J A M A I C A

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL No. 44/84

BEFORE: The Hon. Mr. Justice Rowe, President
The Hon. Mr. Justice White, J.A.
The Hon. Mr. Justice Campbell, J.A.

BETWEEN	-	MANCHESTER BEVERAGES LIMITED	- DEFENDANT/ APPELLANT
AND	-	VINCENT WILLIAMS	- PLAINTIFF/ RESPONDENT

Berthan Macaulay, Q.C., Allan Deans and Mrs. M. Macaulay instructed by O.G. Harding & Co. for appellant

R.N.A. Henriques, Q.C., and Allan Wood instructed by Douglas Brandon of Livingston, Alexander & Levy for respondent

February 26, 27; March 10;
& June 2, 1986

ROWE, P.:

The legal profession in Jamaica has not adopted any comprehensive standard form of agreement for the sale of land in Jamaica. When the appellant wished to sell and the respondent agreed to purchase a property called Security, part of Mount Nelson, Mandeville, the directors of the appellant company and the respondent went along to Mr. John McFarlane an attorney-at-law in Mandeville, and he acting for both parties, drew up an agreement for sale in which Mr. McFarlane accepted the carriage of sale. A document of utmost simplicity on a single sheet of paper has spawned hundreds of pages and tens of thousands of words in interpretation. Probably the conveyancing branch of the

legal profession will one day conclude that the more acceptable practice is for seller and purchaser to be represented by separate attorneys.

This agreement for sale provided that possession be given to the purchaser on July 1, 1979, only 4 days after the signing of the agreement. At the time of the agreement for sale a house stood on the land and there was a special agreement that the vendor would repair the roof at his sole expense and that the purchaser would accept the premises with an existing tenant. Consideration for the purchase was expressed to be 80,000 Jamaican dollars payable as to $30,000 on the execution of the agreement and the balance within twelve months from the date thereof. To that extent the actual date for completion was flexible, allowing the purchaser to take advantage of a full twelve months if he was so minded. The balance of purchase price was not paid up to June 26, 1980, and there is documentary evidence in a letter from the appellant's agent of November 20, 1980 contending that the time for payment was extended by three months to the end of September, 1980. However, an allegation was made by the respondent in his reply to the defence and counter-claim, and repeated in evidence, that the time for payment was extended indefinitely on his payment to the appellant of a sum of 200 Canadian dollars monthly, pending the sale by him of his house in Canada. The respondent maintained that as a result of an oral agreement with the appellant's agent, he paid a sum of 10,000 Canadian dollars on June 19, 1980, towards the balance of the purchase price.

An approach was made by the respondent through his attorney-at-Law to the Jamaica National Building Society for a mortgage loan with which to pay some portion of the outstanding purchase price. To facilitate such a loan, the

appellant handed the title for the Security property to Mr. McFarlane. Correspondence between the Building Society and the respondent reveal that the respondent was both dilatory and negligent in the completion of the application for the loan, and before the processing could be concluded, the appellant took the unfriendly step of advising the Building Society that the proposed sale had been aborted. That led the Building Society to discontinue its very advanced negotiations with the respondent, pending the amicable settlement of the matter between the vendor and purchaser. This was in summary the effect of the letter of February 11, 1981, from the Jamaica National Building Society to the respondent, copied to Mr. McFarlane. An earlier letter of the Building Society to Mr. McFarlane of January 12, 1981 made it clear that there was then no real difficulty in the way of the Society granting the application for the mortgage loan.

Four important pieces of correspondence must be examined. A letter from the appellant to the respondent of November 20, 1980, was in these terms:

> " 11/20/80.
>
> Vincent,
>
> When we last met we agreed on an extension of three months - (July, Aug. & Sept.) for a fee which you have paid along with amounts advanced to you.
>
> You have not informed me as to what have happened nor what may be expected so as to determine if a further extension may be considered.
>
> Your cheque dated 11/11/80 arrived only today which would be in respect of October, if an extension beyond the September deadline had been agreed to. Such fees are payable in advance. The cheque is enclosed.

"In your best interest you should let me hear from you immediately, advising how soon the deal may be closed, and the factors on which consideration may be given to grant a further extension. The last scale of fee will apply but must be up to date for any proposal to be considered.

It is needless to repeat how anxious I am to finalize this transaction, hence I look forward to hearing from you by return mail or phone.

Same,
ALVIN. "

About this letter, the respondent said in evidence that Alvin Chin, managing director of the appellant company had never at any time made any advance to him as was referred to in the first paragraph. Chin gave no evidence to account for the basis upon which he accepted the respondent's cheque for C$10,000.00 on June 19, 1980.

Next came a letter of December 4, 1980, addressed to Attorney John McFarlane by the appellant, in which it was said inter alia:

" Re: Ourselves to Vincent Williams et al

Reference is made to an Agreement of Sale per subject which provided for a closing on June 30, 1980.

The Williams were subsequently expected to close by no later than September 30, 1980, failing which they should have made representations to seek a further extension.

In the absence of their making such representation and in view of the courtesies and patience already accorded at this point in time we consider and so declare that the Williams have forfeited and possession of the property must be reverted to us."

This was a letter rescinding the agreement of sale made on June 26, 1979.

Another letter written by the appellant to the respondent dated December 14, 1980, contained the statement that:

> "In any transaction such as this, time is of the essence and accordingly, you have forfeited. That is to say you have not kept your end of the agreement, therefore you have given up your right thereunder."

Mr. Williams denied receiving this letter.

