JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 47/85

BEFORE: The Hon. Mr. Justice Rowe - President
The Hon. Mr. Justice Carey, J.A.
The Hon. Mr. Justice White, J.A.

BETWEEN	CHARLES ERNEST SMATT		PLAINTIFF/APPELLANT
AND	SIR JACK LYONS	1ST	DEFENDANT/RESPONDENT
AND	KENSINGTON INVESTMENTS LIMITED	2ND	DEFENDANT/RESPONDENT
AND	DAVID STEPHENS LYONS (Trustee for Kensington Investments Limited)	3RD	DEFENDANT/RESPONDENT

Richard Mahfood, Q.C., & Dr. L.G. Barnett for Appellant

Harvey daCosta, Q.C., David Muirhead Q.C., & Donald Scharschmidt for Respondents

June 1, 2, 3, 4, 5, 8 & December 18, 1987

ROWE: P.

A regrettable feature of the Jamaican life in 1974 was the volume of adverse publicity which the country received from inside and outside the nation, from citizens and foreigners alike. This publicity had a dramatic effect upon property values and ever so many of the real property cases litigated these last few years had their genesis in the 1974 era.

Sir John Lyons and members of his family had happily vacationed in Jamaica, summer and winter, for upwards of a decade before 1974 and for the greater part of that time they lived in a luxurious villa "Blundel" but more commonly known as the "Glass House" at Mammee Bay, St. Ann, Jamaica, owned by David Lyons as Trustee for Kensington Investments Limited, a Cayman Company. An attempt was made by Sir Jack, undoubtedly acting as agent for the other two respondents herein, to

sell the "Glass House" but the sale was aborted at an advanced stage. There followed a series of written offers and counter proposals emanating with the appellant and enthusiastically embraced by Sir Jack, in September and October 1974, for the sale and purchase of this house.

Two things became clear in this correspondence. Firstly, Sir Jack was insisting on payments being made on an external basis to the owning company in the Cayman Islands, and secondly that the appellant was advising Sir Jack to sell as soon as possible as otherwise he stood to lose his entire investment in Jamaica.

On November 14, 1974 Sir Jack cabled the appellant to say:

> "Confirm subject to Exchange Control Sale on House Jamaica Dollars Eighty Thousand immediate deposit ten percent to Hugh Hart completion within 60 days stop All fees etc to be shared equally stop This offer is for immediate acceptance and I am phoning Hart Friday stop Regards Jack Lyons"

The appellant responded immediately by sending to Hugh Hart, then a practising attorney, the sum of $8,000 as deposit on the Mammee Bay Property and the amount was acknowledged by receipt dated November 18, 1974. Hart on November 18, 1974 prepared and forwarded to the Bank of Jamaica a draft Agreement for Sale with a request for Exchange Control approval. Both the draft Agreement for Sale and the unsigned covering letter referred to the transferor as David Stephen Lyons as Trustee for Kensington Investments Limited, while the draft Agreement for Sale in detailing the make-up of the purchase price recited that:

> "The said total purchase price of J$80,000.00 shall be payable in Cayman Dollars at the rate of exchange of J$1.00 being equivalent to U.S. $1.10."

Bank of Jamaica approval was signified to Clinton Hart & Company of which Mr. Hugh Hart was senior partner, on January 7, 1975. This letter of approval requested a Statement of Accounts showing the amount of funds in hand for Mr. Lyons so that "we may consider your application for the remittance of proceeds to him."

Completion of the contract did not take place in January 1975. The appellant said that he made financial arrangements through contacts with a number of banks and was willing and able to complete the purchase but that Sir Jack Lyons procrastinated by telling him firstly, through Hugh Hart, that possession would be delayed until Mr. Edward Heath, a prominent English politician, had had the use of the house, secondly, that his family had then expressed to him a renewed desire to use the house, thirdly, that he Sir Jack, had been informed by his legal adviser in England that he did not have to honour the agreement as he did not own the house and lastly that in any event the price was too low.

Between February 4, and April 11, 1975 correspondence passed between the legal advisers for the appellant and for Sir Jack Lyons the import of which was the insistence by the appellant on the one hand that he had entered into a binding contract with the respondents and on the other hand a denial of this claim by the respondents on the twin grounds that:

(a) Sir Jack was not the owner of the property and the owners had decided that they did not wish to proceed with the proposed sale to the appellant and

(b) that no binding agreement had been reached between Sir Jack and the appellant.

Action was commenced by suit filed in the Supreme Court by the appellant seeking specific performance, alternatively damages and alternatively rescission of the contract. The statement of claim is unremarkable. In addition the appellant filed a Caveat upon the Title. The Amended Defence however, raised a number of specific issues viz.,

(a) That the alleged contract was subject to a condition precedent that Exchange Control permission would be obtained for the purchase price to be remitted to the Cayman Islands at the rate of J$1.00 to U.S. $1.10 and that that condition had not been fulfilled;

(b) that the respondent Sir Jack Lyons was not the authorised agent of the 2nd and 3rd respondents to effect sale of the property;

(c) that the cable of November 14, 1974 did not confirm the terms of the agreement alleged by the appellant;

(d) that Hugh Hart was acting as agent of the 1st respondent only and not on behalf of the 2nd and 3rd respondents;

(e) that the deposit referred to in the cable was not paid to any of the respondents;

(f) that the letter of application for Bank of Jamaica Exchange Control approval was defective in that it omitted the pegging provision;

(g) that Bank of Jamaica approval had not been given to remit the full purchase price to the Cayman Islands;

(h) that the appellant had been offered specific performance in April 1976, had failed and or neglected to accept the transfer and had thereby repudiated the contract, which repudiation the respondents had accepted;

(i) that the appellant was not willing or able to perform the contract;

(j) that there was no sufficient note or memorandum of the alleged contract to satisfy the provisions of section 4 of the Statute of Frauds 1677.

There was a counterclaim by the second and third respondents for damages suffered due to the alleged unauthorised registration of the Caveat against the Title.

At trial the appellant wavered in his evidence as to the time when he first became aware that Sir Jack Lyons was stipulating for the purchase price to be paid in United States currency in the Cayman Islands. He said the pegging provision was an "incidental" introduced by Hart after the cable of November 14, and that he agreed to that term. Sir Jack Lyons gave evidence that not only had he discussed payment in foreign currency but he had got an assurance from the appellant that that would not be a problem as the appellant's intended partner was a wealthy American actor. There was no finding by the trial judge as to when the pegging provision was first introduced into the negotiations but it appears from the evidence that the appellant and Sir Jack Lyons both knew that the rate of exchange extant in Jamaica in November 1974 was J$1.00 to U.S. $1.10 and that that conversion rate did not then present a problem to either of them. With the devaluation of the Jamaican dollar, however, it has become important to determine whether the purchase price was a fixed sum in Jamaican dollars, viz J$80,000.00 and not a cent more or the Jamaican dollar equivalent of U.S. $88,000.00 whatever that sum in Jamaican dollars might be at the time of payment.

The learned trial judge dismissed the appellant's claims and entered judgment for the respondents on the claim and counterclaim but did not order any damages. In finding for the respondents the trial judge found:

(a) that there was a valid contract entered between the appellant and the respondents;

(b) that Sir Jack Lyons acted and held himself out to the appellant as a person having the right and authority to contract with the appellant for the sale and purchase of the property;

(c) that Sir Jack Lyons was selling with the knowledge and approval of the owners the second and third respondents;

(d) that the obtaining of Bank of Jamaica Exchange Control approval was part of the contract, that it was a condition precedent and that it was the appellant's duty, obligation and undertaking under the agreement to seek Bank of Jamaica approval;

(e) that time for completion had passed when the Bank of Jamaica wrote on January 7, 1975 giving permission for registration and seeking further information;

(f) that the appellant was ready and willing to complete the contract but he did not show that he was able to pay and so to be in a position to complete at any time during the life of the contract;

(g) that the 1st respondent repudiated the contract before completion;

(h) that the appellant in accepting the return of his deposit had accepted the 1st respondent's repudiation and the contract was then mutually terminated;

(i) that the appellant did not have the money to make the deposit on an offer made in 1976 on the same terms as in November 1974 for the sale of the said property and consequently he could not accept that offer;

(j) that in any event the appellant did not show that he had suffered any damages.

The appellant has sought an order of this Court to set aside the judgment in the court below and to order specific performance of the agreement for sale and/or damages for breach of contract subject to the obtaining of foreign exchange approval from the Bank of Jamaica for the remittance to the Vendor of the sum of U.S. $88,000.00 less the vendor's legal costs and expenses. He has done so on four separate grounds. A respondent's Notice was filed in October 1985 and amended at the commencement of the appeal, seeking to affirm the trial judge's decision on two grounds - firstly, that on the evidence the trial judge ought to have found that there was no contract between the appellant and Sir Jack Lyons and secondly that additionally or alternatively there was no contract between the appellant and the 2nd and 3rd respondents as the 1st respondent had no authority to bind them and in any event, if there was a contract it was not enforceable as there was no memorandum to satisfy the Statute of Frauds.

