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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

AT COMMON LAW

SUIT NO. C.L. S.139 of 1981

BETWEEN	NOEL C. SALES (Personal Representative Estate Edna Veleta Laing, Deceased)	PLAINTIFF
A N D	SONIA ALLEN	DEFENDANT

R. M. Millingen and C. Piper for Plaintiff.

Dr. L. G. Barnett and Miss H. Phillips for Defendant.

Heard on: May 14, 15, and 17, 1984 and June 18, 1984

JUDGMENT

CAMPBELL, J:

By a Memorandum of Sale-signed by the parties herein on 9th April, 1976, the defendant agreed to purchase and the plaintiff to sell premises known as Nos. 8 and 10 Gladstone Drive in the parish of St. Andrew for a purchase price of Ja. $40,000.00. Under the agreement of sale, a deposit of $8,000.00 was payable by the defendant on signature, to Messrs. Dunn, Cox and Orrett the vendor's attorneys who had the carriage of sale.

The deposit was timeously paid. The balance of the purchase money was payable on the 31st May 1976, to the vendor's attorneys-at-law. The stipulation as to payment of this balance further stated that:

> " Immediately upon such payment the vendor will execute a transfer to the purchaser and lodge the same for registration. On failure of payment (in whole or in part) at the time specified as to which time is of essence of the contract, the deposit shall be forfeited to the vendor who may by notice sent by post to the purchaser..... cancel this contract without previously tendering to the purchaser a transfer or other assurance".

The other relevant stipulations in the Memorandum of Sale are in summary form as hereunder:

(i) Incumbrances are to be those endorsed on the certificate of title;

(ii) Possession is to be given on payment in full of the purchase price and proportion of costs payable by purchaser;

(iii) Title is to be given under the Registration of Titles Law. The transfer is to be prepared by the vendor's attorneys and purchaser to pay half the costs of same and of stamp and registration fees;

(iv) Insurance premium, taxes and water rates are to be apportioned up to date of possession;

(v) Special condition is that the transfer is subject to the approval of the Exchange Control Authority, Bank of Jamaica.

A transfer under the Registration of Titles Law was executed by the parties on 24th November 1976, the same was duly stamped for registration but has not to date been registered.

On 5th May, 1981, Messrs. R. M. Millingen and Company the current attorneys-at-law for the plaintiff, by letter, purported to rescind the Memorandum of Sale on grounds stated to be "inter alia failure by the defendant to pay the balance of the purchase money" and by her "setting out conditions subsequent to the date of the agreement for lifting of covenants which cannot be entertained or performed".

By Writ issued on 10th August, 1981, the plaintiff instituted action against the defendant claiming the following:

(1) Recovery of $24,640.00 for rent or for use and occupation of premises Nos. 8 & 10 Gladstone Drive for the period 1st January, 1977, to 31st August, 1981, at $440.00 monthly with interest at prevailing bank rate;

(2) Recovery of possession of the premises on the ground of non-payment of rent and also that the premises were required for personal use and occupation;

(3) Declaration that the sales agreement made on 9th April, 1976, was properly rescinded on 5th May, 1981, on the grounds inter alia that:

(i) There was a breach of contract by the defendant;

(ii) The said agreement has been frustrated by reason of inordinate delay;

(iii) The defendant has introduced conditions incapable of reasonable performance, unnecessary and unacceptable to the plaintiff;

(iv) The contract is subject to the approval of the Exchange Control Authority of the Bank of Jamaica which approval has not been obtained;

(v) Performance of the sales agreement after a lapse of a period in excess of five years would be inequitable;

(vi) Performance of the sales agreement on the part of the plaintiff was rendered impossible by virtue of an encroachment of one building on the premises the subject hereof on adjoining premises.

(4) An order forfeiting the deposit paid by the defendant.

In the statement of claim the plaintiff pleaded generally in paragraph 5 that:

> " The defendant has failed and/or refused to perform the condition of the said sale agreement (save for the payment of the $8,600 deposit) whereby the contract and the purposes thereof have been frustrated".