Notwithstanding the letter to Mr. McFarlane of December 4, 1980, he continued efforts to conclude the mortgage loan. Other lawyers entered the picture and on January 17, 1981, O.G. Harding & Co. gave a formal notice of re-possession, in these terms:

> "TAKE NOTICE that Contract for Sale dated the 26th day of June, 1979 between you and Manchester Beverages Limited of No. 37 Mandeville Plaza Mandeville in the parish of Manchester for the purchase of Lots #24 and 25 part of Mount Nelson in the parish of Manchester being the lands registered at Volumes 1089 and 1101 Folios 503 and 437 respectively has expired by the effluxions time being the 25th day of June 1980 and TAKE FURTHER NOTICE that the registered proprietors have this day reentered the said lands and resume possession and will hold you liable for any loss, damages or waste which may have occurred during your possession and will take such steps as they may be advised for the forfeiture of any deposits paid under the Agreement and or for damages for breach of Contract and for the recovery of any loss incurred by reason of your delay defaults and failure to complete. "

The respondent declined to accept rescission of the agreement. After a series of explanatory letters, suit was filed on September 21, 1981, claiming specific performance and damages in addition to or in lieu of specific performance. The appellant relied on its letters of December 4, and 14, 1980, and notice of January 17, 1981, and denied that the respondent was entitled to any of the reliefs sought. As counter-claim the appellant claimed damages for breach of contract, recovery of possession and refund of mesne profits

at the rate of $400 per month with interest to the date of recovery of possession. In substance the reply to the defence and counter-claim focussed upon the allegation that no notice was given to the respondent making time of the essence of the contract, that the conduct of the appellant between June 19 and December 30, 1980, was such as to estop the appellant from claiming that the contract was not still valid and subsisting, that in the circumstances in which the respondent was put in possession of the property, he had no obligation to account for rent or mesne profits and that having regard to the substantial payments made by the respondent, he should be relieved from rescission or forfeiture.

Alexander J. (Ag.) decreed specific performance and ordered:

> "The defendant is ordered to transfer to the plaintiff the said parcels of land upon the plaintiff paying to the defendant the balance of the purchase price and such other sums incidental to the transfer of the said property.
>
> The balance of the purchase price will be that sum left after deducting the sum of $10,000.00 (Canadian) paid by the plaintiff to Alvin Chin by cheque dated 19th June, 1980, at the rate of exchange applicable in June, 1980, and all sums due are to be paid to the defendants within 90 days of the date of judgment.
>
> The vendor is therefore entitled to interest on the unpaid balance of the purchase price to date. The unpaid balance of the purchase price, on my findings, would amount to upwards of $35,000 (Ja.). Fixing a reasonable rate of interest to that unpaid balance could, in my view, earn to the vendor,a sum equivalent to the rental collected monthly, that is to say, a sum of $400.00 (Ja.).
>
> It therefore follows that the rental collected by vendor, could be equivalent to the sum the plaintiff would have been entitled to pay as interest on the unpaid balance of the purchase price. In these circumstances, there is, therefore, no award to the plaintiff for damages."

The appellant complained, and Mr. Macaulay argued, that it was incompetent for the court to interpret the terms of the written contract relating to the sale of land as having been varied unless the parties themselves had made such a subsequent variation in writing. He contended that under the agreement of June 26, 1979, a term of the contract was for payment to be made in Jamaican dollars and in no other currency. In what circumstances were the 10,000 Canadian dollars paid? The respondent said in evidence that he and Alvin Chin, the managing director of the appellant company went along to their attorney-at-Law, had a discussion and as a result came to an arrangement by which he would pay to Chin C$10,000 and Chin would give him a mortgage for the balance. This method of performance was entirely different from that contemplated in the agreement for sale, but what seems clear is that the parties did not have the intention thereby to cancel the basic agreement for the sale and purchase of the property. Had the respondent tendered to the appellant a bundle of Canadian dollars or as he did a certified cheque in Canadian currency without more, the question as to whether there was a later collateral agreement might not have arisen. But in the mind of the respondent when he made the payment in Canadian dollars he was expecting the payment to have a further effect upon the contract which would mean that he would not have the obligation to make other cash payments to the appellant as the appellant would be carrying the mortgage. In my view, this oral agreement was an attempt to vary the written contract for the sale of land and is unenforceable by virtue of the provisions of the Statute of Frauds. What Kelly, C.B. said in Tyers v. Rosedale and Ferryhill Iron Co. Ltd. [1873] L.R. Exchequer, 305, at p. 315 is applicable to this case:

> "It is now established that a new verbal contract cannot be substituted for the original contract, where by the Statute of Frauds such original contract must be in writing."

And so too, what Lord Atkinson said in British and Bonninghton's Ltd. v. North Western Cachar Tea Company Ltd. [1923] A.C. 48 at 56-57.

> "It will be observed that this parol agreement, not void but admittedly unenforceable at law under the fourth section of the Sale of Goods Act, 1893, only dealt with one of the several matters dealt with in the original agreement of purchase and sale concluded between the appellants and respondents - namely, the place of delivery. The seven other stipulations of the original agreement already mentioned were left untouched. The arbitrator has not found within what time this parol agreement was to be performed, nor has he found whether the parties entered into it with a view to substitute it for the original agreement (which would amount to a rescission by parol of the latter) or whether they entered into it with a view of merely varying by parol the original written agreement in respect of one of its terms, the place of delivery, which is the very thing that cannot legally be done: Morris v. Baron & Co. [1918] A.C.1.
>
> (Emphasis added).

Lord Sumner whose opinion followed that of Lord Atkinson, at page 68, said:

> "Not only did that agreement deal only with a portion of the whole subject matter of each of the original contracts, but it related only to the allowance to be paid for taking delivery at places in Scotland and not ex bonded warehouses in London. It did not include the cases where tea was at Plymouth or in an unbonded warehouse in London, to which the original contracts remained applicable, as they were applicable or had been allied to the large quantities of tea, about which we know nothing except that they were covered by the contracts.
>
> Under these circumstances it is plain that the three original contracts were not made an end of on May 12, 1920, but were meant at most to be subjected to a variation or alteration as to the manner and measure of performance of the original terms. The change does not go

> "to the very root of the original contracts nor is it inconsistent with them: it merely varied the written contract by parol, the situation of the parties being otherwise unchanged. I, therefore, think that the agreement de facto of May 12, 1920, has no effect on the original contracts, not having been reduced into writing and signed by the buyers, and not having superseded the original contracts."
>
> (Emphasis added).

