JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 44 of 1992

BEFORE: THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE WOLFE, J.A.
THE HON. MR. JUSTICE PATTERSON, J.A. (Ag.)

BETWEEN	AUSTIN MCKENZIE	DEFENDANT/APPELLANT
AND	ADA BARRETT	PLAINTIFF/RESPONDENT

Hilary Phillips and Sharon Service,
Instructed by Perkins, Grant, Stewart, Phillips & Company, for the appellant

Earl DeLisser and H. S. Dale,
Instructed by O. G. Dale & Company, for the respondent

November 17, 18, 19; December 2, 1993 and May 2, 1994

WRIGHT, J.A.:

This is an appeal against the judgment of Cooke, J. delivered on May 15, 1992, whereby it was ordered:

"(i) The land delineated on the sketch diagram part of exhibit 3 with the words 'Miss A.M. Barrett and her sister Mrs. G. Bygrave,' 15 acres be surveyed. The cost of this survey is to be shared equally between the Plaintiff and the Defendant.

(ii) There will be specific performance of the contract of sale between the Plaintiff and the Defendant as regards the land to be surveyed in (1) supra.

(iii) The sum of $20,000.00 will go to the purchase price of the said land.

(iv) The Plaintiff will pay to the Defendant the sum of $12,974.11, the balance of the purchase price.

(v) The Defendant is restrained by himself, his servants and/or Agents or anyone on his behalf from entering the land which is to be surveyed in (1) supra.

"(vi) There will costs to the Plaintiff to be agreed or taxed."

In her statement of claim the respondent had sought the following remedies:

"(1) An order for the Specific Performance of the Agreement for the sale and purchase of 15 acres of land and premises situate at Hart Hill, in the Parish of Portland;

(2) A Declaration that the Plaintiff is the beneficial owner of the aforesaid premises;

(3) An Order that the said land and premises be surveyed;

(4) A Declaration that the Plaintiff is entitled to payment by the Defendant of the sum of $20,149.85;

(5) A Declaration that the Plaintiff is entitled to set off the amount of $20,149.85 against the balance of the purchase price of the land hereinbefore described;

(6) An Injunction restraining the Defendant, his servants and/or agents, or anyone on his behalf, from entering upon the land the subject herein;"

It is an unfortunate case for more reasons than one. Foremost among those reasons is the fact that the parties now pitted against each other in legal combat once enjoyed an admirable relationship, the appellant being the pastor and spiritual guide of the respondent, a much valued member of the pastor's flock. And it is all the more regrettable because available correspondence in the appellant's handwriting makes it abundantly clear that there was an honest intention on his part to let the respondent have the interest to secure which she now invokes the aid of the Court. But the problem is compounded by the fact that the search for a solution to the conflict had to be undertaken without the participation of the appellant who by the time of the trial was no longer the respondent's pastor. His non-attendance at the trial is starkly recorded - no reasons were assigned. However, it is noted that in 1981 the appellant - by then approaching his eighties - resigned as pastor and the respondent's disagreement with his nominee as succeeding pastor on the basis of the latter's

lack of qualification caused the relationship to sour so much so that the successor who was accepted over the respondent's objection vowed that the respondent would not get the land - that is the respondent's testimony. It cannot escape notice, too, that there are certain allegations in the defence which are so alien to the clearly expressed intention of the appellant which it would have been virtually impossible to support without recourse to perjury.

Inasmuch as the appellant adduced no evidence the case fell to be resolved on the evidence of the respondent and two witnesses, Winston McCleary and Leeford Walker, together with such documentary evidence as was admitted during the cross-examination of the respondent. The two witnesses called in support of the respondent were to serve the purpose of confirming the existence of a contract of sale of the lands in question to the respondent. Their evidence was that during the period 1973 to 1975 they had on separate dates approached the appellant with a view to purchasing lots of the property at Hart Hill which was being subdivided. However, when each of these gentlemen indicated to the appellant the section of the land he wished to purchase the appellant told him that that section had already been sold to the respondent. But the question as to whether there was in fact a contract of sale was not, and could not be resolved on that evidence. The answer to that question had to be found in the evidence of the respondent and such documentary evidence as there was before the Court.

The respondent testified that she was the principal of the Hart Hill Primary School, a Grade 3 school, until 1971 when she became principal of the Buff Bay Primary School, a Grade 1 school. The award of the National Honour of the Order of Distinction and her appointment as a Justice of the Peace recognize her involvement in social development. She is an industrious person who, in addition to her responsibilities in the classroom at Hart Hill, engaged in pig-rearing as well. She attracted the assistance of

the appellant in her search for land in the Buff Bay area to continue her pig-rearing and so prevent her daily commuting to Hart Hill for that purpose. At the end of a fruitless search, the appellant's wife reminded him of the offer of one Mrs. Andronetta Grant of Hart Hill to sell him lands on which he could erect an orphanage. Promptly the next day he took the respondent to see Mrs. Grant who showed them the land consisting of 46 acres. Because of her pressing need and the appellant's willingness to assist her, he agreed to purchase the land and agreed also to sell her 15 acres of the land at a special price of $2,500 per acre. A property road divides the land and she indicated her wish to be on the left side of that road. The appellant walked out an area and said she could go into possession and erect her pens until the land was surveyed and transferred into her name. She indicated the need for documentation whereupon he began to write on a paper stating that as a Justice of the Peace she could sign it. She declined and said a lawyer should be consulted.

