IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E. 109 of 1969

BETWEEN	ALBERT FERNANDO ROSE	PLAINTIFFS
	and	
	WILBERT CHARLES HANCHARD (as executors of the estate of Mabel Joyce Harvey-McIntosh)	
AND	PATRICK WILKINSON CHUNG	FIRST DEFENDANT
AND	PATRICK CITY LIMITED	SECOND DEFENDANT

Mr. K. C. Burke with Dr. A. Edwards and Mrs. Margaret Macaulay for plaintiffs.

Mr. Peter Millingen of Messrs. Clinton Hart & Company for defendants.

HEARD: March 2, 3, 1977
June 6, 1978

J U D G M E N T

Allen, J. :

1. Persons who owned large areas of land and who were prepared to develop those lands, to provide residential lots within the corporate area of Kingston and Saint Andrew, found a ready market for them among the land-hungry population. The terms, whereby payment was made by way of a small deposit with small monthly payments, spread over several years, at the end of which one owned a residential lot made the prospect doubly attractive.

Background:

2. The first defendant, Patrick Wilkinson Chung (hereinafter called Patrick Chung) was one such owner. In 1957, he was the registered owner of 250 acres of land known formerly as "Waterhouse Pen" and later as "Patrick City" situated in the parish of Saint Andrew, and registered at Volume 865 Folio 86 of the Registered Book of Titles. He had this property surveyed and cut up into some 797 lots, and on or about November 1, 1957, he applied to the Kingston and Saint Andrew Corporation for approval of the proposed

sub-division scheme as required by The Local Improvements Law (Cap. 227 of the 1953 Revised Laws of Jamaica). Approval to the sub-division scheme was eventually obtained on December 11, 1958, subject to certain conditions as to the establishment of roads within the sub-division.

3. Prior to approval being obtained, he had entered into agreements for sale with purchasers, one of whom was Mabel Joyce Harvey-McIntosh. By agreement dated May 18, 1957, Patrick Chung agreed to sell and Mabel Joyce Harvey-McIntosh to buy, property described as Lot 19 of Patrick City, Saint Andrew, for the agreed price of £500.0.0. A deposit of £150.0.0 was paid by her on the signing of the agreement and the balance by monthly instalments of £4.0.0, balance on completion of roadways. Mabel Joyce Harvey-McIntosh had by June 24, 1965, paid £526.00, representing the purchase price and the excess being apparently towards her share of costs. She died on January 29, 1968. This suit is brought by the plaintiffs as Executors of her estate to whom probate was granted in the Supreme Court on September 20, 1968.

4. On or about March 1, 1960, the first defendant, Patrick Chung, transferred his interest and estate in the land to the second defendant, Patrick City Limited (hereinafter called the Defendant Company) subject to contracts of sale of lots which he had already made with the right to receive in respect of such lots already sold, the outstanding balances of purchase money thereon, and notice of the assignment was given to the purchasers of the lots.

5. The sub-division plan of the said property was deposited in the office of the Registrar of Titles by Patrick Chung and the Defendant Company, their servants and/or agents, on or about October 1, 1960, and registered titles to various lots were prepared and issued in the name of the Defendant Company which held the same in trust for and on behalf of such purchasers and/or their nominees as had purchased or as had agreed to purchase the several lots from Patrick Chung or his assigns.

6. On or about January 12, 1962, the Defendant Company or both defendants transferred their rights under contracts of sale

to Farmers and Merchants Trust Company Limited, a company registered in Canada but carrying on business in Jamaica, subject to the rights of the purchasers in law and equity, and notice of the assignment was given to the purchasers of such lots.

7. On or about February 6, 1967, at the trial of issues arising between the first and second defendants on the one hand, and their assigns, Farmers and Merchants Trust Company Limited, on the other (see Farmers & Merchants Trust Company Limited v. Chung et al, 1970, 15 W.I.R. 366), Mr. Justice Kenneth Smith (as he then was) found, inter alia, that contracts for the sale of land for which sub-division approval had not been obtained were made in breach of the Local Improvements Law (Cap. 227 of the Revised Laws of Jamaica) and were illegal and unenforceable. It is common ground that the contract dated May 18, 1957, fell into this category.

8. The decision affected a great number of purchasers who had invested moneys in sub-division schemes which had not been approved by the Board of the relevant local authority prior to their contracts with the vendors. Not only did they lose their equitable interest in the land they purported to purchase but also stood to lose the moneys paid to the vendors on an illegal contract. Many vendors took the stand that such contracts were illegal and that the deposits were not recoverable, and as owners of the legal interest proceeded to re-sell more often than not at a higher price than that paid by the first purchaser.

9. As a result of public reaction the Local Improvements (Amendment) Act (Act No. 36 of 1968) was passed with retroactive effect to validate the contracts so negotiated in breach of the law, and to protect the rights of property which had accrued to purchasers between January 1, 1954, and the date of enactment of the amending Act - August 22, 1968. The relevant provisions are set out below:

The Local Improvements (Amendment (Act) 1968

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 the sanction of the Board hereinbefore referred to, has been obtained. "

Section 3(2):

" This section (i.e. S. 9A) 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. "

10. As was to be expected the amending legislation brought a rash of litigation in respect of the validated contracts against sub-dividers of land within its scope and in particular against the defendants. In one such claim founded on facts similiar to this case (Russell v. Patrick Chung et al) Zacca, J. (as he then was) recognised the effect of the amending Act in his judgment dated October 19, 1971, at page 15. He stated with reference to Act 36 of 1968:

" In order to give effect to the intention of the Legislature I hold that a proper construction of the amending legislation would be that it shall operate so as to give effect to all contracts entered since 1st January, 1954, which were illegal prior to the passing of the amending legislation. "

The amending Act also protected rights of property which had accrued between January 1, 1954, and the date of enactment, August 22, 1968, and which had actually been the subject of a transfer or conveyance. Were it not for the provision in section 3(2) of the Local Improvements (Amendment) Act (No. 36/68) that "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 ..... " there would be no bar to a purchaser under a validated contract being granted an order for specific performance of the contract.

