JUDGEMENT BOOK.

J A M A I C A

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL No. 37 of 1968

BEFORE: The Hon. Mr. Justice Luckhoo, Ag. P.
The Hon. Mr. Justice Smith, J.A.
The Hon. Mr. Graham-Perkins, J.A.

ROSE HALL LTD. - DEFENDANT/APPELLANT

ELIZABETH LOVEJOY REEVES - PLAINTIFF/RESPONDENT

V.O. Blake, Q.C., and R.H. Williams, Q.C., for the appellant.

D.H. Coore, Q.C., and D. Scharschmidt for the respondent.

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November 23 - 26, 1971; January 17,
February 21, March 24, April 14, 1972

LUCKHOO, Ag. P.:

This is an appeal from the judgment of Zacca, J. given on October 24, 1968 granting the respondent's application by way of summons for leave to sign summary judgment pursuant to s. 86A of the Civil Procedure Code, Cap. 177, in a claim for the specific performance of an agreement of sale and purchase of two parcels of land entered into on April 4, 1961, by and between the appellant as vendor and the respondent as purchaser.

The appellant wishes to have the judgment of Zacca, J. set aside and to be given leave to defend the respondent's claim for specific performance of the aforesaid agreement on the ground that he has a good defence to the action on the merits or that at any rate there is a substantial issue to be tried. The appeal turns largely on the proper interpretation to be given to the provisions of s. 3 (2) of the Local Improvements

(Amendment

(Amendment) Act, 1968 (No. 36). The facts not in dispute are as follows. On April 4, 1961, the appellant agreed to sell the respondent two parcels of land part of the appellant's property situate in the parish of St. James for the sum of £50,000 upon certain terms and conditions. The respondent duly paid the sum of £12,500 by way of deposit and, thereupon, in compliance with one of the terms of the contract the appellant delivered possession of the parcels to the respondent. It was necessary under the provisions of s. 6 of the Local Improvements Law, Cap. 227, for the sanction of the St. James Parish Council to be obtained for the sub-division of the appellant's land contemplated by the agreement of sale and purchase and to this end it was necessary under s. 4 of that Law for a plan of the land to be subdivided as well as certain specifications and estimates to be submitted to the Parish Council for its consideration. Under that Law these provisions had to be complied with prior to the making of any agreement of sale involving the laying out or sub-division of land. The parties omitted to obtain the Parish Council's sanction in this regard before entering into the agreement of April 4, 1961, and as has been decided by the Supreme Court of Jamaica in cases where a similar omission occurred, the agreement so made was illegal and void ab initio. See Watkis v. Roblin (1964) 6 W.I.R. 533. The parties, however, treated the agreement as if it were valid and subsisting. In 1964 when the St. James Parish Council gave its sanction to the sub-division subject to certain conditions that fact was communicated by the appellant's solicitor and agent to the respondent's solicitors by letter dated March 16, 1964. Later on the respondent paid the appellant a further sum of £12,500 on account of the purchase price under the agreement. The balance of £25,000 was, under the agreement, to be paid not later than April 4, 1971.

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Sometime during 1965 a Mr. John Rollins (who had by then become the majority shareholder in Rollins Jamaica Ltd. which itself had become the majority shareholder in the appellant company) began to take an interest in the transaction. Mr. Rollins wished to have the two parcels of land remain in the appellant's ownership and to that end negotations were put in train for a re-purchase of the parcels from the respondent. A draft agreement of sale and purchase bearing date January 15, 1968 was prepared by solicitor for the Rose Hall (Developments) Ltd. for consideration by the respondent. The consideration proposed therein for the re-purchase was $365,000 U.S., a sum more than twice that for which the appellant agreed to sell the two parcels to the respondent. However, the respondent did not wish to return the parcels to the appellant and informed the appellant accordingly.

