JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 71/84

BETWEEN: The Hon. Mr. Justice Carberry, J.A.
The Hon. Mr. Justice Wright, J.A.
The Hon. Mr. Justice Bingham, J.A. (Ag.)

BETWEEN	ENID PHANG SANG	PLAINTIFF/APPELLANT
AND	CONLEY J. SUDEALL JOYCE SUDEAL	DEFENDANTS/RESPONDENTS

Mr. W.B. Frankson, Q.C., & Mr. Donovan Coke for the Appellant instructed by Messrs Gaynair & Fraser

Mr. Carl Rattray, Q.C., & Mr. Clarke Cousins for the Respondents, instructed by Messrs Rattray, Patterson & Rattray

November 24, 25, 26, 27, 28, 1986,
October 20, 21, 22, 1987
& June 30, 1988

CARBERRY, J.A.

This was an appeal from the judgment of Wolfe, J., delivered on 22nd October, 1984, in a case heard before him for some 5 days in April and October, 1983. The case arose out of a contract dated the 30th March, 1979 made between Enid Phang Sang, the plaintiff/vendor and Conley Joseph Sudeall and his wife Joyce, the defendants/purchasers. Sydney Phang Sang and his wife Enid, the plaintiff, were the owners of land at Anchovy in the parish of Portland registered at Volume 955 Folio 243. The title was by plan and the land contained by survey some two acres and twenty-one perches. It was subject to a covenant against being sub-divided without the consent of the Portland Parish Council. However that consent was obtained and the land divided into three portions, as appeared in a plan or diagram made by Mr. R.T. Gooden, a commissioned land surveyor, from a survey made by him on the 31st October, 1978. At the time of the sale to

the Sudealls the registered title for the land had not yet been divided into its three separate components, though the process to obtain this had begun.

The sale to the Sudealls was in respect of Lot one, and the price was J$50,000.00. The contract is set out in full below. To summarize, the price was to be paid by a deposit of $5,000.00 and the balance of $45,000.00 was to be paid within 90 days from the date of contract. Though the deposit was paid, the balance was not paid within the time specified or at all, and eventually the vendor purported to rescind the contract and forfeit the deposit, and brought this action claiming an order rescinding the agreement and a declaration that the deposit be forfeited. Again summarizing, the defence was to the effect that there was a term in the contract that the price was to be payable only on receipt by the purchasers of a registered title to this lot of land, that no such title had been presented to them, but that they were willing and able to pay for the land and would do so when they got the title. They counterclaimed for a declaration that the purported rescission of the contract was invalid, and they claimed specific performance of the contract. It should be noted that there was a house on this lot of land, and that the purchasers entered into possession at the time of the contract, 30th March, 1979, and have been there ever since.

Wolfe, J., founding himself on dicta by Denning, L.J. in British Movietonews Ltd v. London & District Cinemas Ltd (1950) 2 All E.R. 390 at 395; (1951) 1 K.B. 55 to the effect that the court qualifies the literal meaning of the words in a written contract so as to bring them into accord with the contemplated scope of the contract, and that even if the contract is absolute in its terms, nevertheless, if it is not absolute in intent, it will not be held absolute in effect. Wolfe, J., observed:

> "Relying on the dictum of Denning L.J., as qualified by Viscount Simon (referring to the House of Lords decision in that case) I am satisfied that from the nature of the contract and the surrounding circumstances that it was a condition of of the contract, albeit not expressed, that the balance of the purchase money would be paid in ninety days in exchange for a registered title and that this condition was a foundation upon which the parties contracted. .....
>
> In the light of the foregoing I hold that the balance of the purchase money was payable in exchange for a registered title, which it was the duty of the vendor to procure. ....." (emphasis supplied)

Wolfe, J., found that the vendor was not justified in rescinding the contract, having failed to date to produce for the purchasers a registered title, and he refused the reliefs sought by the plaintiff/vendor. He went on to order specific performance in favour of the defendants/purchasers, holding that the primary cause of any delay was due to the vendor's interpretation of the contract. He ordered, (in what must be surely an unusual order,) that the defendants, (the purchasers), shall forthwith pay over to their Attorneys-at-law the sum of $45,000.00 balance of the purchase money, and in addition an amount to cover the defendants half costs of obtaining title. The half costs were to be paid over to the plaintiff's attorneys-at-law as soon as the defendant's attorneys-at-law got them. The defendants attorneys-at-law were to inform the plaintiff's attorneys-at-law as soon as they got the $45,000.00 balance of the purchase money, whereupon the plaintiff was to take all reasonable steps to procure a registered title in the name of the defendants within a period of three months from the date thereof.

The result of this judgment is that from March, 1979 to October 1984 (and to date if the Judgment is right) the defendants /purchasers, have been in possession of the land; have paid no rent, and no interest on the unpaid purchase money the value of which has been steadily deteriorating since 1979. Apart from the debatable issue of the condition of the house, the land itself has of course been steadily appreciating in value since 1979.

It seems to me that there are two central points of law involved:

(a) whether it was right to read into this contract the term inserted by Wolfe, J., that the price should be paid only in exchange for a registered title presumably in the name of the purchasers;

(b) what is the duty normally incumbent on the vendor of registered land?

Point (a) involves a great deal of authority: cases on what is sometimes called the parol evidence rule, and also the collateral contract. Point (b) involves a consideration of the Registration of Titles Act and conveyancing practice.

Dealing with (b) the shorter point first, the duty of a vendor selling registered land: at common law, normally, and in the absence of special terms to the contrary, the purchaser would produce his purchase money and the vendor would then sign a conveyance, prepared by the purchaser's lawyer, (unlike the common law rule, in Jamaica, by Section 4 of the Conveyancing Act it is the vendor's lawyer who prepares the conveyance) of the land to the purchaser. The payment of the money and the conveyance of title to the purchaser would be contemporaneous. Before matters reached that stage there would have been a careful perusal of the vendor's title and supporting documents, questions might be raised and answers given aimed at ensuring that the vendor did indeed have the interest he purported to sell, and that the purchaser would get it in exchange for his purchase money.

However, under the Registration of Titles Act or system title is transferred by the entry of the purchaser's name in the Register Book of Titles. It is not practicable therefore to follow the procedure used in the case of unregistered land. On the one hand it would be obviously unwise for the vendor to actually transfer the land into the name of the purchaser without either having got the purchase money, or receiving from the purchaser, his attorney or banker an irrevocable assurance that the price will be paid on the transfer taking place.

On the other hand the purchaser may cavil at paying his money before getting title, though he could if he wished protect himself by lodging

a caveat to protect the title between contract and transfer. Further, he may need to show the title in order to raise part of the purchase money on a mortgage. In this situation the practice is for the vendor to loan the Certificate of Title to the purchaser's solicitor or attorney, on the latter's undertaking to do nothing to harm the vendor. The purchaser's Bank inspects and having assured itself that the title is unincumbered or the like, intimates it will advance the money.

Williams in his book "Vendor & Purchaser" (4th Edition 1936) at Chapter XX deals with the sale of registered land in England and at page 1155 dealing with completion, observes that the payment of the price and the registration of the purchaser as proprietor cannot be exactly simultaneous. The one must either precede or follow the other. At page 1156 "Completion at Vendor's Office" he observes:

> "Thus, notwithstanding that the purchase has not been fully completed by the registration of the purchaser as proprietor, yet it is proper to pay the purchase money in the usual way at the office of the vendor's solicitor, against delivery of the land certificate and of the transfer duly executed; ..... and also where either of these precautions is considered necessary, the lodging of a priority notice after search at the Registry. ....."

Fox, in his book, The Transfer of Land Act, 1954, (New South Wales) at page 140 et seq., sets out the General conditions of Sale of Land under the Transfer of Land Act, 1954. These are the statutory rules that have been made to govern cases where the parties have made no special terms of their own. Rule 12 reads:

> "12. Upon payment of all purchase and other moneys payable by the purchaser under the contract the vendor shall sign a proper instrument of transfer to the purchaser of the land sold and deliver it to the purchaser together with the Crown grant or certificate of title. ....."

Voumard, in "The law relating to the Sale of Land in Victoria" (Australia) (3rd Edition 1978) in a chapter on Conditions of Sale under an open contract at page 242 observes:

> "In the case of land under the Transfer of Land Act the vendor's obligation as to title, in the absence of any contrary stipulation, is to show and verify the fact that he is registered or entitled to be registered as the proprietor under the Act or that he is otherwise entitled by law to execute or procure the execution of a registrable transfer of the land to the purchaser. It is not necessary that the vendor should be able to produce a certificate of title in his own name. "
>
> .....
>
> "7. As soon as the vendor has proved that he has a good title to the property it is the duty of the purchaser to accept it, to enter into possession of the property, to pay the purchase money, and take a conveyance or transfer, the vendor being bound,,upon the purchaser accepting title or tendering the purchase money, to execute the conveyance or transfer and to procure the execution thereof by any other necessary parties. In the case of land under the Transfer of Land Act, the purchase money is paid subject to the implied condition that if there should be found any infirmity in the title of the transferor, the whole transaction is at an end, and the purchase money is repayable to the purchaser.
>
> "8. If the purchase is not completed at the proper time the purchaser must pay interest on the purchase money as from the time when he took possession or might prudently have taken possession (that is from the time when a good title was shown), until actual completion, but he will be entitled to be credited with the rents and profits received by the vendor as from the date when the matter should have been completed.

Similar expressions are to be found in Thom's Canadian Torrens System, see the second edition page 214 - 215, where the possibility of the parties meeting at the office of the Registrar of Titles and there exchanging money for entry of the purchaser's name on the register has been discussed in more than one case, but has not been insisted on.