The defendant in her defence and counter-claim admitted that on or about March, 1974, she became a tenant of the plaintiff at a rental of $170.00 per month. She however stated that this relationship of landlord and tenant had been terminated by mutual agreement in July, 1976, that is to say after the execution of the Memorandum of Sale in April, 1976. She remained in possession thereafter by mutual agreement as beneficial owner pending completion of the sales agreement. She further pleaded that she had, to the knowledge of the plaintiff, obtained the necessary mortgage funds to complete her part of the sales agreement within the time limited for completion and that it was the plaintiff who was at fault in failing to produce and deliver to the attorneys of her mortgagee the duplicate certificate of title to the properties in accordance with the usual practice of conveyancers so to secure completion. It was, she said because of this delay and/or failure of the plaintiff to produce and deliver to her mortgagee's attorneys the aforesaid certificate of title why the plaintiff and her mutually agreed for her to remain in possession no longer as a tenant but as a beneficial owner discharging inter alia property tax and property insurance pending readiness by the plaintiff to complete the sales agreement. The defence goes on to aver that when the duplicate certificate of title was eventually sent to the mortgagee's attorneys on January 28, 1977, there was discovered what appeared to be a breach of one of the restrictive covenants endorsed thereon. The discovery of this breach resulted in both an express and also an implied agreement that completion would be deferred until the offending restrictive covenant had been modified or undertaking given for its modification. She participated fully in efforts made by the plaintiff to complete his part of the agreement. In 1980 a further breach of covenant was confirmed to the defendant by the plaintiff who assured her

that steps would also be taken to rectify this. She denied that she was in breach of the agreement, rather she averred that it was the plaintiff who was seeking to breach the agreement by his letter of 5th May, 1981, which he was not legally entitled to do because:-

(a) So far as the stipulation that time was of the essence of the contract was concerned relative to the payment of the balance of the purchase money this had been expressly or by conduct waived by the plaintiff;

(b) Additionally long after 31st May, 1976, the plaintiff continued to treat the agreement of sale as still valid and subsisting thereby affirming it;

(c) The plaintiff not being himself able to produce a proper title at the completion date could not in law or in equity enforce the condition as to payment of the balance of the purchase money on the stipulated completion date.

The defendant accordingly denies that the plaintiff is entitled to the relief claimed. She counter-claimed for:-

(a) A declaration that the contract of sale is valid and subsisting;

(b) Specific performance of the said agreement with abatement of the purchase price;

(c) Further or alternatively damages for breach of contract;

(d) Recovery of $33,187.14 being water rates, property taxes disbursed on and in relation to the premises with knowledge and concurrence of the plaintiff and or his agents.

At the commencement of the hearing an agreed bundle of documents numbered 1 to 101 was admitted in evidence as Exhibit 1. This has been of inestimable value in testing the sincerity of the facts pleaded and the truth of the sworn testimony by reference to what the parties and/or their agents did or said at a time when no legal action was reasonably contemplated and there would accordingly be no motive for evasiveness if not suppression of the truth.

A perusal of the documents unaided in the first instance by the oral evidence given, discloses the following chronicle of events namely, that Nos. 8 and 10 Gladstone Drive were carved out of premises originally purchased by Gilbert Russell Laing and his wife Edna Veleta Laing as joint tenants in 1939. The premises appeared to have been numbered

