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discretion to "suspend the judgment pending the appeal as the court may seem just." The necessary implication is that terms can be imposed if it is just to do so.

So, in construing this rule, each case must be considered against the background of its own circumstances and one circumstance is that the appellant has good arguable grounds of appeal. This principle is applicable both to appeals from the Supreme Court to the Court of Appeal and from the Court of Appeal to the Privy Council.

The modern approach as reflected in rules of procedure generally therefore is to balance the right to enforce a judgment at the first or second tier against the prospects of success of the appellant if there is a good arguable appeal. This approach was followed by *Linotype Hell-Finance Ltd v Baker* [1992] 4 All ER 887 by Staughton LJ in appeals to the Court of Appeal. This Court has frequently followed that course and imposed appropriate terms.

As for appeals to the House of Lords, the same principle is applicable and two cases are sufficient to illustrate the approach. In *Wilson v Church* (No 2) [1879] 12 Ch 454 at 458 Cotton LJ said:

> ...That possibly was rather novel, but it was right, in my opinion, to make that order to prevent the appeal, if successful, from being nugatory. *Acting on the same principle, I am of opinion that we ought to take care that if the House of Lords should reverse our decision (and we must recognise that it may be reversed), the appeal ought not to be rendered nugatory.* I am of opinion that we ought not to allow this fund to be parted with by the trustees, for this reason: it is to be distributed among a great number of persons, and it is obvious that there would be very great difficulty in getting back the money parted with if the House of Lords should be of opinion that it ought not to be divided amongst the bond-holders. They are not actual parties to the suit; they are very numerous, and they are persons whom it would be difficult to reach for the purpose of getting back the fund. [Emphasis supplied]

The other illustration comes from *Youssoupoff v Metro-Goldwyn-Mayer Pictures Ltd* Vol. L 1933-1934 581. Princess Youssoupoff was awarded £25,000 by Avory J and a jury as damages for libel. At p. 588 Lord Justice Scrutton said:

> It is extremely rare to grant stays of execution pending appeal to the House of Lords. The House of Lords have said that where the unsuccessful party in the Court of Appeal, if successful in the House of Lords, may be in such a position that it is very difficult to get the money back from the previously successful party, the Court should keep the matter *in medio*. We propose to take account of the fact that the defendants have now been beaten twice, and there is, therefore, possibly some slight presumption that they are wrong. We propose to give effect to that presumption by ordering another £5,000 to be paid to the plaintiff, making £10,000 in all, the costs to be taxed and paid on the usual undertaking, the petition to be entered within three months. If those conditions are complied with, there will be a stay of execution until the hearing of the appeal.

Further, just as rule 6 above provides for terms, they are generally imposed when a stay is granted. See The Ratata [1897] P. 118 where the headnote reads:

> ... *Held,* by the Court of Appeal (Lord Esher M.R., Lopes and Chitty L.JJ.), reversing the decision of the President, that the defendants were liable, as they had failed to rebut the prima facie case against them of negligence in obstructing the fairway, for it was an implied term of the contract between the plaintiff and the defendants that the defendants would take, and it lay on them to shew that they had taken, reasonable care to supply a properly equipped leading tug so as to enable the string of vessels to get up safely on the one tide.
>
> The plaintiff, a foreigner residing abroad, on instituting his action, deposited £350 by way of security. On judgment being given for the defendants, £308 13s. 10d. of this sum was paid over to the defendants by way of costs, and the balance returned to the plaintiff, who, on his appeal being successful, claimed the return of the costs:-
>
> *Held,* by the Court of Appeal, that, in the circumstances, a stay would be granted, unless the plaintiff's solicitors gave an undertaking to refund any costs in the event of the defendants' appeal to the House of Lords being successful.

Then in *The Attorney General v Emerson* [1896] 20 QB 56 the headnote reads:

> Order LVII., r. 16, gives the Court against whose decision an appeal is pending a discretion to refuse the appellant a stay of proceedings; and no practice binding on the Courts has, or can be, established to the effect that the Court will only refuse a stay of proceedings as to costs upon the terms that the respondent's solicitor shall give an undertaking to repay, in the event of the appeal being successful, the costs paid to him by the appellant.

Conclusion

Against this background, I would grant conditional leave to appeal to the Privy Council on the terms proposed by Rattray P. Further, I would refuse to stay proceedings and I would order Panton J to make the assessment of damages timeously. Costs of this motion are to go to the respondent JFM.

GORDON, J.A.: I have read the draft judgments of Rattray P and Downer JA. I agree with the conclusions and reasons advanced.

SINGER SEWING MACHINE COMPANY *v.* MONTEGO BAY CO-OPERATIVE CREDIT UNION LIMITED

[COURT OF APPEAL (Rattray, P., Gordon and Patterson, JJ.A.) December 9-12, 1996, January 20-21 and May 19, 1997]

Landlord and Tenant - Lease agreement - Formal lease not executed - Terms agreed - Parties acted on basis of agreed terms.

The appellant entered into negotiations with the respondent to lease a portion of the respondent's premises in Montego Bay. Several letters passed between the parties concerning the rental, the escalation, the tenure and square footage. The appellant commenced partitioning work, took possession and paid $33,000 which approximated to one month's rental. One of the letters stated that "details to be worked out by lawyers in binding contract". The appellant signed and sent the respondent a draft lease, but it was never executed by the respondent. The appellant expended approximately $800,000 on refurbishing the premises and paid the rental monthly.

Over a year later, the respondent wrote to the appellant saying it was considering a sale of the premises. There was continuing dialogue between the parties on the sale of the premises until negotiations broke down and thereafter notices to quit were served by the respondent.

The appellant brought an action by Originating Summons for a declaration that a lease existed between the parties for a duration of 10 years and an injunction against the respondent taking any step to eject the appellant before the lease expired.

The summons was dismissed and the appellant appealed.

Held: where there is a definite agreement of the essential terms of a contract, the agreement shall be binding, although the parties may have declared that a formal agreement is to be prepared and signed by the parties; in the instant case there was a concluded agreement and a desire to have that agreement put into a formal document and there were sufficient acts of part performance.

Appeal allowed, judgment of the court below set aside, judgment entered for the plaintiff/appellant.

Cases referred to:

(1) *Law v. Jones* [1974] 2 Ch. 112; [1973] 2 W.L.R. 994; [1973] 2 All E.R. 437
(2) *Rossiter v. Miller* (1878) 3 App. Cas. 1124; [1874-80] All Rep. 415; 48 L.J.Ch. 10
(3) *Chinnock v. Marchimess of Ely* (1865) 4 De GJ & S 638; 6 New Rep. 1; 12 L.T. 251
(4) *Sweet & Maxwell Ltd v. Universal News Services Ltd* [1964] 2 Q.B. 699; [1964] 3 W.L.R. 356; [1964] 3 All E.R. 30
(5) *Steadman v. Steadman* [1976] A.C. 536; [1974] 3 W.L.R. 56; [1974] 2 All E.R. 977
(6) *Spottiswoode, Ballantyne & Co. Ltd. v. Doreen Appliances Limited and G. Barclay (London) Limited* [1942] 2 K.B. 32; [1942] 2 All E.R. 65
(7) *Harvey v. Pratt* [1965] 1 W.L.R. 1025; [1965] 2 All E.R. 786

Appeal from the dismissal of an action for a declaration and an injunction (Reid, J.).

Dennis Goffe, Q.C. and *Susan McGhie-Sang* for the appellant.
Jacqueline Cummings and *Alayne Frankson* for the respondent.

RATTRAY, P.: The plaintiff/appellant (hereinafter referred to as "Singer) sought against the defendant/respondent (hereinafter referred to as "The Credit Union') by way of Originating Summons in the Supreme Court the following reliefs:

> (i) A Declaration that there exists between the Plaintiff and the Defendant a Lease for duration of ten (10) years evidenced *inter alia* by acts of part performance and in letters dated the 10th July, 1991 from the Defendant to the Plaintiff, the 10th October 1993 from the Plaintiff to the Defendant and Draft Lease dated the 1st October 1991 and exhibit to the Affidavit of Kenry Jackson sworn to on the 24th June 1993 at "K 14' in respect of premises known as 8 Sam Sharpe Square, St. James and registered at Volume 1234 Folio 21 of the Register Book of Titles.
>
> (ii) An injunction restraining the Defendants by themselves or their servants or agents from taking any steps to forcibly eject the Plaintiff from occupation of premises known as 8 Sam Sharpe Square, St. James and registered at Volume 1234, Folio 21 of the Register Book of Titles.

The Originating Summons was dismissed and the Declaration and Injunction refused after a contested hearing before Reid J., in a judgment delivered on the 19th of March 1996.

The facts as posited by "Singer" are to be found in the Affidavits of Kenry Jackson, sworn to on the 24th of June 1993; of Bindley Sangster sworn to on the 8th July 1993 and a further Affidavit of Kenry Jackson sworn to on the 25th of October 1993.

The position taken by "The Credit Union" on the facts is stated in Affidavits of Middleton Wilson sworn to on the 27th July 1993 and an undated Affidavit of Middleton Wilson in reply to the last mentioned Affidavit of Kenry Jackson.

The premises 8 Sam Sharpe Square in Montego Bay, St. James, is owned by "The Credit Union". In May 1991, "Singer" was seeking to relocate its business to larger premises in Montego Bay. Mr. Bindley Sangster the Operations Manager of "Singer" became aware of the availability of the premises at 8 Sam Sharpe Square and entered into negotiations with Mr. Middleton Wilson, the General Manager of "The Credit Union" directed towards the leasing of these premises. It will be important in this appeal to determine whether the negotiations culminated in a concluded agreement between the parties. Consequently the early history is relevant.