On a review of such authority as has been brought to our notice, I am of the opinion that the vendor's duty in the case of sale by him of registered land is to execute in favour of the purchaser when the price is paid a registrable transfer into the name of the purchaser or his nominee. This is after first establishing that he, the vendor, is the registered owner, or entitled to be registered as such, or to transfer the title.

In the case of sale of lots in a sub-division of land already registered the vendor's duty will be to establish:

(a) ownership or the right to deal with the original entity;

(b) that he has satisfied the requirements relating to sub-division (getting approval from the necessary authorities, surveys etc.)

(c) is getting out titles for the individual lots; these need not necessarily be in this name, so long as they can be registered in the name of the purchaser.

There is a certain ambiguity in the trial judge's finding in this case, that the vendor's duty was "to provide a registered title in exchange for the purchase money." In whose name was the title to be registered? It seems clear however that what was being laid down was that a vendor of registered land must go to the trouble and expense of registering the purchaser's name on the title before he is paid any money. What if the money never materializes? Yet the land has been transferred? It is not without interest to see, that apart from providing that the purchaser's money is to be paid to his own attorney-at-law, the order eventually made by Wolfe, J., provides that the purchaser's attorney-at-law on receiving the purchase money is to notify the vendor's attorney-at-law whereupon the vendor will take the necessary steps to get the title in the name of the purchaser. The learned judge himself in his order seems to make the payment or provision of the purchase money and costs of transfer conditions precedent to the vendor's duty with respect of getting the title registered in the name of the purchaser.

To summarise, as I understand it unless the contract specifically so requires, it is not the duty of the vendor of registered land to secure the registration of the purchaser's name on the title to the land being sold before and as a condition precedent to receiving or collecting the purchase price.

The next point to note is that the parties in making their contract may make their own time table. Though the payment of the purchase price and the executing of the conveyance or transfer are ordinarily concurrent things, the parties may alter that, and for example may specifically provide that payment of the purchase money should precede the transfer of title.

Voumard, at page 434, dealing with payment of purchase money and completion, says:

> "The right of the vendor to recover the final balance of purchase money raises different questions. The contract may, of course, provide either expressly or by implication for the execution of a transfer or conveyance only after the payment of the whole of the purchase money; in such a case payment of the whole of the price by the purchaser would be a condition precedent to the right to demand a transfer, and the vendor would be entitled to recover the price in an action at law without having previously tendered a transfer"
> (emphasis supplied)

Cited for this proposition is the English case of Mattock v. Kinglake (1839) 10 A & E 50; 113 E.R. 19. There a time was fixed for the payment of the purchase money, but no time was stipulated for conveyance. Held that these stipulations were independent and that the vendor was entitled to sue for the purchase money without tendering a conveyance. The court followed Pordage v. Cole (1669) 1 Wm Saund 319; 85 E.R. 449, the source of much learning on dependent and independent obligations. The Headnote to Pordage v. Cole reads:

> "If it be agreed between A and B that B shall pay A a sum of money for his lands, & c on a particular day, these words amount to a covenant by A to convey the lands, for agreed is the word of both; but it is an independent covenant, and A may bring an action for the money before any conveyance by him of the land."

It is entirely possible therefore for the parties to a contract for the sale of land to provide that the payment of the price shall be made before the transfer of the title. If they have so agreed that is the end of the matter: the question here before us is did they so agree? This involves looking at their contract and the surrounding evidence.

The contract of sale is in the following terms:

"JAMAICA S.S. (Exhibit 1)

THIS AGREEMENT made the 30th day of March One Thousand nine hundred and seventy-nine BETWEEN ENID PHANG (through her agent Jasper Lawrence of Port Antonio in the Parish of Portland) (hereinafter called 'The Vendor') of the ONE PART and CONLEY JOSEPH SUDEAL of Port Antonio in the Parish of Portland and JOYCE ESETA his wife (as Joint Tenants) (hereinafter called "THE PURCHASERS") of the OTHER PART WHEREBY the Vendor agrees to sell and the Purchasers agree to purchase ALL THAT parcel of land more fully described IN THE Schedule upon the terms herein set forth.

S C H E D U L E

Description of land	ALL THAT parcel of land part of ANCHOVY in the Parish of Portland containing by survey One Rood Sixteen Perches and Seventy-five Hundredths of a Perch AND BEING the LOT numbered ONE on the Plan or Diagram thereof prepared by Mr. R.T. Gooden a Commissioned Land Surveyor from a survey made by him on the 31st day of October, 1978, with building thereon.

"

S C H E D U L E

Consideration	FIFTY THOUSAND DOLLARS ($50,000.00)
Terms of Payment	FIVE THOUSAND DOLLARS ($5,000.00) on the signing of this Agreement and the Balance of Forty-five Thousand Dollars ($45,000.00) within Ninety (90) days from the date hereof.
Title	Under the Registration of Titles Law.
Carriage of Sale	F.V. GROSETT & CO
Date of Possession	On payment of deposit
Costs of Title	Equally - Vendor will pay Transfer Tax
Restrictive Covenants	Those imposed by the Parish Council on the Subdivision
Taxes, Water Rates	To be apportioned as at date of possession
EASEMENT	NIl

Witness: (Sgd) E. Heslop ..... Vendor: (Sgd) Jasper E. Lawrence ..... for ENID PHANG SANG

Witness: ..... Purchasers: Conley Sudeall & Joyce Sudeall

The evidence is that the parties to this contract were, on behalf of the vendor Mr. Jasper E. Lawrence who was their agent charged with the sale of this land. The purchasers Sudeall, husband and wife, were the other parties. They were supported by the father-in-law of Mr. Sudeall, (his wife's father), one Mr. Ramdeen, and the purchaser (Mr. Sudeall) gave evidence to the effect that Mr. Ramdeen was present and ready to write a cheque for the balance when it fell due. There is no other evidence as to this alleged ability to pay the balance of $45,000.00. At the time of the negotiations and contract, both the Phang Sangs were off the Island: they had migrated to Miami. There is more than a suggestion that they were anxious to sell their land, and indeed it appears that at the material time their son was in prison in Miami, having been convicted for the possession

of ganja (marijuana), leaving dependent for support a young wife Beverly Phang Sang, who stated that the lot sold to the Sudealls was intended to be the property of her husband and herself.

By the time of trial the vendors were in a difficult position. They had not been present in Jamaica during the negotiations. Their agent Mr. Lawrence had died. They apparently had no correspondence from him which they could produce: (they might well have been advised that such correspondence was inadmissible any way.) The vendors therefore had no witness available to give evidence as to the negotiations for the sale. The purchasers on the other hand were at full strength. Further, they had a sheaf of letters alleged to have been written by Mr. Lawrence during the negotiations that led up to the signing of the contract of sale. Curiously they had, or produced no letter or letters from him subsequent to the contract, so that we have no way of knowing what Mr. Lawrence's response was to the subsequent events, apart from the evidence offered by Mr. Sudeall as to what happened at a meeting held at Mr. Grossett's office after the time had passed for the payment of the money.

The existence of these letters from Mr. Lawrence seems to have come as a complete surprise to the vendors. There had been no discovery, and none of these letters were put to the vendors' witnesses, Beverly Phang Sang or their attorney Mr. William McCalla. No objection was taken as to their authenticity: it was evidently conceded that they were genuine. But an objection was taken to their admissibility and this will be discussed after the letters have been examined.

It was undisputed that the contract of the 30th March, 1979 was prepared by Mr. Grossett of Grossett & Company, attorneys-at-law. It is clear that Mr. Grossett was acting in that exercise for both parties. He was acting for the vendors in as much as the procuring of subdivision titles for the lots had previously been entrusted to him. He had held the parent registered title, and his correspondence discloses that he

forwarded the prechecked diagram of the subdivision to the Titles Office for the necessary subdivision lot titles to be prepared: see his letter of June 12, 1979 to Messrs Robinson, Phillips and Whitehorne, in response to Mr. McCalla's letter of 30th May, 1979. (Mr. McCalla was a member of the firm Robinson, Phillips & Whitehorne). The later correspondence shows Mr. Grossett acting for the purchasers; he tried to preserve their contract, and is alleged to have served a notice to complete on their behalf. When the vendors sought new attorneys, Mr. Grossett continued to act for the purchasers. There is no suggestion that he was unavailable to give evidence, but he was called by neither side.

According to the ~~evidence~~ given by Mr. Sudeall he received from Mr. Lawrence a letter of the 20th March, 1979, (Exhibit 21), discussed the proposed sale with Mr. Lawrence, and "We both agreed to go to F.V. Grossett & Co". He, his wife and her father Mr. Sydney Ramdeen and Mr. Lawrence attended on Mr. Grossett on the 30th March, 1979. Mr. Grossett prepared the contract of sale of 30th March, 1979 in the presence of both parties.

The fact that agreements for the sale of land in Jamaica to be enforceable are required to be in writing was clearly known to all concerned.

A fair assumption would be that the parties had passed through the stage of negotiating and now reached that of a binding agreement which they wished to have recorded in final form by a mutually acceptable attorney-at-law upon whose skill and judgment they both relied.

The agreement is in common form. It contained a specific clause "Terms of Payment" which provided for a deposit of $5,000.00 on the signing of this agreement, and the balance of $45,000.00 within 90 days from the date hereof. As to Title, it provided: "Under the Registration of Titles Law." As to possession, this was to be "on payment of deposit".

I should have thought that this was a clear and unambiguous provision that the balance of the price should be payable within the time specified. The parties had fixed their own time table. As to title, it was known that there would be a registered title, that one already existed and steps were being taken to have separate titles got out for the separate lots. I should have thought it clear that the parties had fixed a specific time frame for the payment of the price, but had not done the same for the securing of the title, which depended primarily upon the working of the bureaurocracy of the Titles Office. Seeing that the purchasers went into possession on the signing of the contract and payment of the deposit that morning, they had the reality of enjoyment and the title was expected to follow in due course.

