a preemptory "demand that you immediately comply with our request to forward to us documents of title for inspection, and hereby give you notice that our clients stand ready, willing and able to complete the purchase, and advise that unless our demand is complied with within twenty-one days of the date hereof, as to which time is made of the essence of the contract, we are to issue proceedings against you for specific performance of the contract."

The terms of this letter with particular reference to the question of the defendant/respondent's claim for rent must be regarded as inconsistent with the terms of the agreement for sale of the 25th February 1971. The ambivalence of the plaintiffs/appellants 'newly stated position is a striking commentary on their attitude to the whole transaction. Even after the reply by Mr. McFarlane dated 28th August 1973, forwarding the requisite documents at the same time demanding an irrevocable undertaking to pay the sum of $13,077.04 in which was included an item of $2,700.00 for rent due to the 30th July, 1973, at $100.00 pr month, nothing was done. Notwithstanding the repeated desire of the Attorney-at-Law for the defendant/respondent "to avoid any situation which may be embarrassing" and the firmness in the tone of this letter, coupled with the information from Mr. McFarlane that "Mr. Clarke will be acting in accordance with the Notice which was served upon you dated 19th March 1973", the plaintiffs/appellants only response of note was to raise a hair-splitting point in relation to a three-inch overlap by the building on the 4 foot clearance covenant endorsed on the title:

"As the contract was made subject to the purchaser raising a mortgage which he has done, subject to the title being in order, we request that you have the rectifications made with the greatest expedition. We are willing to pay to your client the balance due and owing to him under and by virtue of contract dated 25th February 1971, upon receipt of a registrable transfer and the duplicate certificate of title with no existing breaches of covenant, save and except restrictive covenants endorsed on title which must be complied with by the vendor."

By letter dated 26th February 1974 the Attorneys-at-Law for the plaintiffs/appellants again repeated that "our client has raised the necessary mortgage to complete the purchase of the abovementioned premises and has made certain requisitions on title which have not been complied with to date. Also they, by this letter, "formally require you to comply with the requisitions made within 90 days of the date hereof as to which time shall be and is hereby made of the essence of the contract, failing which we shall have no alternative but to carry out our clients' instructions to issue proceedings against your client for specific performance of the contract."

This poses one of the ironies in this case—the respondent had already served notice making time of the essence, and had been threatening to take action against the purchaser upon his failure to observe that condition. This notice was further extended despite the contention that the appellants were in continuous breach of the agreement. On the other

hand, the appellants complain that the respondent completely and unreasonably ignored the requisitions to rectify alleged building breaches, but this complaint was raised long after they were clearly in breach. Further, long after that fact, the plaintiffs for the first time raised the question of the contract being made subject to the purchaser raising a mortgage. At the same time, there is a bland assertion (never verified) that they had succeeded in raising a mortgage, which the evidence of Mr. Williams belied, and it became clear that they in fact never had any such success in securing a loan or mortgage. Mr. McFarlane replied to the threat to issue proceedings for specific performance of the agreement for sale by two assertions. Firstly, he asserted that the contract had ceased to exist and that the amount of $4,500.00 paid on account of the contract had been appropriated to rental owing for the premises for the period of 30th June 1973 to the 31st May 1974, and sent his cheque in the sum of $900 being the balance. Secondly, he proposed forthwith to institute suit to recover possession of the premises and any rental that may accrue after the 1st June 1976, also for damages.

Thereafter, the plaintiffs/appellants issued their writ and statement of claim dated the 22nd day of July 1974 by which it was alleged that "The defendant has neglected and refused and continue to neglect and refuse to take any steps towards the completion of the said agreement, and is presently attempting to sell the said property in breach of the terms of the said agreement, averring at the same time that the plaintiffs have at all material times been, and are now ready and willing to perform their obligations under the said agreement." In reply thereto, the defendant by his defence and counter-claim admitted "the plaintiffs paid the sum of $4,500.00 as a further deposit under the said agreement".

It is germane to set out here, paragraphs 10, 11, and 12 of the defence and counter-claim:

"10. By way of counterclaim the defendant says that the plaintiffs as tenants of the defendant at the said premises at a monthly rental of $100 per month prior to the making of the agreement referred to in paragraph 1 of the statement of claim herein.

11. The plaintiffs in breach of the said tenancy have failed and or neglected to pay rent and the sum of $3,900 is due and owing by the plaintiffs to the defendant for rent up to the 31st August 1974.

12. The plaintiffs have refused and/or neglected to vacate the said premises and deliver up possession thereof to the defendant despite several requests so to do after the defendant properly terminated the said tenancy agreement."

The claim was therefore made for the sum of $3,900.00 for rent due to the 31st August 1974 and for possession of the said premises.

The notice of the 19th March 1973 making time of the essence

". . . fixed the 31st instant as the date for completion by you of the said contract and a the date for payment of the amount of J$8,100 the amount due and payable by you under the said contract for completion thereof and in the event of your default in complying with this notice, the vendor will forfeit all lands and amounts paid by you and resell the said lands and recover from you all deficiencies in price and all loss, damages, costs and expenses incurred and sustained by the vendor."