Further to a meeting between Mr. Wilson and Mr. Sangster, the latter on behalf of "Singer" in a letter to the former dated 24th May 1991; and I quote:

> ... set out for the record our understanding of the points discussed at our meeting.
>
> 1. Approximate size of rental area 5,000 sq. ft. (2,500 sq. ft. on each floor).
> 2. There is a section upstairs which will be totally separated from the rental area for use by your organisation. This will have its own entrance from the street,
> 3. We would be interested in a 10 year lease with option to renew. You indicated that annual escalation would be not more than 10%.
> 4. Initial rental figure discussed was $100.00 per sq. ft. per annum downstairs with upstairs to be negotiated at a figure somewhere between $50.00 and $80.00 per sq. ft.
> 5. We are interested in the small shop at the rear of the premises but not in the area upstairs that unit.
> 6. You indicated that you will be refurbishing the premises including:
>
> a) Downstairs to include wash rooms
> b) Steps to upstairs
> c) Roof
> d) Upstairs windows
> e) Air conditioning relocation
> f) Some aspects of upstairs
>
> 7. You have agreed to provide details of your present re-furbishing plans and the floor plan of the rental area under consideration.
> 8. We would be doing some refurbishing of the premises to suit our particular requirements. The extent of the refurbishing which we would undertake would depend on your present refurbishing operation and very definitely on the rental figure finally agreed for the upstairs area.
>
> We look forward to receiving the information promised so that we can intelligently submit a proposal to your Board regarding an equitable rental arrangement.

It is clear that at this stage Mr. Sangster was indicating to Mr. Wilson "Singer's" requirements and indicating a framework within which negotiations could be pursued.

By a fax message of June 10, 1991 Mr. Wilson gave some comfort to Mr. Sangster describing his proposal as "way out front" and inviting further discussion over lunch. By a further fax message of June 26, Mr. Wilson informed Mr. Sangster that a new Board of "The Credit Union" had been elected which would have to be apprised of the situation.

What follows next is that "The Credit Union" through Mr. Wilson notified "Singer" for the attention of Mr. Sangster, by letter dated July 10, 1991 that:

> The Board has agreed to rent to you, 8 Sam Sharpe Square based on your conditions agreed with David Barnwell recently, that you provide at your expense:
>
> 1. split air conditioning units (7),
> 2. partition upstairs - this includes cost of removing present partitioning,
> 3. painting for upstairs,
> 4. stairway and stairwell,
> 5. extra lighting,
> 8. carpeting.
>
> The Board's conditions are as follows:
>
> a. rental - $80 per sq. ft.
> b. rental increase 5-10% per annum for first two (2) years and 15% per annum in third and succeeding years,
> c. tenure for ten (10) years renewable,
> d. option to purchase,
> e. total area including bathrooms, storage area, passageways etc. 5600 sq. ft.
> f. details to be worked out by lawyers in binding contract.

Mr. Barnwell is the Marketing Manager of "Singer".

At this stage "The Credit Union" is making an offer to "Singer" bearing in mind the earlier discussions recorded in the letter of the 24th of May 1991.

By letter dated 2nd August 1991 'The Credit Union" further wrote to "Singer:

> Further to our fax of July 10, 1991, the Board has agreed to lease 5,500 sq. ft. space of No. 8 Sam Sharpe Square to you and invites you to meet with us on Thursday August 8, 1991 to look at:
>
> (a) the improved physical arrangement,
>
> (b) vet Draft Contract.
>
> Please respond to this telex indicating your acceptance.

The "improved physical arrangement" referred to related to the "refurbishing operation" being carried out by "The Credit Union".

Following this by fax message dated 7th August 1991 (Wilson to Sangster) request was made for:

> A cheque for $100,000.00 to cover two (2) months Security Deposit and one (1) month rental would be appreciated. This is negotiable.
>
> You can have immediate possession.
>
> Suggest you walk building on Thursday to see state of repairs and how you can integrate partition etc. with the on-going repairs.

The refurbishing operation being carried out by "The Credit Union" as well as the partitioning work etc. to be carried out by "Singer" to meet its particular requirements would have to be co-ordinated between the parties. This was in fact done as agreed and the plaintiff/appellant expended a sum of approximately $800,000.00 for this purpose.

By letter dated August 16 (Sangster to Wilson) it was stated:

> ... we are pleased to confirm as follows: -
>
> 1. We are working towards a September 1, 1991 possession date subject to:- -
>
> (a) Your Contractor completing his work;
>
> (b) The finalizing of lease between our respective Attorneys.
>
> 2. As a token of good faith and subject to the conditions in (1) above, we enclose a cheque in the amount $33,000.00 which approximates one month's rental.

The 'subject to' referred to at 1. above governs the date of possession and not the coming into being of the Agreement to lease.

By a letter dated September 9, 1991 Mr. David Barnwell on behalf of "Singer" wrote to "The Credit Union" as follows:

> We have received formal approval from our regional office and there should now be no obstacles to our moving towards conclusion of a lease agreement. Please regard this communication and our letter of even date as our binding commitment to lease the premises subject to the conclusion of a mutually satisfactory lease agreement.

A letter from Wilson to Sangster dated 1st October 1991, advised that "Singer" had taken possession "to all intent and purpose as of September 01'. It further set out that the contractor for "The Credit Union" had been instructed by Sangster to undertake certain work on behalf of "Singer" and it further stated:

> ... The total area allotted to you is 5,500 square feet, more or less and it is on this basis that your first cheque for September was paid.

The letter requested a "second cheque rental for the month of October ... also to cover two (2) months security deposit as per our agreement." It stated Mr. Wilson's understanding:

> ... that such work as you had asked the Contractor, Mr. Leroy Whyte to execute would be completed in time for you to begin operations by the end of October. This was conveyed to my Board who are anxious to see activities In No. 8 Sam Sharpe Square.

At this stage both parties are clearly proceeding on the basis of the existence of an Agreement by "The Credit Union" to lease "Singer" the identified area at 8 Sam Sharpe Square.

By letter dated 7th October 1991 (Wilson to Sangster) it stated:

> The Board of Directors of Montego Co-operative Credit Union Limited are concerned about the following:
>
> (1) Original Lease Agreement not yet received for perusal.
>
> (2) Rent for October not yet received, although September's rental was prepaid.
>
> (3) Security Deposit not yet received, although you have contracted out work in the building.
>
> Your earliest compliance with our requests above is necessary as there is strong lobby for sale of building, if your exercise of lease is not soon.

On October 10 a cheque for $60,000.00 representing two months' security deposit is sent by "Singer" to "The Credit Union". The letter further states: -

> Please consider the initial payment of Thirty Thousand Dollars, ($30,000.00) rental for the month of October 1991.

"Singer" proceeded to complete its work on the building, to have electricity service put therein, and on November 6, issued a notice to its customers that they were moving from their present location to a new store at 8 Sam Sharpe Square effective Monday 25th November 1991.

In the meantime a Draft Lease had been sent by "Singer" to "The Credit Union" but omitted from this Lease was a Schedule covering rental, escalations and rentable space. This Schedule was sent by letter dated November 4, 1991 and reads as follows:

A. *Rental*

Year 1	-	$80.00 per sq. ft.
Year 2	-	88.00 " " "
Year 3	-	101.20 " " "

And thereafter 15% increase per Annum.

B *Rentable Space*

Upstairs	-	1,900 more or less
Downstairs	-	3,300 " " "
Total . . .	-	5200 Sq. Ft."

"The Credit Union" maintains that on a date in early October 1991 it sent a Draft Lease to "Singer" but which was not executed because "Singer" made amendments which were not acceptable. "The Credit Union" has not stated the nature of the amendments and the reason for their unacceptability. The Draft Lease is however exhibited. This Draft Lease in respect of the condition of parties, rental tenure, and space rented agrees with the Lease sent by "Singer" to "The Credit Union" which was not signed by "The Credit Union." It is strange nonetheless, that Mr. Wilson depones on behalf of "The Credit Union" in paragraph 12 of his Affidavit in reply to Mr. Jackson's Affidavit of the 25th October 1993 as follows:

> That thereafter by letter from Defendant to Plaintiff dated the 7th day of October, 1991 the Defendant intimated its concern that the Original Lease Agreement which it had sent to Plaintiff for its perusal had not been returned to it and indicated further:

When the letter from Wilson to Sangster dated October 7, is examined the "Original Lease Agreement not yet received for perusal" cannot refer to a Draft sent by "The Credit Union" to "Singer" for perusal but must refer to a Draft Agreement expected to be received by "The Credit Union" from "Singer" for its perusal.

Looking at the Schedule to the Draft Lease sent by "Singer" to "The Credit Union" if there can be any doubt as to what was agreed between the parties in this regard it is dispelled by a fax transmittal by "The Credit Union" to Mr. Sangster dated February 2, 1992 as follows:

> Rental is at $80 per Square Foot as agreed by Board in July 1991. See fax of 10th July 1991 - copy attached. Amount of space rented is 5,200 Square Feet x by $80 = $416,000 per annum or $34,666.66 per month.
>
> Rent received so far is at $30,000.00 per month. Amount due is $28,000.00 that is 6 months x difference per month.

It is understandable that there would have been some original uncertainty as to the exact space which would be subject to the Agreement and made available to "Singer" since this depended upon the result of the co-ordinated refurbishing and partitioning being done by both "Singer" and "The Credit Union" and which would determine the specific space which each would occupy for its own purposes since they both would be sharing the building. The space is referred to as 5,500 square feet more or less in "The Credit Union's' letter of October 1, 1991. It was eventually established after as 5,200 square feet. Since the rental agreed was on a square footage basis the final monetary calculation does not create a problem.