The transaction began around October 1971 and between then and sometime in 1972 the appellant took her to see one Mr. Poulle an attorney who the appellant said was looking about the registration of the land. By that time she was occupying a portion of the land while the appellant occupied the other portion. The appellant requested her to supervise the cultivation of his portion and also to take care of Mrs. Grant. She had constructed three pig pens and laid out three cattle pastures to take care of her 180 pigs and 14 heads of cattle. The appellant's portion was fenced. He was selling portions of the land regarding which she was made his agent who decided on the intended purchasers who were then sent on to Mr. Grossett, the appellant's lawyer. It was in this context that in August 1977 the appellant sent her a list of persons to be sold land at Hart Hill as well as the acreages together with a sketch of the outlay of the lots. The two pages of paper were admitted in evidence as Exhibit 3. The sketch shows the Buff Bay to Annotto Bay main road running across the

front of the property. Across the back of the property runs the Mount Vernon to Windsor Castle parish council road and beyond that the land is steep dropping down to a river. Down the middle of the property there is indicated a 30ft wide road linking the two roads. On the extreme left of the land five lots are indicated with the names of the allottees and between these lots and the property road with the exception of a lot indicated to be 140' x 175' with "½ acre Mrs. Barrett" written thereon the land stretching from the main road to the parish council road has written thereon "Mrs. Barrett and her sister Mrs. G. Bygrave 15 acres." A frontage of 350 feet is also shown. Six other lots are indicated on the right of the property road. The list of names with the acreages is as follows:

" Hart Hill 43 3/4 acres approx.

People to be sold land:

Acres		
10	Miss A.M. Barrett, J.P.,	Buff Bay
5	Mrs. Grace Bygrave	-do-
1	Mr. Rupert Gordon	-do-
4	Rev. Basil K. Thompson, 27 Butts Ave.	Kingston
4	Mr. Clayton Laing	Kingston
1	Mrs. Gloria Edwards	
1	Miss Watts	
2	Mr. Glen Gordon	
½	Mr. Eustace Cowan	Hart Hill
1	Mrs. Barbara Robinson	
2	Mrs. Veronica Carby	
1	Mrs. Ivy Banton Thompson	Kingston
10	Miss Leila Jumpp (for me)	

N.B. and if possible Mr. Bonitto (son of Miss Lester Secretary of Tranquility Church) ½ acre.

Note: Priorities re the use of the money from sales:

(a) provision for paying off the mortgage

(b) build house of five apartments (to start) at Hart Hill for me

(c) build house of four apartments at Mr. Bently Jumpp's place White River for Miss Jumpp (Her mother to live in)

(d) Build road.

These may be started together.

A.L. McKenzie
5/8/77
Buff Bay."

Mr. Poulle died between 1981 and 1982 and when the respondent expressed anxiety about the settlement of the transaction the appellant took her to Mr. Grossett whom he said was a former student of his. In her presence he informed Mr. Grossett that he had sold her 15 acres of land and he wished him to complete the sale. Further he told Mr. Grossett that she was his agent for his portion of the Hart Hill lands and, accordingly, from time to time she would be referred to him. A statement dated 4. 5. 81 from the appellant to the respondent regarding payment for the land was admitted as Exhibit 4. It reads:

"This statement shows the amounts given me by Miss A.M. Barrett and what she requested of me to return, to the balance of which must be added her advances with respect to land taxes while I was off the island, the sum total of which to be treated as deposit on purchase price for fifteen (15) acres of the Hart Hill land which she has requested me to sell to her:

Check for		$1201.00
Market for Miss Grant 3 x 10		30.00
Purchase of stove for Miss Grant		31.00
Income Tax on my behalf		37.25
Mattress for Miss Grant's bed		51.60
		$1350.85
Less amts. returned by me	250	
	75	
	325	325.00
	Total =	$1025.85

To the above $1025.85 must be added the taxes she paid in my absence and the expenditure for planting 400 coconut plants, all of which she has to give me.

"

A.L. McKenzie
4/5/81

Copy to:

Mr. Ian Grossett
Port Antonio
(supplied him already)."

Attached, too, is a tax receipt for 1981 to 1982 "46 acres of land at Hart Hill - Austin L. McKenzie - Ada Barrett i/c $226.25." This represents amount paid for taxes by the respondent in her capacity as the appellant's agent on behalf of the appellant referred to in the statement, Exhibit 4.

The respondent said that her further enquiries of the appellant about the land were met with the explanation that the subdivision application took time so she should keep in touch with Mr. Grossett. The appellant further instructed her that all purchasers should make payments to Mr. Grossett. Pursuant thereto on May 15, 1981, she paid the amount of $3,500 to Mr. Grossett, the receipt for which was admitted in evidence as Exhibit 1 and reads as follows:

"F. V. Grosett & Co.
2 Harbour Street
Port Antonio
May 29, 1981

RECEIVED from Miss Ada Barrett the sum of $3,500.00 for Rev. A. L. McKenzie cheque No. B 018900 from the Bank of Nova Scotia Jam. Ltd. Port Antonio dated May 29, 1981, on further payment for land at Hart Hill in the parish of Portland.

Sgd. F. V. Grosett."

Next she introduced as Exhibit 5 a letter from the appellant dated February 28, 1981, to Mr. Grossett which is as follows:

"

21 Begonia Drive
Kingston 6
Feb. 28, 1981

Mr. Ian Grosett,
Attorney-at-Law
Port Antonio

Dear Sir,

This confirms my telephone conversation with you this morning asking that you kindly, without delay, complete the sale of fifteen (15) acres of Hart Hill to

"Miss A. M. Barrett of Buff Bay, and use the additional payment she will make (i.e. besides the amount I have reported to you as received directly or indirectly by me) to further the necessary sub-division of the property and paying off the mortgage. Mr. Bentley Jumpp and I went over the diagram and part of the property and I explained to him what I would like to have done. He will come in to see you one day next week he says.

I gave you a list of amounts of money that passed directly or indirectly between Miss Barrett and me. What amounts she gave me less what I gave her are to be taken as portions of her purchase money on the 15 acres she asked me to sell to her. She promised to give me very shortly the itemised statement of moneys she says she spent to plant 400 coconut plants. This is to be added to her purchase money. Most of the coco-nut plants are either dead or dying as they have had no care. I have to write this off as a loss. I will refer to this later in another context.

Please complete this particular sale as early as possible; and also kindly take over the future payment of taxes from 1981-83 on, apportioning Miss Barrett's share to her.

Kindly send me an affirmation of this.

Thank you, and kind regards.

Sincerely yours

(Rev.) A.L. McKenzie."

Exhibit 2 was a letter dated March 21, 1981, from the appellant as follows:

"Dear Miss Barrett,

Greetings!

I shall be passing through Buff Bay tomorrow but will not be able to stop to talk with you. I will advise you of a date later.