Neither in the correspondence exhibited nor in the pleadings did the appellant acknowledge the payment by the respondent of the C$10,000. A consequence of this silence is that this sum cannot be credited to the purchase price of J$80,000.

I am in complete agreement with the learned trial judge who found that the appellant's letter of November 20, 1980, clearly treated the agreement for sale as being in force and capable of extension as to time of payment if suitable arrangements could be made. Time had not been made of the essence of the contract in the agreement of June 26, 1979, and in my opinion nothing contained in the correspondence up to December 4, 1980, either expressly or impliedly made time of the essence. Test the matter this way, could anyone say with any degree of certainty on which date either the appellant or the respondent expected the agreement to be closed? If the appellant was concerned about delay in concluding the contract, he had the most simple recourse. He ought to have put an end to the procrastination by setting a definite date beyond which the appellant was not prepared to go. This he did not do. The letter of December 4 expressed the final position of the appellant that the land was no longer for sale and that the contract was no longer of any validity. The respondent declined to accept the position adopted by the appellant and called for completion. Notice of re-possession of

January 17, 1981, proferred the reason as being that the contract had expired by effluxion of time on June 25, 1980. This allegation was contradictory of earlier correspondence from the appellant and especially of the letters of November 20, December 4 and December 14, 1980, emanating from the appellant. The notice of re-possession made no reference to time being of the essence of the contract.

Where in a contract for the sale of land time is not made of the essence of the contract expressly or by virtue of the nature of the property, or impliedly, from the surrounding circumstances, if a party fails to perform within the contractual time, the innocent party may not rescind the contract without giving reasonable notice to the offending party making time of the essence. This was the effect of the decision of the House of Lords in Stickney v. Keeble et al [1914-1915] All E.R. Rep. 73, and approved and applied by the Privy Council in an appeal from the British Caribbean Court of Appeal in Ajit v. Sammy [1967] 1 A.C. 255, the headnote of which reads:

> "Where the time fixed for completion was not made the essence of the contract, the vendor might serve on a purchaser who had been guilty of unnecessary delay a notice limiting a time at the expiration of which he would treat the contract as at an end, and in determining the reasonableness of the time so limited the court would consider not merely what remained to be done at the date of the notice, but all the circumstances of the case, including the previous delay of the purchaser and the attitude of the vendor in relation thereto; that the question whether the notice was sufficient was a question of fact ....."

The appellant, not having given notice to the respondent making time of the essence of the contract, the appellant was not entitled to rescind the contract on December 4, 1980 or January 17, 1981. As a result the order for specific performance ought not to be disturbed.

Alexander J. (Ag.) correctly decided on the principles adumbrated in Raineri v. Miles and Another [1980] 2 All E.R. 145 that on the failure of the respondent to pay the purchase price on June 30, 1980, the appellant was entitled to claim damages for breach of contract. However, he elected to accept a fee of C$200 per month as the price of the extension presumably as interest on the unpaid balance. This fee was referred to by the appellant in the letter of November 20, 1980, as "the last scale of fee". I think that this rate of interest should continue to exist as a genuine estimate of the damages suffered by the appellant until January 17, 1981, when the appellant wrongly re-possessed the property. I do not think that the appellant would be entitled to damages for non-performance after January 17, 1981.

In my view, the order made by Alexander J. (Ag.) should be modified in part. His order that the sum of C$10,000 paid by the respondent to Alvin Chin by cheque dated 19th June, 1980, should be deducted from the purchase price ought to be set aside. The respondent did not cross-appeal and consequently no account can be taken in his favour of the fact that the appellant had the down-payment of $30,000 since 1979, and in addition the appellant has had in his possession for his own use and benefit since January 1971 the property agreed to be sold.

The only aspect of the counter-claim which in my opinion should be determined in favour of the appellant is his claim for damages between September 30, 1980, and January 17, 1981, at the rate of C$200 per month. This sum when converted at the current rate of exchange should be added to the balance of $50,000 of the purchase money.

I would therefore allow the appeal in part, as set out above, and reserve the question of costs for argument.

WHITE, J.A.

I do not intend to recapitulate the facts giving rise to this appeal from the judgment of Alexander, J.A. (Ag.), as the facts have already been set out in the judgment of Rowe, P.

Nor do I intend to address the issue of the failure of the appellant to have made time of the essence of the contract, which disentitled him from rescinding the contract according to the circumstances of this case. I agree that the learned trial Judge was right when he ordered specific performance of the agreement for sale in writing made between the plaintiff/respondent and the defendant/appellant dated the 22nd June, 1979 for the sale of the land part of Mount Salem, Manchester, registered at Volume 1089 Folio 503 and Volume 1101 and Folio 437.

I will direct my particular attention to the complaint by the defendant/appellant in the Original and Supplemental Grounds of Appeal that:

> "2. The Jamaican Defendant Company was to receive the balance of $50,000 in Jamaican dollars under the Agreement dated 26th June, 1979. The learned judge wrongly impliedly found that there was a variation of this term of the agreement by his order that the Canadian dollars paid to one of the Directors of the Jamaican Company was to be deducted from the balance of the purchase money due to the Jamaican Defendant Company in Jamaican dollars".

The matter of this sum of $10,000 (Canadian) came to light when in his statement of claim the plaintiff/respondent pleaded that he had paid to the defendant/appellant company the sum of $30,000 on the signing of the agreement, and further sums amounting to $14,783 in Canadian currency towards the balance of the purchase price and interest agreed on. The defendant appellant by his amended defence and counterclaim admitted the agreement for sale and the payment of the $30,000 abovementioned, but denied that it had received any further sums under the contract. The plaintiff/respondent in his reply to the amended defence and counterclaim pointed out

that Mr. Alvin Chin the servant and/or agent of the defendant/appellant had been paid these sums. These payments were after a mutual agreement that time for completion be extended on the basis of a payment of $200 (Canadian) monthly, as interest on the balance of the purchase money. Pending the sale by the plaintiff/respondent of other property owned by him, and in pursuance of the said variation of the agreement the plaintiff/respondent paid the said Defendant/appellant through its servant and/or agent, Mr. Alvin Chin, the sum of $10,000 (TEN THOUSAND DOLLARS - CANADIAN) on the 19th June, 1980 and further sums totalling $1,600 (ONE THOUSAND SIX HUNDRED DOLLARS - CANADIAN) between the 7th August, 1980 and the 30th December, 1980.