There were good reasons for fixing a firm date for the payment of the price: the vendors were off the Island, and needed the money, and the purchasers had gone or were to go into possession at once. Wolfe, J., however found that it was an unexpressed condition of the contract that though the balance of the purchase money should be paid within ninety days this was to be in exchange for a registered title, i.e. that the contract required that the vendors secure registration of the names of the purchasers on a registered title for their particular lot, also within the 90 days. He arrived at this conclusion from "the surrounding circumstances" and apparently largely on the basis of two items of correspondence, one being a letter written by Mr. Lawrence, the vendor's agent to the purchaser, Mr. Sudeall, dated the 20th March, 1979, (Exhibit 21) and the other being a letter written by Mr. McCalla of Messrs Robinson, Phillip & Whitehorn to Mr. Grossett (for the purchasers) dated the 27th August, 1979 (Exhibit 4). It is necessary to look at the pre-contract and post-contract correspondence to see if they justify this finding.

As a preliminary to reviewing the correspondence it is as well to remember two points of law which will be explored later: generally speaking neither the pre-contract negotiations nor the post-contract recriminations are relevant to determining what the parties meant in the written contract that they signed. Its meaning must be sought in the terms of the writing, though there are exceptional cases in which there may be an obvious ambiguity - or where what is called a collateral contract may be found to exist. Secondly, it should be remembered that in Jamaica section 4 of the Statute of Frauds still applies to contracts for the sale of interests in land, and that the Memo required to satisfy the law and make the agreement enforceable must contain all the terms that were agreed. If it does not the memo is inadequate and the contract unenforceable.

The pre-contract correspondence between Mr. Lawrence and Mr. Sudeall consists of six letters commencing with a letter of the 9th September, 1978. (Exhibit 16) and ending with Exhibit 21, 20th March, 1979. They read as follows:

" (Exhibit 16)

53 Red Hassell Rd.
Port Antonio
9.9.78

Dear Mr. Sudeall

This is to advise you that I have been successful in finding out how far the papers in connection with the preparation of the Title for the house at Anchovy have reached.

I am now confirming that the Sub-Division Plans have been approved by the Portland Parish Council and are with the firm of Surveyors Milner & Gooden. They advised me that no action was taken to cut off the land on which the house is situated as they were awaiting such instructions. This is now being done and the diagram will be ready in about six to eight weeks time.

"On receipt of this you will be advised. You may then make arrangements to meet Mrs. Phang Sang and I at your Lawyer for the preparation of the necessary documents to be prepared for the sale. I suggest that no less than $40,000 be made available until the Title is ready. This will take a few months to be done. ½ costs to be paid by you.

Your father in law called on me today and I was happy to be advised that he worked for 25 years as Bookkeeper with my nephew Magnus Lawrence who was then Overseer on the same property he is now in charge of. You may therefore be assured that your business is in good hands.

Kind regards and best wishes.

Yours Sincerely,

J.E. Lawrence"

(Exhibit 17)

53 Red Hassell Rd.
Port Antonio
3.10.78

"Dear Mr. Sudeall

Quite possible you will recall me telling you on your last visit that I had a purchaser who was willing to pay thro his lawyer a certain amount as deposit on the house belonging to Mrs. Phang Sang in which you are interested until the diagram from which the Title will be prepared is ready but I advised him I had already done business.

I have yet another such offer and in the event still keeping the sale open for you as promised, you should make it possible to give me some amount of assurance in writing of your intention to buy as it stands you can have your mind changed and my two buyers seek some other place and up set my plans.

"I was able to contact the Surveyor for the diagram and he has arranged for me to have it in approx. 5 or 6 wks time at a cost of $400. As I told you if you are able to sell your home go ahead and I will arrange for you to live at the house free of rental until the diagram is ready when you will be called upon to make your down payment with other documents relative to the sale. You will also be given permission to carry out any repairs required to your comfort but will receive no refund if you forfeit.

Please let me hear from you early.

Kind regards and best wishes.

Yours Sincerely

J.E. Lawrence

(Exhibit 18)

53 Red Hassell Rd.
Port Antonio
16.10.78

"Dear Mr. Sudeall

As promised I contacted Mr. Smart who represent Mr. Grossett where loans are concerned. He is responsible for all such matters. He advised me that Mr. Grossett will lend no money large or small amounts without a Registered Title. The Bank of Nova Scotia is in a similar position.

As hinted before I can not say how long it will take to obtain a Registered Title, it will be ~~therefore impossible to give free occupancy for an indefinite time.~~

The question of sale will be left open to intending purchasers when the title is ready and not the diagram as was previously decided. I have two interested persons from abroad who is willing to rent at the rate of $200 per month with intention to purchase as soon as the title is ready. If you would be interested in that direction preference would be given to you.

This would be as from 1st November 78

Kind regards and best wishes.

Yours Sincerely

J.E. Lawrence

(Exhibit 19)

"

53 Red Hassell Rd.
Port Antonio
2.11.78

Dear Mr. Sudeall

I sincerely hope that you and family are quite O.K.

This is just a note to advise you on one or two points concerning the house. The diagram should be in hand in the next 3 or 4 weeks time and my son there told me he will be able to get the title in about 6 to 8 weeks time. Consequently I would say the early part of February 79 all papers should be available. If you are still interested you could make your plans accordingly. I must however advise you that Mr. Grossett does not lend amounts as much as what you are thinking and in view of the fact that the lawyer of the Building Society there will be looking about the title it would be a good bet to speak with them. Your loan payment would be on a longer basis and you are right on spot. If however you would rather the bank having the title you should have no problem.

Well this is just my suggestion for you to give a thought if you care to.

Kind regards and best wishes.

Yours Sincerely

J.E. Lawrence

N.B. Please bear in mind that we will soon have what it takes to sell

(Exhibit 20:)

"

53 Red Hassell Rd.
Port Antonio
6.1.79

Dear Mr. Sudeall

Let me sincerely hope that you and family are all well and had an enjoyable xmas and new year.

This is really just a note to advise you that I have obtained the go ahead for you to occupy the house at Anchovy until the title is available.

Mrs. Phang Sang was still asking that the pepper corn rental be $150 but I have overruled that and have decided and asked that $100 be paid.

It will be necessary for you to sign an agreement to the effect. I have already made it out and have enclosed a copy of what it is like for you to see.

The original and duplicate are now in type written form to be signed by both yourself and Mrs. Sudeall and witness by a J.P. If acceptable to you let me know when you would like to move in so that I can make the necessary arrangements for the caretaker of the place to hand over the keys to you.

You should let me know at least 3 - 4 days ahead of time.

Kind regards and best wishes.

Yours sincerely

J.E. Lawrence.

(Exhibit 21)

"

53 Red Hassell Road
Port Antonio
20.3.79

Dear Mr. Sudeall,

By now you should have heard from your father-in-law who was advised by telegraph message that I know your title is ready. Let me explain to you that the title is with the Registrar of Titles and it should be in hand within six weeks.

In the meantime as I promise you in previous letters you can occupy the house at a pepper corn rental of $100.00 per month or if you prefer, pay down a deposit and sign as agreement to pay the balance as soon as you get your title in hand. Please bear in mind that you now have nothing to fear, your title is secured.

Kind regards and best wishes, reply soon.

Yours sincerely,

J.E. Lawrence".

Reviewing this correspondence as a whole Wolfe, J., observed:

> "It is clear beyond the shadow of a doubt that the parties, at the time when they entered into the agreement, Exhibit 1, intended that the balance would be paid in return for a Registered Title."

With great respect, that observation does not offer much assistance in interpreting the meaning of Exhibit 1. The observation contains a latent time-frame, leading to the finding later made that the title was to be got out in the same 90 days that payment was required to be made, and given in immediate exchange. To say that the balance is to be paid in return for a Registered Title is unexceptionable, but does not fix with any precision when the exchange is to be made, and whether payment precedes the issuing of title or the other way, and it does not justify the assumption, in the face of the actual contract's provision re "terms of payment", that the two things are to be done contemporaneously.

The correspondence in fact shows a great many things: I would say it showed some anxiety on the part of Mr. Lawrence to sell this land to Mr. Sudeall in particular; it showed Mr. Lawrence anxiously following up or trying to follow up the progress being made in the machinery of securing separate registered titles for the individual lots; it showed him as always more hopeful of a speedy resolution of the problem than was justified, and that the process took much longer than he anticipated. The correspondence shows Mr. Lawrence as anxious to collect as much as $40,000 on account of the price before, or "until the title is ready." It shows him willing to put the purchasers in possession on payment of a rental of $100 per month. It also shows him as aware of the purchasers' difficulties in raising money to buy the land and that the registered title when obtained would greatly help them to get a loan. This is however a far cry from a term that the balance of the price is not to be paid until the Registered Title to the lot has been obtained and issued in the name of a purchaser who has not paid or produced any assurance of payment.

In any event what is the purpose for which the correspondence was being offered? The answer seems clearly that it was offered in an attempt to vary or alter the terms of the written agreement, Exhibit 1, by asserting (i) that the Registered Title was to be secured within 90 days, though the contract itself is quite silent on this; and (ii) that this was to be a pre-condition of the obligation to pay the balance of the purchase price, though the contract does not say so, and simply says that that balance should be paid within 90 days.