11. The land, the subject matter of this suit, was proved to be registered land to which the provisions of the Registration of Titles Law apply, and under which, once title to the land is registered, such registration is unassailable save in the case of fraud. This system follows the "Torrens" system of registration of title to land which is in force throughout Australia and in other countries as well, and has been adopted in Jamaica. In the case of Abigail v. Lapin (1934) All E.R., P.C. 720, at page 725A, Lord Wright describes it thus:

> " ..... It is a system for the registration of title, not of deeds; the statutory form of transfer gives title in equity until registration, but when registered it has the effect of a deed and is effective to pass the legal title; upon the registration of a transfer, the estate or interest of the transferor as set forth in such instrument, with all rights, powers and privileges thereto belonging or appertaining, is to pass to the transferee. ..... "

Section 3(2) of Act 36/68 is therefore entirely consistent with the system of registering title to land in Jamaica for the purpose of passing the legal interest in land. Thus, the interest of a subsequent purchaser to whom the legal interest in the land had been conveyed or transferred during the transitional period was protected - fraud apart. This was the decision upheld in the Privy Council in the case of Rose Hall Limited v. Elizabeth Lovejoy Reeves (1975) 13.JL.R. 30, where it was held, inter alia:

> " ..... that the retroactive effect of S. 9A(1) of Cap. 227 achieved by S. 3(2) of the 1968 Act was to protect rights of property which had accrued between January 1, 1954, and the date of enactment of the 1968 Act - August 22, 1968 - and the words 'transfer or conveyance' in S. 3(2) both taken singly, and when read together, referred only to legal interests in land brought about, in the case of registered land, by transfer. It followed that the equitable interest arising under the contract of May or June 1968, remained unprotected since no transfer had been 'effected pursuant to' that contract. The decision of the Court of Appeal, was therefore right. "

12. In cases where the vendor had, during the transitional period, (January 1, 1954 to August 22, 1968) conveyed or transferred the legal interest in the land, the subject matter of the contract to a subsequent purchaser, the remedy open to the purchaser under a validated contract lay only in damages. The purchaser could not be granted specific performance of a contract to sell land which at that time of trial had been legally and effectively conveyed or transferred to a subsequent purchaser. In Russell v. Patrick Chung et al, supra, at page 15, Zacca, J. continued:

> " In other words the transfer of lots 107, 23 and 68 to the third defendant cannot be nullified or affected in any way but the original contracts relating to Lots 107, 23 and 68 are nevertheless validated and are to be given effect. The Plaintiff therefore would be unable to get specific performance of the original contract but would be entitled to damages for breach of contract. "

13. However, where the sub-division was not subsequently approved by the Board, the purchaser with an equitable interest became entitled to the statutory relief provided in Section 9A(2):

> " Where a sub-division contract cannot be executed because any relevant sanction of the Board is not obtained by the sub-divider of the land, the other party to the contract or any person succeeding to the right of that other party under the contract may, after the expiration of such time as may be reasonable in the circumstances of each case, withdraw therefrom and recover from the sub-divider of the land any moneys paid to him under the contract, together with interest thereon at the rate of seven per centum per annum from the date on which such moneys were paid. "

In the instant case, sub-division approval had been obtained by the sub-divider in December, 1958, well before the alleged breach of the contract in 1968. In my opinion, Section 9A(2) gives a purchaser the right to rescind and withdraw from the contract where the sanction of the Board is not obtained after the expiration of such time as may be reasonable in the circumstances, and to claim and obtain refund of his deposit with interest at the statutory rate of seven per cent per annum. The facts of this case do not bring it within this section, and I so rule. The remedy to prayer (7) of the Statement of Claim is not therefore available to the plaintiffs.

25.

The Claim:

14. In opening, learned counsel for the plaintiffs, Mr. K. C. Burke, advised the court that although pleaded, the plaintiffs were not leading evidence of fraud, the act of the defendant being more a matter of constructive fraud. As to prayers (in Statement of Claim) -

(1) for specific performance of the agreement in writing dated 18th May, 1957;

(2) damages in lieu of or in addition to specific performance, and

(3) a declaration that the plaintiffs are entitled to a lien on the said property,

Counsel advised the court that after the transfer of Lot 19 to Prestige Homes Limited, the boundaries were redefined. At the date of trial the original Lot 19 formed part of two newly formed lots on which dwellings have been constructed. Lot 19, the subject matter of the action, had completely changed its character, and did not exist as such at the date of trial. Other parties had subsequently acquired legal interest in the land and it was no longer reasonable to expect an order for specific performance.

Measure of Damages:

15. Mr. Burke, counsel for the plaintiffs, and Mr. Peter Millingen, counsel for the defendants, agreed that the only issue joined was that on the question of damages. The questions for the court were: How should damages be assessed? What measures of damages should be applied? What principles of law are applicable? What values are relevant to such assessment?

16. In anticipation of these questions arising, the parties called witnesses as to the value of Lot 19 as at the date of the breach (1968), and as at the date of assessment. I preferred the evidence of Mr. Allan Waters-McCalla, a real estate auctioneer and valuator called by the plaintiffs, to that of Mr. Grant Astley Smith, called by defendants. Mr. Waters-McCalla stated that his estimate of the value of the lot in 1968 was founded on the price fetched on the sale of a comparable lot adjoining Lot 19, sited

along the same road, the sale transaction of which he had negotiated. On that date the road now known as Daytona Avenue, was already constructed. To estimate its present market value (as at date of assessment), he visited the location of the former Lot 19, and gave his estimate based on the current market value of comparable lots in the same area. Mr. Smith, on the other hand, did not know the lot, was not acquainted with its exact location on earth, but gave 1968 values which he stated were the average prices of lots sold, and as it turns out - the 'first sale' prices asked by the sub-divider of purchasers. I find that the market value of Lot 19 in 1968 was £4,500.0.0 (J$9,000.00) and present (1977) market value to be J$11,500.

17. Plaintiffs' counsel relied heavily on the judgment of Megarry, J. (as he then was) in the case of Wroth et al v. Tyler(1973) 1 All E.R. 897, in which damages for loss of bargain were awarded as at the date of assessment, and not as at the date of breach of contract, the rationale being that since the plaintiffs had a proper claim for specific performance, the case fell within S. 2 of the Chancery Amendment Act 1858 (Lord Cairns' Act) the wording of which envisaged damages as a true substitute for specific performance, and envisages an award at the time the court makes its decision to award damages in substitution for specific performance. Section 2 of the Chancery Amendment Act, 1858, reads:

> " In all cases in which the Court of Chancery has jurisdiction to entertain an application for an injunction against a breach of any covenant, contract, or agreement, or against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract, or agreement, it shall be lawful for the same court, if it shall think fit, to award damages to the party injured, either in addition to or in substitution for such injunction or specific performance, and such damages may be assessed in such manner as the court shall direct. "

Although the 1858 Act itself had been repealed, the House of Lords in Leeds Industrial Co-operative Society Ltd. v. Slack (1924) All E.R. rep. 259 (1924) A.C., H.L. p. 851, established that statute has maintained in force the jurisdiction conferred by S. 2. Mr. Burke urged that plaintiffs were entitled to an order for specific performance, the purchase price having been fully paid from June 24, 1965, and the amount paid

(£526.0.0) has been retained by defendants following which the land (lot 19) had been transferred to a third party, being transferred to Prestige Homes Limited, by transfer dated December 1, 1967, and registered February 10, 1968. The defendants therefore kept the purchase money as well as whatever benefit they derived from resale of the land.