65A and 67 Lady Musgrave Road part of Gladstone Villa. Their title was duly registered and recorded at Volume 267 Folio 10 of the Register Book of Title. Gilbert Russell Laing died in March, 1949, and his death was duly recorded on the registered title on 2nd April, 1951. Edna Veleta Laing became the sole registered proprietor by right of survivorship. She died on 8th June 1962, leaving a Will in which Percy Trevor Laing a son of hers, and one Noel Courtney Sales, the plaintiff were named as Executors. Probate of the Will was granted in the Supreme Court of Jamaica on 16th July, 1962, and her estate and interest in the land devolved by transmission to the aforesaid two executors. The transmission was recorded on 2nd October, 1962. Sometime in or about January, 1968, the property was subdivided and splintered titles thereto in the names of the executors as joint tenants were registered on 30th August, 1968, inter alia at Volume 1050 Folio 16, and Volume 1050 Folio 17. These are the premises known as Nos. 8 and 10 Gladstone Drive. The title to each of these premises had endorsed thereon restrictive covenants two of which numbered 7 and 8 are to the following effect:

> " (7) Not to erect or cause to be erected any stable, kitchen, oven or water closet or any other building of a like description within 5 feet of the boundary line of the said land;
>
> (8) Any new building erected on the said land shall not be less than 30 feet from the boundary of Gladstone Drive".

Another relevant splintered title, which became known as No. 6 Gladstone Drive was also registered in the names of the executors at Volume 1050 Folio 15 on August 30, 1968. This property was sold by registered transfer to Eustace Emanuel Walters and three others as joint tenants on 26th September, 1968.

On the 2nd of March, 1975, Percy Trevor Laing died. His death was recorded on both the registered titles at Volume 1050 Folio 16 and Volume 1050 Folio 17 on 26th July, 1976. Prior to the entry of this record, the Memorandum of Sale earlier referred to had been signed by the plaintiff as the vendor, he being at that date the sole surviving executor. However, for the plaintiff alone to validly execute a registered transfer as vendor, he would have had to have the death of

his co-executor recorded on the registered title prior to the date of execution of the said transfer. Further, for completion to be effected by 31st May, 1976, as per the Memorandum of Sale, the plaintiff would additionally have had to have the aforesaid death of his co-executor recorded before 31st May, 1976.

The documents showed that the plaintiff had failed and/or neglected to have the record of death duly entered on the registered title prior to 31st May, 1976. He was thus unable to execute and lodge any transfer for registration in the name of the defendant as per the stipulation governing the completion date even if the balance of the purchase price had been formally tendered on that date.

Exhibit 1 further reveals that prior to the signing of the Memorandum of Sale the defendant had obtained approval by Jamaica Mutual Life Assurance Society (hereafter called the mortgagee) of her application for a loan of $30,000.00 "on security of a house at 8 Gladstone Drive, St. Andrew". This was on 3rd February, 1976. By letter dated May 20, 1976 the attorneys for the mortgagee addressed a letter to the plaintiff's attorneys, Messrs. Dunn, Cox & Orrett requesting the latter to send to the former the duplicate certificate of title of 8 Gladstone Drive to enable the mortgage financing of the purchase by the defendant to be processed. This letter was not included in Exhibit 1, but was referred to in a reminder dated 2nd June, 1976, addressed to Dunn, Cox & Orrett by the attorneys for the mortgagee. There was no response from Messrs. Dunn, Cox & Orrett. Accordingly on 5th January, 1977, the mortgagee's attorneys wrote to the defendant to enquire what the position was, since they had been informed orally by a Miss Tomlinson of Dunn, Cox & Orrett that the latter knew nothing of the proposed mortgage. The defendant promptly got in touch with Messrs. Dunn, Cox & Orrett who by letter dated 28th January, 1977, to the attorneys for the mortgagee recited the fact that the defendant had informed them of the mortgage financing and that they accordingly enclosed the certificate of title together with surveyor's identification report dated 21st October, 1976.