The first question which arises for determination is whether there was a concluded contract between the appellant and the first respondent Sir Jack Lyons and in my opinion this all turns upon whether there was an agreement as to the purchase price. It was argued for the first respondent that at all times the appellant was putting forward in his Statement of Claim and in his evidence a purchase price of J$80,000.00 while the first respondent was saying, and the Court so found, that the purchase price was J$80,000.00 pegged to the U.S. at J$1.00 to U.S. $1.10. If therefore the appellant was only entitled to specific performance of the exact contract which he pleaded, how then could he in his amended Grounds of Appeal be praying for specific performance of a contract which he did not plead? On a perusal of the pleadings it does not appear that the pegging of the Jamaican dollar to the U.S. dollar was a disputed issue. In paragraph 3 (iii) of the Statement of Claim the appellant pleaded that:

> "On or about the 15th day of November, 1974, Mr. Hugh Hart, acting on the instructions and or on behalf of the Defendants orally asked the plaintiff if he could agree to certain incidental matters in connection with the sale, to which the Plaintiff agreed. These incidental matters were:
>
> (i) .....
>
> (ii) .....
>
> (iii) the purchase price of Eighty Thousand Dollars to be payable in Cayman Dollars at the rate of exchange of J$1.00 to U.S. $1.10, ..."

This pleading was not admitted by the respondents but what they said in paragraph 1 (2) of the Amended Defence is instructive:

> "Item (iii) in paragraph 3 in the Statement of Claim is not admitted; the purchase price was to be Eighty Thousand Jamaican Dollars 'pegged' to the official rate of exchange between the Jamaican Dollar and the United States Dollar on the footing that the rate of exchange in mid-November, 1974 was Jamaica $1 to United States $1.10 The Defendant will say that this provision means and was intended by the parties to mean that as the Jamaican dollar appreciated or depreciated against the United States dollar so would the price expressed in Jamaican dollars be reduced or increased at the time of the completion of the alleged contract."

A fair reading of the appellant's oral evidence is that he said he understood his financial obligation was to pay J$80,000.00 and no more as that was the figure mentioned in the cable of November 14, 1974. He said too, that Mr. Hugh Hart did not explain to him what "pegging" meant and did not tell him that the "pegging" provision was being included to protect the respondents' interest against a fall in the Jamaican dollar. According to the appellants as the exchange rate then stood at J$1.00 to US. $1.10, he was perfectly willing to accede to the pegging provision. Sir Jack Lyons was emphatic in his evidence that prior to the cable, in face to face conversation, and on the telephone, he had impressed upon the appellant the necessity to have the purchase price in U.S. dollars payable in the Cayman Islands. What separated these parties was the quantum of the purchase price. Smatt was saying I promise to pay J$80,000.00. Sir Jack contended - I am to be paid U.S. $88,000.00. Clearly therefore the issue joined was as to the meaning of the pegging provision and what needs to be resolved is what effect, if any, this issue would have upon the formation of the contract.

Tweddel v. Henderson (1975) 2 All E.R. 1096, was relied upon by the respondents to show that if in an oral contract there is a divergence between the parties as to what one would pay and what the other would receive for his property, then "price" would be a matter of substance and must be set out in the note or memorandum.

In Tweddel v. Henderson a prospective purchaser orally agreed with a builder to construct a house for a fixed sum which should be paid in four instalments. The note or memorandum upon which the purchaser relied in an action for specific performance made no mention of the instalment payment. Plowman V.C. said at p. 1103:

> "Counsel for the plaintiff, however, submits that the only terms that need be stated in a memorandum are material terms and that 'material terms' means terms of substance or importance and that the provision for stage payments, as they are called, was not a material term in that sense. I am unable to accept that argument. It seems to me that the provision that the purchase money was to be paid, not at the end of the day, when the bungalow had been completed and was ready for handing over, but by the four stages to which I have referred, is a material term in every relevant sense, and there is no reference to it in the alleged memorandum."

The appellant and first respondent did not between November 14 and 15, 1974 intend to vary the essential terms of the contract which they believed they had entered into for the sale and purchase of the Mammee Bay premises, and it seems to me, that the pegging provision was a most material term, indeed the most essential term in that agreement, and it must be evidenced in writing in a note or memorandum to satisfy the provisions of section 4 of the Statute of Frauds. I will return to this later.

Mr. daCosta submitted that there was no agreement between the appellant and the second and third respondents as the first respondent had no authority to bind them. McKain J., held that the the 1st respondent had/authority of the 2nd and 3rd respondents to contract with the appellant. She said at p. 156 of the record:

> "The first defendant made the arrangements for sale with the plaintiff. The first defendant was the person giving instructions to the Attorney with respect to the sale and terms of the agreement. All the defendants were residing abroad at the time and nothing was brought to show why the owners themselves could not have stood with the first defendant in all communications with the plaintiff. For the first defendant to say at this stage that he was waiting for the usual family meeting at Christmas to inform them and discuss the sale with them is unworthy of him. He is a property developer in England familiar with the Estate operations and he admits this. The matter of ownership and disposal of property should be one with which he would be very familiar. I am satisfied he held himself out and acted with the plaintiff as a person having the right and authority to contract with the Plaintiff for the sale of the property."

Then at p. 162 she said further:

> "The defendant said that when he was making arrangements to sell the property, the sale was subject to the family's approval. The unsigned letter of the 18th of November, 1974 to Bank of Jamaica clearly states that David Lyons and Kensington Investments Company applied for approval to transfer the property to Ernest Smatt, and to transmit the purchase to the beneficial owners, Kensington Investments Company. I find the first defendant was selling with the knowledge and approval of the owners, the second and third defendants. I so hold because it was the first defendant who was making all the arrangements with the plaintiff and Attorney for both sides."

Mr. daCosta attacked these findings of the trial judge on the basis that there was no evidence that the 2nd and 3rd respondents had given express authority to Sir Jack to act on their behalf, nor was there evidence of conduct on the part of the 2nd and 3rd respondents

which led the appellant to believe that Sir Jack was acting as their agent. The appellant it was submitted knew that Sir Jack was not the owner of the property and he did not enquire if Sir Jack had authority to sell and consequently consent could not be presumed merely from the silence of the 2nd and 3rd respondents. In my opinion the learned trial judge was entitled to take into consideration the fact that Sir Jack Lyons had acted as agent for the 2nd and 3rd respondents in a previous attempt to sell the Glass House, that Sir Jack had given Mr. Hugh Hart instructions to transmit a copy of the draft contract to the 2nd respondent, which he did, and that there had been no protest from the 2nd and 3rd respondents that Sir Jack was acting without their approval.

It is accepted law that the burden of showing that the agent had authority to bind a third person falls upon the plaintiff who so asserts. In Thirkell v. Gambi (1919) 2 K.B. 590 Eve J., said at p. 598:

> "Mr. Bevan relied on the letter of Mr. Carr dated January 2 as constituting a sufficient memorandum. He therefore relied on a memorandum made and signed by an agent. In such a case I take it to be the law that the person who signs as an agent must be authorised to sign a memorandum of a contract of the nature of that on which the plaintiff relies, and that it is for the plaintiff to prove that the signatory was an agent so authorised."

Where there is no direct evidence of authorization the question of Estoppel arises. The author of Cheshire, Fifoot and Furmston on the Law of Contract, 11th Edition, at 460, deals with agency by Estoppel, and after setting out the general rule says:

> "While, therefore, a person cannot be bound as principal by a contract made without his authority, yet if the proved result of his conduct is that 'A' appears to be his agent and makes a contract with a third person who relies on that appearance, he may be estopped from denying the existence of the authority. An apparent or ostensible agency is as effective as an agency deliberately created. Appearance and reality are one."

As early as March 21, 1975 when the appellant was threatening legal action, Solicitors for the 1st respondent confirmed that a copy of the draft transfer had been sent to the "Vendors" and one of the reasons given for non-completion was that the "owners decided that they did not wish to proceed with the proposed sale to your Client." There was certainly no denial of agency in this letter and as Dr. Barnett pointed out, the original defence far from denying agency, admitted agency.

It is of importance, too, that in 1976, the Attorneys-at-law representing all the respondents in a letter dated 26th April, 1976 headed:

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said in part:

> "We refer to Statement of Claim filed herein and to the alleged agreement pleaded in paragraphs 1, 2, and 3 thereof, we have been instructed to inform you that the second and third Defendants will perform the alleged agreement so pleaded. ....."

That letter, said Dr. Barnett, was the best evidence of ratification by the 2nd and 3rd respondents of the action of the 1st respondent. But ratification could only take place if Sir Jack Lyons had purported to act as agent for the 2nd and 3rd respondents. It was decided in Keighley Maxsted & Co., v. Durant (1901) A.C. 240, that a contract made by a person intending to contract on behalf of a third party, but without his authority, cannot be ratified by the third party so as to render him liable to sue on the contract, where the person who made the contract did not profess at

the time of making it to be acting on behalf of a principal.