I have asked Mr. Grosett to complete the sale to you, without delay, of fif-teen acres of Hart Hill. He says he has his own surveyor. You should go to see him soon.

The cost of the coconut planting has not yet reached me. Kindly send this very early! I must send the cost to Mr. Grosett.

I am sorry to take the use of the two room board house back with so short notice,

"but I consider 'Memi' destitute and would like to help her. The survey line will exclude this house anyway.

I will, as I said above, make a day to come and have further talk with you.

Kind regards and best wishes.

Sincerely yours,

Austin L. McKenzie."

Another letter dated February 28, 1981, from the appellant to Mr. Grossett was Exhibit 6:

"

421 Begonia Drive
Kingston 6

Feb. 28, 1981

Mr. Ian Grosett,
Attorney-at-Law
Port Antonio

Dear Sir,

This is a follow-up letter to that of two weeks ago in which I asked you kindly to take over the papers regarding Hart Hill from Mrs. Poole, (Mr. Poole having died recently) and to complete the application for a registered title for the parcel of land I purchased from Miss N. Grant. This confirms that request and I trust you will proceed with this without delay. Miss Barrett's failure to hand over the tax receipt though requested to do so months ago is the real cause of the delay.

I enclose a copy of the letter I registered to Mrs. Poole asking that she send Mr. Poole's file to you. She has since, over the telephone, told me that Mr. Ian Ramsay of 53 (not 63 as I erroneously told you from memory) Church St., Kingston, had advised her not to hand over the file. I rejected that advise repeating that I desired that she send the papers to you.

Let me add that the papers must contain (a) declaration by Mr. Percy Williams of Buff Bay; (b) declaration by Miss Nettie Grant (c) declaration by Mr. Wallace Henriques. There should also be one by Mr. Poole himself as he travelled to Buff Bay specifically to see Miss Grant and get the declaration from her. I think all three declarations were signed before Miss A.M. Barrett, J.P. Mr. Poole's I cant speak of, not being certain of it.

Thank you.

Yours truly,
(Rev.) A. L. McKenzie."

The final letter from the appellant dated March 5, 1982, became Exhibit 7 and reads:

"

1637 Orrington Avenue
Evanston, Illinois
U.S.A. 60201

March 5, 1982

Mr. Ian Grosett
Attorney-at-Law
2 Harbour Street
Port Antonio
Portland, Jamaica
West Indies

Hart Hill

Dear Sir:

Further to my letter of the 2nd inst., assuming that new negotiations are going on, I repeat that Miss Barrett must not be given more than 135 continuous feet frontage along the main road, thus leaving for some other purchaser 220 feet on 55 of which the church Basic School stands; and I remind you that this purchaser will have to buy about twice as much land as Miss Barrett wants.

There is indeed no necessity for any common inside road since each purchaser can make his or her own exit direct to the main road as is the case in every instance all along that road. There is no urban development and so no need for a service road. Indeed this effectively settles the matter of roads.

If, however, government should demand a service road the price of $2500 will have to be proportionately raised to provide for this. In my rejected pro forma terms I included the clause that at $2500 Miss Barrett would have to build her own road, and pay for her own survey. All this holds.

Finally Miss Barrett, in our conversation, expressed agreement with my selling ½ acre on Nutmeg Corner road and behind Mrs. Barrett's ½ acre to carpenter George Brown who helped me make Miss Grant happy and comfortable by adding a bathroom to her house. He deserved it and needed it badly when he broached the matter to me last year. I told him to come to you and use my name. He can be found by writing to him c/o the Seventh Day Adventist Church, Buff Bay. Please let him have the piece at the same rate and on easy terms. He is a poor man and should be helped.

Thank you.

Yours truly,

Sgd. Austin L. McKenzie."

Let me here set out the inventory of what the respondent's uncontradicted evidence discloses was done by her in pursuance of her agreement with the appellant:

> "Mr. McKenzie said I should cultivate 10 of his acres plant - eg. Coconut seedling and take care of old lady Andronetta Grant. He said I should not pay Mr. Grossett any more money as such. I should keep account of all money expended on his property and looking Andronetta, paying taxes - Income tax bought a Kerosene oil stove for A. Grant - bought mattress for her, gave Andronetta money to go market for 10 weeks, pay taxes, for entire property from 1978 to 1981 including penalties. I gave him bill $20,000 from 1977 to 1981 for reaping pimento - cleaning - ploughing - forking - planting seedlings - coconut, buying fertilizer and paying to spread it. Said he wanted to take to Mr. Grossett to make deductions from purchase price. Between 1977 to 1980 both of us go to property regularly - I show him what did on my side, what I on his side. Between 1977 to 1981 asked for documents. He said trying to get titles - must go to Grossett follow up. Mr. Grossett was my lawyer - had ... confidence in pastor and lawyer."

Failure to secure a conclusion of the transaction drove the respondent to consult Mr. Arthur Williams, Attorney-at-law, whose letter to Mr. Grossett bearing date December 15, 1981, was by consent admitted into evidence as Exhibit 8:

> "December 15, 1981
>
> F. V. Grossett
> 2 Harbour Street
> Port Antonio
>
> Dear Sir
>
> Re: Sale of Land - Rev. A.L. McKenzie to Miss Ada Barrett and others
>
> I am instructed that Rev. McKenzie has entered into a contract for the sale of lands at Hart Hill to Miss Barrett and to a number of other persons.
>
> By letter dated March 21, 1981, Rev. McKenzie informed Miss Barrett that he had instructed you to complete the sale to her without delay. Since that time however, nothing further has been done, despite the fact that Miss Barrett has made several visits to your office in this regard.
>
> I hereby give you notice on behalf of the vendors that time is of the essence of the contract.

"I would also appreciate an early response, informing me of the present position in regard to this contract.

Yours faithfully

Sgd. Arthur H.W. Williams

AHWW/mas

cc. Rev. A.L. McKenzie."