18. There was no question of mitigation of damages as the wherewithal to purchase land of similar value was not repaid.

Delays:

19. Nor was there a question of laches - applicable where specific performance is prayed. The purchaser, Mabel Joyce Harvey-McIntosh, died January 29, 1968, and probate was granted in her estate on September 20, 1968. The Local Improvements (Amendment) Act - Act 36 of 1968 - was enacted August 22, 1968. There was correspondence between the attorneys for the ~~parties~~ parties dated 25th November 1968, and 5th February 1969 and action was filed by plaintiffs against the defendants September 18, 1969. In December 1969, defendants obtained a stay of proceedings, there being other cases involving a similar claim against them, on appeal, at that time. Any delay in seeking redress was therefore no fault of the plaintiffs and in any event was not such as to preclude them from a proper claim for specific performance.

Plaintiffs' submission:

20. The plaintiffs rely on the contention that at the time of the breach (December 1, 1967 when the transfer to Prestige Homes Limited was executed) they had a proper claim for specific performance, although their right did not have legal force until the amending legislation was enacted August 22, 1968. As a result they urge that being entitled to specific performance of the contract, as this remedy is no longer open to them, they are therefore entitled to be awarded damages in lieu of, or in substitution for specific performance, that the measure of damages should be the difference between the purchase price and the value as at the date of assessment. This effect would also be attained if the plaintiff is placed, so far as money can do it - with reference to

the date of trial - in the same position as they would have been in had the contract been performed.

Defence Submission:

21. For the defence, Mr. Millingen urged that damages flowing from the breach of this contract fell to be assessed under the general rules of the common law, that the three main points relevant to the question were:

(a) the value of the land in February, 1968 (when the legal interest in the land passed to a third party on registration;

(b) whether damages should be awarded on the basis of the value of the land on that date;

(c) whether damages should be awarded on the basis of the present market value.

With regard to (a), he commented on the fact that plaintiffs' statement of claim put the value of the land in 1969 at £1,800.0.0. In light of the evidence of Mr. Waters-McCalla which was accepted by the court, plaintiffs were allowed to amend that figure to read "$9,000". The defence urged the court to accept that the value of the land at the breach of the contract was £1,800.0.0 ($3,600.0.0). (For the reasons stated above at para. 16 (p. 7) the court finds the value of Lot 19 at the date of the breach to be $9,000.00). The defence rejected the argument that the measure of damages were to to be assessed on the principle so meticulously and clearly stated in Wroth v. Tyler. Firstly, he mentioned that in opening counsel for the plaintiffs had stated that he was not asking for specific performance, but only for damages as the land when the claim was made had already been transferred to a third party, and that the plaintiff was not proceeding on the ground of fraud. The point has relevance due to the fact that in the case of Russell v. Patrick Chung et al, supra, the only authority brought to the attention of the court where damages were assessed in such matters, the learned trial judge awarded damages based on the value of the land at the time of the breach with interest. That aspect was not left for consideration by the court. This was because in Russell v.

Chung et al it had been agreed between counsel for the parties that if found liable, damages should be assessed on that basis, that is, damages as at the date of the breach of contract. In this case there is no such agreement as to the basis of assessment and the claim for specific performance remains as part of the prayer of the plaintiffs.

22. The second ground alleged by the defence for rejecting Wroth v. Tyler is that this decision was based on the jurisdiction extended by statute to the Court of Chancery. The Chancery Amendment Act, 1858 (U.K.) (Lord Cairns' Act). Neither this piece of legislation nor any similar provision gave the court in Jamaica this extended jurisdiction in equity. Although this lack of jurisdiction in the court was alleged, no case where the question had been considered was brought to the attention of the court. Defence counsel relied on the fact that from the inception of the suit, plaintiffs knew that the remedy of fraud, inferring that they could have in contemplation only damages flowing from the breach - the damages with reference to value of the land at the time of the breach.

23. To these submissions plaintiffs' counsel in reply urged the court to consider that the defendants in breach of the contract had acted high-handedly, what could be described as a legal theft of land, the purchase price having been paid in full from as far back as June 24, 1965, the inference being that the purchaser had been from that date entitled to specific performance of the contract, and that defendants had transferred title to the land to a third party in February, 1968, depriving the purchaser of the land, and of the money paid to purchase the land. Even after the amending legislation had been passed to do justice to the purchaser, the plaintiffs had fought the issue of liability in the courts. Over this period from 1968 until trial (1977) there had been wide fluctuations in the value of land, and due to inflation the value of land had substantially increased while money did not have the same value. The Law Reform (Miscellaneous Provisions) Act (Law 20/55):

> " The Jamaica Legislature has treated the year 1728 and the Act 1 Geo. II Cap. 1 as the year and the event which concluded the reception of English laws and statutes into Jamaica by virtue of its colonial status. This cut-off period was beneficial to the settlers in that it extended the application of these laws and statutes beyond the year 1655 and right up to 1728 and at the same time the 1728 Act 1 Geo. II Cap. 1 set certain limitations on the reception of English laws and statutes by enumerating the circumstances in which they were to be applicable to Jamaica. "

It is therefore necessary to trace cases judicially decided in Jamaica in which English statute up to 1728 "were esteemed, used and accepted" to come to a decision as to whether a particular English statute applied to Jamaica.

25. The Chancery Procedure Amendment Act (1858) Lord Cairns' Act (21 and 22 Vict. c. 27) was enacted 130 years after the cut-off period, and a similar statute was never enacted in Jamaica. Nor does the Act fall among the enactments which by the words of the statute itself were made applicable to the Colony, Jamaica, by imperial legislation, such as The Extradition Act (1870) (33 and 34 Vic. c. 52 and Amends), The Forcible Entry, Act (1381) (5 Ric. 2 Stat. 1 c. 7 and amends to 1623), The Copyright Act (1911) etc. With respect to judge-made law, as Colony and partial self-governing Colony, Jamaica continued to be bound by the development of the Law and Equity by the doctrine of stare decisis, until the country became an independent nation. To ascertain what the law was in Jamaica (apart from statute) one has to examine what the law was in England.

26. The Supreme Court of Judicature Act 1873, comsolidated the courts of Law and Equity in England. In Jamaica, similar provisions were enacted. The Judicature (Supreme Court) Act, Chapter 180, came into force on January 1, 1880. It established the Supreme Court of Judicature of Jamaica, and consolidated the several courts of this island including the Supreme Court of Judicature and the High Court of Chancery. The relevant statutory provisions reproduced in the 1973 revised edition of The Judicature (Supreme Court) Act, Sec. 48, read :

" 48. With respect to the concurrent administration of law and equity in civil causes and matters in the Supreme Court the following provisions shall apply -

(a) If a plaintiff or petitioner claims to be entitled to any equitable estate or right, or to relief upon any equitable ground against a deed, instrument or contract, or against a right, title or claim asserted by a defendant or respondent in such cause or matter, or to relief founded upon a legal right which before the passing of this Act could only have been given by a Court of Equity, the Court and every Judge thereof shall give him such and the same relief as ought to have been given by the Court of Chancery before the passing of this Act.