"The Credit Union" considered the date of possession by "Singer" to be 1st September 1991. This is understandable in the light of their letter of October 1 as "Singer" was at that time on the premises carrying out the work which it required to be done.

The question therefore to be determined is as to whether the parties had an agreement for "Singer" to lease from "The Credit Union" the premises at 8 Sam Shape Square or whether the arrangements had failed to go beyond mere negotiation.

For this purpose it is important to discover whether they had arrived at the essential terms of the Contract, that is say, identity of the parties, identity of the property, the rental to be paid, as well as, the length in terms of years of the Lease. If these essential terms are established to have been agreed then as was stated by Buckley LJ in *Law v Jones* [1973] 2 All ER p. 4.7 at p 443:

> It is well settled that, where there has been a definite acceptance of an offer, the fact that the parties intend that it should be put into a more formal shape does not relieve either party from his liability under the contract (see *Halsbury's Laws of England* and cases there cited). As Lord Blackburn observed in *Rossiter v. Miller* [1878] 3 App. Cas. 1124 at 1152:
>
> > I think the decisions settle that it is a question of construction whether the parties finally agreed to be bound by the terms, though they were subsequently to have a formal agreement drawn up.

Buckley LJ went on to cite with approval at p. 445 of the Report two passages in Lord Westbury's LC's judgment in *Chinnock v. Marchioness of Ely* [1665] 4 De GJ & S 638 at 646:

> . . . if there had been a final agreement, and the terms of it are evidenced in a manner to satisfy the Statute of Frauds, the agreement shall be binding, although the parties may have declared that the writing is to serve only as instructions for a formal agreement, or although it may be an express term that a formal agreement shall be prepared and signed by the parties.

Further: -

> As soon as the fact is established of the final mutual assent of the parties to certain terms and those terms are evidenced by any writing signed by the party to be charged or his agent lawfully authorized, there exist all the materials, which this Court requires, to make a legally binding contract.

The letter of July 10, 1991 is an offer made by "The Credit Union" to "Singer" on the terms stated therein. This offer states the rental figure, the escalation, the tenure and a square footage. This square footage was finally agreed between the parties at 5,200 square feet. The provision therein of "details to be worked out by lawyers in binding contract' can only mean in these circumstances that "a formal agreement shall be prepared and signed by the parties". It is the vetting of this Draft Contract that is referred to by Mr. Wilson to Mr. Sangster in his letter of August 2, 1991.

The fax message (Wilson to Sangster) of August 7, 1991 requesting a cheque for $100,000.00 to cover one month's rental and a security deposit amounting to two months' rental introduces a new element that being the security deposit which is negotiable. The letter (Sangster to Wilson) dated 16th August 1991 evidences the acceptance of the offer of July 10, 1991. The month's rental is paid and the September 1 date of possession, not the existence of the Agreement to Lease, is dependent upon "Singer's" contractor completing his work, and the drawing-up of the Formal Agreement which the lawyers were expecting to prepare.

There is part performance of the Agreement by the expenditure of $800,000.00 by "Singer" in effecting the adaptations necessary for the purposes for which "Singer" required the premises. The entry into possession by "Singer" is also evidenced of that part performance.

The security deposit is paid as evidenced by "Singer's" letter to "The Credit Union" dated 10th October 1991. This is an agreed requirement between the parties to be incorporated into the Formal Lease.

In reliance upon the existence of a Lease Agreement "Singer" informed its customers by the November 6 announcement of its relocation and carries on its business publicly on these premises.

By then a Formal Lease document had been presented to "The Credit Union" selling out the essential features, the location, monthly rental, term of Lease, square footage and the security payment. "The Credit Union' has not signed this Lease Agreement.

I have been unable to discover from the Affidavits what disagreements existed between the parties on the essentials of the Lease Agreement. As was stated by Harman LJ in *Sweet & Maxwell Ltd v Universal News Services Ltd* [1964]3 All E.R. p.30 at p. 38:

> It seems to me that if A. agrees with B. to grant him a lease at such a rent on such and such terms beginning on such a day, and no more, that is a specifically enforceable agreement, and the court will insert in it what are called 'usual' covenants.

This is what this Court would have done had the plaintiff/appellant brought an Action for specific performance.

Miss Cummings for the defendant/respondent has urged us to find that there was no concluded Agreement because the Agreement was subject to contract. That indeed was the finding of Reid J which is on appeal before us.

There is no correspondence from the defendant/respondent which can be interpreted as having made the Agreement "subject to contract'. I do not so interpret the words in the letter of July 10 (Wilson to Sangster) "details to be worked out by lawyers in binding contract" Neither do I so interpret the words in the letter (Wilson to Sangster) dated 2nd August 1991 containing the invitation to Mr. Sangster to meet -

> to look at:
>
> (a) The improved physical arrangement,
>
> (b) vet Draft Contract.

Neither is it expressed in Mr. Wilson's concern in his letter to Mr. Sangster dated 7th October 1991 that:

> Original Lease Agreement not yet received for perusal.

The plaintiff/appellant is maintaining and has urged through Mr. Goffe QC that references to the Lease indicated only the intention of the parties to put their Agreement in a formal document. The parties were ad idem on the essentials of the Agreement

and it appears that the first time that a cloud appeared on the horizon is in the letter of October 7 when Mr. Wilson wrote Mr. Sangster that "there is strong lobby for sale of the building". Thereafter the prospect of sale beleaguered an Agreement which had already been entered into by the parties.

This appeal has been fully argued by both counsel with much persuasive skill and the exhibition of great industry.

I however hold that the parties came to a concluded Agreement and expressed the desire to have that Agreement put into a formal document by their lawyers. The letter of 7th of October 1991 (Wilson to Sangster) indicated the first wrinkle in the carrying out of the Agreement which thus far had proceeded smoothly. Thereafter the focus of "The Credit Union" shifted from a Lease Agreement already in effect to a possible Sale Agreement.

Subsequently on the 23rd April 1993 "Singer" received from "The Credit Union" a Notice to Quit the premises to expire on the 31st May 1993. This was followed by another Notice to Quit dated 3rd May 1993 to expire on the 30th June 1993.

Reid J was in my judgment in error in determining that no Agreement had come into existence between the parties because a precondition of such an Agreement was its incorporation into a Formal Lease document In terms of the negotiations.

I would allow the appeal and set aside the judgment of Reid J and grant to the plaintiff/appellant the Declaration and Injunction in the terms sought with the commencement date of the Lease being 1st September 1991. The Injunction will remain in force during the term of the Lease Agreement.

I would award the plaintiff/appellant the costs of the appeal, as well as, the costs in the Supreme Court.

GORDON, J.A.: By originating summons dated 24th June, 1993 the plaintiff/appellant sought a declaration that there existed between the plaintiff and defendant/respondent a lease for the duration of ten years in respect of premises 8 Sam Sharpe Square, Montego Bay in the parish of St. James. This lease the plaintiff claimed was evidenced by correspondence between the parties, a lease prepared and signed by the plaintiff dated 1st October, 1991 and by acts of part performance.

The summons was heard by Reid, J on 30th November 1993, 3rd December 1993, 28th and 30th November and 2nd December 1994. Judgment was delivered on 19th March 1996 denying the plaintiff the relief sought. From this judgment the plaintiff has appealed.

The plaintiff in the summons made specific reference to letters dated 10th July, 1991 from the respondent to the appellant and 10th October, 1993 from the appellant to the respondent and also to the lease mentioned above but it is necessary to examine all the correspondence exhibited in order to determine the answer to the question posed.

That there were discussions antecedent to the letter of the lath July, 1991 is evident from this letter dated 24th May, 1991 here set out:

Mr.Middleton Wilson
General Manager
Montego Co-Operative Credit Union Ltd
Sam Sharpe Square
St. James

Dear Middleton:

It was a pleasure meeting with you on Tuesday May 21, 1991 to view the premises in Sam Sharpe Square which is available for rental. The location seems to be suitable for our present needs and we are interested in pursueing (sic) discussions towards leasing these premises and set out fix the record our understanding of the points discussed at out meeting.

1. Approximate size of rental area 5,000 sq. ft. (2,500 sq. ft. on each floor)
2. There is a section upstairs which will be totally separated from the rental area for use by your organization. This will have its own entrance from the street.
3. We would be interested in a 10 year lease with option to renew. You indicated that annual escalation would be not more than 10%.
4. Initial rental figure discussed was $100.00 per sq. ft. per annum downstairs with upstairs to be negotiated at a figure somewhere between $50.00 and $80.00 per sq. ft.
5. We are interested in the small shop at the rear of the premises but not in the area upstairs that unit.
6. You indicated that you will be refurbishing the premises including:
   a) Downstairs to include wash rooms
   b) Steps to upstairs
   c) Roof
   d) Upstairs windows
   e) Air conditioning relocation
   f) Some aspects of upstairs
7. You have agreed to provide details of your present refurbishing plans and the floor plan of the rental area under consideration.
8. We would be doing some refurbishing of the premises to suit our particular requirements. The extent of the refurbishing which we would undertake would depend on your present refurbishing operation and very definitely on the rental figure finally agreed for the upstairs area.

   We look forward to receiving the information promised so that we can intelligently submit a proposal to your Board regarding an equitable rental arrangement.

With very best wishes.

Yours truly

Bindley Sangster
Operations Manager

cc: - S.Wishart
- M. Brown
- D. Barnwell
- V. Thompson

In this letter the appellants clearly established their interest in a lease of 10 years duration. The premises were identified, the space to be occupied approximated subject to the separation of a section of the upstairs for the sole use of the respondents, the lessor. The appellants accepted that the respondents would continue the refurbishing of the premises to make it tenantable and indicated that they would be doing limited refurbishing to meet their peculiar needs. Possible rental was suggested but there was no finality on this aspect.