Yet the desired result eluded her. In pursuit of her claim she consulted the firm of Messrs. Donald Bennard and Company and upon her instructions a letter was written to Mr. F. V. Grossett on May 31, 1982, giving an undertaking in respect of the balance of the purchase price (See paragraph 13 of the Statement of Claim). There was no response. Then in April 1983 she was served with three summonses to appear in the Resident Magistrate's Court for the parish to answer to the appellant's claim for recovery of possession and arrears of rental totalling $1,440 and costs.

To put this aspect of the case in perspective, I will interpose paragraphs 5 and 6 of the Defence, which are as follows:

"5. The defendant denies as alleged in the said paragraph 2 of the statement of claim that he received the sum of $1,201:00 or any sum at all from the plaintiff as a deposit on account of the agreed purchase price under any purported agreement for sale oral or otherwise. The defendant states that in the year 1972, the defendant under an oral Agreement leased about ½ an acre of the land at Hart Hill to the Plaintiff at a monthly rental of $20:00. This land was leased to the plaintiff to enable her to erect a pig-pen on the said land.

6. The defendant avers that subsequent to the plaintiff and the defendant entering into the said lease, the plaintiff requested of the defendant that he permit her to cultivate the area of land surrounding the pig pen. To this the defendant agreed at the same monthly rate of $20:00. That the plaintiff was given possession of that part of the lands at Hart Hill under an oral lease and not under an oral Agreement for sale of the lands as alleged in paragraph 3 of the statement of claim."

The learned trial judge held that:

> "It seems sufficiently certain that there was no agreement in 1971 as is pleaded in paragraph 2 of the statement of claim."

He found support for that conclusion in a letter (Exhibit 9) dated March 7, 1973, from the respondent to the appellant, tendered by the defence in cross-examination, which he said in his judgment indicated that the parties were still negotiating. The relevant section of that letter reads:

> "With regards to Hart Hill Mrs. Theresa Thomas and Johnson are all there. In fact all tenants are still there and show no sign of going although Johnson pulled down one of the house he still has things there and goes and come. Mr. Lewis and his wife son-in-law and daughter of Theresa Thomas join with the mother and are giving my workers a hard time. I am very glad you have decided to let them go.
>
> Of course I couldn't do anything without any authority from you. But I return this one to you for amendment.
>
> I am in full agreement with paragraphs 1-5 also 8 & 9.
>
> I am asking you kindly to read over paragraphs 6 and 7 which I am not in agreement with.
>
> I made it clear to you from the beginning when you decided to sell that my sister and I would like to buy a portion of the land from you.
>
> We are not interested in being any tenant. Even if we cant buy the full amount we will satisfy with 15 acres, 10 for me and 5 for my sister.
>
> We will pay $260 per acre if this figure meets your approval.
>
> We will make a down payment and ask you for time to pay the balance whether monthly, quarterly, half yearly or yearly as it pleases you.
>
> Kindly let us hear your decision on this matter."

The defence also tendered another letter, Exhibit 10 dated 15.12.77, from the respondent to the appellant in which she set out the programme of work she proposed to undertake on the appellant's behalf. But that is not the purpose for which it was

tendered. That purpose was to discredit her on the question as to whether she was in charge of the appellant's tenants. In the latter she did report to him on the activities of some tenants. But that is irrelevant to the issue to be resolved.

After ruling against the existence of a contract in 1971, the learned trial judge proceeded to examine the correspondence with a view to ascertaining whether evidence of a contract was to be found therein. He concluded that by March 21, 1981, the date of the letter, Exhibit 2, there was agreement between the parties for the sale of 15 acres of land part of the land which the appellant had purchased from Mrs. Andronetta Grant and by further examination of the correspondence he concluded that there was written memorandum to satisfy section 40(1) of the Law of Property Act (1925) U.K., which replaced section 4 of the Statute of Frauds which provides that:

> "No action may be brought upon any contract for the sale or other disposition of land or any interest in land unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged."

He accordingly gave judgment for the respondent and made the orders set out supra.

Against this decision six grounds of appeal were filed and argued. But before considering the grounds of appeal, I regard it important to examine the question of the rental agreement contended for by the appellant. Paragraphs 5 and 6 of the Defence (supra) disclose the particulars of the alleged agreement. It was oral; the acreage was half an acre of land on Hart Hill; the rental was $20 per month and the tenancy was created in the year 1972. Paragraphs 17 to 19 admit the issue of proceedings for recovery of possession and arrears of rental claims which are pursued in this suit by way of counter-claim. Paragraph 15 of the Statement of Claim states the arrears claimed in or about the month of April 1983 to be $1,440. However, the amount in the counter-claim is $1,460. The amount of $1,440

represents arrears for six years to which the amount in the counter-claim adds another month. The counter-claim is dated 21st May, 1987 - four years later than the claims presented in the Resident Magistrate's Court for the parish of Portland. The arrears would reach back to about April 1977. No mention is made of the years 1972 to 1977 and no credit is given for these years so I will say no more of them.

In seeking to arrive at the genuineness of the claim for rental in arrears, two payments are relevant. First, there is the payment of $1,201 acknowledged by the appellant in his own handwriting in Exhibit 4 (supra) and pleaded at paragraph 2 of the Statement of Claim thus:

> "In or about the year 1971, the Plaintiff entered into an oral agreement with the Defendant for the sale and purchase of 15 acres of land situate at Hart Hill, in the Parish of Portland, being a part of the land comprised in Certificate of Title Registered at Volume 1172 Folio 279 of the Register Book of Titles, whereby in pursuance of said agreement, the Plaintiff paid the Defendant the sum of $1,201 as a down payment on account of the agreed purchase price of $37,500.00."

This payment was, however, denied in paragraph 5 of the Defence (supra) but the challenge was taken no further. On the basis that that sum was appropriated to rental (but of course no such claim was made) then the rental would be paid up to April 1978.

The second payment to be considered was $3,500 paid on May 29, 1981, pleaded at paragraph 6 of the Statement of Claim "as a further payment on account of the purchase price of the aforesaid lands" and evidenced in Exhibit 1 (supra). Paragraph 12 of the Defence admits receipt of this amount as follows:

> "The defendant admits that Mr. F.V. Grossett gave the plaintiff a receipt dated the 29th May, 1981, for the sum of $3,500:00 but asserts that this did not represent any payment towards the alleged purchase price under the alleged Agreement for Sale."