On December 11, 1967, before the preparation of the draft agreement, the respondent had caused a caveat to be entered against all dealing with the two parcels. On May 28, 1968, a company, North Western Enterprises Ltd., was registered under the Companies Act, 1965. It is not necessary to enquire into the circumstances under which and the purposes for which this company came to be formed. An agreement of sale and purchase bearing date May 25, 1968 was executed on behalf of the appellant as vendor and North Western Enterprises Ltd. as purchaser in respect of the two parcels of land. Whether the agreement was in fact executed on the date it bears or, as claimed by the appellant, at some later date is not material to this appeal. Pursuant to that agreement an instrument was executed on September 12, 1968 for the transfer by the appellant of all its estate and interest in the two parcels of land to North Western Enterprises Ltd. That instrument of transfer was on September 13, 1968 lodged with the Registrar of Titles for registration, but the transfer was never registered because of the existence of the caveat which had been entered by the

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respondent on December 11, 1967, in protection of the interest she claimed under the agreement of April 4, 1961 in the two parcels. Accordingly the legal estate in the parcels has never been passed to North Western Enterprises Ltd. (see s. 84 of Cap. 340). Before that, in August, 1968, the respondent offered to pay the appellant all moneys outstanding under the agreement of April 4, 1961, but this offer was not accepted by the appellant.

It is common ground that by virtue of the provisions of s. 6 of the Local Improvements Law, Cap. 227, the agreement of April 4, 1961 was invalid there being a failure, before the agreement was entered into, to apply for the St. James Parish Council's sanction to the sub-division of the land. On August 22, 1968, there was enacted the Local Improvements (Amendment) Act, 1968 (No. 36), s. 3 (1) of which amends Cap. 227 by the insertion of the following provision as section 9A (1) -

> " The validity of any sub-division contract shall not be affected by reason only of failure, prior to the making of such contract, to comply with any requirement of subsections (1), (2) and (3) of section 4 or to obtain any sanction of the Board under section 6 or section 6A, as the case may be, but such contract shall not be executed by the transfer or conveyance of the land concerned unless and until sanction of the Board hereinbefore referred to, has been obtained."

Section 3 (2) of the 1968 amending Act provides as follows -

> " This section shall be deemed to have come into operation on the 1st day of January, 1954 hereinafter referred to as the "operative day" so, however, that as respects transactions which took place between the operative day and the date of enactment of this Act, the amendment effected in the principal Law by virtue of this section of this Act shall not operate so as to nullify or affect any transfer or conveyance of land effected pursuant to any contract of sale made prior to the date of enactment of this Act."

It is also common ground that the effect of the provisions of s. 9A of Cap. 227 with its operative date as January 1, 1954, as specified by s. 3 (2) of the 1968 amending Act is to render

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valid the agreement of April 4, 1961 from the date it bears. It is not denied (though only for the purposes of this appeal) that the agreement between the appellant and North Western Enterprises Ltd. bearing date May 25, 1968 is and always has been a valid contract in that the Parish Council's sanction to the sub-division had been obtained prior to the date it was entered into. It is also not denied (though only for the purposes of this appeal) that under this latter agreement the equitable estate in respect of the two parcels became vested in North Western Enterprises Ltd. However, before Zacca, J. and also before us it was submitted on behalf of the appellant that when the instrument of transfer was lodged for registration pursuant to the agreement bearing date May 25, 1968 there was a "transfer effected" pursuant to a contract of sale made prior to the date of enactment of the 1968 amending Act which by reason of the provisions of s. 3 (2) of that Act remained unaffected although the earlier agreement dated April 4, 1961 between the appellant and the respondent had been validated with effect from the date that agreement bore; that in effect though validated the earlier agreement in the events which had occurred was not specifically enforceable against the vendor. Zacca, J., however, upheld the respondent's contention that the words "transfer ..... effected" in s. 3 (2) of the amending Act of 1968 meant transfer registered and as the transfer in this case was never registered the provisions of s. 3 (2) of the amending Act of 1968 did not afford the appellant an answer to the respondent's application to sign summary judgment. There being no other issues raised by the appellant in opposition to the respondent's application for summary judgment (any facts not admitted being assumed in favour of the appellant) the learned judge made the order prayed by the respondent.