Sir Jack Lyons had disclosed in a letter to Hugh Hart, which was shown to the appellant, dated September 27, 1974 that the owning company was Kensington Securities Cayman Limited to whom payments would have to be made on an external basis, and it seems to me that the 2nd and 3rd respondents were not strangers to the contract so that they could not afterwards ratify the conduct of the 1st respondent. Consequently, although the learned trial judge did not rely upon the principle of ratification, her finding that the 2nd and 3rd respondents were parties to the contract cannot be assailed.

I return to what I consider to be the central issue in this case. Was there a sufficient note or memorandum of the oral contract to satisfy the Statute of Frauds? The appellant pleaded that there was an oral agreement for the sale and purchase of the Mammee Bay property which oral agreement was confirmed by a cable sent by the 1st respondent on November 14, 1974. That cable, as the learned trial judge correctly found, did not contain all the essential terms of the agreement as it did not identify the 2nd and 3rd respondents and omitted any reference to the pegging provision. It is argued for the appellant that it is permissible for the Court to look at the unsigned letter from Hugh Hart together with the draft transfer sent to the Bank of Jamaica to discover the note or memorandum sufficient to satisfy the provisions of the Statute of Frauds.

The Cable of November 14, 1974 made specific reference to Hugh Hart and to Exchange Control. In that Cable the 1st respondent promised to contact Hugh Hart, presumably to give him instructions. If Hart acted on those instructions he would indubitably be acting as agent of the 1st respondent and as I have held earlier, having regard to his former association with the 2nd and 3rd respondents, Hart would also be acting as their agents. Hart's original letter to the Bank of Jamaica was never produced and one cannot therefore speculate as to what must have been the printed heading of that letter. Had this letter been signed by or on behalf of Mr. Hugh Hart the question of the sufficiency of the memorandum would not arise.

If the note or memorandum is required to contain all the essential terms of the contract one would expect that in chronological sequence the latest document relied upon as forming part of the note or memorandum would bear the signature of the person to be charged. Otherwise it would be possible to have the defendant sign a quite innocuous document but because it contemplated therein that other documents would be produced in the future the defendant would then be bound by the contents of those later documents whatever they be, even if those documents were not signed by him or on his behalf. The true rule appears to be that set out by the learned author of Voumard, Sale of Land, 3rd Edition at p. 61 that:

> "A note or memorandum of the agreement signed by the party to be charged may not contain in itself all the terms agreed upon, but it will be sufficient if the note so signed refers to some already existing document or to a document contemporaneously signed containing the missing terms, and does so in such manner as to incorporate it or them with the document signed so that they can be read together." (emphasis added)

If the use of the term "contemporaneously signed" refers to a signature by the person to be charged, then that would in principle impose no hardship upon a defendant who had by himself or his agent authenticated the second document.

Trietel on the Law of Contracts, 5th Edition at p. 125 treats with Joinder of Documents to form a note or memorandum sufficient to satisfy section 4 of the Statute of Frauds. He there says:

> "Where no single document fully records the transaction it may be possible to produce a sufficient memorandum by joining together two or more documents. Joinder is, in the first place, possible where one document expressly or impliedly refers to another transaction. If that transaction is also recorded in a document, and that document was in existence when the first was signed, the two documents can be joined." (emphasis added)

In Trietel's opinion, a document which comes into existence after the signed document may not be joined to the signed document to arrive at a satisfactory note or memorandum.

Both parties relied upon the decision of the Privy Council in Fauzi Elias v. George Sahely & Co., (Barbados) Ltd (1982) 3 W.L.R. 956. There the parties concluded an oral contract of sale for a shop and its contents. A letter written by the purchaser's solicitor to the vendor's solicitor contained all the terms of the contract and with the letter was sent a cheque in payment of the requested deposit. The vendor's solicitor did not acknowledge receipt of the letter but he signed a receipt for the deposit which in part said ... "being deposit on property at Swan Street, B'Town agreed to be sold by George Sahely & Co., B'dos Ltd to Fauzi Elias ....." Lord Scarman in delivering the judgment of the Privy Council, after affirming the opinion of Jenkins L.J. in Timmins v. Moreland Street Property, Co., Ltd (1958) Ch. 110 at 130 said:

> "The first enquiry must, therefore, be whether the document signed by or on behalf of the person to be charged on the contract contains some reference to some other documents or transaction. The receipt in this case clearly did refer to some other transaction, namely an agreement to sell the property on Swan Street. Parol evidence can, therefore be given to explain the transaction, and to identify any document relating to it. Such evidence was led in the present case. It brought to light a document, namely, Mr. Forde's letter of February 10, 1975 which does contain in writing all the terms of the bargain 'it is writing which evidences the transaction, though not itself the transaction ...' If, therefore, a document signed by the party to be charged refers to a transaction of sale, parol evidence is admissible both to explain the reference and to identify any document relating to it. Once identified, the document may be placed alongside the signed document. If the two contain all the terms of a concluded contract, the statute is satisfied."

The Privy Council then held that the receipt signed on behalf of the defendant could be read with the plaintiff's attorney's letter of the same date and held further that the two documents together formed a sufficient memorandum. This case, however, was not concerned with a document which came into being subsequently to the signed document and nothing in Lord Scarman's judgment referred to such a situation.

In my view there was no sufficient note or memorandum signed by or on behalf of the respondents. The unsigned letter to the Bank of Jamaica and the unsigned draft transfer were not in existence when the cable was sent on November 14, 1974 nor were they contemporaneous with that cable. It is from these documents, that is to say, the unsigned letter and the unsigned draft transfer and these documents alone that the essential terms as to "pegging" and as to the identity of the 2nd and 3rd respondents can be ascertained. In my view it is impermissible to read the cable and the subsequent unsigned documents so as to form a sufficient note or memorandum to satisfy the provisions of the Statute of Frauds. The contract is therefore unenforceable in Court.

If I am right in this conclusion, then the appeal fails. However, out of deference to counsel who argued the several points in the case, I will go on to briefly consider the other points raised.

On April 26, 1976 the respondents wrote to the appellant and offered to perform the contract of sale. The appellant rejoined saying that in addition to specific performance he was entitled to damages for the delay/completion. A series of letters passed between the attorneys for the parties and then came the letter of July 16, 1976 from the appellant's attorney which said in part:

> "Respecting the question of completion of the sale, you must appreciate that after action has been filed, completion must take place in accordance with the orders of the Court entered by consent or otherwise. I appreciate that this is a formality which should be complied with. Please let me know whether you will prepare a Draft Consent Judgment or whether you prefer that I prepare same. I await your comments."

The promising interlude which began on April 26, 1976 ended inconclusively and the action continued. The respondents say that in refusing to complete in June 1976 the appellant thereby repudiated the agreement, and that they accepted the repudiation thereby bringing the agreement to an end.

Johnson v. Agnew (1979) 1 All E.R., 883 is clear authority for the proposition that if an order for specific performance is sought and is made, the contract remains in force and is not merged in the judgment for specific performance - per Lord Wilberforce at p. 890 (e). The appellant could have accepted the offer of specific performance and nevertheless continue with his action for damages. At a convenient time the records of the Court in relation to the claim for specific performance could have been tidied up and all questions of costs decided. There is clearly no rule of law that once there is a claim for specific performance, the matter must proceed to judgment on all the issues raised and that in the absence of a Judgment of the Court the parties could not agree to performance. In insisting, however, that the action proceed to judgment, the appellant cannot be said to have evinced an intention not to be bound by the contract and cannot be said to have thereby refused to perform. But the unreasonable refusal of the offer to complete and then to continue the action for another decade should undoubtedly attract the displeasure of the Court and be manifested in an order for costs, if costs became a relevant factor. The learned trial judge found that the appellant was willing but he did not have the ability to complete the purchase of the property. This finding is against the weight of the evidence which was all one way. Evidence came from the appellant and was

supported by his witness, a vice-president of City Bank, that an application for an additional loan of $100,000.00 from the appellant in 1973 - 74 was a bankable proposition. The learned judge's finding that the opinion of Mr. Moses was speculative is against the weight of the evidence especially as it appears that the trial judge was unduly influenced by the appellant's oft-repeated assertion that he did not intend to use any of his personal cash in the transaction. He was quite entitled to finance the deal with Bank loans if these were available.

Much argument turned upon whether the requirement in the cable to obtain Exchange Control permission, was a condition precedent to the formation of the contract of sale or whether it was a condition which related to performance. This condition was specially relevant, as the letter from Mr. Levy of the Bank of Jamaica to Mr. Hugh Hart dated January 7, 1975, did not in terms grant approval for the transfer of the funds from Jamaica to the Cayman Islands. The letter concluded:

> "Kindly furnish us with a Statement of Accounts showing the amount of funds in hand for Mr. Lyons so that we may consider your application for the remittance of the sale proceeds to him."

In evidence Mr. Levy said that the Bank of Jamaica would have refused to grant approval to an application which pegged currency to J$1.00 to U.S. $1.10 having regard to the fluctuating movement of the Jamaican dollar rate.