Ignoring for the moment the incompetence of the plea in derogation of Mr. Grossett to issue the receipt as he did and dealing

with the amount received, here was money which would cover the rental for 14 years and 7 months. Added to the previous payment rental would have been paid up to 1992 - nine years beyond the date when the respondent was sued for arrears. If the first payment be eliminated and the second amount be applied to rental from 1972 the amount would cover rental up to 1986 - three years beyond the date the respondent was charged with being six years in arrears. Either way the claim for rental is demonstrably untenable. It would seem to me that the dilemma in the appellant's stance on the rental defies resolution. To my mind, the claim to the existence of a tenancy in the light of the dilemma identified and the letters in the appellant's handwriting is of doubtful paternity. Finally, it is pertinent to note that this half acre in question does not appear on the sketch, Exhibit 3.

In this regard, there is a very important question which the appellant has not attempted to answer. I pose the question:

> How could a $20-per-month tenant of ½ an acre of land whose security of tenure is liable to be terminated by one month's notice proceed not only to fence but cultivate not ½ an acre but 15 acres without any objection by her landlord for over 11 years? And why should she undertake to buy planting materials, employ labour, cultivate 10 acres of land on behalf of the landlord as well as meeting his bills including paying land taxes with penalty, income tax and finding sustenance for Mrs. Andronetta Grant - all to the tune of $20,149.85?

It seems so preposterous as to leave me no option but to regard the claim to the existence of a tenancy as an indefensible sham. It follows, therefore, that the respondent must be on the land either as a trespasser, which is not the contention of the appellant, or as a purchaser in possession, as she claims.

I am reminded that the appeal is by way of re-hearing and that the mandate of the Court is to ensure the determination on the merits of the real question in controversy between the parties, which in this case is whether there is a sufficient memorandum in writing of a contract to meet the requirements of section 40(1)

of the Law of Property Act (1925) U.K. (supra). As stated earlier, the learned trial judge found such a memorandum was constituted by the letters written and signed by the appellant.

Let me now turn to a consideration of the grounds of appeal which have been argued in opposition to the trial judge's decision. There were three grounds of appeal followed by three supplemental grounds. Supplemental Ground 1 was argued with Grounds i and ii; Supplemental Ground 2 was argued with Ground iii and Supplemental Ground 3 was argued separately.

Supplemental ground

"(1) That the Learned Trial judge erred in law and in fact in finding that on the evidence an agreement had been formed between the Defendant/Appellant and the Plaintiff/Respondent as regards the sale by the Defendant/Appellant and the purchase by the Plaintiff/Respondent of fifteen (15) acres at Hart Hill;"

Grounds

"(i) That the learned trial judge erred in law in finding that the parties had reached an agreement to sell 15 acres of land after finding specifically that the contract or agreement as pleaded by the Plaintiff in her Statement of Claim did not exist.

(ii) That having found specifically that there was no contract in 1971, there was no evidence or sufficient evidence to support the Judgment of the learned trial judge."

The combined effect of these three grounds of appeal is that in the material before the Court, that is, the evidence and/or the Pleadings, there is no support for the conclusion arrived at by the learned trial judge. The burden of the submission in respect of these grounds was that since the trial judge found that no contract existed in 1971 he was in error when he sought to ascertain whether the parties ever reached an agreement since there is no evidence of another oral agreement in relation to the lands at Hart Hill. It was also submitted that there was uncertainty as to the premises, the price contracted for and the parties to the contract, that is, whether it was the respondent

alone as purchaser or whether her sister Mrs. G. Bygrave was joined with her as a purchaser. It was also a contention of the appellant that Exhibit 7 (supra) dated March 5, 1982, indicated that at that date the parties were still in the course of negotiations and that there was no specific evidence as to when any oral contract was formed between the parties.

For the respondent, it was contended that the finding that there was no contract in 1971 was not a finding that no contract existed but that it came into being at a later date and that such date is not an essential ingredient of the contract. Further, it was not correct to say that consideration of the correspondence which passed between the parties related to a contract other than what was pleaded. The submission continued that although the respondent stated that the contract was concluded in 1971 the exhibits tendered in evidence as well as the pleadings, particularly paragraphs 4 to 7 of the Statement of Claim, show the contract to which the respondent was referring and that such a contract was, indeed, supported by the correspondence.

As a matter of fact, it is paragraph 2 (supra) which sets out the contract contended for. Paragraphs 4 to 7 reveal events subsequent to the contract. Paragraph 4 pleads that between March 1977 and March 1981 the respondent made repeated efforts to persuade the appellant to have the agreement reduced to writing and duly executed but such efforts failed because of the refusal or neglect of the appellant. Paragraph 5 reflects the advice in Exhibit 2 (dated 21.3.81) from the appellant that the respondent should attend on Mr. Grossett, the appellant's attorney, for the purpose of making arrangements to complete the sale of the land to her. Paragraphs 6 and 7 plead the payment of $3,500 evidenced by the Receipt, Exhibit 1.

Was the learned trial judge in error when, having decided that there was no contract in 1971 as pleaded, he went on to ascertain whether the parties ever reached an agreement? Having

first set out the evidence to be considered, he said at page 5 of the judgment:

> "I will now deal with the issue as to whether there was an agreement between the parties as to the sale and purchase as claimed by the plaintiff. It seems sufficiently certain that there was no agreement in 1971 as is pleaded in paragraph 2 of the statement of claim. The section of exhibit 9 set out supra is conclusive. The parties were up to that time negotiating. It is to be noted here that in cross examination the plaintiff said that the only agreement between her and the defendant was in 1971.
>
> Did the parties ever reach an agreement? Examination of correspondence between the defendant and the plaintiff and between the defendant and his attorney-at-law is instructive."