The purchasers also offered the oral evidence of Mr. Sudeall. He stated that he and Mr. Lawrence agreed, after he received Exhibit 21 from Mr. Lawrence, that he would pay a deposit, and the balance when the title was 'available'. Accordingly, says Mr. Sudeall, they all went to see Mr. Grossett a few days later, and had drawn up the contract for sale, Exhibit 1 dated 30th March, 1979. Asked to explain in effect how the contract contained a clause requiring the balance to be paid in 90 days

and was silent about the obtaining of a registered title as a precondition to payment, Mr. Sudeall advanced the explanation that Exhibit 21 spoke of the registered title coming in 6 weeks, and he Sudeall therefore suggested that they use 90 days! With great respect, unlike the trial judge who accepted this as an explanation, it does not seem that any answer to the question was ever forthcoming. The need for an answer seems to have got lost in the heat of an argument that broke out between the lawyers as to the admissibility of this evidence. Towards the end of his cross-examination however Mr. Sudeall having stated that both he and Mr. Lawrence gave instructions to Mr. Grossett, said that though aware of the clause requiring payment of the balance within 90 days, both he and Mr. Lawrence told Mr. Grossett that the title was to be produced before the balance of the purchase money was paid. This is not stated anywhere in the written agreement, nevertheless he "was satisfied that the agreement had expressly stated all the conditions agreed to between vendors and purchaser(s). As we understood the agreement it omitted nothing." However he later remarked "Not true Exhibit 1 contains all the terms and conditions of the agreement made between myself and Mr. Lawrence acting on behalf of the Phang Sangs."

The events and correspondence that took place after the 90 days fixed for payment of the balance of the price have also been relied on to support the purchasers' argument that the balance was not payable till after the registered title was produced. Once again, apart from the correspondence between the lawyers, we have only the purchaser's evidence.

Mr. Sudeall states that all the parties met again at Mr. Grossett's office at the expiry of the 90 days on the 30th June, 1979. Mr. Lawrence said he had come to collect the balance of the purchase money, and when asked for title exhibited the parent title for the three lots, and that when it was pointed out that the agreement required that the title for the specific lot be produced before the money was payable, Mr. Lawrence meekly said "Yes, I am in agreement." And they then parted company.

Mr. Sudeall also added that his father-in-law had attended armed with cheque book and prepared to pay the $45,000.00 balance immediately on sight of the title.

I turn from this rather unlikely account to consider the subsequent correspondence. It starts with a letter of 30th May, 1979, from Mr. McCalla of Robinson, Phillip & Whitehorne to Mr. Grossett asking for the prechecked diagram of the Phang Sangs' land so that registered titles for the lots could be obtained and a transfer made to Mr. & Mrs. K. Bennett who had bought one of the lots. (Lot 3). If it was not clear before, this letter would have advised Mr. Grossett that the Phang Sangs were no longer waiting for him to get out the titles to the lots but had sought other counsel. Mr. Grossett's response was to advise that the prechecked diagram had already been lodged at the titles office. It is worthy of note that the sale of this lot went through without any difficulty: the price was paid and the purchasers were duly registered as owners of this lot on the 10th December, 1979.

On the 27th August, 1979, very nearly two months after the 90 days for paying the balance of the purchase price had gone by, Mr. McCalla wrote to Mr. Grossett with respect to the sale to the Sudeals. The letter reads thus: (Exhibit 4.)

"HIGHGATE

27th August, 1979.

Messrs. F.V. Grossett & Company,
Attorneys-at-law,
P.O. Box 36,
2 Harbour Street,
Port Antonio,
Portland.

Dear Sirs,

RE: SUBDIVISION LANDS PART ANCHOVY - PORTLAND SALE SYDNEY PHANG SANG ET UX TO CONLEY J. SUDEALL ET UX

We refer to previous correspondence herein ending with your letter to us of the 12th June, 1979, wherein you advised us that the pre-checked diagram in regard to the above-mentioned matter has been lodged with the Titles Office.

"As you are now aware, we are acting on behalf of the Phang Sangs in the above-mentioned matter and have prepared and hand you enclosed herewith Transfer in respect of the lot part Anchovy, being sold by the Phang Sangs to your client.

You will note that the Transfer has already been signed by the Vendors and we would be obliged if you would have same signed by your clients as soon as possible, and returned to us.

We understand that the full purchase price is $50,000, with a deposit of $5,000 payable on signing of the Sale Agreement, the balance of $45,000 to be payable in exchange for Title. We are to confirm that the deposit has been paid to (sic) your clients and the only thing left to be paid is the balance of $45,000, together with your clients' moity (sic) and the costs therein.

As you are aware, we came into this transaction after same had been commenced and we do not at this stage have enough money in hand to pay transfer tax and stamp duty on the sale, and in view of the large amount for these duties, we are not in a position to advance same.

In the circumstances, we write to request that you ask your clients to make to us a further payment on account of the balance purchase price of $45,000 and we would suggest a further amount of $5,000. We trust you will have no objections to our suggestion and would ask that you send us your cheque in this amount when returning the duly executed Transfer.

We would also ask that you send us with the Transfer and the aforesaid amount, your clients' moity (sic) with costs which are arrived at as under:-

Stamp duty on Transfer	$1,325.00
Registration fee on Transfer	50.00
Attorneys costs - preparing and completing Transfer	1,020.00
TOTAL COST	$2,395.00

one-half thereof payable by your clients $1,197.50.

We look forward to hearing from you in the very near future and receiving your cheque in the afore-mentioned amounts, together with the duly executed Transfer.

Yours faithfully
ROBINSON PHILLIPS & WHITEHORNE

P.S.

Please advise us of Mr. Sudeall's occupation when replying."

The trial judge regarded the fourth paragraph of this letter (Exhibit 4) as of the greatest significance, particularly the phrase "We understand ..... the balance of $45,000 to be payable in exchange for title." He held that this confirmed that the person or persons who consulted Mr. McCalla was also of the view that the contract required that the registered title be first obtained and offered in exchange for the balance of the purchase money. There is no indication in the notes of Mr. McCalla's evidence as to who this person was. His Lordship assumes that it was the plaintiff herself, but as she was not present when the agreement was reached, what she thought may have little weight. This evidence would be an attempt to construe the written agreement by offering evidence of what one of the parties may have said they thought the agreement meant.

In any event the letter shows the vendor as anxious to complete the getting out of the registered title. No matter which came first, the vendor would be required to give at least a registrable transfer of the lot to the purchaser. Inasmuch as the parent title contained a mortgage which was paid off on 10th December, 1979 and some covenants attached thereto which were to pass whether in whole or part to the sub titles, it was necessary to get the signatures of the purchasers to the transfer. What was sent to Mr. Grossett under cover of Exhibit 4 (the letter of 27th August, 1979) was a transfer which the vendors had signed, and which now required the signatures of the purchasers to enable it to be lodged and title transferred. The normal practice would be that on being assured the purchase money would be forthcoming, the vendor's attorneys on getting back the Transfer would lodge the transfer, having stamped it and paid the registration fees and the transfer tax. The Transfer sent is Exhibit 7 and is set out in full below.

To anticipate, it took the purchasers over seven months (27th August 1979 to 18th March 1980) to send the transfer back, a delay that was holding up the issue of the title which they regarded as a pre-condition to payment, An interpretation that can fairly be put on the events is that on receipt of this letter the purchasers said to themselves "if the, balance of the purchase money is not payable till exchanged for title, the longer the title is held up the more the date of payment of the balance is correspondingly put back." They were in possession, no interest charges were being incurred to the vendor, and there was no worry on their part if payment of the balance of the price was delayed.

T R A N S F E R

JAMAICA S.S. (Exhibit 7)

We SYDNEY PHANG SANG

of Port Antonio

In the Parish of Portland, Merchant AND ENID, his wife, of the same place being registered under the Registration of Titles Law as the proprietors of an Estate in fee simple of lands comprised in Certificate of Title Registered at Volume 955 Folio 243

Subject to no encumbrances SAVE AND EXCEPT the restrictive covenants as set out in the second Schedule hereto

IN CONSIDERATION OF the sum of FIFTY THOUSAND DOLLARS ($50,000.00) paid to us by CONLEY JOSEPH SUDEALL

of Anchovy, Port Antonio

In the Parish of Portland, AND JOYCE ESETA, his wife of the same place out of moneys belonging to them on a joint account,

DO HEREBY TRANSFER to the said CONLEY JOSEPH SUDEALL AND JOYCE ESETA as joint tenants in fee simple

all our estate and interest and all the estate and interest which we are entitled to transfer and dispose of in ALL THAT parcel of land set out and described in the Schedule hereto subject to no encumbrances SAVE AND EXCEPT the restrictive covenants as set out in the Second Schedule hereto.

FIRST SCHEDULE

ALL THAT parcel of land part of ANCHOVY in the parish of PORTLAND being the Lot numbered ONE on the Plan of part of Anchovy aforesaid deposited in the Office of Titles on the 24 day of May 1979 containing by survey ONE ROOD SIXTEEN PERCHES AND SEVENTY FIVE HUNDREDTHS OF A PERCH and being part of the land comprised in the said Certificate of Title registered at Volume 955 Folio 243 of the Register Book of Titles.

SECOND SCHEDULE

1: All gates and doors in or upon any fence or opening on to any road shall open inwards.

2: No waste or sullage water or effluent waste shall be permitted to be discharged from any lot on to any road or on to any part of adjoining lands.

3: No fence, hedge or other construction of any kind, tree or plant of a height of more than 4'6" above road level shall be permitted within 18 feet of any road intersection.