This notice made specific reference to the contract for the purchase of no. 17 Duhaney Drive in the parish of St. Andrew. It will be observed that nothing is there said about the plaintiffs/appellants being tenants. This is understandable in view of the preoccupation of both parties with securing completion of the agreement for sale. Strikingly, although the claim for rental to be paid by the plaintiffs was first made on the 23rd January 1973 and although several letters passed between the Attorneys-at-Law for each side in the interim, it was not until the 31st July 1973 after the notice making time of the essence had been received and other correspondence passed between them, that Messrs Williams and

Williams wrote to Mr. McFarlane repudiating on behalf of their clients, the claim by the defendant for rent but promising at that time to pay interest on the balance of the purchase money. Surely, this was an attempt to introduce a new term into the agreement for sale. Mr. McFarlane rightly rejected this and complained that Messrs Williams and Williams were "at this stage attempting to enforce a contract on behalf of the purchasers which is inconsistent with the terms of the agreement. I make particular reference to the vendor's claim for rental". Along with this expression of mystification in his letter dated 28th August 1973, Mr. McFarlane submitted a bill for $13,077.84 as money owing by the plaintiffs. This sum included, inter alia, an amount for rental due to 30th August 1973 at $100.00 per month—$2,700.00.

Two other facts in the development of this dispute must be mentioned. In his last letter—10th May 1974 to Messrs Williams and Williams, Mr. McFarlane reminded of "my telephone conversation prior to your letter of the 14th December 1973, with your Mr. Michael Williams, where I stated emphatically that my client did not regard the contract as being in existence, by reason of the long delays and to the fact that the special condition was not satisfied by the date of completion."

One would have thought, when Mr. McFarlane had strongly indicated his intention to recover possession, that the plaintiffs/appellants would have taken some positive step to meet Mr. McFarlane's complaint of their failure to raise the mortgage under the special condition. Not that the sale shall be subject to the purchasers' raising a mortgage of $6,000 was wrong. In their Writ of Summons and statement of claim, both dated the 22nd day of July 1974, the plaintiffs did assert that they had raised this money. But in fact it was never borne out by the evidence, either oral or documentary. The money was certainly not raised by the time fixed for completion; not even after time was made of the essence. The learned trial judge so found. Considering the conduct of the parties before and after the date fixed for completion, the evidence discloses clearly an unreasonable and continuing delay on the part of the plaintiffs/appellants, explicable only on the basis that they were unable to take the necessary and requisite steps to complete the purchase. Although the vendor persistently called for completion, the purchasers' failure to complete over a period of over three years must be given a prominent place in determining their application for the court to decree specific performance. It cannot be said and was not argued before us that the defendant had waived his notice making time of the essence. We agree with the finding of the learned trial judge in this regard; also with his finding rejecting the claim for specific performance. We have not been given any reasons to cause us to dissent from his judgement that the plaintiffs/appellants were not ready and willing to the extent of being able to complete the agreement for sale.

Even at the ultimate stage of the trial they could have displayed their ability to complete by bringing or paying into court the money which it was alleged beforehand that they had raised on a mortgage (see e.g. *Kilmer v. British Columbia Orchard Lands Ltd.* (1913) A.C. 319 P.C.) Incidentally the complaint about the vendor not complying with the demand regarding the title cannot, in the present circumstances, assist the plaintiffs in their search to attract the jurisdiction of this court, considering that this came along after they had already failed to pay the $6,000.00 by the time specified; considering also that they had long ago failed to raise the mortgage which they were under obligation in their own interest to raise so as to enable them to complete. It was not the defendant who, despite repeated requests by the plaintiffs over a long period of time, had neglected or refused and continued to neglect and refuse to take any steps towards the completion of the said agreement. In truth, it is very clear that it was the purchasers, not the vendor, who was in breach of contract from as far back as the 31st March 1973.

In the prosecution of the appeal, Mr. Edwards endeavoured to move this court to reverse the findings and judgement of the learned trial judge on three principal grounds. Firstly,

that the contract of sale is void for uncertainty, because of the special condition "the sale shall be subject to the purchaser raising a mortgage of $6,800 to enable them to complete". Secondly, if so the amounts of $200.00 and $4,500.00 which were paid by the purchasers would be refundable. Even if the sum of $200.00 is forfeitable, because of the principles enunciated by the decisions of *Howe v. Smith* (1884) 21 Ch. D. 89 and *Soper v. Arnold* (1889) 14 App. Cas. 429 and acted upon from time to time, the sum of $4,500.00 described as a "further deposit" is refundable and should not have been confirmed by the learned trial judge as forfeited. Thirdly, by reason of the description "the purchasers already in possession as tenants of vendor" the contract of sale terminated the relationship of landlord and tenant so that the appropriation by the vendor of the aforesaid sum of $4,500.00 in reduction of rent was wrong.

In his submissions on proposition one Mr. Edwards adverted us to a number of decisions of the courts. He prefaced this consideration by the general statement of principle that where there is a sale of land subject to a mortgage, the contract can be void for uncertainty as the condition is too vague. Alternatively, if the condition is a condition precedent, such a condition must be met, otherwise the contract will be void.

We do not propose to consider in any detail Mr. Edwards first proposition. For one thing, as Mr. Macaulay pointed out, the question of condition precedent does not arise in this case. At the trial, the whole thrust of the argument for the defendant was that he was entitled to revoke the agreement. Although the pleadings were as stated by Mr. Edwards, those defences of condition precedent and uncertainty were not pressed, and therefore those issues were at an end. It must be pointed out at this stage that Mr. Edwards was not the counsel who appeared at the trial of the action, and his approach on the hearing of this appeal was restricted by the way in which the claim was formulated and presented by the evidence at the trial. And though the record notes this finding by the learned trial judge in his oral judgement—"contract subject to conditions precedent, i.e., raising of mortgage (p. 38)", the transcript of the oral judgement at p. 68 of the record notes the learned trial judge as saying that the agreement "was a sale subject to the raising of a loan, a conditional sale. It was essential that the plaintiff must show he had complied with the condition. Has he shown that he had raised the mortgage? If so, at what time did he do so?"