It seems to me that it was not so much a question of Miss Tomlinson of Dunn, Cox & Orrett not knowing anything of the mortgage transaction but of the unavailability of the certificate for delivery to the mortgagee's attorneys. The irresistible inference gathered from other documents bearing dates subsequent to 2nd June ,1976, in Exhibit 1 is that the plaintiff's attorneys were not on 20th May ,1976, nor on 2nd June, 1976, in a position to comply with the request of the mortgagee's attorneys because:

(a) The plaintiff's root of title was imperfect;

(b) The necessary transfer from the plaintiff to the defendant which had also to be submitted could not then be executed because the plaintiff could not at that time show a good root of title namely, that the property was vested in him exclusively by survivorship. He had not yet recorded the death of his co-executor on the registered title. Thus a valid transfer was only executed on 24th November 1976;

(c) The subdivision and consequent splintering of title necessitated the delivery to the mortgagee's attorneys of a surveyor's identification report identifying Nos. 8 & 10 Gladstone Drive as being the premises described as Lot 4 and Lot 5 in the titles registered at Volume 1050 Folio 16 and Folio 17 respectively. The surveyor's identification report was not then available as it was only sought by the plaintiff from Messrs. Miller, Haddad & Associates on October 13, 1976, and the said report dated 21st October, 1976, was only received by the vendor's attorneys on or about 25th October, 1976.

The letter dated 3rd February, 1976, eloquently bespeaks that the defendant had arranged her mortgage finance to pay the balance of the purchase price timeously. The letter to the plaintiff's attorneys by the mortgagee's attorneys dated 20th May, 1976, informed the plaintiff that the balance of the purchase money was awaiting payment over to them in accordance with the known practice relating to mortgage financing of the purchase of real estate. It was for the plaintiff, through his attorneys to submit to the mortgagee's attorneys the relevant transfer together with his root of title to enable the mortgage to be prepared and the mortgage fund disbursed. It is the plaintiff's delay in submitting these certificates of title which prima facie prevented him from receiving the balance of the purchase money on 31st May, 1976. The defendant in the light of these document cannot be held to be in breach for non-payment

on the said date because it was the plaintiff who through his agents disabled the defendant from making payment on the stipulated date.

Turning to the question of whether the defendant had introduced conditions incapable of reasonable performance, Exhibit 1 discloses that after the duplicate certificates of title for Nos. 8 & 10 Gladstone Drive were submitted to the mortgagee's attorneys and as a result of inspection of the premises by their surveyors, the said attorneys by letter to the defendant dated February 25, 1977, drew her attention to a breach of the restrictive covenant numbered 8, in that the wall of a building on No. 8 Gladstone Drive was less than 30 feet from Gladstone Drive. The letter called for a modification of the restrictive covenant to legalize the breach. It further provided that if an undertaking by her attorneys was given that application would be made expeditiously to the Supreme Court to secure a modification of this restrictive covenant the mortgage deed would be prepared with the inclusion therein of this undertaking with the appropriate sanction and the mortgage money could then be disbursed. The defendant no doubt convinced that it was the responsibility of the plaintiff to have the restrictive covenant modified, took this letter to the plaintiff's attorneys. Thus we have a letter dated 7th March, 1977, from the latter to the mortgagee's attorneys referring to the letter addressed to the defendant and giving their undertaking to make application for the modification of the restrictive covenant within six months of the date of completion of the purchase and also confirming that a clause covering the undertaking could be inserted in the mortgage. This was an act by the plaintiff's attorney which not only operated as a waiver of any breach of the agreement by the defendant but was an unambiguous and positive affirmation of the contract. The preparation of the mortgage got under way. By letter dated 28th March. 1977, the mortgagee's attorneys wrote to the plaintiff's attorneys requesting confirmation of the name and description of the transferee named in the transfer. There appears to have been a verbal reply to this query and by letter dated 14th July 1977, the plaintiff's attorneys wrote to the mortgagee's attorneys adverting to the verbal answer to the letter of

28th March 1977, and reminding the mortgagee's attorneys that "the covenant on those premises has to be modified", further that the matter had been handed to their Mr. Eatmon to be done expeditiously and that the defendant had agreed to bear the cost of the application for modification. By letter of 29th July, 1977, the mortgagee's attorneys notified the defendant that the mortgage document had been prepared and that she should attend on them to execute the same. The defendant duly executed the mortgage document in or about the end of July or early August and subsequent thereto the mortgagee's attorneys on behalf of the defendant informed the plaintiff's attorneys by letter dated August 24, 1977, that the mortgage had been executed and that they were in a position to complete. They further made request that "all documents of good title" be submitted to them by the plaintiff's attorneys so to enable the mortgage to be registered and the funds disbursed.