DATED this day 1979

(Sgd) Sydney Phang Sang
SIGNED BY the said SYDNEY PHANG SANG in the presence of:

(Sgd) W.D. Wainwright
JUSTICE OF THE PEACE
FOR THE PARISH OF ST. MARY

(Sgd.) Enid Phang Sang
SIGNED BY the said ENID PHANG SANG in the presence of:

(Sgd) W.D. Wainwright
JUSTICE OF THE PEACE
FOR THE PARISH OF ST. MARY

(Sgd) C.J. Sudeall)
SIGNED BY the said CONLEY JOSEPH SUDEALL in the presence of:

(Sgd) Pearl L. Wolfe
JUSTICE OF THE PEACE
FOR THE PARISH OF PORTLAND

(Sgd) J.E. Sudeall
SIGNED BY the said JOYCE ESETA SUDEALL in the presence of:

(Sgd) Pearl L. Wolfe
JUSTICE OF THE PEACE
FOR THE PARISH OF PORTLAND

No reply having been received to the letter of 27th August, 1979, sending the transfer for signature, Mr. McCalla wrote again on the 12th October, 1979, (Exhibit 5), to the purchasers attorney, Mr. Grossett, and this time he now had the final agreement before him and referred to it, pointing out that the purchase price should have been paid within 90 days of the 30th March, 1979, and that that period had long since passed. He wrote demanding payment of the balance plus half costs of transfer by the 30th November, and made that date (some six weeks away) of the essence of the contract. The letter is set out below:

"HIGHGATE (Exhibit 5)

WCM/pb:B:875 12th October, 1979

Messrs. F.V. Grossett & Compnay,
Attorneys-at-law,
P.O. Box 36,
2 Harbour Street,
Port Antonio,
Portland.

Dear Sir:

RE: SUBDIVISION LANDS PART ANCHOVY - PORTLAND
SALE SYDNEY PHANG SANG ET UX TO
C.J. SUDEAL ET UX

We refer to our letter to you of the 27th August, 1979, to which we have not yet received a reply.

We are to bring to your attention that we have now been handed Copy Sale Agreement dated the 30th March, 1979 and made between the venders (sic) and the purchasers.

We note form (sic) the copy Sale Agreement that the Batance Purchase Price of Forty-Five Thousand Dollars was made payable within ninety days from the 30th March, 1979, which time has now long past.

> "In view of the foregoing we now write to demand that you pay to us on behalf of our clients the Balance Purchase price of Forty-five Thousand Dollars, ($45,000.00), together with the further sum of One Thousand One Hundred and Ninety-Seven Dollars and Fifty Cents making a total of Forty Six Thousand One Hundred and Ninety Seven Dollars and Fifty Cents ($46,197.50), by the 30th day of November, 1979 of which date, time, is hereby made of the essence of the contract of sale.
>
> Should you fail to let us have the aforesaid amount of Forty-six Thousand One Hundred and Ninety-seven Dollars and fifty cents by the said 30th November, 1979 our clients will have no alternative, but to rescind the Contract of Sale and to forfeit the deposit paid thereunder.
>
> Please let us hear form (sic) you by the said date and we would be obliged if you would when replying, return the duly executed transfer to us together with your cheque.
>
> Yours faithfully,
> ROBINSON PHILLIPS & WHITEHORNE
>
> PER:
>
> WCM/pb
> REGISTERED".

The learned trial judge, acting on the premise that this contract of sale - as interpreted by him required the vendors to procure the registration of the purchasers' name on the title to the land before any question of payment of the balance arose, regarded this letter as a fundamental misconstruction of the sale agreement and found that Mr. McCalla for the vendors "superimposed his legalistic approach upon what was the clear intention of the parties." He regarded this "interpretation" as being at the root of the sale going off.

If however one takes the view that the contract said exactly what was meant, then there can be no doubt that the vendor's attorney was more than justified in giving the purchasers the notice to complete contained in Exhibit 5, and there has been no complaint that the length of time given was inadequate.

No response was made to this letter either, and Messrs Robinson, Phillips & Whitehorne on the 17th March, 1980 served a further notice (Exhibit 6) calling for payment of the balance of the purchase price and costs within 14 days. That notice is set out below: It reads:

(Exhibit 6)

"Mr. Sydney J. Sudeall &
Mrs. Joyce Eseta Sudeall
Port Antonio

WE, ROBINSON PHILLIPS & WHITEHORNE of Highgate in the parish of Saint Mary, Attorneys at Law for and on behalf of SYDNEY PANG SANG and ENID PANG SANG of Port Antonio in the parish of PORTLAND HEREBY GIVE YOU NOTICE AS follows:

1. The said Sydney Pang Sang and Enid Pang Sang are ready, willing and able to execute and procure the concurrence of all other necessary parties, if any, to the transfer to yourselves or as may direct of the fee simple property being all that parcel of land part of ANCHOVY in the parish of Portland containing by survey One Rood Sixteen Perches and Seventy-Eight hundredths of a Perch and being the Lot Numbered 1 on the plan or diagram prepared by R.T. Gooden, a Commissioned Land Surveyor from a Survey made by him on the 31st day of October, 1978 with buildings thereon and being the part of the land contained in Certificate of Title registered at Volume 955 Folio 243 of the Register Book of Titles contracted to be purchased by you by an agreement made between the said Sydney Pang Sang of One Part and yourself of the Other Part in accordance with the terms of the Sale Agreement.

2. The said Sydney Pang Sang and Enid Pang Sang REQUIRE YOU FORTHWITH to pay the Balance Purchase Price Moneys TOGETHER WITH the costs in accordance with the said Agreement.

3. If you fail to comply with this notice within FOURTEEN DAYS from the date hereof the deposit of $5,000.00 paid by you will be forfeited to the vendor who will rescind the contract of sale.

DATED the 17th day of March, 1980

ROBINSON, PHILLIPS & WHITEHORNE
Attorneys at law for and on behalf of Sydney Pang Sang & Enid Pang Sang.

c.c. Messrs. Grossett & Co.,
Attorneys-at-law
Port Antonio, Portland

It is not clear whether the purchasers were responding to the time of the essence notice of 17th March (Exhibit 6), or the letters of 27th August and 12th October, 1979 (Exhibits 4 and 5), but by letters of the 18th and 19th March, Mr. Grossett responded to the Vendors' attorney: He sent a cheque for $1,197.50 to cover their half costs of title and returned the transfer signed by the Purchasers. No attempt was then made to enclose the balance of the purchase price or anything on account of it or an advance that could be used on account of the Transfer Tax. These letters were received on 25th March, 1980.

Mr. McCalla responded by returning the cheque for $1,197.50 and announcing that not having received the balance of the purchase money the vendors were rescinding the sale and forfeiting the deposit. He asked that the purchasers give up possession, by 30th April, 1980. (See Exhibit 8:) 8th April, 1980 set out below:

"HIGHGATE 8th April, 1980.
(Exhibit 8)

WCM/pb

Messrs. F.V. Grossett & Co.,
Attorneys at Law & Notaries Public,
P.O. Box 36,
2 Harbour Street
Port Antonio, Portland

Dear Sir:

RE: PROPOSED SALE SYDNEY PANG SANG
ET UX TO CONOLLY J. SUDEAL ET UX

We refer to previous correspondence herein ending with your letter to us of the 19th March, 1980, and are to refer to our Notice of Rescision (sic) and forfeiture dated the 17th March, 1980.

As we have not received the balance purchase moneys together with the costs in accordance with the Sale Agreement, we write to advise you out of courtesy that the Contract of Sale herein is hereby rescinded and the deposit of five thousand dollars paid by your clients to the vendors is hereby forfeited.

"As a result, of this action we are (sic) returned enclosed herewith your cheque in the sum of One Thousand One Hundred and Ninety Seven Dollars and Fifty Cents, representing the payment of the purchaser's costs in this matter.

Please be good enough to have your clients now take steps to vacate the premises, the subject of the Sale by the 30th April, 1980, failing which we will have no alternative but to file action in the Resident Magistrate's Court to recover possession.

Yours faithfully,
ROBINSON PHILLIPS & WHITEHORNE
PER:
WCM/PB
ENCLOSURE

The purchasers replied to this by seeking the services of a new attorney, Mr. V.L. Robinson, who on the 25th April, 1980, wrote Exhibit 9, set out below. It represents the first time in the correspondence that the purchasers set up the defence that the balance was not payable until a registered title for the lot was available. He suggested that his clients would complete on the title being produced, or alternatively suggested that the contract be cancelled and the deposit returned. (See Exhibit 9 below):

(Exhibit 9)

Chambers
23 Orange Street
Montego Bay
Jamaica
Phone 952-4808

25th April, 1980

"Your Ref. WCM/pb: B - 875

Messrs. Robinson, Phillips & Whitehorne
Attorneys at law
P.O. Box 2
Highgate P.O.,
St. Mary

"ATTENTION" Mr. William McCalla

Dear Sirs,

re: Proposed Sale - Sydney Pang Sang et ux to Conley J. Sudeal et ux

"Please be advised that I now act for the Purchasers Mr. & Mrs. Sudeall in this matter.

With reference to your letter dated 8th April, 1980, I would bring to your attention that my clients have been at all material times ready, willing and able to complete the transaction. However, it would seem that your client has been dragging his feet in that, although Mr. Lawrence had indicated to Mr. & Mrs. Sudeall prior to the agreement being signed, by letter and telegram (copies of which we have) that a registered Title was available, for the relevant lot, up to now no title has been prepared.

It was on the basis that Title was available that my clients entered into the agreement for sale. It is to be noted, by way of interest, that time was not deemed to be of the essence.

At the expiry of the ninety-day period Mr. Lawrence and my clients met in Mr. Grossett's chambers and my clients indicated to Mr. Lawrence that they were now ready willing and able to complete and that they would pay if the registered Title could be produced. Mr. Lawrence said that all he was interested in was for the balance of Forty Five Thousand Dollars ($45,000.00) to be paid. In the circumstances, my clients refused to pay over the money.