At the hearing of this appeal counsel for the appellant Mr. Blake stated that we would not be troubled with the appellant's application made to this Court for leave to adduce

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further evidence. It is not necessary therefore to say anything in respect of that application except to note that it has been abandoned.

The first ground of appeal argued before us related to a question which was not raised nor argued before Zacca, J. The agreement of April 4, 1961 contains as paragraph (g) under the heading of "SPECIAL CONDITIONS" the following -

> " The vendor will obtain the consent of the registered proprietors of any mortgage now affecting the Property (in such a manner as to be binding on their transferees and assignees) to the purchase price therein, and the terms of payment thereof and to the release of the Property from any such mortgage upon payment to the mortgagee by the vendor of half the purchase price."

Mr. Blake's submission on this ground is as follows. The decree of specific performance was wrongly pronounced because the respondent failed to show that the condition had been fulfilled. Such a provision is a condition precedent and therefore the onus was on the respondent as plaintiff to show that it had been fulfilled. It was for the judge to satisfy himself that all conditions precedent had been fulfilled (or waived by the party for whose benefit they were inserted which was not the case here) before pronouncing a decree of specific performance and therefore it was not necessary for the appellant to take this point by way of opposition to summary judgment being granted in the claim.

Mr. Coore for the respondent submitted that it was not competent for the appellant to seek to take this point for the first time on appeal and that in any event the provision was not a condition precedent but rather was merely a term of the contract which would require the appellant by way of defence to show that some triable issue arose in relation thereto.

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Mr. Coore pointed out that the respondent by her agent had filed the appropriate affidavit verifying the cause of action and stating that in his belief there was no defence to the action. Further, Mr. Coore urged that the wording in the provision itself did not indicate that there was in fact a mortgage in existence at the time the agreement was entered into. There was therefore no necessity for the respondent to make any assertion in his affidavit in that regard and in any event it has not even been suggested by the appellant during the course of the argument in this appeal that there was in fact a mortgage existing when the agreement was entered into.

In view of the fact that I consider that condition 11 (g) as worded does not in fact assert the existence of a mortgage at the date of the agreement it is unnecessary to give any opinion on the other points raised by Mr. Coore. Condition 11 (g) really only says in effect that <u>if</u> there is a mortgage existing at that time certain things will be done by the vendor. It does not say that there <u>is</u> a mortgage in existence. There is therefore no need for the respondent to aver by affidavit in support of his claim or otherwise that there never was a mortgage in existence at the date of the agreement or that there was one but that the vendor has done what he undertook under condition 11 (g) to do. It is not without significance, as Mr. Coore pointed out, that in the agreement between the appellant and North Western Enterprises Ltd. there is nothing to indicate the existence, at the date that agreement was executed, of any mortgage in relation to the parcels or any of them if ever there was one in existence at some earlier point of time.

The main ground of appeal argued before us relates to the proper construction to be given to the words "transfer .... effected" occurring in s. 3 (2) of the Local Improvements (Amendment) Act. 1968. Mr. Blake submitted that the proper

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construction to be given to those words is a matter which is not free from difficulty and on that basis alone the learned trial judge ought to have granted leave to defend. Mr. Coore, on the other hand, submitted that where a point of law involves the construction of a statute and its application to the facts which are agreed or established then the judge on a summons such as the one in this case has a duty to make up his mind even if it takes him a little time. I think that Mr. Coore's submission on this point is supported by authority. In Cow v. Casey (1949) 1 K.B. 474, the defendant sought leave to defend proceedings brought under O. 14 of the English R.S.C. and relied on the Rent Restriction Acts. One of the matter urged was that the Rent Restriction Acts were complicated Acts and that the Court ought to be very cautious in treating under O. 14 and should therefore give leave to defend. In dealing with that point on appeal from the order of Pritchard, J. confirming an order of Master Horridge, giving leave to the plaintiff to sign final judgment for possession with mesne profits, Lord Greene, M.R. said (at p. 481):