The certificates of title were sent to the mortgagee's attorneys who notified the plaintiff's attorneys of the existence of an encroachment of the building on No. 8 Gladstone Drive onto No. 6 Gladstone Drive which was revealed by the report of their own surveyor. As this constituted a defect on the title calling for remedying, the mortgagee must have insisted on this defect being remedied before it would be prepared to register the mortgage. The plaintiff's attorneys must have accepted the stance taken by the mortgagee, they therefore recalled the certificates which the mortgagee's attorneys returned under cover of their letter dated 7th October, 1977. This letter was admitted in evidence as Exhibit 11. Thereafter the plaintiff's attorneys sought confirmation that an encroachment did in fact exist as was disclosed to them by their surveyors Messrs. Miller, Haddad & Haddad as early as October, 1976, and by the mortgagee's surveyor one Mr. Bogle. The plaintiff's attorneys subsequently did obtain confirmation of the encroachment in the opinion given to them by letter of Messrs. Cooke, McLarty & Associates, dated June 16, 1980. This letter was admitted in evidence as Exhibit 3.

The documents thus disclosed nothing from which expressly or impliedly the defendant could be said to have introduced conditions, much

less conditions which were incapable of reasonable performance. The Memorandum of Sale expressly provided that the transfer was to be subject to the incumbrances endorsed on the certificate of title. Thus if there was a breach of any of the restrictive covenants it would be for the plaintiff as vendor to abate the breach if possible, or alternatively apply to have the restrictive covenant modified so to legalize that which hitherto was a breach. If there was an encroachment by a building on the premises being sold on to adjoining premises owned by a third party, the title of the vendor to that extent would be defective and even if this defect in title did not also constitute a breach of a restrictive covenant, it would constitute a potential law suit which the defendant could not be expected to purchase unless by express special covenant in the Memorandum of Sale he had undertaken not to object to the title on that account. It was therefore the duty of the plaintiff to remove the encroachment by appropriate means where possible as part of his general duty of showing good title. The plaintiff was aware of the two breaches of the restrictive covenants from as early as October, 1976, when his attorneys obtained the report of Miller, Haddad and Haddad. The defect in title constituted by the breach of restrictive covenant numbered 8 was satisfactorily resolved by the plaintiff's undertaking to apply to the Court to have the said restrictive covenant modified.

However, with regard to the breach of covenant numbered 7, the plaintiff's attorneys, after the final confirmation to them in June, 1980, that there was in fact a breach of covenant constituted by the encroachment, did nothing thereafter to remdy the breach. This was not a covenant which required intervention by the Court in aid of the plaintiff. It was a question of either pulling down the offending building or purchasing the small area on which the building encroached. The plaintiff by his amended pleading justified the purported rescission of the agreement on the ground that this encroachment constituted such a defect in title as to render him incapble of performing by giving a good title. This excuse is totally devoid of merit. It certainly is not an irremovable defect on the title nor would its removal be so onerous or create such hardship as to warrant the Court coming to the aid of the plaintiff.