(f) Subject to the aforesaid provisions for giving effect to equitable rights and matters of equity, and to the other express provisions of this Act, the said Court and every Judge thereof shall give effect to all legal claims and demands, and all estates, titles, rights, duties, obligations and liabilites, existing by the common law or by any custom, or created by any statute, in the same manner as the same would have been given effect to if this Act had not been passed by any of the Courts whose jurisdiction is hereby transferred to the Supreme Court.

(g) The Supreme Court in the exercise of the jurisdiction vested in it by this Act in every cause or matter pending before it shall grant either absolutely or on such reasonable terms and conditions as to it seems just, all such remedies as any of the parties thereto appear to be entitled to in respect of any legal or equitable claim properly brought forward by them respectively in such cause or matter; so that as far as possible, all matters so in controversy between the said parties respectively may be completely and finally determined, and multiplicity of proceedings avoided. "

27. This act did no more than to consolidate existing jurisdictions in one Supreme Court, and to vest in the court and every Judge, powers of law and equity in civil cases. Sec. 48(g) is substantially a reproduction of Sec. 24(7) of the Supreme Court of Judicature Act (1873) (U.K.). In Britain v. Rossiter (1879) 11 Q.B.D. at p. 129, Brett, L.J., said:

" I think that the true construction of the Judicature Acts is that they confer no new rights; they only confirm the rights which previously were to be found existing in the Courts either of Law or of Equity; if they did more they would alter the rights of parties, whereas in truth they only change the procedure. "

28. Jamaica became an independent nation on 1st August, 1962, on the enactment of United Kingdom Acts 10 and 11 Eliz. 2 c. 19 and the Jamaica (Constitution) Order in Council 1962. Sec. 97(1) of the Jamaica Constitution reads:

> " There shall be a Supreme Court for Jamaica which shall have such jurisdiction and powers as may be conferred upon it by this Constitution or any other law. "

Provision is made in the Constitution for the continuity of existing laws. Section 4(1) reads:

> " All laws which are in force in Jamaica immediately before the appointed day shall (subject to amendment or repeal by the authority having power to amend or repeal any such law) continue in force on and after that day, and all laws which have been made before that day but have not previously been brought into operation may (subject as aforesaid) be brought into force, in accordance with any provision in that behalf, on or after that day, but all such laws shall, subject to the provisions of this section, be construed, in relation to any period beginning on or after the appointed day, with such adaptations and modifications as may be necessary to bring them into conformity with the provisions of this Order. "

As the Judicature (Supreme Court) Act (Jamaica) did not confer any new rights, it is therefore necessary to consider whether or not the old Court of Chancery (U.K.) (and hence the old Court of Chancery, Jamaica) had and exercised the power to award damages in lieu of or substitution for specific performance, before Lord Cairns' Act or whether this was a new power extended by that Act. Although the defence in the instant case submitted that Wroth v. Tyler did not apply to the issues, that decision having been reached as a result of the case falling under the provisions of Lord Cairns' Act, neither plaintiff nor defendant addressed themselves to the question as to whether or not there was such jurisdiction in the Supreme Court of Judicature of Jamaica.

29. I am indebted to my brother, White, J., for referring me to the case of Gloucester House Ltd. v. Peskin, a case tried in the Supreme Court of Judicature of Jamaica, which went on appeal to the Federal Supreme Court and is reported at (1961) W.I.R. p. 375. This is a case in which on a contract for the sale of land there was non-performance by the vendor, whereupon the purchaser brought action for specific performance and damages, or alternatively, damages for breach of contract. Chief Justice McGregor who was the trial judge ordered specific performance, and an inquiry by the Registrar as to damages occasioned by the vendor's refusal to complete the sale. The principal ground of appeal in that case was that the (trial) court, having granted specific performance, had no power to give, in addition, damages for unreasonable delay in completing the contract. The Federal Supreme Court held that the Supreme

Court of Judicature of Jamaica had jurisdiction to award damages in addition to ordering specific performance of the contract.7

30. The Bench ~~which~~ who heard the appeal in Gloucester House Ltd. v. Peskin was comprised of Hallinan, C.J., Lewis and Marnan, JJ. That Bench had a similar problem to consider, that is, whether (apart from Lord Cairns' Act) the old Court of Chancery had inherent power to award damages in addition to granting an order for specific performance. The Bench considered the following cases which were heard before the enactment of Lord Cairns' Act:

> Nelson v. Bridges (1839) 2 Beav. 239; 48 E.R. 1172;
> Phelps v. Prothero, Prothero v. Phelps (1855) 7 De G.M. & G. 722;
> Gedye v. Montrose (Duke) (1858) 26 Beav. 45; 53 E.R. 813;

and considered cases decided after Lord Cairns' Act:

> Jacques v. Miller (1877) 6 Ch. D. 153;
> Royal Bristol Permanent Building Society v. Bomash (1887) 35 Ch. D. 390;
> Jones v. Gardiner (1902) 1 Ch. 191;
> Phillips v. Lamdin (1949) 1 All E.R. 770.

The comments of Lewis, J., at p. 389, F, with respect to these cases are of interest:

> " It will be observed that in Nelson's case(3) the court held that while it could entertain the claim for relief the form of that relief should be by consensual action at law to ascertain the amount of damages. In Phelps v. Prothero(4) the jurisdiction to award damages which apparently had been out of use for a very long time, was re-asserted. This case incidentally did not concern damages for delay but did concern damages for breach of a contract ordered to be specifically performed. In Gedye's case(5), the object of the claim at law was substantially the same as that of the bill in equity, and the plaintiff was put to his election. My conclusion from the authorities is that the Court of Chancery did not grant damages as such for delay but granted compensation for the purpose of adjusting the rights of the parties where as a result of delay depreciation of the estate had taken place or the property had otherwise diminished in value so that the purchaser was getting less than he had bargained for, and that this was limited to such inquiries as might be carried out by a computation or the taking of an account. "

The view taken by Turner, C.J., in Phelps v. Prothero, supra, at p. 733 indicates that this was the procedure as between the courts of equity and law:

" The defendant had originally the right to proceed, either at law, for breach of the agreement, or in this court, for the specific performance of it. He adopted the latter remedy. I think that a plaintiff, who has legal rights, and comes to this court for its aid, is bound to put his legal rights under the control of the court, and that that principle reaches the present case. The plaintiff, therefore, having sued in equity for specific performance, was bound, in my opinion, to submit his claim for damages to the judgment of this court, and was not entitled to proceed at law otherwise than by leave of this court. "

31. With respect, I approve and thoroughly endorse the line of reasoning and opinion of Lewis, J., at p. 390,F, where he states:

" Nelson v. Bridges(3) and Gedye's case(5) may be regarded as examples of how this rule worked in practice, The court could either give the suitor leave to have his damages assessed in an action at law, or order an inquiry into his loss according to the principles on which it granted compensation. A plaintiff who had submitted his claim for damages to equity could not afterwards without leave sue at law on the same contract for damages for delay.