This letter was clearly an invitation.

On 10th June, 1991 the General Manager of the respondents acknowledged the letter by facsimile and invited Mr. Sangster thus:

> Your proposal is way out front - let us discuss details of refurbishing over lunch down here at your convenience.

On 26th June, 1991 Mr. Wilson sent another fax to Mr. Sangster.

> New elections have brought new board into prominence and they will have to be appraised of the situation.

This correspondence was followed by letter dated 10th July, 1991 from the respondents in the following terms:

> July 10, 1991
>
> Singer Sewing Co
> 52-60 Grenada Crescent
> Kingston 5
>
> Attention: Mr. Bindley Sangster
>
> Dear Sirs,
>
> The Board has agreed to rent to you, 8 Sam Sharpe Square based on your conditions agreed with David Barnwell recently, that you provide at your expense:
>
> 1. Split air conditioning units (7)
> 2. partition upstairs - this includes cost of removing present partitioning,
> 3. painting for upstairs,
> 4. stairway and stairwell,
> 5. extra lighting
> 6. carpeting.
>
> The Board's conditions are as follows:
>
> a. rental- $80 per sq. ft.
> b. rental increase 5-10% per annum for first two (2) years and 15% per annum in third and succeeding years.
> c. tenure for ten (10) years renewable,
> d. option to purchase,
> e. total area including bathrooms, storage area, passageways etc 5600 sq. ft.
> f. details to be worked out by lawyers in binding contract.
>
> Co-operatively yours,
>
> MONTEGO CO-OP. CREDIT UNION LTD
> MIDDLETON WILSON
> GENERAL MANAGER

This letter demonstrates that there had been on going dialogue between the parties and areas of agreement. The letter it was submitted, constituted an offer but closer examination reveals areas of acceptance of proposals made by the appellants in their letter of the 10th July 1991. Look at the Board's Conditions:

(a) Rental - $80.00 per square foot. This is more favourable to the appellants than their offer of $100.00 per square foot on the downstairs and is the upper limit of the suggested charge for the upstairs - see Condition No. 4

(b) Rental increase of 5-10% per annum for the first two years accords with the suggested escalation of not more than IO% in Condition 3.

(c) Tenure for 10 years renewable - first proposed by appellants see Condition No. 3.

The area proposed by the respondent was 5600 square feet whereas the appellant had approximated it at $5000 sq. ft. and the option to purchase was an added incentive.

Condition (f) of the Board's Conditions states:

> details to be worked out by lawyers in a binding contract.

Let us examine the state of the negotiations at this stage.

(1) The parties to the lease were determined.

(2) The premises were determined.

(3) The price (Rental) was determined.

(4) The period ten years was determined.

The date of commencement of the tenancy was not determined, and correspondence to be hereafter scrutinised will clarify this requirement. The details to be worked out by lawyers would not affect the essential ingredients given above.

Following on the letter of the 10th July 1991 the respondents sent another letter dated 2nd August 1991 and followed it with a fax on 7th August, 1991 as under:

> August 02, 1991
>
> Mr. Bindley Sangster
> Singer Sewing Co
> 52-60 Grenada Cres.
> Kingston
>
> Dear Sir,
>
> *Re: Rental of No. 8 Sam Shame Square*
>
> Further to our fax of July 10, 1991, the Board has agreed to lease 5,500 sq, ft. space of No. 8 Sam Sharpe Square to you and invites you to meet with you on Thursday August 8, 1991 to look at:
>
> (a) The improved physical arrangement,
>
> (b) vet Draft Contract.
>
> Please respond to this telex indicating your acceptance.
>
> Co-operatively yours
> MONTEGO CO-OP. CREDIT UNION LTD
> M.Wilson
> GENERAL MANAGER
> Montego Co-operative Credit Union Ltd
> Affiliated with Jamaica Co-operative Credit Union League Ltd

> Date: August 07, 1991
>
> TO: Mr. Bindley Sangster From: Mr. Middleton Wilson
> Singer Sewing Co
> 52-60 Grenada Cres.
> FAX NO: 09264780 FAX NO: 952-8522
>
> No. of Pages one (1)
>
> *MESSAGE*:
>
> A cheque for $100,000 to cover two (2) months security/deposit and one (1) month rental would be appreciated. This is negotiable, You can have immediate possession.
>
> Suggest you walk building on Thursday to see state of repairs and how you can integrate partition etc. with the on-going repairs.

The tenor of the correspondence betrays an anxiety bordering on urgency on the part of the respondents to have the appellants as Tenants. This is so even to the extent of inviting them to take "immediate possession" of premises that were not tenantable because of "ongoing repairs".

The date for the commencement of the tenancy was not stated in the correspondence and this was the basis of submissions by Miss Cummings in support of her contention that there was no binding agreement in the absence of this necessary and vital ingredient. On this subject there was further correspondence from the appellants.

> August 16, 1991
>
> Mr. Middleton Wilsrn
> General Manager
> Montego Co-operative Credit Union Ltd
> Sam Sharpe Square, MO BAY
>
> Dear Middleton:
>
> Further to your letter of August 2, 1991 and our subsequent meeting in Mo Bay and Kingston, we are pleased to confirm as follows:
>
> 1. We are working towards a September I, 1991 possession date subject to:
>
> a) Your Contractor completing his work
>
> b) The finalizing of lease between our respective Attorneys
>
> 2. As a token of good faith and subject to the condition in (1) above, we enclose a cheque in the amount of $33,000.00 which approximates one month's rental.
>
> With best wishes.
>
> Yours truly
>
> Bindley Sangster
> Operations Manager
>
> cc: Messrs -S. Wishart
> - M. Brown
> - D.Branwell

And on 9th September, 1991 the appellants wrote the respondents:

September 9 1991

Montego Co-op Credit Union Limited
5 Sam Sharpe Square
Montego Bay

Attention: Mr. Middleton Wilson

Dear Sir

We have received formal approval from our regional office and there should now be no obstacles to our moving towards conclusion of a lease agreement. Please regard this communication and our letter of even date as our binding commitment to lease the premises subject to the conclusion of a mutually satisfactory lease agreement.

Yours truly

SINGER SEWING MACHINE COMPANY

David S Barnwell
Marketing Manager

cc: Mr. S Wishart
Mr. B Sangster
Mr. M Brown

The "letter of even date" was not exhibited however the respondents undoubtedly knew that Mr. Barnwell and Mr. Sangster with whom they corresponded negotiated as agents for the appellants and this letter was confirmation of their role and ratification of their actions. The lease agreement referred to must necessarily be the formal document embodying the terms agreed. Accepting the existence of consensus the appellants entered into possession with the concurrence of the respondents who accepted deposits and payments in accordance with the agreement reached. In acknowledgment of this the respondents wrote to the appellants on 1st October, 1991 thus:

October 01, 1991

Mr. Bindley Sangster
Singer Sewing Company
52-60 Grenada Crescent
Kingston

Dear Mr. Sangster,

Further to our telephone conversation of October 01, 1991 please be advised that you took possession to all intent and purpose as of September 01, that is at No. 8 Sam Sharpe Square. Since that date you have instructed Mr. Leroy Whyte our Contractor to undertake the following on your behalf:

1) To cut the side wall to the Billy Holiday floor space in order for activities within the warehouse to be visible from the front.

2) A manager's office has been built and there is an extension in the open area facing the ground floor of the Billy Holiday area.

3) Work has been done according to your instructions upstairs, to wit offices have been enclosed and partitions have been removed.

The total area allotted to you is 5,500 square feet, more or less and it is on this basis that your first cheque for September was paid.

In the light of the above, I should be grateful if your second cheque rental for the month of October could be forwarded to Montego Co-op. Credit Union, also to cover two (2) months security deposit as per our agreement.

On the last visit here by you at which Mr. Barnwell was present, my understanding was that such work as you had asked the Contractor, Mr. Leroy Whyte to execute would be completed in time for you to begin operations by the end of October. This was conveyed to my Board who are anxious to see activities in No. 8 Sam Sharpe Square.

I look forward to an early and positive reply from you, as you understand the position where my Board is concerned.

Co-operatively yours
MONTEGO CO-OPERATIVE CREDIT UNION LIMITED
M. WILSON
GENERAL MANAGER

In this letter the respondents acknowledge the extensive work of refurbishing and alterations undertaken by the appellants to make the premises suitable for their use. It is evident that there was no doubt as to the premises let by the respondents: there was no consensus as to the area occupied by the appellant. The respondent stated it was 5500 square feet more or less. The appellants in their letter of the 24th May, 1991 gave the area as approximately 5000 square feet and in the draft lease prepared and signed by the appellants and dated 1st October, 1991 the area was stated as 5200 square feet. Area is measurable and it must be inferred that the area of 5,200 sq. feet stated by the appellants was accurately ascertained. In the lease prepared by the respondents (in October 1991) the area was acknowledged to be 5200 square feet and in a fax message from the respondents to the appellants on 12th February, 1992 the space rented was confirmed as 5200 square feet.

The only detail which appeared to be uncertain was the date of commencement of the tenancy. In the letter of 6th August, 1991 the appellants said "we are working towards a September 1, 1991 possession date subject to ..."

In the draft lease which the appellants signed and sent to the respondents the date of commencement was given as 1st October, 1991. However the letter of the respondents of even date states ... "Please be advised that you took possession to all intent and purpose as of September 01 that is at No. 8 Sam Sharpe Square."