At this point in time my clients are willing, ready and able to complete the sale, with the assistance of short-term financing, but, needless to say, they are insisting on the Title being produced, in keeping with the terms of the agreement.

In the circumstances, therefore, it would seem that, at the highest, your client would only be able to RESCIND the contract, but with the full deposit being returned to my clients. This course need not be adopted, however, since the matter can be quite easily resolved without causing undue hardship to either of the parties.

Could you therefore, stay whatever Court proceedings you may contemplate pending a discussion into this matter with a view to arriving at a settlement as early as possible.

Yours faithfully

(Sgd) VICTOR L. ROBINSON

Apart from one letter the rest of the correspondence is uneventful. In response to the suggestion that the vendors had been guilty of delay in getting out a registered title Mr. McCalla pointed out that the delay was due to the purchasers, e.g, their delay in responding to the letters of 27th August and October 1979. On the 30th October, 1980, (Exhibit 12) Mr. Grossett on behalf of the purchasers wrote saying that they could and would complete; he then sent a cheque for $30,000.00 towards the balance, promising the remaining $15,000 when the title was ready, and enclosed $1,197.50 their half costs of transfer. The cheques were returned to Mr. Grossett by letter 12th November, 1980 and the Sudealls were asked to vacate the premises, by the 15th November, 1980. They did not do so, and as late as 7th August, 1981 (Exhibit 14) they were still offering to complete. The vendors commenced the present action on the 18th January, 1982, claiming rescission, forfeiture of deposit, and recovery of possession.

In interpreting this contract Wolfe, J., relied on some dicta from Denning L.J., in British Movietone News v. London & District Cinemas when that case was in the Court of Appeal (1950) 2 All E.R. 390 at 395; (1951) 1 K.B. 190 at 201. The case was discussing the problem of frustration, and the circumstances in which it could be said that a contract had been commercially frustrated. There are at least two main approaches to the problem: one is the doctrine of the implied term, and the other is to assert that the courts have a qualifying power and may qualify the absolute, literal or wide terms of a contract. The implied term theory rests on the possibility of finding on examination of the contract that the continued existence of some thing or state of affairs was the underlying assumption on which the contract was based, and that its disappearance, whether it be a building that was rented, or the postponement of a public event (e.g. a coronation) brought the contract to an end. Lord Denning's assertion that the courts had a power to

release persons from their contractual liability under a literal reading of the contract in view of the happening of an ensuing turn of events so completely outside the contemplation of the parties that the court was satisfied that the parties as reasonable people could not have intended that the contract as worded should apply to the new situation was his response to dealing with commercial frustration.

The dicta, though eminently quotable, did not command the support of the House of Lords. The Court of Appeal decision was reversed: (1951) 2 All E.R. 617; (1952) A.C. 166 and their Lordships went out of their way to express the view that the passage cited (and relied on by Wolfe, J.,) did not represent the law. After citing the passage at length, Viscount Simon at page 183 refuted the idea that the Courts had now developed an absolving power in construing contracts, though it might infer from surrounding circumstances that a condition which was not expressed was a foundation on which the parties had contracted:

> "The suggestion that an 'uncontemplated turn of events' is enough to enable a court to substitute its notion of what is 'just and reasonable' for the contract as it stands, even though there is 'no frustrating event', appears to be likely to lead to some misunderstanding."

Lord Simonds was more blunt. He said at p. 188:

> "I hesitate to make any brief comment upon the judgment of Denning L.J., lest by taking a pasaage out of its context I should do injustice to the whole. But I must at least dissent from the suggestion of the learned Lord Justice that the court, whether it is exercising its function in construing a document or in applying the law of frustration to particular circumstances, 'really exercises a qualifying power ..... in order to do what is just and reasonable in the new situation'."

In the event then the principles quoted and relied on from the judgment of Denning L.J., are far too wide and were overruled by the House of Lords. Further, we are not here dealing with a case of frustration; no "uncontemplated turn of events" has taken place here justifying the application of the suggestions made by Denning L.J., and they furnish no safe guide to the solution of this case.

This brings us back to the central problem, was it right to read into this contract the term inserted by Wolfe, J., that the price should be paid only in exchange for a registered title in the name of the purchasers. This implied term was rested on two supports:

(a) the pre-contract letter of Lawrence, the vendors' agent, dated 20th March 1979 (Exhibit 21), and

(b) the fourth paragraph of the letter of 27th August, 1979 (Exhibit 4) written by the Vendors' attorney at law to the Purchaser's attorney at law.

An objection was taken by the plaintiff's attorney to the admission of the pre-contract correspondence on the ground that both sides had said they were suing on the written contract and that the defence, while asserting that the contract contained a condition that the balance of the price was payable only on receipt of a registered title, had never made it clear that they were asserting that there was an oral collateral contract to that effect, that is to say that this was a term that had been orally agreed between the parties and that it had been accidentally left out of the written contract. There was no claim for rectification of the written contract to insert this term. It was argued that it was inadmissible to admit this correspondence as an aid in the interpretation of Exhibit 1. The defence on the other hand argued that extrinsic evidence was admissible to "explain" the written instrument and ascertain the intention of the parties. The Trial judge accepted the argument on behalf of the purchasers and admitted the correspondence and on that basis inferred a term into the written contract that made the balance of the purchase price payable only on the transfer of title.

It was unfortunate that the judge does not seem to have had the benefit of examining the authorities which show very clearly that:

> "When a transaction has been reduced to, or recorded in, writing either by requirement of law, or agreement of the parties, the writing becomes, in general, the exclusive memorial thereof, and no evidence may be given to prove the terms of the the transaction except the document itself or secondary evidence of its content$. ....."
>
> See Phipson on Evidence, 13th Edition 1982: 37 - 01.
>
> "When a transaction has been reduced to, or recorded in, writing either by requirement of law, or agreement of the parties, extrinsic evidence is, in general, inadmissible to contradict, vary, add to or subtract from the terms of the document.
>
> In equity, the rule that a written contract could not be varied by parol was prima facie the same as at common law. But in equity there were the special exceptions that an extraneous parol agreement might form ground for refusing specific performance, and that mistakes in documents might be rectified; while at common law there was the peculiarity that a collateral parol agreement might be enforced by separate action or counter-claim."
>
> See Phipson, opus cit. 38-01

Giving reasons for the rule, Phipson observes inter alia:

> "..... when the parties have deliberately put their agreement into writing, it is conclusively presumed between themselves and their privies that they intend the writing to form a full and final statement of their intentions, and one which should be placed beyond the reach of future controversy, bad faith or treacherous memory. ....."
>
> Phipson 38 - 02

Cross on Evidence, 6th Edition (1985) at page 615 et seq deals with what is often called the parol evidence rule, and a useful statement of the law is also to be found in Volume 12 Halsbury, 4th Edition (Interpretation of deeds etc.,) at paragraph 1478 et seq:

> "1478. Extrinsic evidence generally excluded. Where the intention of the parties has been reduced to writing it is, in general, not permissible to adduce extrinsic evidence, whether oral or contained in writings such as instructions, drafts, articles, conditions of sale or preliminary agreements, either to show that intention or to contradict, vary or add to the terms of the document."

In this case, as I understand it, after several weeks of negotiation, letters, interviews and so forth, the parties met at Mr. Grossett's office for the purpose of putting their agreement into writing; to make a record of what was intended to be a binding enforceable agreement. They effectively agreed to be bound by the terms of this written instrument. Indeed both sides relied on it in their pleadings. In one of the oldest cases on this subject, Goss v. Lord Nugent (1833) 5 B & Ad. 58 at 64 (110 E.R. 713 at 716), Lord Denman, C.J., giving the judgment of the court, said:

> "By the general rules of the common law, if there be a contract which has been reduced into writing, verbal evidence is not allowed to be given of what passed between the parties, either before the written instrument was made, or during the time that it was in a state of preparation, so as to add to or subtract from, or in any manner to vary or qualify the written contract; ..... . "

He went on to observe that after it had been made the parties could of course make a new contract whether in writing or not to waive, dissolve or annul their former agreements.

It is also possible to have a situation in which the parties have made an oral contract, providing that their entry into the written contract is conditional on the terms of the oral contract being met. See for example Pym v. Campbell (1856) 6 E & B 370; 119 E.R. 903 (written contract to have no effect unless a third person, A, approved it. He did

not: evidence of oral agreement admitted to show there was no contract at all) or De Lassale v. Guildford (1901) 2 K.B. 215 (C.A) (Written agreement for lease handed over only on terms of oral contract that drains were in order: drains were not. Oral agreement admitted to be sued on.)

In this case however the defence does not allege or suggest what is sometimes called an oral collateral agreement. What they set up is an alleged term of the agreement which they say did not get into the written contract, but should have.

The cases seems to establish that the collateral term being set up should not clearly contradict or be inconsistent with the terms of the written agreement: (See Collateral Contracts: by K.W. Wedderburn, (1959) C.L.J. 58.) This however is not a collateral contract case:

There are a good many cases in which parties have sought to alter or vary the terms of a written contract into which they have entered and have sought to give evidence of what was said or done at a previous stage in the negotiations. (See Hals. op. cit. para 1480: evidence of previous negotiations). Unless there has been a common mistake and rectification has been sought in equity, the attempts have failed. I propose to look shortly at some of the cases:

> Evans v. Roe (1872) L.R. 7 C.P. 138: Written contract of employment at a weekly wage. Held to be a weekly hiring and evidence that during negotiations it was said it would be a yearly hiring, not admitted.
>
> Brett J: "The agreement being in writing, oral evidence was not admissible to vary it. We must gather the intention of the parties from the writing and the writing only. ..."
>
> Grove J: "It would render written agreements useless if conversations which take place at the time could be let in to vary them. ....."