> " But it is not sufficient under an O. 14 case to flourish the title of the Increase of Rent Restriction Acts in the face of the Court and say it is enough to give leave to defend. If a point taken under the Rent Restriction Acts is quite obviously an unarguable point, the Court has precisely the same duty under O. 14 as it has in any other case. It may take a little longer to understand the point and to be quite sure that one has seen all around the case under the Rent Restriction Acts than in other case, but when the point is understood and the court is satisfied that it is really unarguable, the court has a duty to apply the rule ..."

It was next submitted by Mr. Blake that when the instrument of transfer was lodged with the Registrar of Titles for registration a transfer of the parcels from the appellant to North Western Enterprises Ltd. was effected which, under the provisions of s. 3 (2) of the Local Improvements Act, 1968, remained unaffected

despite the validation of the earlier contract of sale between the appellant and the respondent. Mr. Blake contended that in holding that a transfer could not be said to be effected until it was registered the learned judge overlooked the provisions of s. 57 of Registration of Titles Law, Cap. 340 whereby an instrument of transfer is deemed to be registered at the date it is produced for registration provided the Registrar registers it in the appropriate way and also overlooked the fact that the passing of the legal estate or interest is not dependent on the act of the parties but on the act of the Registrar. It could hardly have been intended by the legislature, Mr. Blake argued, that a transferor or transferee who intended the legal estate or interest to pass could be defeated by reasons beyond his control e.g. delay by the Registrar in registering a transfer. Finally Mr. Blake urged that a court will always lean in favour of a construction of a statute which would protect vested rights. Mr. Coore, on the other hand, contended that Mr. Blake's observations on s. 57 of the Registration of Titles Law, Cap. 340 did not take into account the existence of the caveat system (as provided for by ss. 133 - 137 of the Registration of Titles Law, Cap. 340) whereby registration of transfers could not be made while a caveat was not cleared off and that in any event s. 3 (2) of the 1968 Act had no bearing on the matter as (i) the appellant's transaction with North Western Enterprises Ltd. is not a transaction contemplated by that subsection; (ii) and even if it were, the words "transfer ..... effected" in that sub-section means transfer registered and the appellant's transfer to North Western Enterprises Ltd. was not registered.

Dealing first with (ii) above, if the construction of s. 3 (2) of the 1968 Act contended for by Mr. Blake is correct it would have the result, as Mr. Coore has pointed out, that in the case of land with a common law title the saving provision contained in s. 3 (2) would only apply if the legal estate or interest has passed by way of conveyance whereas in the case of

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land with a registered title the saving provision would apply while the legal estate or interest still remains in the vendor. A further observation may be made on this point. The signing and lodging of an instrument of transfer in itself creates no estate or interest in the purchaser. An equitable estate or interest may arise when the contract of sale is made. In the case of registered land the legal estate or interest is passed only when the transfer is registered.

When regard is had to these matters and to the nature of the provisions of s. 3 (2) itself it seems clear that the words therein "transfer or conveyance of land effected" mean "transfer or conveyance of land registered or executed respectively". If this is the true interpretation of those words, as I think it is, then it is unnecessary to say more in respect of (i) above than that the transactions contemplated under the saving provision in s. 3 (2) relate only to transactions which were invalid by reason of non-compliance with ss. 4 or 6A of Cap. 227.