The learned trial judge made three important findings in relation to the Exchange Control clause in the agreement. She said:

> "(i) I accept that this obtaining of Exchange Control permission was a part of the agreement, and it was a condition in the agreement that the plaintiff should get the purchase money out of Jamaica and into Cayman Island."

> "(ii) I can only conclude that the plaintiff knew it was and accepted it as his responsibility to see that the (defendant's) money was delivered in the Cayman Island, and to that end tried to reassure the first defendant, and that one feature of this reassurance was the agreement to secure the necessary Exchange Control permission so that the defendants could at least get something out of their investment here.
>
> (iii) I am of the view and so hold that it was the plaintiff's duty, obligation and undertaking on his agreement so to do."

At page 16 of her judgment the learned trial judge asked the question "was the payment in Cayman Islands a special term, making it a condition precedent to transfer of ownership?" Without answering the question directly, she said:

> "In the case before me, the necessary approval from the Bank of Jamaica had not been obtained. Although I have held it was the plaintiff's duty to obtain it, his witness Levy, said that no approval would have been given for any transfer that held as a condition the pegging of the currency."

I draw the inference from this treatment of the evidence and findings of the trial judge that she was accepting that payment in the Cayman Islands was a condition precedent in this contract and that the plaintiff had failed to obtain the approval.

On the evidence there was no refusal by the Bank of Jamaica to grant Exchange Control permission. What the Bank requested was an account of the net sum which was to be transferred to the Cayman Islands.

This Court held in Barbara Grant v. Derrick Williams (unreported) C.A. 20/85, in which judgment was delivered on June 25, 1987, that the provisions of the Exchange Control Act went to performance and not to the formation of the contract. It was further held that unless the parties expressly excluded the provisions of the Exchange

Control Act in circumstances where the Act clearly applied, the absence of permission of the Exchange Control authorities while it might prevent a party from collecting out of the scheduled territories did not itself provide a defence in answer to an obligation to specifically perform the contract of sale. In my opinion, in the context of this case, it does not matter upon which party the obligation lay to seek Bank of Jamaica approval. The parties clearly intended to comply with the statute and the application for approval could have been made at any time. I do not find that the obtaining of Exchange Control permission was expressly or impliedly made a condition precedent by the parties and the mere mention of the requirement for Exchange Control permission does not have the effect of making that special condition a condition precedent.

For the reasons given earlier, I would dismiss the appeal with costs to the respondents to be agreed or taxed.

CAREY, J.A.:

This appeal arises from an action by Charles Smatt, the purchaser, for specific performance of a contract for the sale of a house "Glass House", in the parish of St. Ann. Mr. Smatt is the appellant; the respondents are, firstly, Sir Jack Lyons sued as the agent of the Second and Third Respondents; secondly, Kensington Investments Ltd., the equitable owners of the property, the subject of the Suit, and, thirdly, David Stephen Lyons, Trustee for Kensington Investments Limited, the second respondents.

The action was heard by McKain, J., who, by an order dated 14th October, 1985, gave judgment in favour of each of the respondents on the claim against them and in their favour on their counter-claim which sought an order that a caveat registered on the Register of Titles against the property in dispute, be removed.

I must now detail the relevant history: The purchaser who lived at that time in the vicinity of the Glass House, learnt that it was up for sale, and intimated his interest to Sir Jack Lyons (the agent), round about 1974. The purchaser was advised to make an offer which he did by a letter dated 3rd August, 1974, but the terms of that offer did not commend themselves to the agent and were not accepted by him. Thereafter, there was an exchange of offers and counter-offers. Then as a result of a telephone conversation between the purchaser and the agent, who was then in London, a bargain was struck. It was agreed that the property would be sold at a price of $80,000(J), a 10% deposit should be sent to Mr. Hugh Hart, an Attorney-at-Law; completion to be within 60 days; legal fees were to be shared equally, and Bank of Jamaica approval should be obtained. Sir Jack suggested that Mr. Hart [the senior partner in Clinton Hart & Co.] be apprised of these terms so that when he was cabled he would be au fait with the agreement. A cable was received by the purchaser on 14th November. It was in the following form:

"CONFIRM SUBJECT TO EXCHANGE CONTROL SALE
ON HOUSE JAMAICA DOLLARS EIGHTY THOUSAND
IMMEDIATE DEPOSIT TENPERCENT TO HUGH HART
COMPLETION WITHIN 60 DAYS STOP
LEGAL FEES ETC TO BE SHARED EQUALLY STOP
THIS OFFER IS FOR IMMEDIATE ACCEPTANCE AND
I AM PHONING HUGH HART FRIDAY STOP REGARDS

JACK LYONE RRR JACK LYONS."

He then contacted Mr. Hart and also remitted the agreed deposit which was acknowledged by a receipt. He was advised by Mr. Hart, among other matters, that the price of $80,000 would be pegged at the rate of $1.00(J) to $1.10(US).

Thereafter, he put enquiries in train to secure the balance of funds necessary to complete. He was, he said, in a position to complete.

Sometime in January 1975, Mr. Hart told him that there would be some delay in completion on the part of the vendors. In that very month, when he spoke with the agent, he was advised that some problems with the family had developed. Further, the children having parted with the property, nonetheless, still desired to have the use of it, and he had been advised by his lawyers that he was not obliged to honour the agreement, as he was not the owner of the house and additionally, the selling price was too low.

The purchaser, having taken legal advice, lodged a caveat (which was the subject of the respondent's counter-claim) against the registered title to the property. A writ was issued against the respondents but even after that event, efforts were made to settle the matter but they proved futile. Sometime in 1976, the respondents offered to complete and because, firstly, the matter was before the court, secondly, negotiations, without prejudice, were in progress, the purchaser suggested a consent judgment be entered. Thereafter, the action proceeded to trial.

It is worthy of comment that when the first defence was filed

in respect of all the respondents on 21st March, 1979, there was an admission therein as to the agreement for sale but it was averred that the conditions of the said agreement had not yet been fulfilled. Paragraph 9 of the defence pleaded as follows:

> "9. As to paragraph 7 and 8 the Secondnamed and Thirdnamed Defendants state that they stand ready and willing to fulfil all their obligations under the terms of the contract - providing all the conditions and requirements as set out herein are satisfied."

But, when on 31st July, 1981, an amended defence was filed, it was alleged at paragraph 1(3) as follows:

> "1(3) The first-named Defendant was at no time authorised by the second and third-named Defendants to act as their agent in the sale of the property (hereinafter called 'the disputed property') referred to in paragraph 1 of the Statement of Claim and in consequence the second-named Defendant never agreed as alleged in paragraph 1 of the Statement of Claim or at all."

and at paragraph 9(4), the averment reads:

> "9(4) The Defendants and each of them deny that the Plaintiff has at all times been ready and willing to perform the alleged contract as alleged in paragraph 8 of the Statement of Claim."

This was a startling volte-face, which doubtless would reflect on the credibility of any witness called to support the new posture.

In his reply, the appellant dealt with that matter in this way. It was pleaded at paragraph 2 of the Reply:

> "With reference to paragraphs 1 (3) and 12 of the Amended Defence, the Plaintiff says that the Second and Third Defendants represented and/or held out the First Defendant as their agent and the Plaintiff relying on their said representation entered into the transaction in question and acted pursuant thereto. Further to their Defence dated March 2, 1979, the Defendants admitted the said agency and have only sought to deny it seven years after in their Amended Defence. For this reason the Plaintiff was induced to proceed on the basis of the admitted agency and took no steps to claim

> "against the First Defendant for breach of warranty of authority. Accordingly, the Defendants are estopped from denying the agency of the First Defendant."

To return, therefore, to the exposition of facts, Sir Jack was the sole witness for the defence on the substantial issues before the Court; the other witness for the defence was concerned with the question of damages. It was at least clear that Sir Jack had a great many conversations with the appellant concerning the negotiations for sale. It was equally clear that Clinton Hart & Co., were the attorneys (solicitors) for the family. Sir David said that he made it clear to the purchaser that the negotiations were without prejudice as any offer had to be discussed with the family. He also testified that he had no authority from the owners to negotiate the sale of the property.

In the course of his cross-examination, he made certain statements which were relevant to the issue of agency, and these it will be necessary to rehearse. He admitted that there had been an earlier transaction concerning the sale of the property. The lawyers in the matter, acting on behalf of the owners, were Clinton Hart & Company. Mr. Hugh Hart had been instructed by him in respect of each transaction to receive the deposit, draft a formal agreement, as well as the transfer document and also to apply for Bank of Jamaica approval.