Angelia v. Duke (1975) 32 L.T. 320: Written agreement for lease of a furnished house. Allegation that at the time of signing the contract the landlord promised to send in additional furniture. Head Note:

> "Where a written contract has been executed containing all the terms agreed upon between the parties, a previous parol promise relating to the same subject matter is invalid."

Blackburn J: "... It is a most important rule that where there is a contract in writing it should not be added to if the written contract is intended to be the record of all the terms agreed upon between the parties. ....."

Inglis v. Buttery (1878) 3 App Cas 552 (H.L.) Construction of a ship repair contract, as to what constituted "extras." Held that the correspondence previous to the written contract, and a printed clause in the contract form that had deleted were not to be looked at in construing it.

Lord Hatherly at 558: "..... where the words of the contract are not themselves in any way technical, but are plain and simple language, at all events, so plain and simple as to require no aid of testimony specially to explain them, - in that case it is not legitimate to introduce parol evidence to say what the meaning of the contract is ....."

Leggott v. Barrett (1880) 15 Ch. D. 306: Dissolution of a partnership by deed. Held that previous drafts of the agreement were not admissible.

British Equitable Assurance Co. Ltd v. Bailey (1906) A.C. 35. A shareholder complaining that the directors of the company had departed from the terms of a prospectus, on the basis of which he had taken shares, though they had merely followed the constitution of the company which he accepted when he took out shares. Held the prospectus was not a collateral contract, and only the constitution of the company was relevant.

Henderson v. Arthur (1907) 1 K.B. 10; (1907) 76 L.J. (K.B) 22
Lease of a theatre provided that the rent should be payable quarterly in advance. The tenant, when sued for the rent, held not able to put forward as a defence an alleged parol agreement made prior to the written lease that the rent could be paid by bills every three months.

Collins MR: "... to admit evidence of such an agreement.....would be to violate one of the first principles of the law of evidence; because, in my opinion, it would be to substitute the terms of an antecedent parol agreement for the terms of a subsequent formal contract under seal dealing with the same subject matter."

Hutton v. Watling (1947)2 All E.R. 641; affmd (1948) 1 All E.R. 803: (C.A.) A case where the vendors of a business prepared a written contract which listed a number of obligations accepted by them. Held that this document was, and was meant to be a true and complete record of their agreement, and that parol evidence to prove a different antecedent agreement was not admissible.

Creery v. Summersell (1949) Ch. 751: Harman J., held evidence to show the original form of the covenant contained in the draft of a lease was not admissible, nor the suggested alterations.

City & Westminster properties (1934) Ltd v. Mudd (1959) Ch. 129:(1958) 2 All E.R. 733: Harman J, held that in construing the lease it was not permissible to consider the history of the matter, or the fact that the tenant had been living on the premises to the knowledge of the landlords, or that express words of prohibition of user as a dwelling had appeared in the draft lease and did not appear in the lease as executed. (see pages 739 - 40)

Prenn v. Simmonds (1971) 3 All E.R. 237 (H.L.) in a complicated commercial case involving the construing of a written contract, Lord Wilberforce, after observing the danger of departing from established doctrine (the parol evidence rule) and the danger of going back through previous negotiations to construe a written agreement, said at page 241:

> "In my opinion, then, evidence of negotiations, or of the parties intentions, and afortiori of Dr. Simmonds' intentions, ought not to be received, and evidence should be restricted to evidence of the factual background known to the parties at or before the date of the contract, including evidence of the 'genesis' and objectively the 'aim' of the transaction ....."

In my view neither the correspondence between Mr. Lawrence and the Sudealls prior to the writing and signing of the written contract, nor the evidence offered by Mr. Sudeall as to what took place at the making of the agreement was admissible. There was no application for rectification on the ground of fraud or mistake here. What was being done was to vary the terms of the written contract which the parties had made as the record of that to which they had agreed. Apart from the fact that we are dealing with a long established basic rule of evidence, as a matter of commonsense if parties consult a lawyer of their choice and say please record our agreement, surely the presumption to be made is that they have effectively agreed to be bound by the written instrument so prepared.

There was nothing mysterious or complicated in the provision that the balance of the purchase price was to be payable within a period agreed upon by the parties. These words required no "explanation" and the insertion of the term by the learned trial judge that payment should depend on the vendors first providing the purchasers with a title registered in their name was unnecessary and unjustified.

The solution adopted by the learned trial judge raises an additional problem. Sales of land are still governed in Jamaica by the provisions of the Statute of Frauds. Contracts to be enforceable must be supported by a memorandum which satisfies the requirements of the Statute. Further, the memorandum to satisfy the statute must contain all the terms of the agreement. Reference can be made to Fry on Specific Performance, 6th Edition (reprinted 1985) page 155 Chap 3: incompleteness of the contract, and Chapter 11; Statute of Frauds and part performance page 242 et seq., paragraph 504 et seq. The omission of very minor terms may be overlooked, and on occasion the situation can be met by the person in whose favour a term was to be inserted deciding to waive it: North v. Loomes (1919) 1 Ch. 378. But to omit from the written memo a term to the effect that the balance of the purchase price is not to be paid until the title to the land has been registered in the name of the purchaser is not a small

stipulation of no importance but a major provision governing the whole contract. A memorandum that does not contain such a term is obviously incomplete, and the contract unenforceable.

There are older cases which establish this proposition, for example Goss v. Lord Nugent (1833) 5 B & Ad 58; 110 E.R. 713; and Pitts v. Beckett (1845) 13 M & W 743; 153 E.R. 312.

There have been a host of these cases in recent years, as for example: Johnson v. Humphrey (1946) 1 All E.R. 460 (failure to mention in the document when possession was to be given, was to omit a material term); Hawkins v. Price (1947) Ch. 645 (where the plaintiff himself proved an oral contract different in terms from the memo on which he sued); Beckett v. Nurse (1948) 1 K.B. 535 (C.A.) (The memo did not contain all the terms agreed to between the parties, unenforceable); Walford v. Narin (1948) 2 All E.R. 85 (Memo omitted a term covering delivery by the seller, held insufficient and unenforceable).

While it is true that the Statute of Frauds must be pleaded in order to be relied on, the pleadings here did not in terms indicate that was being set up was an oral term said to have been omitted from the written contract; if this had been pleaded then the failure to rely on the Statute of Frauds in reply would have rendered the statute unavailable. It seems to me that the purchasers here are in something of a dilemma similar to that in Hawkins v. Price, supra. Had the pleadings raised the point, an application to amend by pleading the statute would have been difficult to resist.

There remains to be dealt with the fourth paragraph in Exhibit 4, Mr. McCalla's letter of 27th August, 1979. It will be remembered that the learned trial judge attached great weight to that paragraph, and drew from it the inference "that the client herself was of the view that the balance of the purchase money was payable in exchange for a registered title."

The inference seems to be doubtful, (the client was never present at any stage of the negotiations) but even if it were not, the authorities show that neither the previous negotiations nor the subsequent declarations or conduct of the parties will affect the court in its duty of construing the written contract recording the agreement of the parties: See Volume 12 Halsbury, 4th Edition (Interpretation of deeds etc.,) paragraph 1480: Evidence of previous negotiations, and the cases there cited. I mention one or two below.

In Lewis v. Nicholson (1852) 18 Q.B. 503 at 510, Lord Campbell C.J., said:

> "..... I am clearly of opinion that we can not look to subsequent letters to aid us in construing the contract. It is always legitimate to look at all the co-existing circumstances, in order to apply the language, and so to construe the contract; but subsequent declarations shewing what the party supposed to be the effect of the contract are not admissible to construe it." (emphasis supplied)

In Munro v. Taylor (1848) 8 Hare 51 at 56 (68 E.R. 269 at 272) Affmd (1852) 3 Mac & G 713; 42 E.R. 434, Sir James Wigram V.C., said:

> "But no point of law can, I apprehend, be better settled than this: that, in construing the agreement, no acts of the parties subsequent to the making of it are (as such) admissible for the purpose of determining its meaning. The acts of the the parties subsequent to the agreement may be material to shew that a writing does not express that which the parties intended to express in it; and proof of that may be a reason why this Court should refuse to act upon the written agreement. But that is a very different thing from deducing from the acts of the party the meaning of the agreement itself." (emphasis supplied)

In North Eastern Railway Co. v. Lord Hastings (1900) A.C. 260, (H.L.) despite the fact that both parties had acted for many years on the same view as to the meaning of their agreement, a view held to be mistaken, Earl of Halsbury L.C., at page 263 said:

> "The words of a written instrument must be construed according to their natural meaning, and it appears to me that no amount of acting by the parties can alter or qualify words which are plain and unambiguous.
>
> So far as I am aware, no principle has ever been more universally or rigorously insisted upon than that written instruments, if they are plain and unambiguous must be construed according to the plain and unambiguous language of the instrument itself. ....."

In Bruner v. Moore (1904) 1 Ch. 305 at 310, Farwell J., said:

> "Statements by either party as to the sense in which he used or intended to use the words made subsequently to the execution of the document and subsequent acts of the parties are inadmissible for the purpose of construing the document."

See too Lord Atkinson in Houlder Brothers & Co., Ltd v. Commissioner of Public Works (1908) A.C. 276 (P.C.) at 285.

In the result then, even had the plaintiff expressed the view attributed to her by the judge, it would not have been to the point in interpreting the plain and unambiguous words used in this contract as to when the purchase price was to be paid.