Details are given of these last payments. And in fact evidence was given by the plaintiff/respondent regarding the $10,000 Canadian. He told the trial judge that after the expiration of the twelve months set for the completion of the agreement for sale, he and Mr. Chin, (who had himself signed the agreement for sale which bears the seal of the appellant), went to Mr. McFarlane, an Attorney-at-law, who had carriage of sale. The discussion they held ended in the arrangement that the plaintiff/respondent would pay $10,000 Canadian to Mr. Chin, who said he would raise a mortgage for the balance. The plaintiff/respondent further said:

> "He then changed his mind by saying he would not give the mortgage to me anymore, he would leave it open until I sold my house and paid him. The interest was $200 per month (Canadian)".

Be it noted that it is not clear from the Record when Mr. Chin's change of mind took place. Nor did the defendant/appellant by any further pleading deal with the payment of the Canadian money. Nor did Mr. Chin or anyone on behalf of the defendant/appellant give evidence in the case. So that at

the end of the day the learned trial judge was left with two unchallenged facts relevant to the immediate discussion, viz. Mr. Alvin Chin was the agent of the defendant/appellant engaged in the transaction of the sale of the abovementioned parcel of land, and that Mr. Vincent Williams, the plaintiff/respondent, had paid to him this money on account of the purchase price. To put the matter beyond a peradventure of a doubt let me quote from the judgment:

> "....the evidence discloses that the plaintiff was paying monthly sums to Mr. Chin from October 6, 1979. Based on the terms of the original agreement, having made the initial payment of $30,000, no payment were due until June, 1980".

The learned trial judge did not accept the plaintiff/respondent's evidence that all payments made to Mr. Chin were "payment towards the purchase price and interest". He was, therefore, careful to identify those payments which seemed to be "more consistent with some separate transaction with Chin". Apart from such payments he found as a fact that "The payments after that seem consistent with the arrangement the plaintiff/respondent spoke of, that is $10,000 and interest at $200 per month". Accordingly, he found that the $10,000 Canadian was paid on account of the purchase price in pursuance of the terms of the written contract.

Mr. Macaulay argued that the consideration was $30,000 Jamaican. The payment made was in $30,000 Jamaican. It was therefore wrong, in effect, for the learned trial judge to have ordered that the $10,000 Canadian should be converted into the Jamaican equivalent and to be taken into account to arrive at the balance owing by the plaintiff/respondent to the defendant/appellant. Mr. Macaulay criticised this order with the comment that a court cannot vary the terms of a written contract relating to land unless

the parties themselves had varied it. Nor can the court interpret that a written contract has been varied by parol. In fact however, the plaintiff/respondent had already pleaded the mutual agreement of the parties to the variation of the agreement albeit with reference to the time within which the plaintiff/respondent should complete the transaction. As a result of such variation the abovementioned payments were agreed upon and made. If Mr. Macaulay is correct it must follow that the plaintiff/appellant would have been without any remedy which he sought in the action. This would be so because the variation would mean that the action was brought in respect of a contract relating to land which by statute must be in writing, but had been varied by an oral contract. In the result the action was on a contract partly written and partly oral.

In support of his stand he cited the cases of Goss v. Lord Nugent 5 B. Ald. 538, 110 E.R. 713; (1824-34) All E.R. Rep. 305; Tyers and Others v. Rosedale & Ferryhill Iron Co. Ltd. (1873) 8 L.R. Ex. 305 (1874-80) All E.R. Rep. 607; and Hartley v. Hymans(1921) 124 L.T. 31; (1920) All E.R. Rep. 328. These cases he argued, show that the judge failed to appreciate that the variation had no legal effect because of the operation of the Statute of Frauds.

Examining the cases cited it should first be noted that Goss v. Lord Nugent was a case brought on a written contract for the sale of land. The defendant agreed to waive the necessity of a good title being made as to one of the lots mentioned in the contract of sale. Although the defendant had been let into possession, he refused to pay the remainder of the purchase-money and relied on his objection of the title. Denman, C.J., adverted to the effect of the Statute of Frauds s.4 and observed on the facts of the case (1824-34) All E.R. Rep. at p. 308:

> "It may be said by the plaintiff that this does not in any degree vary what is to be done by either party; that the same land is to be conveyed, there is to be the same extent of interest in the land, and it is to be conveyed at the same time, and the same price is to be paid, and that it is only an abandonment of a collateral point. But we think that the object of the Statute of Frauds was to exclude all oral evidence as to contracts for the sale of lands, and that any contract which is sought to be enforced must be proved by writing only. In the present case, the written contract is not that which is sought to be enforced, it is a new contract which the parties have entered into, and that new contract is to be proved, partly by the former written agreement, and partly by the new verbal agreement; the present contract, therefore is not a contract entirely in writing; and as to title being collateral to the land, the title appears to us to be a most essential part of the contract; for if there be not a good title, the land may, in some instances, better not be conveyed at all; but our opinion is not formed upon the stipulation about the title being an essential part of the agreement but upon the general effect and meaning of the Statute of Frauds, and that the contract now brought forward by the plaintiff is not wholly a contract in writing".