On 7th November, 1991 the respondents wrote to the appellants:

October 07, 1991

Mr. Bindley Sangster
Singer Sewing Machine Company
52-60 Grenada Crescent
Kingston

Dear Sir,

Re: Rental No. 8 Sam Sharpe Square

The Board of Directors of Montego Co-operative Credit Union Limited are concerned about the following:

(1) Original Lease Agreement not yet received for perusal.

(2) Rent for October not yet received, although September's rental was prepaid.

(3) Security Deposit not yet received, although you have contracted out work in the building.

Your earliest compliance with our requests above is necessary as there is strong lobby for sale of building, if your exercise of lease is not soon.

Co-operatively Yours
MONTEGO CO-OPERATIVE CREDIT UNION LIMITED
M. WILSON
GENERAL MANAGER

The appellants responded by letter on 10th October, 1991:

October 10, 1991

Montego Bay Co-op Credit Union
5 Sam Sharpe Square
Montego Bay
Jamaica

Attention: Mr. Middleton Wilson

Dear Sirs,

Enclosed is our National Commercial Bank cheque #13449 for Sixty Thousand Dollars, ($60,000.00) representing two (2) months security deposit on premises 8 Sam Sharpe Square, Montego Bay.

Please consider the initial payment of Thirty Thousand Dollars ($30,000.00) rental for the month of October 1991.

Yours faithfully,

SINGER SEWING MACHINE COMPANY

Merrick M Brown
Controller
cc: Messrs. S. Wishart
D. Barnwell
B. Sangster

The respondent accepted the cheque for security deposit sent. There is exhibited no response to the second paragraph.

The appellants under cover of a letter dated 4th November, 1991 sent to the respondents the schedule to their (appellants') draft lease which had been inadvertently omitted from the main document. It is passing strange that the respondent deny receipt of this schedule. It is instructive to assess the contents of this lease:

(1) All the terms of the Respondent's letter of the 10th July, 1991 are included in the lease.

(2) The date of commencement is given as the 1st October, 1991,

(3) There is a covenant for renewal.

(4) There is a covenant (option) given to the appellant to purchase.

(5) There is a covenant by the Lessee to effect repairs not exceeding $2500.00.

(6) There is a covenant for the appellant to deposit two months rent as security.

The lease prepared by the respondents' Attorneys-at-law contain all the above terms save that *no date is given* for the commencement of the term.

There are some differences in the other details which are always determined by the draftsman:

(a) The rent which is in the schedule to the appellants' lease is in the body of the respondents' lease. This is a matter of style.

(b) There is a clause in the respondents lease for arbitration. In the appellants' lease arbitration is restricted to the exercise of the option to purchase.

The covenant for the lessee to effect minor repairs contained in both lease documents is a certain indication that there was agreement between the parties on this topic as it is contained in none of the correspondence exhibited.

The rental was agreed at $80.00 per square foot but it was not until 12th February, 1992 by facsimile from the respondents to the appellants that the respondents agreed that the space rented is 5200 sq. ft. Respondents then demanded arrears of rent based on this agreed space and the appellant settled.

February 12, 1992

Mr. Bindley Sangster
Singer Sewing Company
Fax 926-4780

MESSAGE

Rental is at $80 per Square Foot as agreed by Board in July 1991. See fax of 10th July 1991 - copy attached. Amount of space rented is 5,200 Square Foot x $80.00 = $416,000 per annum or $34,666.66 per month.

Rent received so far is at $30,000.00 per month. Amount due is $28,000.00 that is 6 months x difference per month.

(Sgd.) MIDDLETON WILSON

February 07, 1992

Mr. Bindley Sangster
Singer Sewing Company
Fax No: 0926-4780

MESSAGE

Dear Bindley,

In a discussion with you last month, I pointed out that the rental is $32,500.00 and you are sending $30,000.00. You had promised to send a cheque to make up the difference, but that has not been sent.

Now we have received February's rental for $30,000.00. Please give instructions to your Accounts Department to remit six (6) months at $2,500.00 per month to take care of this matter.

(Sgd.) MIDDLETON WILSON

Rental payments were regularized to the extent that the respondents wrote to the appellants on 11th March, 1993 acknowledging the prompt payment of rent and requesting payment of General Consumption Tax which had been omitted.

The appellants concerned that the respondents had not returned the lease sent to them, wrote on 8th January, 1992 expressing their concern. They wrote again in the same vein on 18th February, 1992 after they had commenced tentative discussions on the sale to them of the premises. The failure of the respondents to return the appellant's lease was the subject of further correspondence from the appellant to the respondents on 23rd April, 1992, 19th May, 1992 and, from the appellant's Attorneys at law to the respondent on 15th September, 1992.

By letter dated 9th June, 1992 respondents' Attorneys-at-law advised the plaintiffs' attorneys-at-law that between the parties "to date no agreement has been reached." They further intimated that the Credit Union Board had decided to sell the premises

and was "reluctant to encumber the property with a lease in the event that the purchaser will require vacant possession."

The appellant's Attorneys-at-law by letter of 15th September, 1992 refuted the statement that no agreement had been reached and said the matter would be referred to their litigation department. The respondents wrote to the appellants on 24th November, 1992 informing them that they had received an offer of $9m for the sale of the premises. The letter continued:

> The Board has not positively responded to the offer despite the fact that a substantial deposit by way of a cheque was placed with our attorneys.
>
> It is the wish of the Board to dialogue with you on your intent to purchase and to reach a successful conclusion with you on this matter.

Dialogue between the parties on sale of the premises bore no fruit and on 27th. April, 1993 the appellants complained of a leaking roof which had to be repaired. On 12th May, 1993 the appellants submitted estimates obtained from 3 contractors for the repairs to be effected. In the meantime the respondents served on the appellants a notice dated 3rd May, 1993 to quit on or before 30th June, 1993. This was followed by the Originating Summons.

The factual situation obtaining at this juncture is that the appellants were in possession of the premises in terms of the respondents offer of the 10th July, 1991.

The appellants had expended approximately $800,000 in refurbishing the premises as agreed. They were paying rent at the agreed rate, They had made the security deposit. The only thing that was not in place was the document signifying the agreement with "details worked out by lawyers in a binding contract."

The learned trial judge in his judgment placed great emphasis on the interpretation to be placed on terms with legal overtones used by the laymen in the correspondence *viz*:

> details to be worked out by lawyers in a binding contract,

in the respondent's letter of 10th July 1991.

> Subject to the finalising of lease between our respective attorneys;

in the appellant's letter of the 16th August 1991: And the appellant's assertion in letter dated 9/9/91 -

> Please regard this communication and our letter of even date as our *binding commitment to lease the premises. Subject to the conclusion of a mutually satisfactory lease agreement.*

The judge found:

> It is settled law that where an agreement is made subject to contract the matter remains in negotiation until a formal contract is executed. See *Eccles vs. Bryant* [1947] 2 All ER. 865 'Likewise, whether the words 'subject to a proper contract to be prepared by the vendor's solicitors,' imported a condition that no agreement between the parties should be binding until such a 'proper contract' was executed, depended on the true construction of the document. See *Chillingworth & Another vs. Esche* 1923 All Rep 97...

The true construction of the documents must be coupled with the situation obtaining as at the time of filing of the Originating Summons. The date of commencement of the term of years appears to be a grey area but scrutiny of the correspondence assist in -ascertaining this essential term. The respondents in their facsimile of the 7th August, 1991 offered the appellant:

> You can have immediate possession.

The Appellants in their letter of the 16th August, 1991.

> We are working towards a September 1, 1991 possession date...

The respondent by letter of the 1st October, 1991 advised the appellants "you took possession, to all intent and purpose (sic) as of September 01." They then itemised work of refurbishing that had been done on the appellants' instructions. The appellants sought to have the date of possession postponed to 1st October, 1991 and even inserted this date in their draft lease but the respondent would not relent and held firm to 1st September, 1991 as the date of possession. In his affidavit responding to that of the appellants' agent Henry Jackson which was sworn on 25th October, 1993, Middleton Wilson the respondents' General Manager declared in paragraph 18 "and I say that the plaintiff paid rental for month of September 1991." This declaration in my judgment concludes speculation as to the time of commencement of the tenancy and fixes the 1st of September, 1991as the date:

1. The appellants were in possession of the demised premises and had been in occupation thereof since September, 1991.
2. They observed all the terms of the offer contained in the letter of 10th July, 1991 to which they had agreed.
3. They had expended a considerable sum in terms of the agreement to make the premises suitable for their use. This sum was equivalent to approximately two years rental. The expenditure on painting, security, electrical fittings, carpeting, partitioning and air conditioning had the fill approval of the respondent.
4. Their security and rental payment as agreed were up to date.

The acts of part performance above were not alluded to by the learned trial judge but they cannot be ignored. In *Steadman vs. Steadman* [1974] 2 All E.R. 977 the House of Lords held:

> (i) In order to establish facts amounting to part performance it was necessary for a plaintiff to show that he had acted to his detriment and that the acts in question were such as to indicate on a balance of probabilities that they had been performed in reliance on a contract with the defendant which was consistent with the contract alleged. There was no general rule that the payment of a sum of money could never constitute part performance.

In *Spottiswoode, Ballantyne & Co Ltd vs. Doreen Appliances Ltd and G. Barclay (London) Ltd* [1942] 2 All E. R. 65:

> An offer by the defendants to take a lease of premises was accepted on behalf of the plaintiffs subject, *inter alia*, 'to the terms of a formal lease to be prepared by their solicitors.' The defendants were let into possession and a draft of the agreement was sent to them. A fortnight later the plaintiff wrote to the defendants indicating that they were not willing to proceed with the agreement. They brought an action to recover possession, and the defendants counter-claimed for specific performance of an alleged agreement to grant them a lease: Held: upon the proper construction of the offer, there was no binding contract until a formal agreement had been executed. Since this had not been done, the defendants were not entitled to specific performance.