For these reasons I am of opinion that the learned trial judge was wrong to find as he did that the balance of the purchase money was to be paid in ninety days in exchange for a registered title, which it was the duty of the vendor to procure, and that failing to produce the title accordingly meant that the payment of the purchase money was delayed indefinetely until the vendors did so. That finding was based on inadmissible evidence. Consequently, the appeal must be allowed, the judgment on the counter claim for specific performance in favour of the purchasers must be set aside with costs, and judgment must be entered on the claim for the plaintiff.

What exactly however is the entitlement of the plaintiff/ vendors?

This is not a case of "recission" of the contract ab initio. It is a case in which the purchasers owed a duty to pay the balance of the purchase price on a date within 90 days of the contract being signed. They failed to do so. The vendors indicated willingness and readiness to perform their duty when they sent the purchasers a registrable transfer by Exhibit 4 on the 27th August, 1979. Time was made of the essence by the vendor's letter, Exhibit 5, 12th October, 1979. A formal notice to this effect was sent in Exhibit 6, of 17th March, 1980. It is trite law that a party may be held to have repudiated a contract by his conduct, even though he may contend that he is abiding by its terms. In all the circumstances the purchasers must be held by their conduct to have shown either an unwillingness or an inability to pay the outstanding balance, and the vendors were entitled to treat that conduct as a repudiation of the contract, and to accept it as such, so terminating the contract and also their own duty to shew further willingness and ability to carry out their duties in respect of title. Their letter Exhibit 8, dated 8th April, 1980 did just that. It asked that the purchasers vacate the premises by the 30th April, 1980. I am of the view that after that date the purchasers became trespassers and liable for damages for breach of contract, and for continuing in possession when their right to do so had been cancelled.

The vendors became entitled to forfeit the deposit paid by the purchasers. Normally that forfeited deposit would have been more than adequate compensation or considered as damages for the purchasers' breach of contract. There was in fact at one time a view entertained by some eminent authorities in this field that one could not forfeit the deposit and in addition seek damages for the purchaser's breach. It is not easy to see why this was thought to be so, seeing that if the vendors re-sold at a loss, they would be entitled to recover the difference between contract price and re-sale price, provided it exceeded the amount credited

for the deposit. (They recovered the price difference, but must give credit for the deposit).

Exemplifying the older view, Volume 34 Halsbury, 3rd Edition page 320 paragraph 543, Remedies under an uncompleted contract: rescission and resale, states:

> "If the vendor, acting within his rights, rescinds the contract, he may resell the property as owner, and retain any excess of price obtained on such resale beyond that fixed by the contract, but he cannot recover damages (f), or, if the purchaser has been in possession, occupation rent. (g) ...."

The suggestion that where the vendor rescinds he cannot get damages, but must be satisfied with the forfeiting of the deposit is based in footnotes (f) to (g) on Henty v. Schroeder (1879) 12 Ch. D. 666, and Hutchings v. Humpherys (1885) 54 L.J. Ch. 650 and Barber v. Wolfe (1945) 1 Ch. 187; (1945) 1 All E.R. 399. All three cases have been over ruled by the House of Lords in Johnson v. Agnew (1980) A.C. 367; (1979) 2 W.L.R. 487; (1979) 1 All E.R. 883. Giving the judgment of the House, Lord Wilberforce considered the right of an innocent party to a contract being put an end to by accepted repudiation, and cited two cases from the Australian High Court, McDonald v. Dennys Lascelles (1933) 48 C.L.R. 457 and Holland v. Wiltshire (1954) 90 C.L.R. 409 and also passages in Voumard on the sale of land. He concluded.

> "The vendors should have been entitled, upon discharge of the contract, on grounds of normal and accepted principle, to damages appropriate for a breach of contract."

It may be useful to quote from Voumard's 3rd Edition, page 413: The vendors right to damages: at Common Law

> "The damages to which a vendor is entitled in such circumstances are computed by placing him, so far as money can do it, in the same situation as if the contract had been performed. These damages include but are not confined to the difference between the contract price and the net value of the property thrown back on the vendor's hands (that is, its value at the date of the determination of the contract) but in estimating the damages the vendor must give credit for any deposit received by him under the contract. The vendor may recover in addition any incidental expenses which have necessarily flowed from the breach."

Applying Johnson v. Agnew I reach the following conclusions: for a purchaser to keep on putting off his clear obligation to pay the purchase price for this period of time was clearly a repudiation that the vendor was entitled to accept, and did accept. Damages are recoverable for the breach, and are not necessarily limited to the deposit. Accepting that the vendor should be put, so far as money can do it in the situation she would have been in if the contract had been performed, what is the vendor's position? She has been kept out of her money, the purchase price. In fact she has never got it.

She has also lost the use and possession of this land from the date of the contract, 30th March, 1979, to the date on which the purchasers give up possession in compliance with this judgment. What would have been a fair rental for this property? At page 41 of the notes of evidence (T.S. 27) Mr. Sudeall puts the rental at $150.00 per month. If one calculates 5% interest on the outstanding balance of $45,000.00 one gets an approximate figure of $180.00 rental and interest correspond. Assuming that the purchasers should have given up possession by the 30th April, 1980 as requested in Exhibit 8 (dated 8th April, 1980), there would be some eight years rental to account for; at $150.00 per month, this would be $1,800 per annum, and at 8 years would be some $14,400. If one deducts from that figure the $5,000 deposit actually paid, this leaves a sum of $9,400.00. (Such a deduction takes no account of rental from the date of the contract 30th March, 1979 to the 30th April, 1980. In a sense the deduction deducts the deposit twice;).

The vendor complained that the house had been allowed to deteriorate and was in a deplorable condition. The purchasers denied this, observing that the house had been locked up for some years and was already in bad condition, when they entered, and that they had spent money on various items of repair. As to this, the trial judge who saw and heard the witnesses accepted the evidence of the purchasers and rejected that of the young Mrs. Phang Sang. No damages can be given under this head.

In the result judgment should be entered for the plaintiff/appellant/vendor, Mrs. Phang Sang, giving her an order recognizing the right to accept the repudiation of the contract by the defendant/respondent/purchasers; a declaration that the purchasers have forfeited the sum of $5,000 paid as a deposit, and that they do pay the sum of $9,400.00 representing damages due as arising from the purchaser's breach of this contract, and an order that they do give up possession of the said premises to the plaintiff/appellant within thirty days of this judgment. Appellant to have the costs of this appeal, to be taxed or agreed, and the costs below.

BINGHAM, J.A.

Having read in draft the opinion prepared by Carberry, J.A., I wish to state that I am in agreement with his reasoning and the conclusions he has arrived at that the appeal ought to be allowed with the necessary consequential orders that he had made.

If I may, however, add a few words of my own in retrospect, when the judgment of the learned judge below is examined against the background of the evidence before him. It appears that having erred in admitting the ~~full~~ pre-contract correspondence (Exhibits 16 to 21) he then sought to arrive at his primary finding as to the intention of the parties based on that as well as on the evidence contained in paragraph 4 of the letter written by the plaintiff's Attorneys (Exhibit 4). From the very tenor of that letter it is apparent that they did not at the time of such writing have in their possession a copy fof the written contract (Exhibit 1 as paragraph 4 commenced with the words "we understand that." Nevertheless the learned judge proceed to arrive at his conclusions on that evidence as to what the intention of the parties were. He states at page 19 of his judgment:

> "I am satisfied that from the nature of the contract and the surrounding circumstances that it was a condition of the contract, albeit not expressed that the balance of the purchase money would be paid in ninety days in exchange for a registered title and that this condition was a foundation upon which the parties contracted."

The circumstances in which the written contract (Exhibit 1) was entered into and its terms when examined it was unmistakably clear that the terms of payment were "Five Thousand Dollars on signing of this Agreement and balance of Forty Five Thousand Dollars within ninety days from the date hereof."

In my view this left no room therefore, for such a finding as was made by the learned judge that the agreement was one requiring payment to be made in exchange for title, presumably in the purchasers names. This would be so as in the absence of any ambiguity in the written contract (Exhibit 1), neither the precontract correspondence (Exhibit 16 to 21) or the post contract correspondence (exhibit 4) were admissible and could be resorted to alter, vary or explain the intention of the parties which had to be arrived at from the clear and express terms contained in the written contract.

The law applicable in this area has been so fully explored and stated by Carberry, J.A., in his opinion that it would be doing him an injustice on my part to attempt to comment on his very scholarly exposition in that area.

Regrettably, had the learned judge followed what is accepted as a cardinal rule in construing evidence as it relates in particular to the admissibility of documentary evidence he would have focussed his attention entirely upon the written contract which, based upon its terms when examined along with the evidence as to the conduct of the parties, he would have been led irresistibly to the conclusion that the contract has been rescinded either by:

1. The purchasers who had by their own conduct exhibited a clear unwillingness on their part to conclude the contract by complying with the condition as to the term of payment.

2. The purchasers default in complying with the terms of the letter (Exhibit 5) which apart from requesting payment of the balance of the purchase price by 30th November, 1979 went on to make time of the essence of the contract.

As it is common ground that up to the time of the filing of the writ in 1982 the balance of the purchase price, or some written undertaking from a reputable financial institution, had not been tendered to the plaintiff or her attorneys, the contract was rescinded based upon either of the two situations set out above.

In any event, the failure by the defendants to comply with the final request for payment contained in the letter (Exhibit 5) gave the plaintiff the right to rescind the contract and to forfeit the deposit paid.

On the basis of either of the above premises therefore a Court of Equity would have allowed for rescission of the contract to be granted which, when the circumstances are fully examined was, what, based upon the terms of the written contract and the conduct of the parties the justice of the case demanded.

WRIGHT, J.A.

I agree.