We are of the view that this indicates an enquiry which had to be made in the light of all the facts and circumstances of the case. Those remarks must not, and cannot be interpreted to refer to an enquiry as to the conditionality of the agreement for sale, so as to effectively destroy the fundamental validity of that agreement. The plaintiffs were to raise the mortgage, and they were not dependent on any undertaking by the defendant to assist their efforts. We see nothing in the agreement for sale which would indicate that there was mutual acceptance that the parties "minds were such that if a mortgage was not raised the agreement for sale would be aborted, and the parties would revert to their position before the agreement."

The assertion that the contract was void for uncertainty is, of course, inconsistent with the plaintiffs/appellants' claim to enforce it specifically, and his claim that it terminated the landlord and tenant relationship that previously existed and so relieved him of the obligation to pay rent. It is also inconsistent with paragraph three of the plaintiffs' reply. It was tacitly abandoned below.

Proposition two arose out of the declaration by the judge, "I confirm that the amount in the defendant's hands paid by the plaintiffs as deposits have been forfeited to the defendant." Mr. Edwards submitted that this was wrong particularly with respect to the sum of $4,500.00. He was allowed to amend the statement of claim as was done in *Howe v. Smith* (1884) 27 Ch. D. 89. so that the claim would now be for damages for breach of contract, or in the alternative, for the return of the moneys paid by the plaintiffs. In granting

this application we were of the view that the questions of forfeiture of the deposit and what was the deposit, were inextricably bound up with the interpretation of the document, the agreement for sale. And notwithstanding that this court has upheld the refusal of the trial judge to order specific performance, we had to give serious consideration to whether any moneys paid should be refunded. To this end, the remarks of Cotton, L.J., in *Howe v. Smith* at p. 95 are pertinent. He said:

> "I do not say that in all cases where this court would refuse specific performance, the vendor ought to be entitled to retain the deposit. It may well be that there may be circumstances which justify the court in declining, and which would require the court, according to its ordinary rules, to refuse to order specific performance, in which it could not be said that the purchaser had repudiated the contract or that he had actively put an end to it so as to enable the vendor to retain the deposit. In order to enable a vendor so to act, in my opinion, there must be acts on the part of the purchaser which not only amount to delay insufficient to deprive him of the equitable remedy of specific performance but which would make his contract amount to a repudiation on his part of the contract."

Bowen, L.J. recognizing the importance of paying attention to the contract in question dealt with the argument for the purchaser that "the rule is different when the purchaser does not insist on abandoning his contract, but on the contrary, is desirous at the moment he appears before the court, of completing it, and therefore neither the principle nor the decisions apply and that this is not a case where the purchaser is receding from the contract, but on the contrary he is seeking to enforce it." The lord Justice met that argument in these words:

> "It seems to me the answer to that argument is that although in terms in a case like the present the purchaser may appear to be insisting on his contract, in reality he has so conducted himself under it as to have refused, and has given the other side the right to say that he has refused performance. He may look as if he wishes to perform, but in reality he has put it out of his power to do so."

Those words are an apt description of the behaviour of the plaintiffs/appellants in this case. It cannot be seriously contended that since the contract went off because of their failure, the deposit of $200.00 on the strength of the authorities is not forfeited. Of more moment is to determine whether the same fate befalls the sum of $4,500 which was described as "a further deposit".

In our view, this contract description does not by itself make it a deposit in the sense in which that word is understood in the authorities (see *Soper v. Arnold* (1889) 14 Appeal Cases 429, and *Howe v. Smith* (1894) 27 Ch. D. 89).

> "The mere fact that a payment under a contract is called a "deposit" does not itself exclude the jurisdiction of the court to relieve a purchaser, in appropriate circumstances from forfeiture of the amount so paid. If the contract provides for the payment of an unreasonably large sum under the guise of a deposit, the court may go behind the language of the contract and consider the true nature of such a stipulation and if it concludes that the amount of the deposit is out of all proportion to the damage which the vendor is likely to suffer by reason of the purchaser's breach of contract and that having regard to all the cases it would be unconscionable for the vendor to retain it, relief will be given."

This passage from Voumard, "The sale of land" (2nd ed.) at p. 517 is supported by among the cases cited, the case of *Stockloser v. Johnson* [1954] 1 Q.B. 476. This case involved a contract for sale of machinery in which the purchase price was payable by installments. The question raised was whether on the default of the purchaser in paying the

installments, and the consequent rescission by the vendor the purchaser lost those installments which he had already paid by virtue of an express forfeiture clause to that effect. The Court of Appeal (Somervell, Denning and Romer, L.JJ.) held that the purchaser was not entitled to any relief. Somervell, L.J. and Romer, L.JJ. were of the view that on the true construction of the agreements involved the installments were not recoverable on the ground that the forfeiture clauses did not operate as penalty clauses. Interestingly enough at pp. 489-490 Denning L.J. summarised the applicable law to be this:

> "(1) When there is no forfeiture clause. If money is handed over in part payment of the purchase price and then the buyer makes default as to the balance, then so long as the seller keeps the contract open and available for performance the buyer cannot recover the money but once the seller rescinds the contract or treats it as at an end owing to the buyer's default, then the buyer is entitled to recover his money by action at law, subject to a cross-claim by the seller for damages:
> See *Palmer v. Temple* (1839) 9 Ad & Fd 508, *Mayson v. Clouet* [1924] A.C. 980; 40 T.L.R. 679; *Dies v. British and International Co.* [1939] 1 K.B. 724; Williams on Vendor and Purchaser, 4th ed. p. 1006 (2). But where there is a forfeiture clause or the money is expressly paid as a deposit (which is equivalent to a forfeiture clause), then the buyer who is in default cannot recover the money at all. He may, however, have a remedy in equity, for despite the express stipulation in the contract, equity can relieve the buyer from forfeiture of the money and order the seller to repay it on such terms as the court thinks fit. That is, I think, shown clearly by the decision of the Privy Council in *Steedman v. Drinkle* [1916] A.C. 275 where the Board consisted of a strong three, Viscount Haldane, Lord Parker and Lord Summer."