The bases on which the learned judge found against the purchaser were firstly, that the purchaser "was ready indeed, willing perhaps, but certainly not able as far as meeting the requirements for payment of the balance of purchase money when he was called upon by the defendants when they had signified they were prepared to transfer the property to him." (page 8) Secondly, she held that "the defendants had breached their contract, and repudiated and the plaintiff effectively accepted the defendant's recission of the contract." Thirdly, she asked herself the question, "was the payment in Cayman Islands a special term, making it a condition precedent to transfer of ownership?" She answered it in

this way: "It seems to me land is passed by handing over the documents of title thereto. Purchase price therefor is paid in handing over the cash, therefore, it is common sense and obvious that a vendor must have his purchase secured and available to him before he, by the stroke of a pen, divests himself of his property." (page 159) And, "During the negotiation and up to the time of the Suit in March 1975 at no time could the plaintiff show that he had the necessary permission to transmit." (page 157)

These grounds the purchaser has challenged. As to her finding that the purchaser lacked the financial ability to complete, it was submitted that this finding was based on a mis-apprehension of the evidence of Peter Moses, resident Vice-President of City Bank, who gave evidence in support of the purchaser on the issue of his ability to complete.

Mr. Moses stated categorically that "a loan on real estate of additional $100,000 [be] a bankable proposition on the securities presented. On a general basis would at that time be received as a bankable proposition."

There was, so far as a reading of the cross-examination goes, no evidence to show that that view of the purchaser's status financially, was wrong or ill-conceived. As the statement of the purchaser's assets and liabilities revealed, his net worth was approximately $4.4M. It is true that the purchaser, in evidence, stated that he did not wish to invest his own money in the purchase, but that is not, I would think, a basis for saying he was <u>unable</u> to complete the agreement. The learned judge, in rejecting Mr. Moses' evidence, expressed herself thus:

> "Mr. Moses' view as to the likelihood of his bank funding the transaction I consider as speculative, depending as it did on many 'ifs and buts'."

Since the learned judge did not indicate any of the "ifs and buts"

with which she was impressed, this Court is entitled to look at the bank statement which was tendered on the purchaser's behalf and the evidence of Mr. Moses and the purchaser himself. It was not suggested that the credit of either of these persons was destroyed or that they should not be believed on their oath. Under "assets" in the statement, there appear the following items:-

"Real Estate encumbered	$3,303,000
Real Estate unencumbered	230,000."

With respect to these items, the judge said this:

> "He [Moses] produced exhibit 5 which clearly indicated the plaintiff did have assets all of which were heavily encumbered except for $230,000."

It appears to me that the judge did not, with respect, appreciate the significance of those notations and indeed, the effect of the purchaser's bank statement in its entirety. The encumbrances were plainly the mortgages which were mentioned under "Liabilities" and the net worth of the purchaser was given as $3.7M. That evidence was not given due or indeed any weight whatever. Albeit a question of fact, this Court is entitled to say that the finding is unreasonable having regard to the evidence.

When the vendors in April 1976 offered completion, the purchaser gave two reasons for not himself performing his outstanding obligations. The reasons he proffered were:

(a) he got legal advice;

(b) negotiations without prejudice were in train.

Some correspondence which passed between the attorneys for the vendors and the purchaser was also put in evidence. Mr. George Fatta, the purchaser's attorney, in a letter dated 27th May, 1976 wrote as follows:-

> "As you are no doubt aware, in addition to specific performance of the said contract, my client is entitled to damages for breach of delay in completion (see Peskin vs Glouster House), as well as cost of the action incurred to date.
>
> Kindly let me know whether you wish a formal order for the assessment of damages by the Court or whether the quantum of damages for delay can be amicably settled.
>
> I await hearing from you."

In a letter dated 16th July, he returned to the matter of completion in this way:

> "In your said letter, you offered to comply with my client's claim for specific performance, but remained silent as to the claim for damages, which, as pointed out to you in my reply, my client is also insisting on.
>
> I would, therefore, suggest the procedure to be adopted now that your clients are prepared to specifically perform the contract is for a Consent Judgment to be entered for specific performance and for damages for delay to be assessed. (see Glouster House Limited vs Peskin, 1960-61 3 W.I.R. 375). If the question of damages cannot be amicably settled then we would proceed to have the matter set down for Assessment.
>
> Respecting the question of completion of the sale, you must appreciate that after action has been filed, completion must take place in accordance with Orders of the Court entered by Consent or otherwise. I appreciate that this is a formality but nevertheless, it is a formality which should be complied with.
>
> Please let me know whether you wish to prepare a Draft Consent Judgment or whether you prefer that I prepare same."

The submission by Mr. Mahfood that the learned judge misapprehended the significance of that evidence is, I think, right. For she stated, on at least two occasions in her judgment, that "his reason for non-acceptance was that he felt if he signed it, he would not get his damages which he has suffered by virtue of being denied the use and possession and occupation of the property in the first instance." Nothing in the letters, extracts from which I have set out

above, leads to the finding arrived at by the judge. The conclusion seems inescapable that, far from rejecting completion, a modus operandi for completion was being put forward for consideration by the vendors. Seeing that the learned judge's finding did not depend on any advantage of seeing and hearing the witnesses, this Court is in as good a position to draw inferences from the facts which were not rejected. For my part, I do not think that the finding as to the purchaser's inability to complete, can be supported on the evidence.

The second basis on which the learned judge found against the purchaser, was that the contract for sale was terminated by mutual agreement. She found that "the defendants had breached their contract and repudiated" and that "this disposal of $8,000 irrespective of how much 'without prejudice' the plaintiff may have held, effectively accepted the defendant's recission of the contract." ..... "The contract became mutually at an end as far as the ownership of the property was concerned." ..... "Nevertheless, he was entitled to whatever damages he may have suffered .....". (page 164)

It is convenient to look at the pleadings in order to appreciate the real issue which fell to be determined. At paragraph 10 of the amended defence, it was averred as follows:

> "10. The Defendants and each of them deny that they have repudiated the alleged contract wrongly or at all. Alternatively if (which is not admitted) the Defendants or any of them have repudiated the alleged contract such repudiation has not been accepted by the Plaintiff and the said alleged contract accordingly remained effective until repudiated by the Plaintiff and the acceptance of such repudiation by the Defendants."

This was in answer to paragraph 9 of the Statement of Claim which was in the following form:

> "9. The Defendants and/or each of them have wrongly repudiated the said agreement and the authority of the first Defendant to enter into the same on behalf of the second Defendant and the latter has refused to complete the agreement for sale."

The issue joined between the parties then, was, firstly, -

(a) did the defendants repudiate the contract?

(b) if the answer to (a) is yes, did the purchaser accept that repudiation?

The vendor's case would be, and was, that they had not breached the contract for sale; the purchaser had. He was unable to complete because he had no sufficient funds to pay the purchase price. It was never the case for the vendors that because Clinton Hart & Company had returned the deposit, that was tantamount to an acceptance of repudiation. Mr. DaCosta frankly conceded that much in the course of his arguments at the Bar, and I do not think anything more need be said about that aspect of the case. But it is necessary to state, shortly, the circumstances of the return of the deposit.

After the owners decided they did not wish to proceed with the sale of the property, Mr. Hugh Hart wrote Mr. Fatta, advising that he had been instructed by Sir Jack's London solicitors to return the deposit, but in the interim, he had placed the $8,000 on deposit with a Bank. Mr. Fatta responded thus:

> "I note that you are arranging for the deposit which is presently with the Bank of Nova Scotia Trust Company to be forwarded me together with interest as soon as it matures. I regret that my client cannot accept a refund of the deposit as his claim is for specific performance of the Contract of Sale.
>
> However, without prejudice to Ernie's claim for specific performance, there can be no doubt that your action in placing the money on deposit is a prudent course for you to have adopted in the circumstances."

Subsequently, the purchaser, having been advised by Mr. Hart that he was winding down his law practise, and by his own lawyers, accepted his deposit when it was returned to him. I understood that evidence to mean that although he had been sent his deposit, he had not solicited it. Indeed, the purchaser had given evidence that the question

of the return was handled by his lawyers who accepted it without prejudice.

From the above, it would seem plain that there was no material on which it could be concluded that the agreement was terminated by mutual consent: it was never put forward by either of the parties to the action, and was not in the circumstances open to the learned judge. Indeed, it is inconsistent with her view that the purchaser, nonetheless, preserved his claim for damages.

That view would be correct if it were found by the judge that the defendants were in breach, that is that they had repudiated the agreement, and the repudiation had been accepted by the appellant, or that the purchaser had refused to accept the repudiation and was insisting upon performance by the respondents. It is in those circumstances that the purchaser would have had a claim for damages. But although the question of mutual agreement was not open to the judge for determination, that of determining whether the purchaser, by receiving back his deposit, accepted the repudiation of the contract by the defendants which was also a finding of the judge, remains for consideration and will be dealt with hereafter.

I have earlier pointed out that the evidence could not amount to an acceptance of the repudiation in view of the fact that the purchaser was concerned to have the vendors perform their obligations under the contract. It should not be forgotten that the vendors were undertaking to complete at a time when the deposit had already been returned to the purchaser on the directions of the agent's London solicitors.