The necessity to seek the aid of equity for an injunction to restrain a plaintiff suing at law for damages for delay, and the fact that the court might in such a case grant leave to a plaintiff to proceed at law are an implied recognition that such a right of action existed. Lord Cairns' Act made it unnecessary for a plaintiff to pursue this circuitous mode of obtaining complete relief. It gave to the Court of Chancery the power to grant damages "in addition to" or "in substitution for" specific performance ... "

" In my opinion* Lord Cairns' Act was in this respect merely procedural, (~~the emphasis mine~~), and authorised the Court of Chancery to give damages as a remedy in cases where formerly it would have been necessary for that court to turn the plaintiff over to law; e.g. where it dismissed his bill without prejudice to his action at law (substitution), or where it would have given him leave to go to law to have his damages assessed (addition.) "

32. In view of these decisions, the opinion of Lewis, J., that Sec. 2 of Lord Cairns' Act was in that respect merely procedural, appeals to this Court. The Act purported to give to the Court of Chancery a jurisdiction which earlier decisions showed Chancery already had and exercised, that is, to grant, in addition to making an order for specific performance ancillary relief by way of compensation/damages for delay, in order to do complete justice. Indeed, courts of Equity did trespass on the powers and procedure of the courts of Law, up to the decision in

* The emphases mine

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Todd v. Gee, 1810. In Vol. 14, Halsburys Laws of England, p. 472 a note reads:

> " There was at one time a notion that a court of equity, if it refused specific performance might give compensation for the breach of contract. (Denton v. Stewart (1786) 1 Cox, Eq. Cas. 258) but the view was later dissented from. (Todd v. Gee (1810) 17 Ves. 273). "

Lord Eldon in the latter case said:

> " ..... except in very special cases, it is not the course of proceeding in Equity to file a Bill for specific performance of an agreement; praying in the alternative, if it cannot be performed, an issue, or an inquiry before the Master, with a view to damages. The Plaintiff must take that remedy, if he chooses it, at Law: generally, I do not say universally, he cannot have it in Equity. "

Lord Eldon's view did not exclude a special case. It is of importance to note that the litigant could obtain damages if refused specific performance, but he must follow the procedure and apply to Law. The view that the Act was procedural was clearly stated by Lord Summer in the case of Leeds Industrial Co-operative Society, Ltd. v. Slack, (1924) A.C. 865. Lord Summer (who with Lord Carson held the minority view) speaking of the Act, said at p. 870:

> " ..... The Act from title and preamble to the last word of the last section is a procedure Act. It empowers the Court of Chancery to award damages in certain cases, to impanel juries and take verdicts and so forth. It has been repeatedly said, and especially in the years immediately following this enactment, that its object was to save the litigant from being harassed by the necessity for applying to two Courts for complete relief in respect of one wrong and from being "turned over", as the phrase was, by equity to law, if the case was not one for an injunction, or was a case for damages as well: ..... "

33. Although the 1858 Act itself has been repealed, the House of Lords in the Leeds case has established that the law which it laid down still exists. The Statute Law Revision and Civil Procedure Act, 1883, repealed Lord Cairns' Act but with the proviso in Sec. 5 that the repeal should not affect any jurisdiction or principle or rule of law or equity established or confirmed by any enactment so repealed. The Statute Law Revision Act, 1898, repealed parts of the Act of 1883, including Sec. 5, and the repealing section of the Act of 1898 (Sec. 1) contains a proviso that the Act shall not affect any principle or rule of law

or established jurisdiction, notwithstanding that the same might have been affirmed by or derived from any of the repealed enactments. The words of Sec. 2 are gone, but the principles which it laid down remain. Speaking of the Act, Viscount Finlay, at p. 863 said:

> " Lord Cairns' Act is one which is continually referred to, and will be continually referred to in English cases, as giving in a convenient form results which it might cost some effort and a good deal of time to work out afresh, and its absence from the Revised Statutes is to be regretted. Though the Act is gone, the law which it laid down still exists, and this case, like many others of the same kind, has throughout, from beginning to end, been dealt with on this view. "

34. Judicial opinion has been divided on the construction of Sec. 2 of Lord Cairns' Act. The Leeds case is a decision by a majority of three to two in the House of Lords. Although repealed, the words of Sec. 2 were resurrected and referred to in the judgments of the four Law Lords, the view of the majority prevailing, that damages may be awarded in lieu of an injunction quia timet. This view is recognised by Megarry, J., (as he then was) in Wroth v. Tyler (1973) 1 All E.R. 897, at p. 920(b). There he states:

> " In the case before me, the Leeds case is both relevant and important. It shows that Lord Cairns' Act extended the field of damages. In the Leeds case the House of Lords, by a majority, held that the Act allowed damages to be awarded quia timet. An injunction had been sought to restrain a threatened obstruction of ancient lights; and although no actual obstruction had taken place, and so there could be no claim for damages at common law, the Act was held to have empowered the court to award damages for the whole of the threatened injury. That case, of course, was concerned with the award of damages under the 1858 Act which could not be awarded at common law, and not with the quantum of damages in a case where damages could be claimed at common law ..... "

35. It may therefore be said that Lord Cairns' Act was in the main procedural, but that in respect of awarding damages where injunction is refused, it created a new power, or as Megarry, J., describes it, it extended the field of damages. As for the other powers exercisable in Equity, I hold that Chancery prior to the Act, exercised its power to award damages in substitution where it refused to order specific performance, by sending the litigant to Law, the only procedure open to the courts before the Act. I also hold that the old Court of Chancery in Jamaica

similarly had the jurisdiction to award damages by the same procedure until the separate Courts were consolidated in one Supreme Court of Judicature of Jamaica on January 1, 1880. On consolidation, all existing jurisdiction in equity and law were transferred to the Supreme Court, and the difference in the procedures is no longer relevant in that respect.