There contrasting situations show the breadth of the court's jurisdiction. In the instant case, there was no forfeiture clause. In *Stockloser v. Johnson*, the forfeiture clause was express, and the seller sought to keep money which had been paid to him "in part payment of the purchase price and as soon as it was paid, it belonged to him" (p. 489), per Denning L.J. who thereafter rehearsed the arguments by counsel for the vendor:

> "On the other hand, Mr. Benny urged us to hold that the buyer could only recover the money if he was able and willing to perform the contract, and for this purpose he ought to pay or offer to pay the installments as they become due, and he relied on *Mussen v. Van Diemen's Land* [1938] Ch. 253.

I think that this contention goes too far in the opposite direction. If the buyer was seeking to reestablish the contract, he would, of course, have to pay up the arrears and to show himself willing to perform the contract in future, just as a lessee, who had suffered forfeiture, has to when he seeks to reestablish the lease. So also, if the buyer were seeking specific performance he would have to show himself able and willing to perform his part. But the buyer's object here is not to reestablish the contract. It is to get his money back, and to do this I do not think it is necessary for him to go so far as to show that he is ready and willing to perform the contract."

Even where there is a forfeiture clause, the court can invoke its jurisdiction in a proper jurisdiction as "an equity of restitution". Denning, L.J. opined that this equity of restitution is to be tested not at the time of the contract, but by the conditions existing when it is invoked. This would arise in the situation set out by him at p. 491:

> "Again suppose that a vendor of property in lieu of the usual 10 per cent deposit stipulates for an initial payment of 50 per cent of the price as the deposit and a part payment, and later when the purchaser fails to complete the vendor resells the property at a profit and in addition claims to forfeit the 50 per cent deposit. Surely the court will relieve against the forfeiture. The vendor cannot forestall this equity by describing an extravagant sum as a deposit, any more than by calling it liquidated damages."

Sommervell, L.J. expressed the view that readiness and willingness to produce the balance of purchase money is not a condition precedent for relief on the question of the refund of prepayments.

In *MacDonald v. Dennys Lascelles Ltd.* (1933) 48 C.L.R. 457, Dixon, J. made some pertinent remarks on the right of a purchaser who is in default on a contract for the sale of land to recover the installment of purchase money which he has paid to the vendor before the latter has rescinded the contract. The action involved the resale of land, subsequent to an earlier agreement by the first purchaser to sell land. The contract of resale contained no provision for the retention or forfeiture of installments. The application of general principles to the very special facts of this case is concisely stated in the headnote which reads:

> "Installments of purchase money, other than the deposit payable, upon a sale of land cannot be retained or recovered by the vendor after the contract has been determined by his election to treat the purchaser's default as a discharge. In such a case the contract is determined only in so far as it is executory. And the party in default remains liable for damages for his breach; nevertheless the contract being at an end, installments which are prepayments on account of the price of the land become repayable at law, in the absence of a stipulation to the contrary, and equity relieves against such a stipulation."

A detailed quotation of Starke, J. and Dixon, J. manifests the jurisdiction of the Courts in Australia. First from the judgement of Starke, J. at pp. 469-471

> "I do not stay to consider whether the purchasers had any right so rescind the contract for their vendors and Dennys Lascelles Ltd. accepted the renunciation and acted as if the contract were ended. The recission of the contract, however, did not operate to extinguish it ab initio, but in futuro, so as to discharge obligations under it unperformed (Salmond and Winfield, Law of Contracts, (1927), p. 320). It is of no little importance in the present case to ascertain the consequences of the recission. The precise terms of the contract often determine those consequences. But apart from any special stipulations of the contract, I apprehend that a purchaser who is not himself in default is discharged from further performance of the contract and is entitled to recover any money paid or property transferred by him thereunder, he is entitled to take proceedings in equity to assert his right and secure restitution, or to sue at law *Palmer v. Temple* (1839) 9 Ad & Fd 508; 112 E.R. 1304; *Mayson v. Clouet* [1924] A.C. 980; Williams on Vendor and Purchaser, 3rd ed. Vol. 2 (1923) Vol. 2, pp. 1012, 1013). On the other hand, a vendor who is not himself in default is discharged from further performance of the contract, and is entitled to the return of his land, the subject matter of the contract, or his interest therein, but is bound to restore any moneys paid or property transferred to him thereunder; the vendor cannot have the land and its value too (*Laird v. Pim* (1841) 7 M & W 474 at p. 478 per Parke B., 151 E.R. 852, at p. 854). A deposit paid as security for the completion of the contract stands perhaps in an exceptional position, because the intent of the parties is that if the contract goes off by the default of the purchaser, the vendor shall retain it (*Howe v. Smith* (1884) 27 Ch. D. 89). On the other hand, stipulations providing for forfeiture of installments of purchase money in case of default have been treated as in the nature of a penalty and relief given against them (In re *Dagenham (Thames) Dock Co. Ex parte Hulse* (1837) L.R. 8 Ch. 1022; *Kilmer v. British Columbia Orchard Lands Ltd.* [1913] A.C. 319 and cf. *Palmer v. Moore* [1950] A.C. 293. Relief against forfeiture is no doubt an equitable remedy. But, in the case of a recission of a contract of sale of land by a vendor, moneys paid under the contract by a purchaser in default that are not forfeited can be recovered at law. That is recognized, I think in *Palmer v. Temple* and *Ocklenden v. Henly* (1858) E.B. & E. 485, 120.E.R. 590; and, if it be not a legal remedy, still the equitable remedy is clear and well established. Consequently, after the recission of the contract about June 1931, an action or proceeding for the recovery of the installment of $1,000 the payment of which had been extended to 24th January, 1931, and of the balance of the purchase money, could not have succeeded, for the vendors were not entitled to both the land (or their interest therein) and the purchase money. The assignee of the vendors stands in no better position for it accepted or acted upon the renunciation of the contract as well as the vendors; it cannot be affirmed that it was, after the date of the purchaser's recission ever be ready or willing to carry out the contract or make title to the property sold."