Two noticeable features of this case stand out. Firstly, the plaintiff/respondent had sued on the contract as varied. Secondly, as Denman, C.J. indicated, "the title appears to us to be a most essential part of the contract". Nor should it be overlooked that as part of the judgment the learned Chief Justice mentioned this:

> "There have been some cases at law on contracts within the Statute of Frauds, where verbal evidence has been allowed; Warren v. Hagg cited in Littler v. Holland (1790) 3 Term Rep. 590; 100 E.R. 749; Thresh v. Ralie (1793) 1 Esp. 53, and Cuff v. Penn (1813) 1 M W 21; 105 E.R. 8. These were cases where the time for performance of the contract had been enlarged by a verbal agreement, and they were decided on the ground that the original contract continued, and that it was only a substitution of different ways of performance. It is not necessary to say whether these cases were rightly decided; if they were so, still the present is a different case, for here, without doubt, the terms of the original contract were varied".

Tyres and Others v. Rosedale & Perryhill Coal Co. Ltd.

arose upon the alleged breach of a contract for the sale of goods. Delivery was to be made in monthly quantities over 1871. The question was what was the effect of postponement by agreement from time to time of delivery of monthly instalments? The forbearance to make delivery was at the request of the plaintiffs. Kelly, C.B., and Pigott, B., held that the plaintiff themselves having requested the defendants to forbear from delivery during the several months of 1871 up to November, could not require delivery of the residue of the whole 2,000 tons (originally ordered) in December, and were therefore not entitled to recover. In the judgment of the majority, (Kelly, C.B. and Pigott, B.), it is stated that "the written contract sued on is a totally different contract, and so a new contract and to be binding in law must have been made in writing". This was so because it was

> "necessary to imply a new contract - no such implication can arise where it so materially alters the condition of both parties - an implication which may never have occurred to the mind of the party against whom it is to operate, and which may seriously prejudice his interests, and expose him to an indefinite amount of inconvenience and loss". (The emphasis is mine)

Martin, B., dissented from the foregoing, and held that the original contract had not been put an end to by the plaintiff's application to the defendants not to deliver full monthly quantities between February and November 1871, and that the defendants were bound to deliver the whole 2,000 tons under the contract.

Hartley v. Hymans also was a case involving the sale of goods to be delivered within a certain period of time. It was held that the buyer's right to require delivery within that period may be waived even after that period has expired, where after the expiration of the period, the buyer

by his letters and conduct leads the seller to entertain the belief that the contract still subsists, and to act upon that belief at serious expense to himself. A new agreement may be implied that the period for delivery is extended and that delivery may take place within a reasonable time of which notice is to be given by the buyer. The plaintiff seller in this case was entitled to succeed.

Mr. Macaulay did not cite any other case, contenting himself to the passing reference that Hartley v. Hymans reviews all the authorities on the point. This case does illustrate one aspect of the rule that a written contract relating to land can only be varied by another written document and not by parol. McCardie, J. founded his judgment for the plaintiff on the point of waiver by the defendant. The headnote reads:

> "Held: in an ordinary commercial contract for the sale of goods time was prima facie of the essence of the contract with respect to delivery, but that condition could be waived. In the present case, after the final delivery date the defendant had demanded and received deliveries under the contract and so had waived his right to assert and was estopped from asserting, that the term of the contract as to date for the final delivery was still binding on the plaintiff; on the construction of the correspondence passing between the parties there must be implied a new agreement that the contract period should be extended beyond November 15, 1918. That agreement could not be terminated by the defendant except by a reasonable notice requiring the plaintiff to deliver the undelivered balance of the goods; and therefore the plaintiff was entitled to succeed".

In the further amplification of the views of McCardie, J., I quote the following passage which occurs at p. 338:

> "In my view the facts and documents here clearly call for one or more juristic bases on which to support the plaintiff's claim. First, I hold that here the defendant waived his right to insist that the contract period terminated on November 15, 1918. Waiver is not a cause of action, but a man may be debarred by the doctrine of waiver from asserting that an original condition

> "precedent is still operative and binding. In view, moreover, of the fact that the plaintiff acted (at great expense to himself) upon the footing that the waiver had taken place, it would, I conceive be wrong to allow the defendant to insist on the terms of the original contract as to time. Secondly, I hold that (in so far as estoppel differs from waiver) the defendant is estopped from saying that the period for delivery expired on November 15, 1918, or from asserting that the contract ceased to be valid on that date. Inasmuch as the defendant led the plaintiff to believe, by letters as well as by conduct, that the contract was still subsisting, and inasmuch as the plaintiff acted on that belief, at serious expense to himself, it would be unjust to allow the defendant to assert that the delivery period ended on November 15, 1918..... Thirdly, I hold that upon the letters passing between the parties I can, and ought to imply a new agreement that the contract period should be extended beyond November 15, 1918, that is until the defendant had given a notice to the plaintiff requiring delivery within a reasonable period".

Mr. Henriques' riposte to the arguments of Mr. Macaulay is that there was no variation at all. Mr. Macaulay, he said, had not observed the difference between the formation and the performance of the contract. He contended that the agreed consideration of $80,000 was not reduced or increased. The obligation to pay the agreed purchase price remained, and indeed, the plaintiff/respondent was obliged to pay the balance of $50,000 which could be discharged by payment by cheque, cash or any other equivalent. In fact Canadian dollars were accepted as part payment of the balance, and the plaintiff/respondent had discharged the purchase price to that extent, by a substantial payment to the Managing Director of the defendant company. He did not cite any authorities for the proposition regarding the performance of the contract.

In the circumstances, I have thought fit to enquire a little further into what McCardie, J. in Hartley v. Hymans (1920) All E.R. Rep. at p. 338 described the cases as showing:

> "an unhappy confusion of authority, and this embarassing ambiguity of principle".

Similarly, Goddard, J., as he then was, remarked that:

> "It often happens, when either sect. 4 or sect. 17 of the Sale of Goods Act has to be considered that the cases are found to be somewhat difficult of reconciliation, and this case is no exception. In Stead v. Dawber (1839) 10 Ad. & El. 57; 9 L.J.Q. 101, the Court found it difficult to reconcile the case of Goss v. Nugent (Lord), with Cuff v. Penn (1813) 1 M & S 21; and Stead v. Dawber though the facts were similar, had in turn to be distinguished by the Court in Hickman v. Haynes (1875) L.R. 10 C.P. 598".