36. Hallinan, C.J., in Gloucester House Ltd. v. Peskin at p. 381 rejected the argument that where mordern English decisions have given specific performance and damages occasioned by delay in completing the contract, this was done in exercise of powers conferred by Lord Cairns' Act and not by powers conferred by the Judicature Act. He was then referring to the cases of Jaques v. Miller (1877) 6 Ch. D. 155; Royal Bristol Permanent Building Society v. Bomash (1887), 35 Ch. D. 390; and Jones v. Gardiner (1902) 1 Ch. 191. At p. 382, the learned Chief Justice said:

> " The House of Lords, by a majority, held that Lord Cairns' Act enabled them to give Slack damages for a threatened injury in lieu of an injunction. It is difficult to resist Lord Summer's statement in his dissenting speech that if Lord Cairns' Act gave the court such a power, it created a fresh jurisdiction. But I cannot accept a submission that, when the courts were deciding Jaques v. Millar(9), Bomash's case(8) and Jones v. Gardiner(10) they were exercising a jurisdiction under Lord Cairns' Act which in Slack's case(12) neither the trial judge nor the Court of Appeal thought existed and was only at length established by a majority decision in the House of Lords. "

I would endorse the comments of the learned Chief Justice on this point. It was from the consideration of the Leeds case in 1924 that it was recognised that the principles/law as declared in Sec. 2 of Lord Cairns' Act survived the repealing statutes.

37. The conclusion is supported by commonsense and the practicalities of the situation. The question of whether a superior court in an independent country lacks inherent jurisdiction in its equitable jurisdiction is startling. No doubt there are blurred areas which cannot be proved with certainty. In the absence of authority to the contrary I would respectfully rely on the presumption of jurisdiction in a superior court as stated in Peacock v. Bell & Kendal 1 Wms. Saund. 74 and restated in London Corporation

v. Cox (1867) L.R. 2 H.L. 239, 259:

> " And the rule for jurisdiction is that nothing shall be intended to be out of the jurisdiction of a Superior Court, but that which specially appears to be so; and on the contrary nothing shall be intended to be within the jurisdiction of an inferior court but that which is so expressly alleged. "

The point was considered in Privy Council in the case of Board v. Board (1919) A.C. 956, a case from Alberta, Canada, where the jurisdiction of the Supreme Court of Alberta, Canada, in divorce was questioned.

38. Prayer (1) of the plaintiffs in this action is for specific performance of the contract of 18th May, 1957, between Mabel Harvey-McIntosh and first defendant. On the evidence that she had performed her part of the contract by paying the sum of £500 (and an amount in excess - £20) she was at that date in the position of a purchaser with an equitable interest who was entitled to specific performance of the contract. The decision in Farmers and Merchants Trust Company Limited v. Chung deprived her of her rights under the agreement including the right to a refund of her payment. These rights were validated retroactively by the Local Improvements (Amendment) Act 1968. In my opinion the retroactive effect of this statute put her in the position at law of a purchaser holding a valid contract for the sale of land, and therefore a purchaser who was entitled to the relief of specific performance of the contract, as between herself and the vendor. The equitable remedy of specific performance is one in the discretion of the court. The fact that third parties had acquired a legal interest in the land the subject matter of the contract, and that the character of the land had changed, the boundaries redefined and buildings erected thereon, are strong reasons why a court would not order specific performance, as to do so would be to create chaos.

Damages/Compensation:

39. How then may the court grant redress for the breach of the contract occasioned by the vendors' failure to convey? Historically, the court in exercising equitable jurisdiction proceeds by the general rule that equity follows the law, and in

damages representing the loss of his bargain. (See McGregor on Damages, 13th. Edn. p. 633). The rule is subject to one exception, that is, where the seller is unable to complete due to defect of title. (Flureau v. Thornhill (1776) 2 Wm. Bl. 1078). Flureau v. Thornhill itself did not establish a rationale. This was done when the House of Lords considered it in the light of Hadley v. Baxendale in the case of Bain v. Fothergill (1874) L.R. 7 H.L. 158. The rule now known as the rule in Bain v. Fothergill, is stated in Williams' Contract of Sale of Land (1930) p. 128:

> " Where the breach of contract is occasioned by the vendor's inability, without his own fault, to show a good title, the purchaser is entitled to recover as damages his deposit, if any, with interest, and his expenses incurred in connection with the agreement, but not more than nominal damages for the loss of his bargain. "

42. Although defence counsel touched lightly on the applicability of the rule in Bain v. Fothergill, no attempt has been made to set up defect of title in the defendants. Quite to the contrary, it has been shown that legal title to Lot 19, the subject matter of the suit, was transferred by defendants to a third party, Prestige Homes Limited, under the provisions of the Registration of Titles Law. The facts of this case show quite clearly that the defendants chose to take advantage of the decision in Farmers & Merchants Trust Co. Ltd. v. Chung, supra, that such a contract was illegal and unforceable, and showed by their conduct that they were seizing and forfeiting the moneys paid by the deceased, Mabel Joyce Harvey-McIntosh. There was no question but that the vendors had good title to the land. I accordingly hold that the measure of damages does not fall to be determined under the rule in Bain v. Fothergill.

Damages outside Bain v. Fothergill:

43. In cases falling outside the rule in Bain v. Fothergill, the measure of damages has been held to be the difference between the purchase price and the market value at the date of the breach of contract. In Engell v. Fitch (1869) L.R. 4 Q.B. 659 a case in which the sellers who were also the mortgagees of the property refused to complete on the ground of expenses to turn out a

mortgagor in possession, it was held that the purchaser was entitled to recover the loss of the bargain. Kelly, C.B. delivering the judgment of the court, said at p. 665:

> " What we then have to consider is, when a vendor, not by reason of any want of title, but by reason of not choosing to oust the mortgagor, refuses to complete, and the action is really for a breach of contract to deliver possession, whether under such circumstances the vendee is entitled to recover the difference between the contract price and the 'market value at the time of breach' (my emphasis). We think the vendee is entitled to this difference. And I may add that we think this would be so in all cases of this kind, excepting those within the rule of Flureau v. Thornhill which is confined to the single case of failure of title. "

In Diamond v. Campbell-Jones (1960) 1 All E.R. at page 591, Buckley, J., stated:

> " The damages should be assessed in accordance with the principle normally applicable to cases of breach of contract for the sale of land, where the breach does not arise from a defect in the vendor's title, that is to say, by reference to the difference between the purchase price and the market value at the date of the breach of contract. "

The "date of the breach" may in some circumstances equate the date which would be the contractual time for completion. In Baldeosingh v. Maharaj, (1970) 17 W.I.R. 41 (Court of Appeal, Trinidad & Tobago), Fraser, JA., stated in relation to the measure of damages to be applied:

> " ..... but a subsequent event occasioned by the appellant's resale of the property has allowed another measure of damages to be applied. There is, therefore, another principle which should be invoked in a case of this kind where the vendor, having agreed to convey or assign property, without any reasonable excuse conveys or assigns the property to a third party in order to obtain a higher price, the purchaser is entitled by way of damages for loss of the bargain to the additional price obtained by the vendor on the resale. This proposition was clearly the basis of the judgment of the Court of Appeal in England in Ridley v. De Geerts 1945, 2 A.E.R. 654 C.A. and was applied in India as long ago as 1882 in Trilokhya Nath Biswas v. Joy Kali Chowdhrain ..... "

By applying that principle Fraser, JA. held:

> " ..... that the respondent would be entitled to the difference between the agreed purchase price of $2,400 and the resale price of $5,000 paid to the appellant by Ramjass Seereeram. "

The learned Judge here applied the resale price as evidence of the market value of the property at the date of the breach, no other evidence of value having been adduced. This follows the procedure

* my emphasis

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adopted in Engell v. Fitch and in Ridley v. DeGeerts where the resale price was used as prima facie evidence of market price at the date of the breach.