When he came to examine the nature of the liability incurred by a purchaser under an agreement to pay before conveyance, part of the purchase money, and of the responsibility of the vendor to repay installments so prepaid when the contract comes to an end and no conveyance is to be made, Dixon, J. dealt specifically with a contract which stipulates for payment of part of the purchase money in advance, the purchaser relying only on the vendor's promise to give him a conveyance, and said:

> ". . . the vendor is entitled to enforce payment before the time has arrived for conveying the land, yet his title to retain the money has been considered not to be absolute but conditional upon the subsequent completion of the contract. 'The very idea of payment falls to the ground when both have treated the bargain as at an end; and from the moment the vendor holds the money advanced to the use of the purchaser.' (*Palmer v. Temple*). In *Laird v. Pim* Parke B. says 'It is clear he cannot have the land and its value too'; the case however was one in which conveyance and payment were contemporaneous conditions (see *Laird v. Pim*). It is now beyond question that installments already paid may be recovered by a defaulting purchaser when the vendor elects to discharge the contract (*Mayson v. Clouet*). Although the parties might by express agreement give the vendor an absolute right at law to retain the installments in the event of the contract going off, yet in equity such a contract is considered to involve a forfeiture from which the purchaser is entitled to be relieved (see the judgement of Long Innes J. in *Pitt v. Curotta* (1931) 31 S.R. (N.S.W.) 477 at pp. 480-482. The view adopted in *In re Dagenham (Thames) Dock Co. Ex parte Hulse* seems to have been the relief that should be granted, not against the forfeiture of the installments, but against "the forfeiture of the estate under a contract which involved the retention of the purchase money; and this may have been the ground upon which Lord Moulton proceeded in *Kilmer v. British Columbia Orchard Lands Ltd.* notwithstanding the explanation of that case given in *Steedman v. Drinkle* [1916] 1 A.C. 275 and *Brickles v. Snell* [1916] 2 A.C. 599. However, these cases established the purchaser's right to recover the installments, other than the deposit although the contract is not carried into execution. If a vendor under a contract containing a power to forfeit installments at first determined the contract and retained the installments but afterwards resiled from his former election to treat the contract as discharged and insisted that if the purchaser was unwilling to forfeit his installments according to the tenor of the agreement, he should at least carry out the sale, perhaps the purchaser as a term of equitable relief against forfeiture would be required to carry out his contract. But where there is no express agreement excluding the implication made at law, by which the installments became payable upon the discharge of the obligation to convey and the purchaser has a legal right to the return of the purchase money already paid which makes it needless to resort to equity and submit to equity as a condition of obtaining relief, the vendor appears to be unable to deduct from the amount the installments the amount of his loss occasioned by the purchaser's abandonment of the contract. A vendor may, of course counter claim for

damages in the action in which the purchaser seeks to recover the installments. In the present case, the contract of resale contains no provision for the retention or forfeiture of the installments. If, therefore, the installment originally due on 24th January 1930 had been paid by the purchasers to the vendors, they would, in my opinion, have been entitled to recover it from the vendors. This right so to recover it is legal and not equitable. It arises out of the nature of the contract itself. This would be so even if the second contract was rescinded by the vendors upon the purchasers' default."

In the instant case, the matter of the forfeiture of the sum of $4,500.00 must be looked at in the light of the contract and the conduct of the parties to see whether that sum is forfeitable.

While the effect that plaintiffs/appellants were willing though not ready, i.e., not able, to complete the purchase, is an important factor when the court has to decide whether or not to grant specific performance, their not being able does not deprive them of any right of recovering that sum. Indeed, several letters from Mr. McFarlane dealing with this sum show clearly that at no time was it ever treated as a mere deposit. Initially, after the repudiation of the agreement by the inability of the purchasers to complete, Mr. McFarlane wrote that "the vendor will be refunding the amount of $4,500.00 by the 31st instant and thereafter, he will resell the premises." (Letter dated 11th October, 1971). In his letter of the 23rd January, 1973, he states that Mr. Clarke is prepared to make a refund of $2,500.00 which sum is the balance remaining after deducting $2,000.00, rent accrued, from the item "by cash of your account purchase $4,500). As late as 10th May, 1974, Mr. McFarlane writes to Messrs Williams and Williams: "The amount paid on the contract amounting to $4,500.00 has been appropriated to rent as for the period 30th June, 1973 to 31st May 1974 and my cheque in the sum of $900 being the remainder is herewith." This is the letter where he has stated emphatically that the contract is at an end, "by reason of the long delays and the fact that the special condition was not satisfied by date of completion." It can be said without disrespect that this sum of $4,500.00 is wholly disproportionate as a deposit to the purchase money.