A deposit as is well known is regarded in law as a guarantee that the contract shall be performed: it is an earnest for performance. The question of whether it was to be regarded as a condition precedent to the creation of a contract was considered by Warren, J., in

Millichamp & Ors. v. Jones [1982] 1 W.L.R. 1422. Having reviewed some decisions of Goulding, J., in which that judge decided the other way, and reinforced by the Court of Appeal decision of Pollway Ltd. v. Abdullah [1974] 1 W.L.R. 493, and that of the House of Lords in Johnson v. Agnew [1979] 1 All E.R. 883, came to the view that payment of a deposit was not a condition precedent to the creation of a binding contract. At page 1430 he stated his opinion thus:

> "It is with the greatest diffidence and hesitation that I differ from a view taken by Goulding J., but it seems to me that unless a distinction is to be made between sales by auction and sales by private treaty, the weight of authority is in favour of the view that a requirement, in a contract for the sale of land, that a deposit should be paid by the purchaser does not constitute a condition precedent, failure to fulfil which prevents the contract from coming into existence, but is in general to be taken as a fundamental term of the contract, breach of which entitles the vendor, if he so elects, to treat the contract as at an end and to sue for damages including the amount of the unpaid deposit. Nor do I see that anything, either in the authorities or in principle, calls for a distinction to be made in that respect between sales by auction and sales by private treaty."

In the present case, at the time when the vendors had already directed the return of the deposit to the purchaser, they nonetheless were offering to complete. In point of law, the absence of the deposit did not prevent the contract of sale from being a reality. Again it could not be seriously affirmed that there had either been a mutual termination or a repudiation and an acceptance thereof.

This brings me to the finding that it was the purchaser's duty to obtain Bank of Jamaica approval, and as he had failed to secure it, there was no binding contract. I assume that this is the conclusion at which the learned judge arrived. But as Mr. Mahfood pointed out in the course of his submissions before us, the question posed by her, viz., whether payment in the Cayman Island was a

condition precedent to the transfer of ownership, was wholly misconceived. He suggested that the proper question was whether payment in Cayman in U.S. dollars, was a condition precedent to the creation of a valid contract of sale.

I do not think the learned judge misconceived the position here. In paragraph 9(1) of the amended defence, it was pleaded:

> "9. In regard to paragraphs 7 and 8 of the Statement of Claim the second and third-named Defendants say as follows:-
>
> (1) the Plaintiff has failed and neglected to obtain from the Bank of Jamaica permission to pay the purchase price of the disputed property in the Cayman Islands in accordance with the alleged contract and accordingly the alleged contract never became unconditional."

With that in mind, she has plainly found for the defendants on that limb of their defence. However, I do not think she drew the correct inferences from the proved facts in arriving at that conclusion.

The defendants did not plead that Bank of Jamaica approval was a condition precedent. To the contrary, they pleaded as follows at paragraph 1(1):

> "1.(1) the alleged agreement for sale was at all times subject to the Condition that Exchange Control approval would be obtained to payment being made by the Plaintiff on an 'external basis' to the third-named Defendant in the Cayman Isles."

and at paragraphs 8 and 9(1):

> "8. The Defendants state that conditions of the said sale agreement have not yet been satisfied.
>
> 9. In regard to paragraph 7 and 8 of the Statement of Claim the second and third-named Defendants say as follows:-
>
> (1) the Plaintiff has failed and neglected to obtain from the Bank of Jamaica permission to pay the purchase price of the disputed property in the Cayman Islands in accordance with the alleged contract and accordingly the alleged contract never became unconditional."

They pleaded a condition subsequent. I was not impressed by the

submissions of Mr. DaCosta in favour of a condition precedent. He argued that the raison d'etre of the contract for sale was that the proceeds of sale would be paid in U.S. dollars in the Cayman Islands, so that the defendants could salvage something from the wreck of their investment. He also said that the creditor was entitled to receive payment at his residence which was the Cayman Island and that required the purchaser to make the necessary arrangements, including Bank of Jamaica approval. Since he had not done so, no contract had come into being.

The facts show that on the instructions of the agent, Bank of Jamaica approval was sought and indeed obtained. The Director of Exchange Control from the Bank of Jamaica wrote as follows:

> "Lot 4, Mammee Bay - Volume 951 Folio 378 - Kensington Investments Limited to Ernest Charles Smatt
>
> With reference to your letter dated 18th November 1974, I write to inform you that permission under the Exchange Control Law is hereby given for the registration of a transfer of Lot 4, Mammee Bay, registered at Volume 951 Folio 378 with dwelling house, furniture and fittings for a total consideration of J$80,000.00 from Mr. David Stephen Lyons as Trustee of Kensington Investments Limited a Company incorporated under the Laws of the Cayman Islands to Mr. Ernest Charles Smatt of Mammee Bay, St. Ann, Jamaica.
>
> Kindly furnish us with a Statement of Accounts showing the amount of funds in hand for Mr. Lyons so that we may consider your application for the remittance of the sale proceeds to him."

Until there was a quantification of the proceeds of sale, there could be no approval to remit funds. So far as quantification went, only the vendors could decide how much, if any, of the proceeds they would wish to have remitted. That could scarcely be within the knowledge of the purchaser and accordingly be regarded or accepted as being his obligation.

It is right to point out that a condition in a sale for Bank of Jamaica approval is not uncommon in this jurisdiction. Downer, J., dealt with such a condition in an unreported case Williams v. Grant 26th April, 1985; also SCCA No. 20/85 judgment delivered on June 25, 1987; Watkins v. Roblin [1964] 6 W.I.R., and Bank of London & Montreal Ltd. v. Sale [1967] 10 JLR are also in point. What is clear from these cases, is that a breach of the Exchange Control Act goes rather to performance of the contract and not to its formation. The failure of the purchaser to obtain Bank of Jamaica approval can have no bearing on the result and this is so, whether or not that was his duty.

Because the learned judge stated in her judgment that the contract would not be specifically enforced, because Bank of Jamaica approval would not be granted to remit where there was an agreement for "pegging", I must now express my views on this aspect of her judgment. Mr. Levy of the Bank of Jamaica had not in his letter to Clinton Hart & Company refused to approve remittance. He was careful to say in his final paragraph that he would consider that aspect of the matter when the statement of accounts showing the funds in hand for the vendors, was received by the Bank. That stage, certainly up to the time of trial, had not yet been reached. The opinion of Mr. Levy as to a condition regarding "pegging", does not, in my view, destroy or alter the import of the second paragraph of the Bank's letter. Whatever "pegging" might mean in terms of the quantification of the foreign exchange required to satisfy the sale price, would be a matter of construction by the Court, seeing that the parties did not seem to hold coincident views. At the end of the day, Bank of Jamaica approval had been obtained for the registration of the sale, and the parties were aware that consideration would be given for the transfer of foreign exchange when the figures were notified to the Bank. I cannot, therefore, accept the finding of the judge that "Exchange Control permission had not been secured."

I can now deal with the remaining alternative submissions which were pressed by the respondents in support of the judgment. Mr. DaCosta boldly argued that there was no contract between Sir Jack and the purchaser, or the vendor and the purchaser, because there was no agreement with reference to the purchase price, because the plaintiff alleged one purchase price and the defendant another, which latter price the Court below accepted as the true purchase price. Suppose, he said, the plaintiff asks for specific performance on his claim and a defendant on his counter-claim, and the Court found that the correct contract is that on the counter-claim, could the Court grant specific performance of the contract alleged by him. The answer, he thought, was clearly no.

Two separate and distinct questions are raised in these submissions. The first is fundamental. Was there a consensus ad idem as to the terms of the agreement? On any fair reading of the evidence, two important facts emerge. Both parties agreed the purchase price as $80,000(J). Mr. Smatt said so. The cable dated 14/11/75 from Sir Jack [exhibit 6] to the purchaser so states. The draft agreement prepared by Mr. Hugh Hart on the instructions of Sir Jack reflect that figure as the price. The letter from Clinton Hart & Co., to the Bank of Jamaica, seeking the Bank's approval for sale and remittance, is consistent with the instructions of Sir Jack. Both parties agreed that the agreement contained a "pegging clause". The evidence suggests, however, a divergence as to what it meant in money terms. The purchaser understood "pegging" to mean that as the prevailing rate of exchange relating to U.S. dollars was $1.00 J = $1.10 U.S., he would have to find $88,000 U.S. to be paid in Cayman Islands. Sir Jack responded to questions regarding price in the course of his cross-examination, thus:

> "Q: On any basis, position is that price at which selling would not be less than $88,000.
>
> A: Yes sir, my position it would not be more than $88,000. One fixed and definite price is $88,000. Believe that figure was mentioned in document. Rate of Exchange was mentioned peg rate which equals. One does not have to be mathematic to arrive at $88,000."

The divergence, in view appeared to be this. While the purchaser took the view that the one fixed amount was $80,000(J), or $88,000 U.S., Sir Jack was equally adamant that the figure would not exceed $88,000 U.S. The final figure would depend on the actual exchange rate prevailing at the time of payment. This dissimilarity of view, meant that from one point of view, there was no consensus, but, seeing that the disagreement related to the meaning of a clause, that was a matter of construction for the Court. I have little difficulty in rejecting the arguments of the respondents on this point.