The plaintiff claims also that the Memorandum of Sale should be declared frustrated due to inordinate delay and/or that it would be inequitable for him to be required to perform the said agreement after the lapse of a period in excess of five years. The doctrine of frustration is a part of the law of contract and to the extent that the Memorandum of Sale contains obligations which are executory, it would at first blush be thought that the doctrine would apply thereto. But the very nature of the obligations undertaken in the Memorandum of Sale makes the doctrine rarely if ever applicable. The obligation of the purchaser to pay the purchase price, that is to say, to pay money is never regarded as incapable of performance unless prohibited by statute or is subject to Exchange Control approval which has not been given. The obligation of the vendor to give vacant possession on completion, that is to say, to make the property available at the due date of completion encounters no problem of frustration except perhaps in the exceptional case of "some vast convulsion of nature swallowing up the property altogether, or burying it in the depths of the sea" as per Lord Simon L.C. in Cricklewood Property and Investment Trust Limited v. Leighton's Investment Trust Limited (1945) A.C. 221 at page 229. Since the doctrine of frustration is founded on impossibility of performance of the contract by one or the other or both parties consequent on some unforeseen event, the mere lapse of time, however inordinately long, cannot and does not per se result in frustration of a contract. In this case the corpus still exists, good title can be made by the plaintiff since the encroachment of the building on No. 8 Gladstone Drive onto No. 6 Gladstone Drive does not as I have earlier said, constitute an irremovable defect. A case of impossibility of performance by the plaintiff is not established on the available evidence, hence there is no case made out of frustration.

With regard to the claim that it would be inequitable for the plaintiff to have to perform the agreement after the lapse of a period in excess of five years, this pre-supposes that the defendant was at fault and has occasioned this inordinate delay. The plaintiff in his reply expressly pleaded that the failure to date, to complete was entirely the

fault of the defendant. Contrary to this contention, Exhibit 1, discloses that it was the plaintiff and his attorneys who have occasioned and are still occasioning the delay. There was delay by the plaintiff in perfecting his title by recording on the registered title the death of his co-executor. There was delay in executing the transfer. There was delay in submitting the necessary documents to the attorneys for the mortgagee so that the mortgage could be processed and completion effected. There was tardiness, resulting in delay in securing confirmation of the existence of the encroachment and no steps have thereafter been taken in an effort to remedy this encroachment. The oral evidence in-chief of Mr. Owen Laing for the plaintiff that the delay in completion was somewhat on the defendant's part is totally discredited by his own letter of March, 1980, addressed to the defendant in which he expressly stated that she was not at fault. In re-examination he reluctantly conceded that he had formed the opinion that it was the plaintiff's attorneys and not the defendant who were to blame for the delay.

The evidence of Miss Barbara Laing does not contradict the evidence contained in Exhibit 1. Her evidence, to the contrary, confirms the fact that the plaintiff's attorneys had always to be urged into action by her. On one occasion the defendant actually accompanied her to urge expedition in the matter. Her evidence confirms the evidence of the defendant that the latter was in possession after July, 1976, not as a tenant but as beneficial owner making disbursements with regards to property tax, property insurance, water rate qua the legal owner. Miss Laing admits that the defendant was in possession not paying rent but paying property expenses because of the plaintiff's inability to complete, coupled with recognition of the prejudice to the defendant in having to meet financial expenses collateral to the mortgage which she to the knowledge of the plaintiff had obtained. She did not then or thereafter require the defendant to pay the balance of the purchase price nor has the plaintiff's attorneys ever mentioned that they had demanded payment of this balance. Miss Laing's further evidence that she understood that the only remaining matter delaying completion was the payment of the balance

of the purchase money was regrettably far from frank and is inconsistent with her evidence that the defendant to her knowledge had been complaining of the delay in completion, and that both she and the defendant had occasion in 1978 to jointly urge the plaintiff's attorneys to expedite completion.

The defendant's evidence is fully confirmed by Exhibit 1. Her evidence was straight-forward and frank. She admitted that she had previously been a tenant of the premises paying rent to Miss Laing who appeared to be acting for the plaintiff. She testified as to the circumstances surrounding the execution of the Memorandum of Sale and that in particular it was Miss Laing who introduced her to the late Frank Barrow of Dunn, Cox and Orrett who had the carriage of sale. Her evidence with regard to the efforts made by her to have the agreement completed was not seriously challenged in cross-examination and could not, in the light of the documentary evidence in Exhibit 1. She testified that contrary to the claim of the plaintiff that rescission of the agreement was justified because Exchange Control approval had not been obtained, she had herself obtained the necessary approval. Exhibit 1 discloses that the failure of the plaintiff to obtain Exchange Control approval was due soley to his supplying in error the wrong particulars of the registered title to the bank namely, titles registered at Volume 1050 Folios 13 and 14.