In his note of the oral judgement, the learned trial judge states: "Paragraph 12 of counterclaim not denied. Defendant therefore entitled to judgement as to rent $3,900 and use and occupation $2,400 = $6,300. Interest allowed at 10 per cent on $41,800 from 1st June 1974 as defendant did have in hand $4,500 until 1974 May." This of course is not as positive as "I confirm that the amount in the defendant's hands paid by the plaintiffs as deposits have been forfeited by the defendant." On the reasoning which our judgement has broached the use of the words "forfeited" and "deposits" are wholly inappropriate to the amount of $4,500.00. In these circumstances it is not simply a matter of set-off would be eminently practicable. It may be that the question of whether the sum of $4,500.00 was subject to forfeiture was not clearly in mind, and it was simply dealt with as a mere matter of settlement of accounts, upon a set-off. Strictly speaking, as was pointed out before, it is a separate head of claim which has to be considered, independently of the question of specific performance.

The last matter which was fully argued before us was the assertion by the plaintiffs/appellants that when the agreement for sale was signed and they remained in possession, the tenancy under which they previously held was determined. Carey, J. had found that the signing of the agreement did not terminate the tenancy. He pointed out that the agreement makes no mention of interest on the outstanding purchase price. There was nothing to show that the tenancy had ended. Mr. Edwards was at pains to stress that this court should give due weight to the fact that the plaintiffs/appellants were in possession after the signing of the agreement. They had not paid any rent, nor was any rent demanded by the vendor from the commencement of the agreement for sale. It has been already pointed out that the first

time any mention of rent was made was by letter dated 23rd January 1973, nearly two years after the date of the agreement for sale. The period for which rent was then claimed was from the month of June 1971 to the month of January 1973, thereby apparently giving a moratorium of five months on rent between February 1971 and June 1971.

Mr. Hoilett, the plaintiff/appellant, was of the view that he was entitled to live without paying rent and he admitted that he wondered at paying installments on the purchase money and rent at the same time; so he refused to pay rent. So too, Mr. Michael Williams reasoned that there was no agreement that the plaintiff should continue to be tenants on signing of the agreement. Because the plaintiffs were in possession as tenants he said they should pay interest or alternatively, a reasonable sum for use and occupation. Admittedly, there was no provision in the agreement for payment of interest on the purchase money.

This is the background of fact against which the position of the purchaser as tenants in possession should be considered. It is convenient to start this discussion with the case of *Doe D. Gray v. Stanion* (1836) 1 M & W 695; 150 E.R. 614 which flowed from a demand for possession of land the subject of a contract of sale by a landlord to a tenant from year to year. In the landlord's action for ejectment it was contended that the tenancy from year to year was still subsisting and a notice to quit ought to have been given to determine it. It was held that the tenancy from year to year was not determined by the defendant entering into the agreement for sale. Parke, B. commented as follows at p. 292:

". . . there is no doubt that if there be an agreement to purchase, and the intended purchaser is thereupon let into possession, such possession is lawful, and amounts at law *strictly* speaking, to a bare tenancy at will: *Right d. Lewis v. Beard* (1811) 13 East 210, 104 E.R. 350. It is not, however, the agreement but the letting into possession that creates such tenancy, for the person suffered so to occupy cannot on the one hand, be considered as a trespasser when he enters, and on the other hand cannot have more than the interest of the tenant at will the lowest estate known to the law. But where the tenant is already in possession as tenant from year to year, it must depend upon the intention of the parties to be collected from the agreement, whether a new tenancy at will is created or to, and at what time. In this case if the true construction of the agreement be that from the date of it (or any other certain time) the defendant was absolutely to become a debtor for the purchase money, paying interest on it, and to cease to pay rent as tenant from year to year, a tenancy at will would probably be created at that time, and the acceptance of such new demise at will would then operate as a surrender of the interest from year to year by operation of law. If the agreement is conditional to purchase only provided a good title should be made out, and to pay the purchase money when that should have been done, there is no room for implying an agreement to hold as tenant at will in the meantime, the effect of which would be absolutely to surrender the existing term while it would be uncertain whether the purchase would be completed or not. This is strongly illustrated by supporting such an agreement to be made by a value beyond the reserved rent, in which case it would at once strike any one as impossible to give effect to the agreement. In such a case, no one would doubt but that the intention was that the lease should not be given up unless the purchase was completed."

The intention of the parties will then be the governing factor and must be interpreted by the court from the document which expresses the agreement of the parties. Indicators are the payment of interest, in lieu of rent and/or the express statement that the tenancy is terminated pending completion of the sale.

Such a positive situation arose in *Turner v. Watts* [1928] 97 L.J. K.B. 403; 138 L.T. 680. This was an action for recovery of possession of a house, arrears of rent and mesne profits. The plaintiff was the owner of a house of which the defendant was a weekly tenant.

The Rent Restriction Act applied to this house. The landlord and the tenant entered into a written agreement for sale of the house to the sitting tenant. Apart from the agreement to accept a smaller sum in satisfaction of a larger sum of money owing for rent, it was also agreed that until arrangements could be made for the transfer of certain mortgages from the plaintiff to the defendant, the plaintiff should remain in absolute ownership of the house, and that the defendant should pay interest from a certain date until the completion of the conveyance. The vendor rescinded the contract under a power in the document. It was held that the effect of the purchase agreement was to determine the weekly tenancy, and to substitute therefor, either a licence or a tenancy at will, which was determined when the vendor rescinded. Contractually, the defendant had no right to resist the claim for possession. Nor was he entitled to rely on the protection of the Rent Restriction Act, because during the currency of the purchase agreement the defendant remained in possession not as a statutory tenant, but under the contract either as a licensee or a tenant at will. The tenancy, it was held, was one at no rent.