Issue for Decision:

44. The real issues for this court have some relevance to the points raised by Megarry, J., in Wroth v. Tyler. For the purpose of his judgment in that case it was not necessary that he probe the matter. If this case had been decided in 1969, a year after the land was proved to have a market value, £4,500, then the loss of the bargain would be the difference between the purchase price £500, and the market value, £4,500, making £4,000 (converted J$8,000), as the damages for loss of bargain. At the date of hearing (1977), the market value was proved to be ~~J$11,000.00~~ J$11,500.00 (less purchase price £500, converted ~~J$1,500.00~~ J$1,500.00), which makes the loss of the bargain J$10,500.00. In other words, in 1969 (when action filed), it would cost the defendants J$9,000.00 (including refunded purchase price) to put plaintiff "in the same position as she would have been in had the contract been performed". At the date of hearing, today, it will cost J$11,500.00 to achieve the same end. In Wroth v. Tyler, supra, Megarry, J., faced with a similar problem stated at p. 919:

> " Today, to purchase an equivalent house they need £5,500 in addition to their £6,000. How, then, it may be asked, would the award today of £1,500 damages place them in the same situation as if the contract had been performed? The result that would have been produced by paying £1,500 damages at the date of the breach can today be produced only by paying £5,500 damages, with in each case the return of the deposit. On facts such as these, the general rule of assessing damages as at the date of the breach seems to defeat the general principle, rather than carry it out. In the ordinary case of a buyer of goods which the seller fails to deliver, the buyer can at once spend his money in purchasing equivalent goods from another, as was pointed out in Gainsford v. Carroll, and so the rule works well enough; but that is a very different case. It therefore seems to me that on the facts of this case there are strong reasons for applying the principle rather than the rule. The question is whether it is proper to do so.
>
> I do not think that I need enquire whether such an award could be made at common law. It may be that it could. The rule requiring damages to be ascertained as at the date of the breach does not seem to be inflexible, and in any case the rule may be one which, though normally carrying out the principle, does on

> " occasion fail to do so; and on those occasions the rule may have to be modified so as to accord with the principle ..... "

Megarry, J., had no need to invoke common law principles for his decision. He continued:

> " However, as I have said, I do not think I need explore that; for it seems to me that this case (Wroth v. Tyler) in which there is a proper claim for specific performance, falls within the Chancery Amendment Act 1858 (better known as Lord Cairns' Act), and that damages assessed under that Act are to be ascertained in accordance with that Act on a basis which is not identical with that of the common law ..... "

In that case, Megarry, J., awarded damages computed ~~in~~ on a market value referable to the date of assessment. This case was followed by Grant v. Dawkins and others (1973) 3 All E.R. 897. Goffe, J., ordered that for the purpose of assessing damages, however, the property was to be valued as at the date set for completion of the sale rather than the date of the breach, thus giving the plaintiff the benefit of any appreciation in value of the property between those dates. This was a case in which it was held that Lord Cairns' Act applied, and the decision in Wroth v. Tyler was followed, an award on the basis of damages in substitution for specific performance.

45. Not surprisingly, counsel for the defence urged the court that the damages in this case should be assessed on the value computed ~~at~~ as at the time of the breach, and not on the figure which is proved to be the value of an equivalent lot at the date of hearing which is urged on behalf of the plaintiffs. Obviously, the return to plaintiffs of the money paid in respect of purchase price, even with interest, plus an amount representing the loss of the bargain in 1968, would be inadequate to "place plaintiffs in the same position as they would have been in had the contract been performed." The amount in figures would work out as follows:

£520 (converted J$1,040.00)plus interest, say at a mean rate of what mortgage rates have been over the period - seven per cent to 12½ percent say 10 per cent per annum, would mean J$10.40 x 11 years = J114.40. To that add loss of the bargain, J$8,000.00

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Loss of Bargain	=	J$8,000.00
Amount paid	=	1,040.00
Interest to date on deposit	=	114.40
		9,154.40

On the evidence the plaintiffs would need J$11,500.00 to purchase an equivalent lot today. After thirteen years, during which period the defendants withheld her money on such assessment she would still need J$2,500.00, in addition to be placed in the position of owning a lot of land of equivalent value.

46. The comment of Megarry, J., that the rule at common law requiring damages to be assessed as at the date of the breach does not seem to be inflexible (see Wroth v. Tyler p. 919) was not enlarged upon, not being necessary to his deliberations in that case. However, I would venture the opinion that this limitation might have been due to the fact that the common law was (a) awarding damages for compensation for a past wrong, (b) that a litigant could return to Law toties quoties as the damage arose. In the Leeds case, Lord Summer in his dissenting judgment stated at p. 869:

> " It is quite true that the jurisdiction, which has been exercised in fact in pursuance of s. 2, where damages are awarded in lieu of an injunction, has differed in two respects from the jurisdiction as to damages exercised in Courts of common law. For the purposes of the assessment, (1) the injuries suffered by the plaintiff have been taken as at the date of the judgment of the Court, and not as at the commencement of the action only; and (2) the sum awarded has been calculated so as to include the whole injurious effects both present and future, so as to be, in intention at any rate, a compensation once and for all for what has been actually done up to the date of the judgment with all its consequences. On the other hand, for damage actually done by the invasion of the plaintiff's rights, the Courts of common law would have awarded damages only in respect of damage suffered at and before the commencement of the action leaving him to bring fresh action for damage suffered thereafter, On this principle also they would have calculated the damages exclusive of anything attributable to subsequent prejudice to the plaintiff, arising after the commencement of the proceedings and not included in the action. Without suggesting any doubt, I express no opinion about these differences. After all they relate to procedure only; ..... "

47. The damages which can be awarded to the plaintiffs now represent a compensation once and for all for what has been due to Mabel Harvey-McIntosh up to the date of assessment. Sec. 48(g) specifically provides for the exercise by the Supreme Court of all such remedies, etc.