He added that:

> "Hickman v. Haynes (was) another case of a verbal request to allow instalments to stand over, where it was held that the statute was no answer. In the following year, in Plevins v. Downing (1876) 1 C.P.C. 220, a very similar case it was decided that it was".

Goddard, J. at p. 555-556 expressed:

> "the underlying principle which will explain the different results in cases which at first sight appear to be so alike in point of fact. From these two last cited cases I think it is possible to extract a principle and it seems to me to be this. If the parties agree to rescind their original contract and to substitute for it a new one, the latter must be evidenced by writing. So too, if, as a matter of contract, the parties agree that the terms of the original agreement shall be varied, the variation must be in writing. But if what happens is a mere voluntary forbearance to insist on delivery or acceptance according to the strict terms of the written contract, the original contract remains unaffected and the obligation to deliver and to accept the full contract quantity still continues".

In the light of the foregoing discussion I have come to the conclusion that the pleaded variation in this case was not such a variation as went to the root of the agreement for sale. The rights of the parties were not at all changed by the arrangement made between the plaintiff/respondent, and Mr. Chin, the managing director and agent for the defendant/appellant. True it is that the latter failed to assert its rights when the plaintiff/respondent did not complete by the agreed date. But what eventuated thereafter enured to the benefit of the defendant/appellant. In my view the

unchallenged evidence is that not only would time have been extended, and interest paid on the amount outstanding on the purchase money, but Mr. Chin accepted the $10,000 Canadian in reduction of that balance. When the defendant/appellant, through its agent, accepted the benefit of the arrangement, it is my view that the matter departed from the scope of the previous authorities, in that in each of those cases the application of the principle for which Mr. Macaulay contended depended greatly/in default, upon a mere request by the party and the consequent forbearance or waiver by the party who was ready and willing to perform the contract. In the present case there was an arrangement altering the mode or manner of performance which was not intended to substitute one agreement for the other. It would be inequitable to deprive the plaintiff/respondent of the benefit of his payment of the disputed amount. And this, especially so when there was no pleading contrary to the assertion in the pleadings of the plaintiff/respondent, and more importantly, no evidence to expressly contradict the evidence of the plaintiff/respondent. The impression is that the parties in fact mutually acted upon the arrangement, which I repeat resulted in substantial benefit to the defendant/appellant.

Accordingly in the circumstances of this case, I am of the decided opinion that we should approve the decision of Alexander, J.A. (Ag.), in ordering the deduction of the sum of $10,000 Canadian from the balance of the purchase-money; the Canadian sum to be converted at the rate of exchange in June, 1980.

I would therefore dismiss the appeal in its entirety, subject to that sentence in the judgment which ordered 'All sums due to be paid to the defendant within ninety days of the 13th July, 1984'. A new date should be substituted for that date.

CAMPBELL J.A.

The primary facts have been fully set out in the judgment of the learned President. I will accordingly advert only to such facts as relate to and are necessary in considering a particular ground of appeal.

Ground 1 of the appeal complains that the judgment on the respondent's claim is against the weight of the evidence in that:

> (1) the documents in evidence together with the oral evidence established that time was of the essence of the contract;
>
> (2) despite this, the respondent had up to date of the trial made payment of only the deposit of $30,000.00 and was still even at that date unable to provide the balance of the purchase price;
>
> (3) he was contrary to his pleading not ready willing and able to provide the balance of the purchase money.

On the counterclaim of the appellant, the judgment was also against the weight of the evidence in that the respondent as a mere prospective purchaser was not authorised to lease the property before the balance of the purchase price had been paid. He was accordingly liable for mesne profits.

On tne issue of payment towards the purchase price, the respondent in his reply and defence to counter-claim specifically pleaded that he made an additional payment of $10,000.00 (Canadian) to the appellant through its servant and/or agent Mr. Alvin Chin. He gave evidence of this payment and of other payments representing fees for extension of the date for completion of the contract. Retired Canadian cheques payable to Mr. Chin and encashed by him were admitted in evidence as Exhibit 1. He was not challenged that the payments which were undoubtedly made by him, were in connection with some transaction other than the sale transaction with the appellant. Document (7) in the agreed bundle signed by Mr. Chin and addressed

to the respondent is at the least an admission of the receipt of certain payments being fees for extension of what is agreed to be the contract of sale. This gives credence to the respondent's evidence as to the payment of the $10,000.00 (Canadian). Mr. Chin was not called by the appellant to contradict the evidence that payments received by him including the $10,000.00 (Canadian) were other than payments to the appellant through him. In this state of the evidence the finding of the learned judge that the payment by the respondent of C$10,000.00 on June 16, 1980 and the interest of C$200.00 per month thereafter, were made to the appellant in connection with the contract of sale was amply justified on the evidence and he was not in error in not finding that only $30,000.00 had been paid.

On the issue of time being of the essence, the learned judge considered the relevant authorities cited to him. He also considered the criteria for determining whether the contractual date for performance in a contract for the sale of land is to be construed as intended by the parties as being of the essence of the contract. He applied the principles derived from the cited cases and the criteria for ascertaining the intention of the parties, to the case before him and correctly concluded that from the agreed documents tendered in evidence and the oral evidence, time had not originally been expressly made of the essence of the contract nor did the circumstances of the transaction or the subject matter justify time being considered of the essence of the contract. Further, time had not been made so at any subsequent time prior to the purported determination of the contract on December 4, 1980. This being the case, the purported determination was ineffectual, the contract remained subsisting and was capable of being specifically enforced.

On the issue that the respondent, even at the date of trial, was not able to pay the balance of the purchase price the respondent stated in his evidence that though he could not then produce the money, he was in a position to find the money to complete the transaction. The learned judge found on the evidence that the respondent's present inability to find the money to complete was due to the act of the appellant in thwarting the efforts of the respondent in securing mortgage finance from Jamaica National which efforts were then at an advanced stage of satisfactory conclusion. Doubtless this was the reason why the learned judge in decreeing specific performance, granted the respondent a period of 90 days from the date of the judgment within which to put in place again the arrangements for securing mortgage finance.