The position then is that s. 3 (2) of the 1968 Act does not aid the appellant's endeavour to show that leave to defend should have been granted. Indeed s. 3 (2) specifically makes the amendments introduced by the 1968 enactment retrospective to January 1, 1954 so that the contract between the appellant and the respondent made on April 4, 1961 is to be considered as valid from the date it was entered into by the parties and enforceable from October 9, 1963, the date on which the sanction of the St. James' Parish Council under s. 6 of Cap. 227 was obtained. In that event the equitable estate in the two parcels of land would be deemed to have passed under the contract to the respondent unless it is held that when the contract with North Western Enterprises Ltd. was made in 1968 prior to the enactment of the 1968 amending Act the equitable estate vested in that company by that contract remained undisturbed by that enactment. Mr. Blake submitted that the Court will always lean in favour of construction of a statute to protect vested rights. But in the case of the 1968

enactment it is not the case that it is being given a construction so as to have retrospective operation whereby it would follow that it should not be given a greater retrospective operation than its language renders necessary. The fact is that that the enactment expressly states that its provisions are retrospective and specifically defines what rights are to remain undisturbed by the amendments contained in the enactment.

It seems to me that the equitable rights acquired by North Western Enterprises Ltd. under that company's contract with the appellant have been adversely affected by the amendments made by the 1968 Act in that it is now deemed that under the respondent's contract with the appellant the equitable estate in the two parcels passed to the respondent as from October 9, 1963 and would take precedence over the equitable interest created in 1968 in favour of North Western Enterprises Ltd. under that company's contract of sale and purchase with the appellant.

There remains the question whether specific performance, being a discretionary remedy, should have been decreed. The learned trial judge did not specifically state that he considered the question of the exercise of his discretion in making the order for specific performance of the appellant's contract of sale and purchase with the respondent. In the absence of anything on the record to indicate that he omitted to exercise his discretion in that regard it ought to be presumed that he did exercise it. In any event Mr. Blake has conceded, and I think he is correct in so doing, that there is on the record no material upon which the trial judge could have exercised his discretion against the respondent.

I can see no good reason why the decree should be refused. In the result this Court ought to dismiss the appeal and affirm the order of the trial judge with costs of the appeal to the respondent.

SMITH, J.A.:

The first point argued for the defendant company on appeal was that clause 11(g) of the agreement of sale is a condition precedent and there was no evidence before the judge in chambers, Zacca, J., to establish that this condition had been fulfilled; that the judge was, therefore, wrong in giving the plaintiff summary judgment on her summons. Assuming that this point could properly be taken for the first time on appeal, I am of opinion that it fails on two grounds.

Firstly, it was said that clause 11(g) is a condition precedent inserted in protection of the vendor (i.e. the defendant company) if it turned out that the mortgagee would not agree to release the mortgage upon payment of half of the purchase price so as to make it thereby possible for the vendor to transfer to the purchaser (i.e. the plaintiff) free of encumbrances as contemplated. I agree that the purpose of the condition is to enable the plaintiff to obtain a title unencumbered by the mortgage but this seems to me to be in the interest of the plaintiff and not the defendant. If a mortgagee withheld his consent the sale would be subject to the mortgage. Condition 11(g) clearly relates to title and not to the validity of the agreement. It did not prevent the relationship of vendor and purchaser from being established or coming into being. That such a relationship has been recognized to exist in this case (apart from the point as to illegality) cannot be doubted. This condition is much like that which was considered in Property and Bloodstock Ltd. v Emerton, [1967] 3 All E.R. 321. There a contract of sale of leasehold property by a mortgagee was made subject to the condition that the vendor obtain the consent of the landlord to the assignment of the lease to the purchaser. It was held that the condition was not a condition precedent to the formation of the contract of sale

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and the creation of the relation of vendor and purchaser between the mortgagee and the purchaser.