I accept the defendant as a truthful witness and find on the basis of her evidence and the documentary evidence, in particular Exhibit 1 that the grounds on which the plaintiff sought to rescind the agreement are neither justified in law nor on the facts. Equally, inasmuch as the defendant, on the evidence was never a tenant after July, 1976, the plaintiff's claim for recovery of rent and of possession qua landlord must also be and is hereby dismissed. The plaintiff's claim is accordingly dismissed in its entirety.

The defendant in her counter-claim seeks specific performance of the Memorandum of Sale with abatement of the purchase price. The facts found by me establish without the slightest doubt that the defendant was always ready, willing and able to pay the balance of the purchase money.

By the conduct of the plaintiff and/or their attorneys the defendant was led reasonably to believe that the payment of the balance of the purchase money was to await the readiness of the plaintiff to make good his title by removing such defects as existed. I have already stated that the encroachment of the building on No. 8 Gladstone Drive onto No. 6 Gladstone Drive does not constitute an irremovable defect on the plaintiff's title. On the evidence before me the offending building is more like an outhouse. It is not the main building. The cost of demolition of this building is approximately $3000.00. With its demolition the way is clear for the plaintiff to complete by lodging the executed transfer for registration after which the mortgage could be registered. The defendant has exercised her right in electing not to treat the purported rescission as constituting a breach of the contract by the plaintiff. She elects to treat the aforesaid contract as still subsisting and asks the Court so to declare it and further that specific performance thereof be ordered with abatement from the purchase price.

In Rutherford v. Acton-Adams 1915 A.C. P.866 Viscount Haldane delivering judgment in the Privy Council stated the principle which a Court of Equity applies in suits for specific performance in the following words commencing at page 869:

> " In exercising its jurisdiction over specific performance Court of Equity looks at the substance and not merely at the letter of the contract. If a vendor sues and is in a position to convey substantially what the purchaser has contracted to get, the Court will decree specific performance with compensation for any small and immaterial deficiency provided that the vendor has not, by misrepresentation or otherwise, disentitled himself to his remedy. Another possible case arises where a vendor claims specific performance and where the Court refuses unless the purchaser is willing to consent to decree on terms that the vendor will make compensation to the purchaser, who agrees to such a decree on condition that he is compensated. If it is the purchaser who is suing, the Court holds him to have an even larger right. Subject to considerations of hardship, he may elect to take all he can get, and to have a proportionate abatement from the purchase money, but this right applies only to a deficiency in the subject matter described in the contract".

In this case the defendant has elected to take the premises agreed to be sold less the offending outhouse which will have to be demolished unless its encroachment onto No. 6 Gladstone Drive can otherwise be satisfactorily dealt with. The evidence is that this outhouse is valued at $10,000.00 while the main building less the value of the land is valued at $90,000.00 at the date of the attempted breach by the plaintiff in May 1981. It will cost $3000.00 for this outhouse to be demolished. Either the plaintiff cause this building to be demolished or the defendant would be entitled at the expense of the plaintiff to demolish the building to clear the defect in the title. No hardship will be occasioned to the plaintiff by an order for specific performance with abatement from the purchase money. Accordingly it is hereby ordered that the agreement dated 9th April, 1976, be specifically performed and carried into execution by the plaintiff but subject to abatement in the purchase money of $10,000.00 being the value of the outhouse and a further abatement of $3000.00 in the event that it becomes necessary for the defendant to effect the demolition consequent on the neglect and or default of the plaintiff to effect demolition within one month from the date of this judgment.

The defendant will have her costs against the plaintiff both as regards the claim and the counter-claim and is entitled to deduct this sum when agreed or taxed, from any balance of the purchase money payable to the plaintiff.