The submission of Mr. Macaulay considered in the context of the evidence both documentary and oral is without substance. The learned judge's analysis of the evidence, his reasoning, and conclusions drawn from such evidence cannot be faulted. It cannot accordingly be said that his judgment on the respondent's claim was against the weight of the evidence.

Turning now to the counter-claim as amended, which was dismissed, this was for refund of mesne profits of $400 per month with interest to the date of recovery of possession and damages for breach of the contract dated 26th day of June, 1979.

With regard to the claim for damages for breach of contract, sufficient has been said elsewhere in this opinion to show that contrary to the respondent being in breach it was the appellant who attempted by its conduct to breach the aforesaid contract.

With regard to the claim for mesne profits Mr. Macaulay submits that where a purchaser is let into possession before transfer he is merely a tenant at will with no power to let or rent the property of the vendor unless so authorised. If in such circumstances the prospective purchaser lets the premises he must account to the vendor. The short answer to this submission is that, on the evidence, the respondent was impliedly authorised to let the premises because he was given possession subject to an existing tenancy, and to ensure his acceptance of the premises so tenanted there was inserted a special condition in the contract of sale. This ground of appeal fails, as being without substance.

Ground 2 of the appeal complains that the learned judge in finding that a part of the balance of the purchase price of $50,000.00 had been paid in Canadian dollars, erred in law in that by so doing he was accepting and relying on an oral variation of the written contract dated June 26, 1979 which oral variation was unenforceable.

Before us Mr. Macaulay submitted quite tersely that since the written contract dated June 26, 1979 was one relating to land, it could not be varied except in writing. The aforesaid contract provided for payment in Jamaican dollars. The evidence of payment of part of the balance of the purchase price in Canadian dollars amounted to evidence of a variation of the contract which variation not having been proved to be in writing was unenforceable and accordingly ineffectual. Therefore that part of the learned judge's order directing the reduction of the balance of the purchase price by the equivalent in Jamaican dollars of $10,000.00 (Canadian) must be excised.

Mr. Henriques on the other hand submitted that there has been no variation of this written contract. There is, he said, no evidence that the contract had been varied to require payment from the respondent of a purchase price greater or less than that

provided for in the contract, neither had the respondent bound himself to pay any sum in Canadian dollars nor had the appellant placed itself under any obligation to accept payment in Canadian dollars in discharge of the respondent's obligation to pay the balance of the purchase price. The Canadian dollars were merely proferred by the respondent in part settlement of the obligation to pay in Jamaican dollars and were voluntarily accepted by the appellant through its agent.

Mr. Henriques in thus asserting that there was no variation of the contract impliedly asserts that what was arranged was merely a waiver of the mode of performance which waiver, unlike a variation, need not be in writing. The difficulty in accepting Mr. Henriques' submission which is otherwise eminently reasonable and meritorious arises from the fact that the respondent has himself expressly pleaded a variation of the agreement.

The appellant was however the one who set the stage for this difficulty by pleading a "mutual agreement" to extend the time of completion of the contract. By paragraphs3 and 4 of the Defence, the appellant pleaded as follows:

> "3. The defendant says that the plaintiff failed to complete the said agreement on the aforesaid date (26th June, 1980) and consequently by mutual agreement the defendant granted to the plaintiff an extension of 3 months expiring on the 30th of September, 1980 within which to pay the balance of the purchase price."
>
> 4. The defendant says that the plaintiff in breach of the said agreement again failed to pay the balance of the purchase price on the 30th September, 1980."

It is to be noted that the "mutual agreement" which undoubtedly amounted to a variation of the original contract is not explicitly pleaded to have been in writing even though the appellant is relying on it.

The respondent in answer to the above paragraphs pleaded in paragraphs 2 and 3 of his Reply as follows:

> "2. That the plaintiff denies that he was in breach of the said agreement when he failed to pay the balance of purchase price on or before the 30th September, 1980 as alleged in paragraph 4 of the Defence or at all.
>
> 3. The plaintiff says that it was mutually agreed between the Defendant through its servant and/or agent, Mr. Alvin Chin, and the plaintiff that the time within which the plaintiff should complete the transaction should be extended on the basis of a payment of $200 (Canadian) monthly pending the sale by the plaintiff of other property owned by him and in pursuance of the said variation of the agreement the plaintiff paid to the defendant through its servant and/or agent, Mr. Alvin Chin the sum of C$10,000. (Ten Thousand Dollars Canadian) on the 19th June, 1980 and further sums totalling C$1,600.00 (One Thousand Six Hundred Dollars - Canadian) between the 7th August, 1980 and the 30th December, 1980.

The respondent's evidence at the trial regarding this variation of the agreement is to the following effect:

> "After the twelve months, Chin and I had a discussion in the matter. It was the same Chin who signed the Agreement. We both went to see Mr. McFarlane. Some arrangement was made:
>
> the arrangement
>
> $10,000 Canadian to be paid to Chin and he would give a mortgage for what was left. He then changed his mind by saying he would not give the mortgage to me anymore, he would leave it open until I sold the house and paid him. The interest was $200.00 per month (Canadian) Mr. McFarlane was there. It was in his office ..... I paid the $10,000 by certified cheque."

The cross-examination on this issue was directed solely to correcting the evidence as to the time of the discussion and is recorded thus:

> "Before 26th June, 1980, I informed Chin that I could not meet the deadline. Chin and I came down to Jamaica as a result. Did not have meeting with Mr. Chin and Mr. Lowe. Never saw Chin until the day after when we were in McFarlane's office. Had no meeting with Mr. Lowe. Don't know if McFarlane is coming to give evidence for me. Did not see Lowe in McFarlane's office.