It is, of course, on a construction of the contract of sale in question that a decision whether a condition is a condition precedent or not is to be reached. In the agreement under consideration clause 7 is as follow :-

" 7. Encumbrances & Reservations: Subject to:
(a) existing easements for the right for water to drain along existing channels
(b) the special conditions mentioned below
(c) the covenants and stipulations in the Schedule hereto
(d) the stipulations imposed by the Parish Council in granting subdivision approval and if any term of the said approval is not acceptable to the Vendor this agreement shall be null and void and the Vendor shall only be liable to repay all moneys paid hereunder but not interest thereon or any other compensation or damages whatsoever."

The special conditions referred to in clause 7(b) are those set out in clause 11, including para. (g) of that clause. Of significance in deciding whether or not condition 11(g) is a condition precedent is the fact that the provision in clause 7 whereby the agreement may be rendered null and void is limited to the stipulations referred to in para. (d). In my judgment, on a true construction of the agreement, condition 11(g) is not a condition precedent but a mere term of the agreement.

Secondly, assuming it is a condition precedent, in my opinion it is not fatal that no direct evidence was given in respect of it. As was submitted for the plaintiff, clause 11(g) does not say that there was any mortgage in existence at the time the agreement was made. I agree with Luckhoo, P. that the effect of the clause is that if there was a mortgage in existence certain things would be done by the vendor. If there was such a mortgage and the condition is a condition precedent, there would be no enforceable agreement if the consent of the registered proprietor

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of the mortgage had not been obtained. One would, therefore, ex hypothesi, expect the defendant company to resist the plaintiff's application for summary judgment on this ground. These facts, if they existed, would have been peculiarly within the knowledge of those acting for the company. But no such ground was alleged though it was clear on the pleadings that the plaintiff was asserting that she had a valid and enforceable agreement. No submission was made before the judge that the plaintiff had failed to prove that the condition was fulfilled and the point was not expressly taken in the grounds of appeal. The defendant company was clearly not contesting the summons on this ground for the obvious reason, I suspect, that no facts existed on which it could be based. It is significant that no attempt was made before us to allege that there was a mortgage and that the requisite consent had not been obtained though an elaborate attempt was made, but not pursued, to have fresh evidence admitted with a view to having the agreement declared null and void under clause 7(d). In my view, there was ample material before Zacca, J. from which the inference could reasonably be drawn either that there was no mortgage in existence or that, if there was, the necessary consent had been obtained.

The other, and main, point argued for the defendant company was that Zacca, J. was wrong in holding that it was perfectly clear that the words "transfer ..... effected" in s. 3(2) of the Local Improvements (Amendment) Act, 1968 could only mean "transfer ..... registered" and that it was not arguable at all that those words might have some different meaning. It was submitted that another possible construction that may be put on the word "effected" is that it relates to the act of the relevant party or parties and signifies the moment of time at which the transferor has properly done all within his power to do to pass the legal estate or interest to his transferee. It was said that that moment of time would be the date on which he produces to the

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registrar of titles a properly executed transfer in form contemplated by the statute and accompanied by all supporting documents. As this was a possible interpretation, it was contended, Zacca, J. should have given leave to defend.

Before the learned judge it was submitted as a general proposition that leave to defend should be given where a difficult question of law is involved. A fairly full argument was addressed to him on the proper interpretation of the words "transfer..... effected" with a view to showing, on the part of the defendant, that there was an arguable defence and, on the part of the plaintiff, that the meaning was perfectly clear. It seems to me that the learned judge could not decide whether the meaning was clear or not without making a serious attempt, with the assistance of the argument and applying the relevant rules of construction, to construe the words. In my opinion, it would be idle and a shirking of his responsibility for him, without properly considering the matter, simply to say "this looks difficult let some other judge decide it at a trial", perhaps on the same argument. I entirely agree with the submission for the plaintiff that if the only defence raised on an application for summary judgment is a question of law which is precisely defined and capable of being permanently decided on the basis of the undisputed evidence put before him it is the judge's duty to decide it even if it appears difficult. I cannot see that any advantage would be gained or purpose served by allowing the issue to go to trial. Very difficult points of law are decided from time to time in chambers without disadvantage to the parties. Once the judge has made a decision then, as far as he is concerned, it is a plain case and it is he who must decide at that stage whether it is a plain case or not. As has been pointed out by Luckhoo, P. in his judgment, the point of view here expressed is supported by the passage cited by him from the judgment of Lord Greene, M.R. in Cow v Casey [1949] 1 K.B. 474 at 481. I think it is also supported by a statement by Russell, L.J. in Biggs v Boyd Gibbins Ltd. [1971] 1 W.L.R. 913, a