The second question which arises for consideration is whether specific performance would be granted where the meaning of a clause was uncertain. A similar question arose in Sweet & Maxwell Ltd. v. Universal News Services Ltd. [1964] 3 W.L.R. 351. Buckley, J., gave the following example which I venture to think is apt. He said this at page 319:

> "If A and B, parties to a contract, form different views as to the construction and effect of their contract, and A demands performance by B of some act which B denies he is obliged to perform upon the true interpretation of the contract, then, if B says "I am ready and willing to "perform the contract according to its true tenor, but I contend that what you, A, require of me is not obligatory upon me according to the true construction of the contract", and if in so saying he is acting in good faith, he does not manifest the intention to refuse to perform the contract. On the contrary, he affirms his readiness to perform the contract, but merely puts in issue the true effect of the contract."

On the evidence before the learned judge it could not be doubted that the purchaser was prepared to pay up to $88,000 U.S. It could quite properly be said that the purchaser was affirming his readiness to perform the contract and had merely put in issue the true effect of the contract.

Next, it was said that there was no contract between the purchaser and the second and third respondents, because no authority was given to Sir Jack to treat on their behalf. I mentioned earlier in this judgment in the course of reviewing the pleadings that in the original defence filed, there was an admission of the existence of a contract, but in the amended defence, the issue of agency was introduced. This matter calls for adjudication. The learned judge dealt with this issue as she was obliged to do and concluded thus:

> "I am satisfied he held himself out and acted with the plaintiff as a person having the might and authority to contract with the plaintiff for the sale of the property."

At a later portion of her judgment, she made the following finding: (p. 162)

> "I find the first defendant was selling with the knowledge and approval of the owners, the second and third defendants. I so hold, because it was the first defendant who was making all the arrangements with the plaintiff and the Attorney for both sides."

I think the judge was right in these findings. There was evidence from Sir Jack himself which showed that in a prior transaction regarding the sale of the same property, he had played the leading role, giving instructions to attorneys and the like. Two letters from the London solicitors to Mr. Fatta are of significance. In the first at page 16 paragraph 2, they stated as follows:

> "As you are aware, the property at Mammee Bay does not belong to Sir Jack and the owners decided that they did not wish to proceed with the proposed sale to your Client. This in itself should be sufficient to avoid the threats which you have made in your letter."

Paragraph 2 of the second letter, stated as follows:

> "However, if your Client is determined to embark on legal proceedings, there is nothing further I can do or say. I would only add, that even if (which is of course denied) a binding contract was concluded, I do not understand what damage it is suggested that your Client suffered. Although I have not been able to speak to Sir Jack before replying to your letter, my understanding is that this property has been on the market for some considerable time without any offer having been received in excess of that which your Client made and you will no doubt be aware that the reason for its withdrawal from the market was entirely unconnected with price."

Finally, a letter from the respondent's present attorneys in which it was stated as follows:

> "We have been instructed to inform you that the second and third Defendants will perform the alleged agreement so pleaded and enclose for your inspection duplicate of Title registered at Volume 951 Folio 378 on your undertaking to hold the same to our order pending completion, and draft Transfer for your approval on behalf of the Transferee."

Ratification could not be more firmly or clearly expressed. Indeed, the first intimation that Sir Jack had no authority is to be found in the amended defence filed. There was, in my view, material from which an agency by estoppel could arise. There was inferential evidence from the conduct of the owners in permitting Sir Jack to act as if he had their authority to sell the property. I would hold that the learned judge was correct in finding as she did.

It was next contended by the respondents that even if there was a binding contract, it is not enforceable because there is no memorandum to satisfy the Statute of Frauds. We were told that the cable sent by Sir Jack to the purchaser, assuming he had power to sign, could be looked at as also the draft document in which the additional terms agreed were included, but this latter document was never signed by anyone. The cable could not be linked to this subsequent unsigned document so as to

form a sufficient memorandum to satisfy the Statute of Frauds. The letter sent by Clinton Hart & Co. to the Bank of Jamaica for its approval, was not signed by anyone acting for the vendors. Mr. Hart, an attorney, would have no authority to sign a memorandum on behalf of his client unless he was authorised to do so. It was also said that the true owner, David Lyons was not mentioned in either the cable or any correspondence. Dr. Barnett submitted on behalf of the purchaser that the documents to which attention has been called above, provide a sufficient memorandum to satisfy the Act. Further, he stated, there was part performance on the part of the purchaser.

It seems to me that there was an agreement between the parties as to the purchase and sale of the "Glass House". Next, there was writing but the question which must now be considered is whether the documents under reference, if taken together, are a sufficient memorandum within the Statute. In the circumstances of this case, what would be required are facts which name and identify the parties, describe the property for sale and state the nature of the consideration. I would, in acceding to Dr. Barnett's argument in preference to Mr. DaCosta's, observe that it is possible to find a sufficient memorandum within the statute if -

i. the cable
ii. the Receipt
iii. the letter for Clinton Hart & Co. to Bank of Jamaica seeking the Bank's approval of this transaction.
iv. Formal agreement drawn up by the attorney which accompanied that letter,

are read together.

I do not think the objections raised by the respondents are valid. The cable was signed by Sir Jack who on the evidence was acting for the owners. He testified that he gave instructions for the preparation of the draft agreement. That document sets out all the terms of the agreement and demonstrates the fact of a precedent agreement between the

parties. The letter to the Bank is explicable only on the footing that there was an agreement in existence. That letter was signed by the solicitor or attorney acting for the respondents. Is the solicitor's signature acceptable? I think Gavahan v. Edwards [1961] 2 Q.B. 220 is helpful. The facts must be detailed and are taken from the headnote at pages 220, 221:

> "The plaintiff agreed to sell and the defendant agreed to purchase a house. The terms of the sale were contained in a standard form of contract which the vendor obtained from an estate agent and which vendor and purchaser signed over a sixpenny stamp. The contract stated that the date for completion was to be agreed between the parties. Apart from the date of completion, all the other conditions of the contract were agreed and referred to in the document which the parties had signed.
>
> The vendor's solicitor was instructed to act in the purchase on behalf of the purchaser as well as the vendor. Subsequently, the vendor and purchaser orally agreed on the date for completion. The vendor informed the solicitor of the agreed date and the solicitor wrote to the purchaser asking for confirmation. The purchaser telephoned the solicitor and confirmed the date, and the solicitor endorsed a note to that effect on a copy of the letter that he had sent the purchaser.
>
> The purchaser refused to complete and the vendor sued the purchaser for damages for breach of contract. On the question whether there was a memorandum in writing of the contract as required by section 40 of the Law of Property Act, 1925[1]:-"

Danckwerts, L.J., with whom Ormerod and Willmer LJJ concurred, said this at page 227:

> "It seems to me that where the parties have in fact agreed, as is the situation in the present case, there is nothing contradictory in the position of a solicitor acting for both parties which will prevent him creating an additional memorandum for the purpose of recording a final term agreed by the parties so as to bind either or both of his clients. To my mind the inference from what happened in the present case is plainly that the solicitor had such authority. He may not have had authority to make a memorandum before he wrote the letter of May 15, 1958, but as the result of the conversation which took place with

> "his client, the purchaser, when his client confirmed that the position was as stated in the letter, that seems to me to authorise the signing of the memorandum, as a matter of confirmation apart from any difficulties, if there were any, which existed before that as to the terms of the solicitor's instructions and authority.
>
> In those circumstances it seems to me the necessary memorandum for the purpose of satisfying section 40 of the Act of 1925 was completed by the letter of May 15, 1958, to which there is a signature by the solicitor as agent on behalf of the purchaser."

In my view, Mr. Hart, acting for the vendors, could deal with one of the conditions of the agreement for sale, i.e., one relating to Exchange Control approval and his signature was sufficient.

Then there was the receipt of Clinton Hart & Co., acknowledging the payment of a deposit on the property. This document is plainly referable to an agreement regarding the sale of the said property. I am reinforced in the view that all the requirements exist by this statement of the law by Jenkins LJ (as he then was) in Timmins v. Moreland Street Property, Ltd. [1958] Ch 110 at page 130 where the learned Lord Justice states:

> "To the case already cited I would add Studds v. Watson (1884) 28 Ch.D.305; 1 T.L.R. and Oliver v. Hunting, 44 Ch.D. 205 neither of which, on their facts, went nearly as far as this. Some of the observations of Kekewich J. in the latter case are, I think, manifestly too wide.
>
> The rule has no doubt been considerably relaxed since Peirce v. Corf L.R. 9 Q.B. 210. was decided in 1874, but I think it is still indispensably necessary, in order to justify the reading of documents together for this purpose, that there should be a document signed by the party to be charged, which, while not containing in itself all the necessary ingredients of the required memorandum, does contain some reference, express or implied, to some other document or transaction. Where any such reference can be spelt out of a document so signed, then parol evidence may be given to identify the other document referred to, or, as the case may be, to explain the other transaction, and to identify any document relating to it. If by this process a document is brought to light which

> "contains in writing all the terms of the bargain so far as not contained in the document signed by the party to be charged, then the two documents can be read together so as to constitute a sufficient memorandum for the purposes of section 40."