Thereafter he proceeded to examine the correspondence and concluded that there was sufficient memorandum in writing to satisfy the requirements of section 40(1) of the Law of Property Act, 1925 of an agreement having been reached by March 21, 1981. He was persuaded to this conclusion by the letter of that date (Exhibit 2) written by the appellant which is repeated here for emphasis:

> "Dear Miss Barrett:
>
> Greetings!
>
> I shall be passing through Buff Bay tomorrow but will not be able to stop to talk with you. I will advise you of a date later.
>
> I have asked Mr. Grosett to complete the sale to you, without delay, of fifteen acres of Hart Hill. He says he has his own surveyor. You should go to see him soon.
>
> The cost of the coconut planting has not yet reached me. Kindly send this very early! I must send the cost to Mr. Grosett.
>
> I am sorry to take the use of the two room board house back with so short notice; but I consider 'Mami' destitute and would like to help her. The survey line will exclude this house anyway.
>
> I will, as I said above, make a day to come and have further talk with you.

"Kind regards and best wishes.

Sincerely yours,

Austin McKenzie."

The appellant is evidently happy with the finding that it had not been proved that an agreement came into being in 1971 and claims that the learned trial judge's enquiry should have ended with that finding. But the reality of the situation, as unfolded by the evidence, is that the respondent had been in possession of the subject matter of the suit for about twenty years up to the date of the trial. It was not alleged that she was a trespasser. The plea that she was a tenant was not supported by even a scintilla of evidence and has already been excluded. She claimed her possession was by virtue of purchase from the appellant. I think in the circumstances the learned trial judge would have been remiss if he had done what the appellant asserts. It is patent that the learned trial judge had set out to determine whether there was an agreement for sale by virtue of which the respondent had come into and remained in possession of the fifteen acres of land in contention. The justice of the case required such a course and not just an enquiry confined to an agreement in 1971. It must be remembered that Exhibit 9, on which the finding that negotiations were continuing in 1977, was tendered by the appellant so the appellant cannot be prejudiced by a finding that these negotiations culminated in an agreement. Indeed, how could the appellant be prejudiced by such a finding having regard especially to Exhibit 1 - the receipt for $3,500 and Exhibit 4 (supra).

This letter was specifically pleaded in paragraph 20 of the Statement of Claim and as specifically denied in paragraph 26 of the Defence. Accordingly, issue was joined. How then could the learned trial judge refrain from considering such evidence? No change of heart by the appellant can alter the clear admission that there had come into being prior to that date a vendor-and-purchaser relationship between the appellant and the respondent.

The course adopted by the learned trial judge did not result in the imposition of a contract upon the appellant but rather in ascertaining the contract which the appellant expressly recognized in Exhibits 1, 2, 3, 4, 6 and 7.

In Exhibit 2, dated March 21, 1981, the appellant wrote:

> "I have asked Mr. Grosett to complete the sale to you without delay of fifteen acres of Hart Hill." [Emphasis supplied]

The parties to the transaction and the subject-matter are clearly known to the appellant. It is to be observed that in Exhibit 3 dated 5/8/77 the purchasers stated by the appellant in his own handwriting were Mrs. A. M. Barrett and Mrs. G. Bygrave. It is obvious that in the interim there had been a change in that by March 21, 1981, he regarded Mrs. A. M. Barrett as the purchaser of fifteen acres. And, indeed, the respondent did testify that at one stage the proposal was that she would purchase ten acres and her sister, Mrs. Bygrave, five acres but that she decided subsequently to acquire the fifteen acres alone. And, indeed, there is no record of any dealing with Mrs. Bygrave. Exhibit 4, dealing with payments for which the respondent must be given credit, states:

> "...the sum total of which to be treated as deposit on purchase price for fifteen (15) acres of land which she has requested me to sell to her."

This exhibit which is dated 4/5/81, that is, about ten weeks after Exhibit 2 acknowledges a previous payment of $1,201 - date omitted - as well as expenses incurred on the appellant's behalf which are to be set-off against the purchase price. There is a reasonable inference that the parties had agreed to the purchase price. The respondent testified that she was given the special price of $2,500 per acre. In my opinion, the significance of paragraph 3 in Exhibit 7 dated March 5, 1982, can be appreciated against this background. It reads:

> "If, however, government should demand a service road the price of $2500 will have to be proportionately raised to provide for this. In my rejected pro

> "forma terms I included the clause that at $2500 Miss Barrett would have to build her own road and pay for her own survey. All this holds."

I agree with the learned trial judge that the price here stated refers to the price per acre. This would corroborate the respondent as to the agreed price per acre. The appellant takes issue with this decision. But what else could it mean? It certainly cannot mean the total purchase price because the respondent had already paid in excess of that amount and all payments were to be treated as a deposit on the purchase price. Then, too, what would "proportionately raised to provide for this" mean if it did not relate to an apportionment of any new expenses on a per acre basis to meet these expenses? I am satisfied that the written material provides evidence of the existence of a contract between the appellant and the respondent, the absent date being, in the circumstances of the case, immaterial. There is also evidence of the subject-matter and the price.

But this view was strongly opposed by the appellant who contends that the Court may not read connectedly two documents so as to find a sufficient memorandum in writing as is required by the Statute of Frauds unless there is express reference in one document to the other. Support for that proposition was sought from **Elias vs. George Sahely & Co (Barbados) Ltd** [1982] 3 All E.R. 801 but concerning such a submission in that case the Privy Council per Lord Scarman said at page 806:

> "To accept this submission would, in their Lordships' view, be to take the law back to what it was in the middle of the nineteenth century when Pierce v Corf (1874) LR 9 QB 210 was decided."

The Privy Council accepted as a correct statement of the modern law a statement by Jenkins, L.J. in **Timmins v. Moreland Street Property Co Ltd.** (1957) 3 All E.R. 265 which appears at page 807 b-d in the **Sahely** case thus:

> "...it is still indispensably necessary, in order to justify the reading of documents together for this purpose, that there should be a document signed by the

> "party to be charged which, while not containing in itself all the necessary ingredients of the required memorandum, does contain some reference, express or implied, to some other document or transaction. Where any such reference can be spelt out of a document so signed, then parol evidence may be given to identify the other document referred to, or, as the case may be, to explain the other transaction, and to identify any document relating to it. If by this process a document is brought to light which contains in writing all the terms of the bargain so far as not contained in the document signed by the party to be charged, then the two documents can be read together..."