On the pleadings the inference could properly be drawn that there was only one agreement for the variation of the contract, with the appellant contending that its terms provided only for an extension of the date of completion to 30th September, 1980, while the respondent was asserting that the variation involved a payment by him of C$10,000.00 in reduction of the balance of the purchase price and an extension of time until he sold his house during which time he was required to pay interest fixed at C$200.00 per month. At trial it was not even faintly suggested that no such agreement as given in evidence by the respondent was entered into. Nor was any question addressed to the issue whether this variation agreement was in writing. In these circumstances the inference could properly be drawn that the agreement pleaded by the appellant to which the respondent referred in his pleading was in writing or if not in writing the agreement was treated by them merely as a waiver of the strict terms of the contract which was not required to be in writing. If the latter was the case then since this waiver preceeded the breach of the strict contractual terms, as evidenced by the payment of the $10,000.00 (Canadian) on 19th June, 1980, justice would demand that there be no issue entertained on appeal on the unenforceability of this agreement based on the assertion that the agreement amounted to a variation which was required to be in writing, instead of it being a mere waiver not required to be in writing. The appellant ought not to be allowed to repudiate its own pleading by submitting in effect before us that it was oral.

The variation agreement even if oral, is not void but merely unenforceable. The privilege of rendering it unenforceable is that of the party against whom it is being asserted. This privilege can be waived and in fact will be treated as waived unless the unenforceability of the agreement is expressly pleaded. In this regard Mr. Macaulay submitted that it was impossible for the appellant to have pleaded that the alleged variation agreement under which the $10,000.00 (Canadian) was paid was unenforceable due to the absence of writing, since the appellant had already denied receiving any such sum and it would therefore be engaging in inconsistent pleading which is impermissible. Mr. Macaulay relied on section 179 of the Judicature (Civil Procedure Code) Law which states that:

> "No pleading not being a petition or summons, shall except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same." (emphasis mine)

The section as is plain to be seen, does not however prohibit inconsistent averments; what it prescribes is that the inconsistent averments must be contained in the same pleading either as originally drafted or by subsequent amendment. In this case not only could the defence have been amended in the light of the matter pleaded in paragraph 3 of the reply but it became mandatory that it should have been amended to plead specifically the absence of writing if such a plea was being relied on as this was a matter which would render the variation agreement mentioned in the said paragraph 3 of the reply unenforceable. Section 178 of the Judicature (Civil Procedure Code) Law is controling in this regard. It reads thus:

"178. The defendant or plaintiff (as the case may be) must raise by his pleading all matters which show the action or counter-claim not to be maintainable or that the transaction is either void or voidable in point of law, and all such grounds of defence or reply as the case may be, as if not raised would be likely to take the opposite party by surprise." (emphasis mine)

Section 178 of our Law corresponds to Ord. 19 rule 15 of the Annual Practice 1962 and the comment thereon by the learned authors runs thus at p. 475:

"It often is not enough for a party to deny an allegation in his opponent's pleading; he must go further and dispute its validity in law ..... Thus if the plaintiff sets up a contract which was in fact made, it will be idle for the defendant merely to traverse (i.e. deny) the making of the contract; he should confess (i.e. admit) that he made the contract, but avoid the effect of the confession by pleading the statute of Frauds ..... Any number of defences may now be pleaded together in the same defence, although they are obviously inconsistent."

At page 479 it is expressly stated that the Statute of Frauds (which is applicable in the present case) must be specifically pleaded, if the defendant desires to rely on it.

In the absence of such a specific pleading the privilege of the appellant is deemed to have been waived. The learned judge was accordingly not in error in making his finding which was amply supported on the evidence that $10,000.00 (Canadian) had been paid to the appellant towards liquidation of the balance of the purchase price and accordingly should be deducted from the balance payable.

There is no merit in this ground of appeal which therefore fails.

The respondent by Notice filed on January 4, 1985 intimated his intention of seeking a variation of the Learned judge's decision by having included therein an order to the following effect:

> "That the plaintiff/respondent is entitled to rents accruing due from the said premises part of Mount Nelson, Manchester from the 17th January, 1981 or alternatively damages for breach of the Agreement for Sale of the said premises,"

The learned judge in declining to award damages to the respondent impliedly found that the respondent was entitled to the rent but reasoned that the vendor was also entitled to interest on the unpaid balance of the purchase price from the date of completion as extended, on the hypothesis that the respondent was in possession, enjoying the profits from the land. The appellant on the evidence repossessed itself of the land and of the profits equivalent to $400.00 rental per month from 17th January, 1981. This amount the learned judge considered would be equivalent to the interest which the respondent would have had to pay to the appellant had the said respondent continued to be in possession. No order as sought in the respondent's notice was therefore made. The relevant part of the learned judge's judgment reads thus:

> "The vendor is therefore entitled to interest on the unpaid balance of the purchase price to date. The unpaid balance of the purchase price, on my findings, would amount to upwards of $35,000.00 (Ja.). Fixing a reasonable rate of interest to that unpaid balance, could, in my view, earn to the vendor, a sum equivalent to the rental collected monthly, that is to say, a sum of $400.00 (Ja.).
>
> It therefore follows that the rental collected by vendor, could be equivalent to the sum the plaintiff would have been entitled to pay as interest on the unpaid balance of the purchase price. In these circumstances, there is, therefore no award to the plaintiff for damages."

Mr. Henriques submitted that the learned judge failed to appreciate that under the agreement for sale of the premises the respondent was entitled to rents accruing due from the said premises of which he has been deprived by the appellant's wrongful act of re-possession. This complaint is not well-founded

because as earlier stated, the learned judge rightly or wrongly proceeded on the assumption that the respondent was entitled to the rent, but that the vendor in witholding the said rent was merely appropriating it in settlement of interest which the learned judge concluded was payable to him on the unpaid balance of the purchase price. As there is no complaint and rightly so, against the learned judge's conclusion that interest was payable on the unpaid balance of the purchase price, there exists no ground for seeking a variation of his decision.

I would accordingly dismiss the appellant's appeal and also the respondent's notice of variation.