The facts of this case seem to be similar to those of the case under review but there are areas in which it may be distinguished.

Firstly the correspondence from the plaintiff/lessor indicated that the defendant was being let into possession provided:

(a) The rent is paid from the date you take it over and

(b) you give an undertaking to vacate when called upon, if no agreement is entered into.

The latter clause indicates that the lessor treated the correspondence up to that point as negotiations and a formal agreement had not been reached. As Lord Greene M.R. put it at page 66:

> The crucial words are those which refer to the formal agreement ... Even if any doubt could remain as to the true construction of that phrase, the matter is entirely settled, in my judgment, by the words referring to the undertaking to vacate when called upon if no agreement is entered into.

The appellants were let into possession unconditionally and presumably in terms agreed to contained in the letter of 10thJuly, 1991.

Secondly, the appellants in this case spent a considerable sum in refurbishing the premises to make it suitable for their operation. This was done with the knowledge and assent of the respondents and in keeping with the conditions agreed to in correspondence. In this regard the appellants acted to their detriment, This feature is absent from the *Spottiswoode* case.

Thirdly, two weeks after the defendants in the *Spottiswoode* case were let into possession the plaintiff wrote terminating the arrangements and sought to recover possession. In the instant case it was 9 - 10 months after the plaintiff had been let into possession and acted to their detriment that the defendants wrote indicating that no agreement had been reached. The defendants also informed the plaintiff of a decision taken by the Board to sell the premises and the unacceptability of the offer made by the plaintiff in exercise of the option given. The option was a term of the agreement for lease. This is contained in the letter of the respondents' Attorneys-at-law dated 9th June, 1992.

There was "continuing" dialogue between the parties on the sale of the premises. This is evidenced by a letter written by Mr. Wilson the General Manager of the respondents to the plaintiffs. This letter is given for its full effect:

> November 24, 1992
>
> Mr. Bindley Sangster
> Singer Sewing Machine Company
> 52 Grenada Crescent
> Kingston 5
>
> Sir,
>
> I write as a follow up to our recent telephone discussion in which you mentioned the continuing interest of Singer in purchasing the Credit Union's property at #8 Sam Sharpe Square.
>
> As a start to further discussions, I have to advise that we have a written offer for purchase by a Real Estate Agency on behalf of its clients, the price offered is $9 million.
>
> The Board has not positively responded to the offer despite the fact that a substantial deposit by way of a cheque was placed with our Attorneys.
>
> It is the wish of the Board to dialogue with you on your intent to purchase and, to reach a successful conclusion with you on this matter.
>
> An early reply from you would be appreciated.
>
> Yours sincerely
>
> Mr. Middleton Wilson
> General Manager

This letter was followed by Telefax transmission:

> Date: 26.1.93
>
> To: Mr. Bindley Sangster
> Singer Sewing Machine
>
> From: Middleton Wilson
>
> Comments: Further to our personal discussions on purchase # 8 Sam Shape Square my board would wish for a serious meeting on this matter with you and others from Singer down here at a mutually convenient time. Regards.

Negotiations broke down and thereafter notices to quit were served by the respondents the first dated 22nd April, 1993 and the second 3rd May, 1993.

The appellants are a well established international firm with business locations in Jamaica and the respondent company is a credit union well established in the western section of Jamaica.

The correspondence disclose a desire on the part of the respondents to be associated with the appellants in business as lessor/lessee and ultimately as vendor/purchaser. They failed to concur as vendor/purchaser. When they entered into the relationship of landlord/tenant it was by an agreement which had all the essential terms of an agreement for a lease supported by consideration. The appellants as lessees paid the rent reserved, entered into possession and performed acts of part performance. In the process they indulged in expending a considerable sum thus acting to their detriment. In my judgment in Law and in Equity the appellants are entitled to the judgment of the court.

It would be remiss of me to conclude without thanking counsel in the case for the assistance they gave by their industry and the clarity of their submissions. The fact that reference is not made to the many authorities they used in support of their arguments is no reflection on the value of their presentation. Each case must be judged on its own peculiar facts and it would be a Herculean task to find a case with facts identical to the one under review.

I would allow the appeal and set aside the judgment of the Court below. I would grant the declaration sought by the appellants with the term of years commencing on 1st September 1991. The restraining order I would also grant.

The appellants are to have their costs here and below to be taxed if not agreed.

PATTERSON, J.A.: The appellant. Singer Machine Company ("Singer") is an overseas company which is registered under the Companies Act and has been carrying on business throughout Jamaica for many years. Singer commenced an action against the respondents. Montego Bay Co-operative Credit Union Limited ("the Credit Union") by originating summons seeking the following relief and order

> (i) A Declaration that there exists between the Plaintiff and the Defendant a Lease for a duration of ten (10) yeas evidenced *inter alia* by acts of part performance and in letters dated the 10th July 1991 from the Defendant to the Plaintiff, the 10th October 1993 from the Plaintiff to the Defendant and Lease dated the 1st October 1991 and exhibit to the Affidavit of Kenry Jackson sworn to on the 24th June 1993 at 'KJ4' in respect of premises known as 8 Sam Shape Square. St. James and registered at Volume 1234 Folio 21 of the Register Book of Titles.
>
> (ii) An injunction restraining the Defendants by themselves or their servants or agents from taking any steps to forcibly eject the Plaintiff from occupation of premises known as

8 Sam Shape Square, St. James and registered at Volume 1234 Folio 21 of the Register Book of Titles.

(iii) Such further and other relief as this Honourable Court deems fit.

The summons was supported by evidence contained in an affidavit sworn by Kenry Jackson, the Operations Manager of Singer. It disclosed that the Credit Union is the registered proprietor of premises known as 8 Sam Shape Square, Montego Bay and registered at Volume 1234 Folio 21 of the Register Book of Titles. Singer entered into "initial discussions concerning the rental of the premises" and on May 24. 1991, the stage that the discussions had reached is recorded in a letter from Singer to the Credit Union. That letter reads as follows:

Mr. Middleton Wilson
General Manager

Montego Co-Operative Credit Union Ltd
Sam Sharpe Square
Montego Boy
St. James

Dear Middleton:

It was a pleasure meeting with you on Tuesday May 21, 1991 to view the premises in Sam Shape Square which is available for rental. The location seems to be suitable for our present needs and we are interested in pursueing (sic) discussions towards leasing these premises and set out for the record our understanding of the points discussed at, our meeting.

1. Approximate size of rental area 5,000 sq. ft. (2.500 sq.ft. on each floor).
2. There is a section upstairs which will be totally separated from the rental area for use by your organisation. This will have its own entrance from the street.
3. We would be interested in a 10 year lease with option to renew. You indicated that annual escalation would be not more than 10%.
4. Initial rental figure discussed was $100.00 per sq. ft. per annum downstairs with upstairs to be negotiated at a figure somewhere between $50.00 and $80.00 per sq. ft.
5. We are interested in the small shop at the rear of the premises but not in the area upstairs that unit.
6. You indicated that you will be refurbishing the premises including:
   a) Downstairs to Include wash rooms
   b) Steps to upstairs
   c) Roof
   d) Upstairs windows
   e) Air conditioning relocation
   f) Some aspects of upstairs.
7. You have agreed to provide details of your present refurbishing plans and the floor plan of the rental area under consideration.
8. We would be doing some refurbishing of the premises to suit our particular requirements. The extent of the refurbishing which we would undertake would depend on your present refurbishing operation and very definately (sic) on the rental figure finally agreed for the upstairs area.

We look forward to receiving the information promised so that we can intelligently submit a proposal to your Board regarding an equitable rental arrangement.

With very best wishes.

Yours truly
Bindley Sangster
Operations Manager.

This letter makes It clear that the parties had preliminary discussions centred around Singer's interest "in pursueing (sic) discussions towards leasing" the premises. That is quite understandable and I have no doubt that it must have been in the contemplation of the Credit Union that Singer would require security of tenure to continue their business operations.

There is evidence that subsequent discussions took place between the parties. However, up to the 10th June, 1991, those discussions may not have crystallized into a binding agreement although they must have been quite near. This is what the Credit Union wrote to Singer:

Your proposal is way out front - Let us discuss details of refurbishing over lunch down here at your convenience.

That is followed by a similar letter on the 26th June, 1991,which reads:

I have been out of office when you called. New elections have brought new Board into prominence and they will have to be appraised of the situation.

There is no evidence as to what exactly the parties discussed between May 21 and July 10, but Singer placed great reliance on a letter from the Credit Union bearing date July 10. 1991, to establish that the parties had arrived at a binding agreement for a lease. It is necessary to quote that letter:

Singer Sewing Co.
52-60 Grenada Cres.
Kingston 5

Attention: Mr. Bindley Sangster

Dear Sirs,

The Board has agreed to rent to you, 8 Sam Shape Square based on your conditions agreed with David Barnwell recently, that you provide at your expense:

1. Split air conditioning units (7),
2. Partition upstairs - this includes cost of removing present partitioning.
3. Painting for upstairs,
4. Stairway and stairwell,
5. Extra lighting,
6. Carpeting.

The Board's conditions are as follows:

a. Rental-$80 per sq.ft.
b. Rental increase 5-10% per annum for first two (2) years and 15% per annum in third and succeeding years.
c. Tenure for ten (10) years renewable,
d. Option to purchase.

e. Total area including bathrooms, storage area, passageways etc. 5600 sq. ft.

f. Details to be worked out by lawyers in binding contract.