In a later case of Elias v. George Sahely & Co. (Barbados) Ltd. [1982] 3 W.I.R. 956, their Lordships in the Privy Council confirmed the continued validity of that statement of the law. One of the questions in that case was whether a letter and a receipt amounted to a sufficient memorandum to satisfy the Statute of Frauds. It is, in my view, sufficient to cite the following extract as it is plainly applicable to the circumstances of this case: (at page 963) Lord Scarman delivering the opinion of the Board commented as follows:

> "The receipt in this case clearly did refer to some other transaction, namely an agreement to sell the property in Swan Street. Parol evidence can, therefore, be given to explain the transaction, and to identify any document relating to it. Such evidence was led in the present case: it brought to light a document, namely Mr. Forde's letter of February 10, 1975, which does contain in writing all the terms of the bargain. It is a writing which evidences the transaction, though not itself the transaction. This distinction is, however, not material, whether the rule be as formulated in Long v. Millar, 4 C.P.D. 450 or as in Timmins v. Moreland Street Property Co. Ltd. [1958] Ch. 110. Moreover, it would be contrary to the intendment of the Statute of Frauds to limit the rule to cases in which the reference in the signed document must be to a writing intended to have contractual force. The Statute of Frauds is concerned to suppress not evidence but fraud. In seeking a sufficient memorandum it is not necessary to shoulder the further burden of searching for a written contract. Evidence in writing is what the statute requires. For, as Steadman v. Steadman [1976] A.C. 536 emphasised, an oral contract for the sale of land is not void but only, in the absence of evidence in writing or part performance, unenforceable. If, therefore, a document signed by the party to be charged refers to a transaction of sale, parol evidence is admissible both to explain the reference and to identify any document relating to it."
>
> [Emphasis supplied]

The learned judge found that there was sufficient writing to satisfy the Statute of Frauds and in that, for the reasons stated above, she was, in my opinion, eminently correct. Dr. Barnett also argued that there were sufficient acts of part-performance. But, I do not think it any longer necessary to consider whether a deposit can ever amount to a sufficient act of performance. Mr. Muirhead for the respondents, thought that although the issue was pleaded, it was never opened to or argued in the Court below. Accordingly, the issue must be deemed to be abandoned. We have not been referred to any authority in which a part-payment by itself has been held to amount to part-performance.

There is another question which was raised by the respondents, namely, did the purchaser repudiate the contract, assuming a binding contract was created. On 26th April, 1976 the respondents' attorneys-at-law wrote to the purchaser's attorney-at-law, at page 29 of the Exhibits -

> "We have been instructed to inform you that second and third Defendants will perform the alleged agreement so pleaded and enclose for your inspection duplicate Certificate of Title registered at Volume 951 Folio 378 on your undertaking to hold the same to our order pending completion, and draft Transfer for your approval on behalf of the Transferee.
>
> On returning the Transfer approved and the duplicate Certificate of Title would you let us have your undertaking for the payment of the Purchase Money or so much thereof as shall remained unpaid in terms of the alleged agreement."

The 'reply courteous' as Mr. DaCosta categorised the reply, was couched in the following language -

> "I refer to your letters of the 26th. April and 29th. April 1976. My client is pleased to note that your clients are now prepared to perform the contract.
>
> I would also refer to letter dated the 13th. May 1976 from your Town Agents, Messrs. Cargill & Graham, enclosing draft Transfer from David Stephen Lyons to Ernest Charles Smatt which was omitted from

> "your letter of the 26th. April 1976. I await your forwarding me the Duplicate Certificate of Title in due course for my inspection.
>
> As you are no doubt aware, in addition to specific performance of the said contract, my client is entitled to damages for breach of delay in completion (see Peskin vs Glouster House), as well as cost of the action incurred to date."

There was another letter from the purchaser's attorney to the vendors, wherein the purchaser's approach to completion was set out -

> "In your said letter, you offered to comply with my client's claim for specific performance, but remained silent as to the claim for damages, which, as pointed out to you in my reply, my client is also insisting on.
>
> I would, therefore, suggest the procedure to be adopted now that your clients are prepared to specifically perform the contract is for a Consent Judgment to be entered for specific performance and for damages for delay to be assessed. (see Glouster House Limited vs Peskin, 1960-61 3 W.I.R. 375). If the question of damages cannot be amicably settled then we would proceed to have the matter set down for Assessment.
>
> Respecting the question of completion of the sale, you must appreciate that after action has been filed, completion must take place in accordance with Orders of the Court entered by Consent or otherwise. I appreciate that this is a formality but nevertheless, it is a formality which should be complied with."

It was argued that the only reasonable explanation for the purchaser's refusal of performance was that he was repudiating the contract. Even if the purchaser made a genuine mistake in law, as between the parties, the innocent vendors ought not to be made to suffer: the purchaser, who was wrongly advised, should suffer the consequences.

The law is not in doubt. The test of repudiation is whether the conduct of the party evinces an intention no longer to be bound

by the Contract. See Freeth v. Burr LR 9 CD 208. The test as adumbrated by Lord Selbourne in Mersey Steel & Iron Co. Ltd. v. Naylor, Benzm & Co. 9 App. Cas. 434 at page 438 - you must examine the conduct - "so as to see whether it amounts to a renunciation, to an absolute refusal to perform the contract."

In James Shaffer Ltd. v. Findlay Durham & Brodie [1953] 1 W.L.R. 106, the facts were these:

> "Export distributors contracted in writing to pass on to manufacturers customers' orders for goods of not less than $80,000 in any one year for a number of years. Owing to import restrictions on the continental market, they were unable to obtain sufficient orders. In negotiations with the manufacturers, they said that their obligations under the contract did not go beyond passing on to the manufacturers whatever orders they received, and, though they would do their utmost to obtain orders, they were not responsible to do more. The manufacturers wrote referring to this statement and accepting it as a repudiation of the contract and holding the defendants responsible in damages resulting from repudiation."

It was held that -

> "In the circumstances of the case, the conduct of the distributors did not evince a clear intention not to be bound by the contract. They had expressed an erroneous construction of the contract but it was apparently held by them in good faith and was not an unreasonable construction to put on the contract. They had and were doing their best to fulfil the contract and did not intend to repudiate it."

This decision was followed in Sweet & Maxwell Ltd. v. Universal News Services Ltd. (supra) where the defendant's mistaken view on the construction of an agreement, it was held, did not amount to a repudiation.

I have already expressed the view that the letters from the purchaser's attorney-at-law was an endeavour to find a procedure to resolve the matter. Even if his view that a consent judgment was a sine qua non for performance on the part of the purchaser, I am inclined to think that, nevertheless, that conduct did not evince an intention no longer to be bound by the contract. Moreover, even if Mr. DaCosta was right in his suggestion that the purchaser was engaged in some manoeuvring, that would not alter the position. The erroneous view taken of the procedure to be followed would have to be shown to be so unreasonable, as not bona fide. In my view, the evidence of the

contents of the letters from the purchaser's attorney fall far short of the essential requirement of repudiation, viz., an absolute refusal to adopt performance.

From what I have stated, it is plain that the judgment of MxKain, J., in favour of the respondents, cannot be supported and should accordingly be set aside. A long list of cases makes it clear that a Court of Equity will grant specific performance on condition that the party seeking the remedy, accepts terms as understood by the party against whom he seeks it. This was a point strongly urged before us by Dr. Barnett. In Fife v. Clayton 13 Ves. Jun. 544: 33 E.R. 398; Lord Eldon decreed specific performance upon the plaintiff offering to perform the specific agreement. In Watson v. Marston 4 DeG.M. & G. 230: 45 E.R. 495 the Court gave the plaintiff the option of having his action dismissed or specific performance decreed in the terms accepted by the defendant. See also Harris v. Pepperell [1867] LR 5 Eq. 1; Baskcomb v. Beckwith [1869] LR 8 Eq. 100.

In the result, I would enter judgment for the purchaser and decree specific performance on the claim, and I would enter judgment for the plaintiff on the counter-claim. The order of the Court below should be set aside and specific performance of the agreement for sale ordered, subject to the obtaining of foreign exchange approval from the Bank of Jamaica for remittance to the vendor of the sum of U.S. $88,000 less vendor's legal costs and expenses. The appellant should be granted 30 days within which to complete. Further he is entitled to his costs both here and below.

Before parting with this appeal, I must express my regret in the delay in preparation of my contribution. Regrettably, I underwent surgery after the submissions of counsel and following that event went on long leave, part of which was spent off the Island.

WHITE, J.A.:

I have read the judgments prepared by Rowe, P., and Carey, J.A. I agree with the judgment of Carey, J.A., that the appeal of the plaintiff should be allowed, the judgment in the Court below set aside, and that judgment be entered for the plaintiff/appellant for specific performance of the agreement for sale made between the plaintiff/appellant and the first defendant/respondent, the agent for the second and third respondents/defendants. Also that the counter-claim of the defendants/respondents be dismissed.