Scrutton, L.J., described the case as an odd and complicated one, but all the members of the court (Scrutton, Sankey, Russell, L.JJ.) were of the view that the effect of the agreement was to surrender the tenancy held by the plaintiff from the defendant.

The distinction between *Doe d. Gray v. Stanton* and *Watts v. Turner* was pointed out by Sommervell, L.J., when he delivered the judgement of the Court of Appeal in *Leek & Moorlands Building Society v. Clark* [1952] 2 All E.R. 492 at pp. 493A-494A: (1952) 2 Q.B. 788 at 791:

> "Leaving aside for the moment the question of the tenancy being joint, it was submitted for the plaintiffs on the authority of *Turner v. Watts* that an agreement by a tenant to purchase the reversion operates as a termination of the tenancy. That case we think turned on the terms of the agreement and in particular, a provision that interest should accrue on the purchase price from the date of the agreement. In the absence of any provision express or to be implied an agreement to purchase would not so operate: *Doe d. Gray v. Stanton*."

This understanding of the legal position where a sitting tenant enters into an agreement to purchase the land which he occupies as a tenant from the landlord was emphasized by the Court of Appeal (Sir R. Evershed, M.R., Denning and Romer, L.JJ.) in *Nightingale v. Courtney* [1954] 1 All E.R. 362; [1954] 1 Q.B. 399. There was a contract by a statutory tenant to purchase the house he occupied was under consideration. There was no provision in the contract for payment of interest on the purchase money until completion. After the date of the contract, the tenant continued to occupy the flat although he paid no rent. When he failed to complete although extensions of time were given, the landlord treated the contract as repudiated, rescinded it and the deposit was forfeited.

It is interesting to note the remarks of the judges when considering the issue raised whether the flat was sold subject to the existing tenancy of the purchaser. First, Sir R. Evershed M.R. said at page 365c [405]:

> "Counsel for the plaintiff contended that in light of the decision in *Turner v. Watts* (when there was an agreement by a sitting tenant to purchase the reversion), that circumstance is, at any rate, prima facie evidence of a surrender by operation of law, at least in the sense of something in the contract for negativing such a result. I hope I have correctly apprehended the submission. I am bound to say I that reject it. In *Turner v. Watts* the contract for sale contained a provision for the payment of interest on the purchase price from the date of the contract until completion, and there was an express agreement on the defendant tenant's part to maintain and keep the premises in repair, pending completion and to pay outgoings . . .

In my judgement, that case turned on the particular terms of the particular contract. More especially, it turned on the circumstances that (see Slater, J. observed) the form of the contract negatived the continued payment of rent and provided in lieu for an obligation on the purchaser's part to pay interest and to undertake such matters as repairs, insurance and maintenance. Thus it was, as I think, an exception to what would be the ordinary rule, where a sitting tenant buys the reversion. That ordinary rule was established many years ago in *Doe d. Gray v. Stanton* decided in 1839. In FOA's Landlord and Tenant, 7th ed. P. 619 it is stated:

> 'When a tenant entered into an agreement to purchase the reversion, it was held that such agreement being impliedly conditional on a good title being made did not operate as a surrender . . .'
>
> I respectfully agree with that view [of *Watts v. Turner*] expressed by Somervell L.J. in *Leek & Moorlands v. Clark* which is indeed bringing in any case on this court."

According to Denning, L.J. at p. 367 E-G [408]

> "When a statutory tenant has entered into a contract to purchase a house but has not yet completed the purchase, then in the interval pending the completion he does not automatically cease to be a statutory tenant. It all depends on the agreement between the parties. If it is agreed between them that the tenant shall no longer pay rent, but only pay interest on the purchase money, that goes a good way to show that he becomes in law a licensee and is not protected by the Rent Restriction Acts: (see *Turner v. Watts*). But if nothing is agreed about his position in the interval then in law he remains a statutory tenant until completion. In that case, if he cannot ultimately find the purchase money, he will, no doubt, forfeit his deposit, but he does not lose his statutory tenancy as well."

Nor does a tenant when he "enters into a contract with his landlord to purchase the reversion, acquire an immediate equitable interest in the demised premises which is inconsistent with the view that the tenancy continues as a tenancy, and by operation of law according to the lease is determined by surrender." Romer, L.J. discountenanced such statement of the law expressing himself as:

> "Quite satisfied that there is no such presumption at all. Certainly there is not where the tenant's lease is a contractual one, as was pointed out by Sommervell, L.J. in the passage in *Leek & Moorlands Building Society v. Clark* to which Sir Raymond Evershed, M.R. has referred, and I see no reason why the position should be in any way different where the tenancy is a statutory tenancy. It seems to me that the question of surrender or no surrender is one of the intention of the parties to be discovered from the terms of the contract."

If the arguments for termination of tenancy or lease on the mere signing of an agreement for sale were accepted, it would mean that the tenant purchaser would be able to have the benefit of paying nothing for his occupation and use of the house pending completion, no matter how long completion took, and even where the delay was due to his fault and there were no provisions for interest on the unpaid purchase price. In *Nightingale v. Courtney*, Sir Raymond Evershed M.R., said at p. 367b-c:

> "It would certainly be a very surprising thing if the effect of the contract either was or was ever thought to be such that the defendant could go on from the date of the contract to completion (which might be, as in fact, it was postponed so as to become some time after the date of the contract) without obligation to pay anything whatever."

Denning, L.J. did not think it likely that the parties -

> ". . . intended that the tenant should have even for a short period complete freedom to stay in the house without paying either rent or interest. The more likely interpretation

of the facts is that the tenant was to be liable for rent in the interval, and that it was not to be paid in cash but included in the concluded amount."