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case in which the plaintiff applied for summary judgment in an action for specific performance of an agreement by the defendant to purchase land from the plaintiff. At. p. 915 Russell, L.J. said:

> " With the matter being dealt with under Ord. 86, it is, I think, right to say that an order should be made only if the judge thinks it is a plain case and ought not therefore to be tried. Speaking for myself, I should have thought that it would be sensible that if you have got simply a short matter of construction, with a few documents, the judge on this summary application should simply decide what is in his judgment the true construction. There could be no reason to go formally to trial (except that you might possibly get another judge) where no further facts could emerge which would throw any light at all upon the letters that have to be construed."

A short matter of construction is not necessarily the same thing as a simple or easy matter of construction. It is also to be noted that in referring to the reason for going formally to trial Russell, L.J. spoke of the emergence of facts at the trial which could throw light upon the documents to be construed.

In the case under consideration it was not suggested that there were any facts which could emerge at a trial which could assist in the construction of s. 3(2) of the Act of 1968. It was conceded that the determination of the question whether or not the defendant had an arguable defence depended solely on whether the meaning of the words "transfer ..... effected" was plain. Zacca, J. said that he was satisfied that the only possible interpretation of s. 3(2) is that a transfer is effected when it is registered. He said that he had no doubt about it. The learned judge was here saying, in effect, that the interpretation of the provision is plain. In other words, it was a plain case. We had, therefore, on appeal to decide whether the judge was right. It was contended that we could not say that this was a plain case because the legislation is, on the face of it, extremely difficult to interpret; that its proper interpretation raises questions as to equities and extracting from the language used the intention of the legislature in regard to competing claims. A full and very helpful argument was, nevertheless, addressed to us on behalf of

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each party on the proper interpretation of the provision.

The defendant company sought to contend, in answer to the plaintiff's claim, that a transfer of the lands in question had already been effected as a result of the agreement made in 1968 between the company and North Western Enterprises Ltd. and that this transfer was protected by the saving provision in subs-s. (2) of s. 3. It was submitted before us for the plaintiff that the saving provision is limited to "transactions" which resulted in the contracts validated by s. 3(1) of the Act of 1968 and is intended to ensure that transfers or conveyances effected before sanctions of sub-divisions had been obtained are treated as effective (see latter part of s. 9A (1) in s. 3 (1) of the Act). Such an interpretation would exclude the transaction and the alleged transfer between the defendant company and North Western Enterprises Ltd. It was not disputed that the saving provision is framed in wide terms but it was submitted that in order to arrive at the meaning of "transactions" the word must be looked at in its context and, in particular, in the light of the mischief which the legislature aimed at preventing. Looked at in this way, it was said, no convincing reason has been advanced why the word should be given the wider meaning contended. In my opinion, the word is used here in its widest sense and it is for the plaintiff to show that it is used in the narrow sense contended by her. I am not convinced by the argument that it has any such restricted meaning. There is nothing in the context in which it is used which, in my view, compels such a conclusion. If such a restricted meaning was intended I would have expected the saving provision to be framed so as to make specific reference to the prohibition contained in the latter part of s. 9A (1). If the interpretation put upon "transfer ..... effected" by Zacca, J. is right then it is clear that the legislature intended to protect legal titles to land which resulted from the contracts of sale referred to in s. 3(2). In my opinion, the transaction with North Western Enterprises Ltd. is within

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the provisions of s. 3(2).