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> " so that as far as possible, all matters so in controversy between the said parties respectively may be completely and finally determined and multiplicity of proceedings avoided. "

48. It would appear that the decision in Wroth v. Tyler was influenced by this passage of Lord Summer's judgment in the Leeds case. Megarry, J. at p. 920 stated:

> " .... On the wording of the section, the power 'to award damages to the party injured ... in substitution for such ... specific performance' at least envisages that the damages awarded will in fact constitute a true substitute for specific performance. Futhermore, the section is speaking of the time when the court is making its decision to award damages in substitution for specific performance, so that it is at that moment that the damages must be a substitute. The fact that a different amount of damages would have been a substitute if the order had been made at the time of the breach must surely be irrelevant. "

49. Where a contract is not duly performed on one side, the normal remedy is an action at law to recover damages for breach of contract; but if this were the only remedy, it would always be at the option of the defaulting party either to perform his contract or to pay damages. (See Halsburys Vol. 14, 3rd Edn. p. 897). However, Equity has assumed jurisdiction to deprive the defaulting party of this option and to compel performance where damages would be inadequate remedy. The facts in this case disclose that the defendants/ vendors chose to breach the contract which had been subsisting for over ten years, and to ignore the moral if not then legal rights of the purchaser. It was submitted in defendants' pleadings that, (see para. 11 of Defence) before transfer of title to Prestige Homes Limited, Mabel Harvey-McIntosh had called upon them to perform their agreement, and that they refused as they believed they were entitled to do. That they were proved wrong is the price of their unjust course in this matter. An assessment of damages which would profit the defaulting vendor to breach the agreement at the expense of the purchaser would seem to me to be inadequate remedy to compensate the purchaser. Damages assessed on common law principles would be totally inadequate.

Judgment:

50. The case is a proper case for an order that the contract be specifically performed. The Court, in exercise of its discretion, refuses the order for specific performance, and awards damages in

lieu of such an order. I therefore award the plaintiffs the sum of J$10,500 as damages in lieu of specific performance, together with $1,000 refund purchase money paid and $52.00 excess, the J$1,052.00 to bear interest at seven per cent per annum from June 24, 1965, until payment. The award of J$10,500 as damages in substitution for specific performance by its nature comprises compensation up to and as at date of assessment will attract interest only as from the date of judgment at the statutory rate of six per cent per annum. Costs of the action to be borne by defendants.

51. The conclusion that this court has reached may be summarised as follows:

(1) The Courts of Chancery and of Law (Jamaica) exercised similar jurisdiction ~~as~~ to the old Courts of Chancery and of Law in England.

(2) Sec. 2 of Lord Cairns Act gives "in a convenient form results which it might cost some effort and a good deal of time to work out afresh. "

(3) Lord Cairns Act was in the main procedural in the respect that it stated what the law was as exercised by Law and Equity cumulatively, and set out procedures, for example, it empowered "the Court of Chancery to award damages in certain cases to impanel juries, and take verdicts and so forth".

(4) That the words of the law were repealed but that the Jurisdiction (whether previously held or given in the Act) remained.

(5) That Lord Cairns' Act as statute Law never applied to Jamaica.

(6) That the principles, rule of law, established jurisdiction of the Courts of Chancery (England) were binding on and represented the principles, rule of law, established jurisdiction of the Court of Chancery, Jamaica, by virtue of Jamaica's colonial status.

(7) That these principles, rule of law and established jurisdiction were confirmed by the Judicature (Supreme Court) Act 1880 Jamaica).

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(8) That in particular, the Supreme Court of Judicature of Jamaica has the jurisdiction to grant specific performance and to grant damages in lieu of such specific performance where the party is entitled to such order, but in the court's discretion the order is refused.

52. I regret the delay in delivering this judgment, but it seems to me that the point merited due consideration and research.

E. B. Allen (Mrs.)
Puisne Judge

general applies common law rules for the assessment of damages.

40. It has been shown that before consolidation of the several courts by the Judicature (Supreme Court) Act, the court of Chancery granted specific performance, and in addition damages by way of ancillary relief for delay, or where these damages would not be adequate to do complete justice to the litigant he could be sent to law where he would be able to obtain full damages. "Damages" in that sense were given at Law as compensation for past wrongs, for what has already happened. Such damages might include compensation for consequences of the injury already committed which it was proved would occur in the future.

Damages at Common Law:

41. What then are the considerations applicable at common law to the measure of damages for breach by the seller/vendor of a contract for the sale of land? The general rule, long established by the common law (and first taught to students of law) is that expressed by Alderson, B., in Hadley v. Baxendale (1854) 9 Ex. 341 as follows:

> " Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. "

The principle is sometimes referred to as the principle of restitutio in integrum which applies to both tort and contract. As frequently quoted is the rule stated by Parke, B., in Robinson v. Harman (1848) 1 Ex. 850, 855: (1843 - 60) All E.R. Rep. 91, which has been consistently cited with approval and restated in similar language:

> " The rule is that the plaintiff is entitled to be placed so far as money can do it, in the same position as he would have been in had the contract been performed. "

On the interpretation of the rule, it has become well established law based on analogous contracts for the sale of goods, that the buyer could recover in the event of the seller's failure to deliver

gives the court the power to award interest at the rate that the court thinks fit. The Money Lenders Law Sec. 13(b) gives exemption from its provisions where the rate of interest does not exceed 12½ per cent per annum, the law holding a rate in excess of 12½ percent as being unconscionable. Mortgage rates had moved from six per cent to seven percent to eight per cent up to 12½ per cent. It was against this background that he urged the court that the law be applied in the most equitable manner, that is, that the party wronged ~~is to be~~ may be placed as far as money can do it in the same position as ~~they~~ it would have been had the contract been performed. Counsel submitted that not only should damages be assessed at present market value but also that plaintiffs should be awarded a sum by way of interest or for loss of use of the land.

24. Because the jurisdiction of the court is questioned as to its power to grant damages either in lieu of or in substitution for specific performance, it is necessary to consider the Jamaica situation, particularly as The Chancery Amendment Act, enacted in 1858, in the United Kingdom, has not been enacted in Jamaica.

25. Jamaica received English laws and statute by virtue of its colonial status until 1728. Section 22 of the statute 1 Geo. II Cap. 1 sets the limitations for the reception of English laws and statutes applicable to Jamaica prior to 1728. The counterpart of this section is now contained in Section 41 of the Interpretation Act, which reads:

> " All such laws and Statutes of England as were, prior to the commencement of 1 George II Cap. 1, esteemed, introduced, used, accepted, or received, as laws in the Island shall continue to be laws in the Island save in so far as any such laws or statutes have been, or may be, repealed or amended by any Act of the Island. "

The subject of the applicability of an English statute to Jamaica was discussed in a judgment of the Full Court delivered by Henry, J. in suit M. 3 of 1976: Orville Winston Cephas v. the Commissioner of Police and the Attorney General. Henry, J., stated: at page 9.