And Romer, L.J. put in these words at page 368:

". . . If there was a surrender which was to operate at once, then the plaintiff during the period prior to completion, would get nothing in return for the defendant's occupation of the property. She would get no rent, because ex hypothesi, the lease had determined, and she would get no interest on the purchase money because there was no contractual provision which provided for it . . ."

Mr. Edwards put a bold front on it when he submitted that those cases were helpful to him. As he saw it, in the particular circumstances of this case, the intention of the parties as well as their conduct show the interpretation placed upon the possession clause. At the same time, he argued the clause "purchasers already in possession as tenants" might mean that they are so to continue; it may also mean that possession need not be given to them because they are already in possession. This he said is indicated by the letter from Mr. McFarlane dated 26th January 1973. This letter did not demand rent. According to Mr. Edwards, this shows that the tenancy was terminated by the agreement for sale. If the agreement had gone through no rent would have been payable. What these submissions fail to accommodate is the realization that there must be indications in the contract of sale which outweigh the ordinary rule that pending completion the tenancy continues. Whatever the indications they must be referable to the right of occupation being converted to that of a purchaser who has been let into possession and not to that of a purchaser continuing in occupation as a tenant. In *Nightingale v. Courtney* there was the express reservation of the tenancy. It was the argument of Mr. Edwards that the non-demand for rent for the months of February 1971 to May 1971 is conduct which adequately points to the parties having no contemplation of payment of rent; and more importantly, the question was raised whether the vendor had by his conduct led the purchasers to believe that no rent should be paid. This question finds a complete answer in the observations of Denning, L.J.:

"The judge inferred an agreement from the conduct of the parties. He relied on the fact that after the contract of purchase the tenant did not pay rent, and that the landlord's agent in his rent book closed the rent account and the tenant himself paid rates. Those are points well worthy of consideration, but to my mind they are overpowered by the fact that there was nothing in this agreement compelling the tenant to pay interest on the purchase money in the interval before the date fixed for completion."

This view accords in some measure with the refusal of Sir Raymond Evershed to resolve the doubt on the basis of the actual behaviour of the parties.

So that Mr. Edwards' reliance on the landlord/vendor's failure to demand rent for the four or five months as showing the termination of the lease is not well-founded. Merely lying by and witnessing the breach of the condition of non-payment of rent is not a waiver of that breach by the tenant. Some positive act must be done so that it can be said that the defendant has indicated that he does not regard the relationship of landlord and tenant as still existing. Indeed, by demanding rent the defendant communicated to the plaintiffs/appellants that he treated the tenancy as continuing, thus acting inconsistently with any notion that the tenancy in the circumstances of this case had been determined by the agreement for sale. It must be marked further that Mr. Williams' thinking on this point was belated and it is not inapposite to express the view that the time when the agreement for sale was entered into was the appropriate point at which the matter of the real character and position of the tenants should have been defined. If this had been done, it is inconceivable that the plaintiffs/appellants would have been free to imagine that they were quit of paying anything

whatever between the agreement for sale and the completion, no matter how long this took, even if it never took place at all.

The foregoing are the reasons why this court on the 30th day of July, 1982 gave judgement dismissing the appeal against the judge's refusal of specific performance on the claim with costs to the respondent. In that judgement, we allowed the appeal by the plaintiffs/appellants on the amended statement of claim to the extent that we gave judgement for the plaintiffs/appellants in the sum of $4,500.00 being the amount paid by them on the agreement for sale, with costs (excluding the initial deposit of $200.00 which is forfeited). Interest is awarded on the sum of $4,500.00 at 10%. The appeal against the judgement in the counter-claim was dismissed and the judgement awarding the sum of $3,900.00 for rent and the sum of $2,400 for use and occupation is affirmed. The judgement thereon was varied by the award of interest on the sum of $6,300.00 at the rate of 10%. Possession to be given up on the 31st October, 1982. It should be pointed out that the total sum of $6,300 accrued in respect of the period up to the date of judgement in the trial. Any adjustments for periods thereafter may be a matter for further inquiry. Liberty to apply.

SYLVIA ELOISE COE AND VERNIE SEMMES COE (ADMINISTRATORS ESTATE CLARICE NINA COE) *v.* BERKLEY BUSH

(COURT OF APPEAL—CAYMAN ISLAND APPEAL (Zacca, P., Carey, and Ross, JJ.A.) November 30, December 1 and 2, 1982 and June 6, 1983]

Landlord and Tenant—Cayman Islands—Lease for 30 years—Option to renew—Whether option validly exercised.

In 1951 the respondent executed a 30 year lease between himself and the lessor, now deceased, concerning land known as George Town Central, Block 14 BG parcel 28. The lease contained a clause granting to the lessee an option to renew the lease. The lessor (deceased) transferred his interest to his wife in 1956 and she in turn devised it by her will to her relatives. Administration of her estate was granted to the appellants. Prior to the 2nd of June 1981 the respondent wrote to the appellants indicating his desire to discuss the renewal of his lease and a probable purchase of the land. The appellants did not respond. He also made several telephone calls during which he was assured that a meeting would be arranged. The respondent sent the appellants a cheque representing a month's rent. The appellants' Attorney-at-Law returned the cheque under cover of letter which stated that the relationship of landlord and tenant no longer existed. They demanded the respondent give up possession of the premises. The appellants further filed a writ against the respondent claiming an order for immediate possession.

Respondent claimed to have exercised the option. At the trial the learned judge agreed with the respondent. The appellants appealed.

Held: (i) The law in Cayman is that an option unlimited as to time for its exercise, must, if it is to be regarded as validly exercised, be exercised prior to the expiry of the lease of which it forms part of so long as the relationship of landlord and tenant continues.