Co-operatively yours,

MONTEGO CO-OP. CREDIT UNION LTD.

MIDDLETON WILSON
GENERAL MANAGER.

It should be noticed that the preliminary discussions took place between Bindley Sangster on behalf of Singer and Middleton Wilson on behalf of the Credit Union, but it seems that one David Barnwell also entered in the discussions on behalf of Singer.

Singer understood that letter to be an offer to lease. Paragraph 6 of Mr. Jackson's affidavit reads as follows:

> 6. By letter dated the 10th July 1991, the Defendant offered to lease to the Plaintiff premises known as 8 Sam Shape Square for a period of ten years upon the terms and conditions agreed between the parties herein and set out in the said letter.

The Credit Union was of the same view. This is what Mr. Wilson's affidavit states in part:

> 2. By letter dated the 24th day of May 1991 the Plaintiff wrote to the Defendant disclosing an interest to pursue discussions towards Its obtaining a Lease of premises situate at 8 Sharpe Square, Montego Bay and by letter dated the 10th day of July, 1991 the Defendant advised the Plaintiff that the Defendant was prepared to rent the premises to the Plaintiff on certain conditions as set out In the said letter and particularly contained a condition that the details were to be worked out by the Lawyers in a binding contract.

Reid, J. considered the construction to be placed on the letter of the 10th July, 1991, and In particular the words at "f" therein which read:

f. Details to be worked out by lawyers in binding contract.

He went on to consider other further correspondence between the parties, as well as other evidence, and concluded that a lease agreement did not exist between the parties.

The first ground of appeal argued by Mr. Goffe, Q.C. was this:

4. The Learned Judge should have held:

a. that as a matter of law the only document that fell to be construed was the letter of July 10, 1991 from the Defendant to the Plaintiff.

b. that as a matter of law, on a proper construction of that letter, the Defendant bound itself to give *a* lease of the premises to the Plaintiff and the Plaintiff bound itself to take that lease, the essential terms of which were set out in that letter and that the words 'details to be worked out by lawyers. in *a* binding contract' meant only that such details as were reasonably incidental to the lease were to be contained In a document to be settled by the parties' lawyers.

He submitted that the words "details to be worked out by lawyers in a binding contract" are quite different in meaning to cases in which the stipulation "subject to contract" is interpreted. He contended that the letter itself is the only document which falls to be construed, and that it created the contract and sets out its essential terms. He argued strongly that once the parties have come to a binding agreement which is reflected in a document, then that document must be construed without reference to later documents.

The letter of the 10th July must be looked at closely. It is quite clear that the discussions between Bindley Sangster and David Barnwell with Middleton Wilson did not bind the contracting parties, Singer and the Credit Union. Mr. Wilson would report to the Board of the Credit Union for them to agree whether or not to grant a lease and so on what terms. It seems to me that the discussions between Mr. Wilson and Mr. Barnwell, must have taken place before 10th July, and that they were centred around renovations and alterations that would be necessary to put the section of the building to be leased In a condition suitable for the purpose it was required. This is evidenced by what Mr. Jackson said in his affidavit at paragraph 7:

> 7. The agreed terms and conditions were as follows. Firstly, that the Plaintiff would carry out the following repairs and improvements:
>
> 1. Installation of seven (7) split air conditioning units.
> 2. Installation of partition upstairs - this includes cost of removing present partitioning.
> 3. Painting for upstairs.
> 4. Stairway and stairwell.
> 5. Extra lighting.
> 6. Carpeting.
>
> The Plaintiff carried out these works as agreed spending a sum of approximately $800,000. This sum is fully particularized in paragraph 36.

The letter of July 10, in my view, must be construed as an offer by the Credit Union to Singer for the lease of a part of premises at S Sam Sharpe Square, Montego Bay. It sets out the conditions and general terms that the Credit Union had agreed to offer, but stopped short of naming a commencement date. What it lists as condition "f ("details to be worked out by lawyers in binding contract") can only mean that if Singer accepted the offer, to lease the premises, a formal lease would be necessary to include the basic terms offered and accepted and of course, the commencement date, the usual covenants, and any other covenants that may be agreed.

Undoubtedly, an unconditional agreement for a lease which sets out the terms agreed upon between the parties is as good as a lease. Where it is alleged that there is a written contract, then there must be evidence of an offer and an unconditional acceptance of that very offer. A contract for a lease must be evidenced by a memorandum or note in writing signed by the person to be charged in order to satisfy the requirements of the Statute of Frauds. The memorandum or note in writing must contain the names or descriptions of the lessor and lessee, the property to be leased, the consideration or rent reserved, the commencement date and the duration of the lease.

If the memorandum or note omits to specify any of these necessary terms, the negotiations cannot be said to be complete, and it cannot qualify as a concluded contract. If, as in this case, the commencement date of the term is omitted, there can be no memorandum or note in writing sufficient to satisfy the requirement of the Statute of Frauds, unless the date can be garnered from the agreement as a whole. This issue was considered in *Harvey v. Pratt* [1965] *2* All E.R. 786. Lord Denning. M.R. put it this way (at p. 787):

> It has been settled law for all my time that, in order to have a valid agreement for *a* lease, it is essential that It should appear, either in express terms or by reference to some willing which would make it certain or by reasonable inference from the language used, on what

day the term is to commence. As Lush, L.J., said in *Marshall v. Berridge* (1881-85) All ES. Rep. 908 at p.912:

> There must be a certain beginning and a certain ending. otherwise it is not a perfect lease, and a contract must, in order to satisfy the Statute of Frauds, contain this reference.

I am fortified in my views that the parties had not completed negotiations by the evidence contained in paragraph 9 of the affidavit of Mr. Jackson, and the letter exhibited dated August 2, 1991. This is how the letter reads:

August 02, 1991

Mr. Bindley Sangster
Singer Sewing Co.
52-60 Grenada Cres.
Kingston

Dear Sir,

Re: Rental of No.8 Sam Shame Square

Further to our fax of July 10, 1991, the Board has agreed to lease 5,500 sq. ft. space of No.8 Sam Sharpe Square to you and invites you to meet with us on Thursday August 8, 1991 to look at

(a) The improved physical arrangement.

(b) vet Draft Contract.

Please respond to this telex indicating your acceptance.

Co-operatively yours,
MONTEGO CO-OP CREDIT UNION LTD.
M. Wilson
GENERAL MANAGER.

It is noteworthy that the area which the Credit Union was now offering for lease was less than what was stated in the letter of July 10. No doubt the "improved physical arrangement" referred to in the letter was responsible for the reduction in the available area.

On August 7, the Credit Union sent another message to Singer which reads:

A cheque for $100,000.00 to cover two (2) months security deposit and one (1) month's rental would be appreciated. This is negotiable.

You can have immediate possession.

Suggest you walk building on Thursday to see state of repairs and how you can integrate partition etc. with the on-going repairs.

These letters contain compelling bits of evidence which clearly show that the letter of July 10 did not create a present demise of the premises, not only because a commencement date had not been agreed, but also because the area had not been finally fixed. The Credit Union was not in a position to offer "immediate possession" until they had effected repairs to the building.

But even then, Singer had not accepted the offer in the terms of the Credit Union. This is what the operations manager of Singer wrote to the Credit Union on August 16, 1991:

August 16, 1991

Mr. Middleton Wilson
General Manager
Montego Co-operative Credit Union Ltd.
Sam Shape Square, MO BAY

Dear Middleton:

Further to your letter of August 2, 1991 and our subsequent meeting in Mo Bay and Kingston, we are pleased to confirm as follows:

1. We are working towards a September 1, 1991 possession date subject to:
   a) Your Contractor completing his work
   b) The finalizing of lease between our respective Attorneys
2. As token of good faith and subject to the conditions in (1) above, we enclose a cheque in the amount of $33,000.00 which approximates one month's rental.

With best wishes.

Yours truly

Bindley Sangster
Operations Manager

In my view, it is quite clear that the parties were still in the process of negotiations, but with a view of arriving at a valid agreement for a lease. There is a distinction between an agreement for a lease and a lease, and the two should not be confused. An agreement for a lease arises when two parties bind themselves, one to grant and the other to accept a lease of land. A lease, on the other hand, may be drawn up in proper terms which creates a demise or grant of land by one person (the lessor) to another (the lessee) for an interest less than a freehold and less than that of the grantor, whose interest will be in the reversion. It was within the contemplation of the parties in this case that whenever they arrived at a binding agreement for a lease, a formal lease, embodying the agreed terms and any other covenants and conditions which may be necessary to fulfill the wishes of the parties, would be drawn up and approved by their respective attorneys-at-law.

The various written correspondence between the parties did not record, in my view, all the discussions that took place at the numerous meetings and the agreements arrived at up to this time. But, undoubtedly, they contemplated arriving at an agreement for a lease, and the only essential term that remained to be agreed was the commencement date of the lease. The Credit Union, by letter dated August 7, 1991, offered immediate possession, and Singer countered with a possible date of September 1, 1991. It seems that certain works to the premises had to be completed by the Credit Union in order that Singer could then carry out their preparations for the commencement of business. Singer sent the Credit Union a cheque for $33,000 which they said "approximates one month's rental." The month referred to must be September, 1991. The Credit Union accepted it as rental from the 1st September and, in my judgment, by their conduct, they accepted arid agreed to the commencement date of the lease as September 1, 1991. As a consequence, all the terms necessary to create a binding agreement for a lease had been arrived at and agreed to by the parties, and accordingly the Credit Union was bound to grant and Singer was bound to accept a lease of the premises.