By applying this principle the Privy Council, agreeing with Douglas, C.J. for Barbados, allowed a receipt signed by the vendor's attorney for the deposit sent him by the purchaser's attorney to be read together with the letter from the purchaser's attorney which accompanied the deposit and contained all the terms of the agreement. There were no terms left to be negotiated. What is significant is the fact that the letter containing the terms of the contract was signed, not by the vendor (the person to be charged) or his agent, but by the purchaser's agent. The receipt in question reads:

> "Received from Fauzi Elias the sum of Thirty nine thousand Dollars and... Cents being deposit on Property at Swan Street B'Town agreed to be sold by George Sahely & Co. B'dos Ltd. to Fauzi Elias and or his nominees
>
> R. G. Mandville & Co.
>
> per E. Clarke."

It was held that that receipt clearly did refer to some other transaction, namely, an agreement to sell the property in Swan Street. Accordingly parol evidence was admissible to explain the transaction. Clearly this case which cannot assist the appellant favours the respondent's case.

The instant case is a far stronger case than **Sahely** because here all the documents under reference, with the exception of the receipt which was signed by his attorney, were signed by the vendor, the person to be charged. This ground of appeal fails.

Supplemental ground

"(2) that the Learned Trial Judge erred in law and in fact in finding that on the state of the Pleadings of the Plaintiff/Respondent and/or in the absence of any pleadings to that effect, that there was sufficient memorandum of an Agreement for sale of land at Hart Hill to satisfy the Statute of Frauds."

Ground

"(iii) That the learned trial Judge misapplied the law in relation to the facts in this case in holding that the Plaintiff succeeded despite the variance between the pleadings and the findings of facts."

Two issues arise for consideration under these grounds, viz:

1. The adequacy of the Pleadings to support the finding that there was a sufficient memorandum in writing to meet the legal requirement;

2. What is the effect of the course adopted by the learned trial judge in arriving at his conclusion that there was a contract?

Once the issues are stated it becomes obvious that they have in some degree been discussed already. As regards the first issue it has already been shown that paragraph 20 of the Statement of Claim pleads the very important letter (Exhibit 4) dated 4th May, 1981, which to my mind occupied a rather focal point in the resolution of the question confronting the learned trial judge. It is obvious from that letter, for which the appellant has proffered no explanation, that there was a sale of land transaction regarding fifteen acres of land at Hart Hill between the appellant and the respondent which had commenced at an earlier date. It really discloses an accounting relationship as well. Accordingly, on the principle enunciated in **Sahely** (supra) all the correspondence to which this pleaded letter points directly or by necessary inference become admissible in the endeavour to identify the contract on which the appellant had collected payment and in respect of which the respondent had incurred expenses on the appellant's

behalf which he had agreed to treat as part payment of the purchase price.

Paragraphs 6 and 7 of the Statement of Claim which pleaded the payment of $3,500 which was receipted by the appellant's attorney "on further payment for land at Hart Hill" in the parish of Portland are of similar effect. This receipt dated May 29, 1981 "on further payment" speaks to earlier payment(s) such as are recorded in the letter of May 5, 1981. The learned trial judge was obliged to consider these matters pleaded and any other document to which they speak. And I repeat, these are all documents signed by the appellant. He did not attend Court to disclaim authorship. Any such attempt would totally discredit him. The letters written by him are by the pleadings referred to made relevant and admissible.

In pressing opposition to the respondent's claim, counsel for the appellant referred the Court to the Nature and Functions of Pleading as set out at pages 7 to 8 Chapter 1 in **Bullen & Leake and Jacob's Precedents of Pleadings** 12th edition, viz:

> 1. To define with clarity and precision the issues or question which are in dispute between the parties and fall to be decided by the Court.
>
> 2. To require each party to give fair and proper notice to his opponent of the case he has to meet to enable him to frame and prepare his own case for trial.
>
> 3. To inform the Court what are the precise matters in issue between the parties which alone the Court may determine, since they set the limits of the action which may not be extended without due amendment properly made.
>
> 4. To provide a brief summary of the case of each party and to constitute a permanent record of the issues and questions raised in the action and decided therein so as to prevent future litigation upon matters already adjudicated upon between the litigants or those privy to them.

Paragraph 3 of the Statement of Claim states the commencement of the contractual relationship between the parties as "In

or about the year 1971." Paragraph 2 of the Defence and Counter-claim in denying the aforesaid paragraph 2 alleges a land transaction by oral agreement between the said parties "in the year 1972." There can be no doubt that it is abundantly clear from the Pleadings what the respondent was claiming. It is significant that the case went to trial without any request for further and better particulars or without discovery of documents though documents were pleaded by the respondent and expressly denied in the Defence and Counter-claim.

Insofar as the Pleadings do incorporate the correspondence, it was submitted on behalf of the appellant that the letter, Exhibit 7 dated 2/5/82, makes it plain that negotiations were still in train at that date so that on the Pleadings a concluded contract cannot be identified let alone at a date earlier than March 21, 1981. But in so contending counsel has obviously tripped over the word "negotiations" in that letter. The letter addressed to Mr. Ian Grossett, the appellant's attorney, commences:

> "Further to my letter of the 2nd inst, assuming that new negotiations are going on..."

[Emphasis supplied]

The first comment I would make is that the letter referred to is not in evidence and there is no suggestion that the respondent is either privy to or is in agreement with its contents. The letter, Exhibit 7, expresses the appellant's thinking as at the time of writing to his attorney premised on the likelihood of provision having to be made for expenses which would have to be incurred to comply with demands by Government, if such demands were made. But this is communication between the appellant and his attorney. It is not even an approach to the respondent to re-negotiate terms already agreed. He is not speaking about continuing negotiations but of new negotiations which may never arise. It is clear from the wording of the letter that the $2,500 is an agreed figure and that occasion would be sought to disturb that figure only in the event that Government intervened. It is, however, settled law that:

> "When once it is shown that there is a complete contract further negotiations between the parties cannot without the consent of both, get rid of the contract already arrived at" per Lord Cozens-Hardy M.R. in Perry v. Suffields (1916) 2 Ch. 167 at 192.