Now as to the meaning of "transfer ..... effected". These words have no defined or legally decided meaning and must, therefore, be interpreted in the ordinary way. It is the meaning of the word "effected" which needs to be considered. It must be given its ordinary or dictionary meaning. In the Oxford English Dictionary the verb "effect" is defined thus: "To bring about (an event, a result); to accomplish (an intention, a desire)." In Webster's International Dictionary the definition is: "To bring to pass; to execute, to enforce, to achieve; to accomplish." In my opinion, it is in these senses that the word is used in both places where it occurs in s. 3(2). Legally, land cannot be said to be transferred or conveyed until the legal estate passes. For example, when it is stated in s. 9A (1) that " .....such contract shall not be executed by the transfer or conveyance of the land concerned ...." this can only refer to the transfer or conveyance of the legal estate in the land. No lawyer refers to the passing of an equitable estate or interest in land from one person to another simply as a transfer or conveyance of land. A transfer or conveyance of land can only be brought about or achieved or accomplished by the passing of the legal estate - in the case of registered land by registration and in the case of unregistered land by delivery of an executed conveyance. So that the plain meaning of "transfer ..... effected" in the case of registered land is "transfer ..... registered."

There is another, and perhaps more accurate, way of looking at the matter with the same result. The word "effected" in question was used in the sub-section in order to relate the words "transfer or conveyance of land" which precede it to the contracts of sale specified in the words which follow it. So the legally accepted meaning of the words "transfer or conveyance of land" is not affected by the word "effected." They do not

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depend on that word to give them meaning. The words bear the same meaning that they do in s. 9A(1). The point I wish to make is made clear if the relevant words in s. 3(2) are read with the addition of the words "which is" as follows: "..... the amendment effected in the principal law by virtue of this section of the Act shall not operate so as to nullify or affect any transfer or conveyance of land which is effected pursuant to any contract of sale ....." All that is meant is that the amendment shall not operate so as to nullify or affect the passing of any legal estate in land which is brought about or accomplished pursuant to any contract of sale made prior to the date of the enactment of the Act. It is in this same way that the word "effected" is employed earlier in the sub-section in relation to "amendment". It is conceded that the legal estate in the lands had not passed from the defendant to North Western Enterprises Ltd. at the time when the application was heard by Zacca, J. The saving provision did not, therefore, help the defendant.

With all due respect to the able argument of Mr. Blake, it must follow from the views I have formed and expressed above that the words in question are not capable of bearing the alternative meaning for which he contended. In my judgment, the meaning of the words is perfectly clear. It was a plain case and it was, therefore, competent for Zacca, J. to give the plaintiff leave to sign summary judgment.

Though the point was taken in the grounds of appeal, the question of the exercise of the judge's discretion in decreeing specific performance was not challenged on appeal. The question whether specific performance or damages was the proper remedy in the circumstances was raised before the learned judge. In granting the plaintiff's application he must be taken to have exercised his discretion unless the contrary is shown. It was not suggested before us that there was any triable issue on this aspect of the

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case. S. 86A of the Civil Procedure Code, which allows summary judgment to be entered in a claim for specific performance, would serve little purpose if it is to be said that there is a triable issue whether specific performance or damages is the proper remedy. In fact, s. 86A allows an application for summary judgment to be made even where there is an alternative claim for damages and the defendant can resist the application only if he satisfies the judge that "he has a good defence on the merits or discloses facts sufficient, in the opinion of the Court or Judge, to entitle him to defend." There was no material in the record on which the judge could have judicially exercised his discretion against the plaintiff by refusing her application for specific performance.

It is for the above reasons that I agreed that the appeal should be dismissed.

LUCKHOO, Ag. J.:

In the result by a majority the Appeal is dismissed with costs to the respondent and the order of the trial judge is affirmed.