It was contended by the appellants that the commencement date of the lease should be the 1st day of October, 1991, but that is not borne out by the evidence. Singer had

contractors doing work to prepare for their occupancy during September, and, as I have already pointed out, the month's rental was paid in August, there was nothing then to indicate that the lease should commence on 1st October.

Miss Cummings, for the respondent, contended throughout that the parties at no time arrived at a binding agreement for a lease. She submitted that the letters all pointed to negotiations which were taking place between the parties, and that it was within their contemplation that a formal lease would be necessary to bind them. She buttressed her submission on a letter from Singer to the Credit Union dated September 9, 1991,which reads as follows:

> September 9 1991
>
> Montego Co-op Credit Union limited
> 5 Sam Sharpe Square
> Montego Bay
>
> *Attention: Mr. Middleton Wilson*
>
> Dear Sir
>
> We have received formal approval from our regional office and there should now be no obstacles to our moving towards conclusion of a lease agreement. Please regard this communication and our letter of even date as our binding commitment to, lease the premises subject to the conclusion of a mutually satisfactory lease agreement.
>
> Yours truly
>
> SINGER SEWING MACHINE COMPANY
>
> David S Barnwell
> Marketing Manager
> cc Mr S Wishart
> Mr B Sangster
> Mr D Brown.

This letter, so she submitted, clearly shows that the negotiating team for Singer had no approval to enter into a binding agreement before then, and that a mutually satisfactory lease must be agreed to bind the parties. But the letter did not state when the "formal approval' was received. In any event it seems to me that the "formal approval" must be referable to the agreement for a lease arrived at between the parties including the commencement date of September 1, and whatever may have been done without authority was ratified by Singer and related back to the acceptance of the offer by the Credit Union and the final agreement. To my mind, it was always the intention of the parties to have their respective attorneys-at-law embody their agreement for the lease in a formal document, and the words "subject to the conclusion of a mutually satisfactory lease agreement" must be viewed in that light. That is all that should be read into those words, as there is nothing there to displace the binding agreement which I find materialized in August,1991. The conduct of the parties supports the views that I have expressed. The Credit Union, from the very outset of the negotiations, discussed areas of the premises that would be refurbished by the Credit Union and those by Singer. The letter of July 10 sets out what Singer had agreed to do at their expense to make the premises suitable for their purposes. Singer completed the refurbishing on the agreed terms at a cost of approximately $800,000. The Credit Union raised no objection whatsoever, even though no formal lease had been entered into. Their acquiescence can only be explained by the fact that a binding agreement for a lease had been arrived at. Singer was let into possession on or about

September 1, without the formal lease having been executed. In fact, it was not until October 7 that the Credit Union expressed any concern about the non-execution of the formal lease. This is what they wrote to Singer:

> October 07, 1991
>
> Mr. Bindley Sangster
> Singer Sewing Machine Company
> 52-60 Grenada Crescent
> Kingston
>
> Dear Sir,
>
> *Re: Rental - No. 8 Sam Sharpe Square*
>
> The Board of Directors of Montego Co-operative Credit Union Limited are concerned about the following:
>
> (1) Original Lease Agreement not yet received for perusal
>
> (2) Rent for October not yet received, although September's rental was prepaid.
>
> (3) Security Deposit not yet received, although you have contracted out work in the building.
>
> Your earliest compliance with our requests above is necessary as there is strong lobby for sale of building, if your exercise of lease is not soon.
>
> Co-operatively yours.
> MONTEGO CO.OPERATIVE CREDIT UNION LIMITED
> M. WILSON
> GENERAL MANAGER.

It was sometime after that letter was written that a draft of the formal lease was sent by Singer to the Credit Union for approval. But that lease was not executed by the parties, nor was one sent by the Credit Union to Singer. The parties agree that a formal lease was never executed, and the respondents contend that in those circumstances the entry of Singer "would by operation of law be only a monthly tenancy, based on the fact that they are in possession of the premises and are paying rent monthly." I do not agree with the respondents. I have already pointed out the distinction between an agreement for a lease and the lease itself. The appellants entered into possession with the consent of the respondents and have been paying the agreed rent, including the increases, which is consistent with the agreement contended for by Singer. It is true that unless an agreement for a lease is evidenced by a memorandum or note in writing sufficient to satisfy the requirements of the Statute of Fraud, there will be no remedy in a court of law if the agreement is breached. However, an oral agreement for a lease is not without remedy as a court of equity will decree specific performance of the agreement if the plaintiff establishes that (1) there have been sufficient acts of part performance exclusively referable to the agreement contended for and (2) the acts are not merely ancillary or introductory to the agreement, and the acts are such as would render it a fraud were the defendant to rely on the statutory provision. It seems to me that in the instant case, there are sufficient acts of part performance that would render the agreement contended for by the plaintiff enforceable in equity by an order for specific performance. But Miss Cummings argued otherwise. She relied on the judgment of Lord Greene. M.R. in *Spottiswoode, Ballantyne & Co. Ltd. v. Doreen Appliances Ltd. and G. Barclay (London) Ltd.* [1942] 2 All ER. 65. The headnote reads as follows:

An offer by the defendants to take a lease of premises was accepted on behalf of the plaintiffs subject, *inter alia*, 'to the terms of a formal lease to be prepared by their solicitors.' The defendants were let into possession and a draft of the agreement was sent to them. A fortnight later the plaintiffs wrote to the defendants indicating that they were not willing to proceed with the agreement. They brought an action to recover possession, and the defendants counter-claimed for specific performance of an alleged agreement to grant them a lease:

HELD: upon the proper construction of the offer, there was no binding contract until a formal agreement had been executed. Since this had not been done, the defendants are not entitled to specific performance.

I think the point that counsel was making is contained in the headnote at "Held". However, Goddard, L.J. expressed the view that "in many cases it is not helpful to try to construe the words of one contract by reference to another contract" and I respectfully agree with that view. The construction placed on the phrase used in that case can be readily seen, and the inclusion of the undertaking to vacate when called upon if no agreement is entered into puts the matter beyond all doubt. The phrases used in the instant case, when viewed in the context of the way in which the negotiations proceeded are quite different in meaning to that used in the *Spottiswoode* case.

A number of cases were relied on by both counsel for the parties, but since the phrases used were interpreted to a large extent on the facts of each case, I have refrained from referring to them, with deference to the learning therein. The phrase in the instant case is not a "subject to contract" case, but must be interpreted in the context that it was used. The learned judge in the court below was also bombarded with authorities, but in my view, the construction that he has placed on the phrase has led him into error. I would allow the appeal and set aside the judgment in the court below. I would grant the order sought in this court by the appellants with an amendment deleting the word "October" and substituting therefor "September".

RATTRAY, P.: The appeal is allowed and the judgment of the Court below set aside. Judgment is entered for the plaintiff/appellant Singer Sewing Machine Company in the following terms:

(1) A Declaration that there exists between the Plaintiff and the Defendant a Lease for duration of ten (10) years commencing on the 1st September 1991.

(2) An injunction restraining the Defendants by themselves or their servants or agents from taking any steps to forcibly eject the Plaintiff from occupation of premises known as 8 Sam Sharpe Square, St. James and registered at Volume 1234 Folio 21 of the Register Book of Titles during the existence of the Lease.

(3) The plaintiff/appellant is awarded the costs of the appeal as well as the costs of the Originating Summons in the Court below.

R. v. SIMON HOYTE

[COURT OF APPEAL (Rattray, P., Forte and Patterson, JJ.A.) March 6 and June 2, 1997]

Criminal Law - Evidence - Rape - Young witnesses - Whether capable of corroborating each other - Special warning to jury - Whether warning given sufficient.

Criminal Law - Rape - Consent - Absence of - Female under age of consent - Burden of proof on prosecution.

The appellant allegedly locked three young girls in a room in his house and had sexual intercourse with each of them. In his defence, he denied having had anything to do with any of the complainants and alleged there was "bad blood" between himself and two of the girls' families. The appellant was convicted on all three counts and was sentenced to twenty years imprisonment on each, to run concurrently. He appealed contending that the judge should have given the jury a special warning with respect to the tender age of the complainants.

Held: (i) a judge must give the jury a special warning in sexual cases in which the complainant is of tender years, that the age of the complainant is a circumstance which created risk of unreliability and inaccuracy by reason of over-imaginativeness and susceptibility to influence by third persons and it was dangerous to convict on her testimony for that reason; in this case the directions given the jury were sufficient to warn them of the necessary carefulness with which they should assess the evidence of the complainants and the evidence of each girl was capable of corroborating the others;

(ii) the fact that a girl under 16 years consented to sexual intercourse is not a defence to an accused who would nevertheless be guilty of carnal abuse; where the charge is rape, the prosecution has the burden of proving the lack of consent, if it fails, then the accused would be liable to a conviction for carnal abuse.

Appeal dismissed, conviction and sentence affirmed.

Cases referred to:

(1) *R. v. Britton* (1996) 33 J.L.R. 307

(2) *Abraham (Nelson) v. R.* (1992) 43 W.I.R. 142

Appeal from convictions of three counts of rape in the Home Circuit Court.

L. Jack Hines for the appellant.

Kent Pantry, Q.C., Deputy Director of Public Prosecution, *Lisa Palmer* and *Marlene Malahoo* for the Crown.

FORTE, J.A.: This appeal was heard by us on the 6th March, 1997 when we dismissed it, and affirmed the convictions and sentences, and promised to put our reasons in writing.

The appellant was, on the 27th May, 1996 tried and convicted in the Home Circuit Court on three counts each alleging the offence of rape. He was sentenced on each count to twenty years imprisonment, to run concurrently.

The victims in all the counts were children of tender years. The offences were all committed on the same occasion, when the appellant allegedly locked all three young