Accordingly, this suggestion of new negotiations which was not even communicated to the respondent cannot affect a contract already concluded at some time between 1977 and March 21, 1981. The appellant's contention fails.

The second issue set out above arises out of what is termed the variance between the pleadings and the findings of fact, that is, that a contract was concluded at a date other than the date pleaded. I have already stated that that finding of fact does no prejudice to the appellant and if doing justice between the parties is the outcome sought then all that has happened is that the learned trial judge has sought to put his fingers on the contract which the appellant was urging his attorney by letter dated March 21, 1981:

> "...to complete the sale to you without delay, of fifteen acres of Hart Hill."

The finding of fact has not gone any further than the appellant was anxious to go on that date.

Reference was made to several cases in the effort to bolster the submission that the departure from the pleaded date is fatal:

1. Esso Petroleum v. Southport Corporation (1956) A.C. 218
2. Blay v. Pollard and Morris (1930) 1 K.B. 628
3. Qualcast (Wolverhampton) Ltd. v. Haynes (1959) 2 All E.R. 38
4. John G. Stein Co. Ltd. v. O'Hanlon (1965) 1 All E.R. 547
5. Waghorn v. George Wimpey Co. Ltd. (1970) 1 All E.R. 474.

There is no quarrel with the decisions in the cases numbered 1, 2, 3 and 5 which were correct decisions on their facts. Case number 4 is decidedly in favour of the respondent. It was held that:

> "...there was not such a radical departure from the case averred on record as would justify absolving the appellants from liability, and the appellants would not have been prejudiced when the facts on which liability was established were those that they alleged in defence."

[Emphasis supplied]

The only difference between the **Stein** case and the instant case is the fact that whereas in that case the finding of liability was based on the facts pleaded in defence in the instant case the facts coming to the aid of the respondent were provided by the appellant in his letters. Accordingly, the decision by the House of Lords is very relevant. The opinion of Lord Guest, with whom the other Law Lords concurred, is both instructive and conclusive. This is how he dealt with the question of variation from the Pleadings at pages 553H to 554C:

> "The question is whether the case on which the respondent succeeded was covered by the pleadings. I have no doubt that the respondent failed to establish the case of a long-standing overhang some thirty feet from the corner; but in the way in which the evidence came out this became immaterial where the accident was proved to have taken place at about the corner. The facts on which the respondent succeeded before the Second Division were in effect the facts as alleged by the appellants in answer 2:
>
> > 'Explained and averred that the point at which the fall occurred was just round the corner from the position in which shots had been fired. The side of the road from which clay fell on the pursuer had been secure until the said shot-firing had taken place. The strata at said place was not weak nor dangerous prior to said shot-firing. It is believed and averred that the two explosions accompanying the said shot-firing had the effect of disturbing the strata of said place.'
>
> On these facts the Second Division (1963) S.C. 357 held that there was a breach of s. 48 by the manager. Although this finding was to some extent a variation or modification of the respondent's case on record, it was based on the same ground of fault and it related to the facts as found by the Lord Ordinary on evidence properly before him. There was not, in my view, such a radical departure from

> "the case averred on record as would justify the House in absolving the appellants from liability. The test was well expressed by the Lord Justice-Clerk (LORD THOMPSON) in words which I should like to adopt, when he said in **Burns v. Dixon's Iron Works, Ltd.** (1961) S.C. 102, at p. 107, 108:
>
> > 'The court is often charitable to records and is slow to overturn verdicts on technical grounds. But where a pursuer fails completely to substantiate the only grounds of fault averred, and seeks to justify his verdict on a ground which is not just a variation, modification or development of what is averred but is something which is new, separate and distinct, we are not in the realm of technicality.'
>
> Counsel for the appellants complained that they had been prejudiced in their conduct of the case. I fail to see how they can have been in any way prejudiced when the facts on which liability was established are those averred in the defences and spoken to by their witnesses in evidence."

We are confident that this case is concerned with just a variation and not "something which is new separate and distinct" which is not just a technicality.

These grounds of appeal also fail.

Supplemental ground (3) complains:

> "That the Learned Trial Judge erred in law and in fact in finding that there was in evidence, sufficient memorandum of an Agreement for the sale of land at Hart Hill to satisfy the requirements of the Statute of Frauds."

This ground was labelled by counsel as an "in any event" ground and submissions thereon proceeded on the basis that Exhibit 7 must be regarded as indicating that negotiations were still proceeding and have not been shown to have been concluded. But that fallacy has been exploded and there is no need to pursue submissions based thereon.

The judgment would logically end at this point since the respondent did not give any notice of appeal or respondent's notice. However, the respondent took advantage of Rule 18(4) of the Court of Appeal Rules, 1962, which provides that:

> "The powers of the Court under the foregoing provisions of this rule may be exercised notwithstanding that no notice of appeal or respondent's notice has been given in respect of any particular part of the decision of the Court below or by any particular party to the proceedings in that Court, or that any ground for allowing the appeal or for affirming or varying the decision of that Court is not specified in such a notice; and the Court may make any order, on such terms as the Court thinks just, to ensure the determination on the merits of the real question in controversy between the parties."

to raise the question of part-performance which had been rejected by the learned trial judge. This is how the learned trial judge dealt with that aspect of the respondent's claim at page 10 of his judgment:

> "The plaintiff urged, however not with much vigour that the doctrine of part performance could assist her. It cannot. The acts she relied on were (a) entering into possession and (b) fencing off 15 acres. But when were these acts done? They were carried out on or about 1972. I have decided that there was no contract between the parties at that time. Therefore there was no contract to which those acts could be referrable. At best those acts were in anticipation of an eventual contract - whatever the state of mind of the plaintiff at that time."

To my mind, the issue is quite concisely and decisively dealt with and I am not persuaded by any argument presented to warrant a departure from that conclusion.

In the event, therefore, the appeal is dismissed, the judgment of the Court below is affirmed and the respondent is to have the cost of appeal to be taxed if not agreed.

WOLFE, J.A.:

I agree.

PATTERSON, J.A. (Ag.):

I agree.