JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 30 of 1989

BEFORE: THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE WOLFE, J.A. (Ag.)

BETWEEN	DULCIE ERMINE TULLY (Executrix of the estate of Cyril Lorenzo Shirley, deceased and Mimili Erminizude Shirley, deceased)	DEFENDANT/APPELLANT
AND	ERIC CLIVE ROBINSON	PLAINTIFF/RESPONDENT

Mrs. M. E. Forte for the appellant

John Vassell and Miss Avis Somers for the respondent

May 27, 28 and July 13, 1992

WRIGHT, J.A.:

This is an appeal by the vendor of certain property against a Declaration and Orders made by Gordon, J. upon an Originating Summons brought by the purchaser for the proper construction of a contract for sale between both parties. The Originating Summons reads as follows:

> "Let the Defendant, DULCIE ERMINE TULLY of 17 Saint Andrew Park, Kingston 10 in the Parish of Saint Andrew within Eight days of the service of this Summons inclusive of the day of such service cause an Appearance to be entered on her behalf to this Summons issued on the Application of Eric Clive Robinson of Apartment 10, Ocean Towers, Ocean Boulevard, Kingston Mall in the Parish of Kingston for the following reliefs:

"1. For a Declaration that upon a proper construction of a contract of sale of lands part of Chancery Hill, Mammie Hill and Shirley Castle in the Parish of Portland dated 14th November 1985 and entered into between the Plaintiff as Purchaser and the Defendant as Vendor the Plaintiff is entitled to perform and enforce the said contract by the payment of the purchase price stipulated in the said contract less such sum as he is adjudged entitled to as compensation arising from a material discrepancy between the acreage stipulated in the contract, namely '130 acres, more or less' and the acreage the said land was found on survey to contain, namely 94½ acres.

2. For an Injunction to restrain the Defendant from selling, charging or dealing with the said lands otherwise than as required by or in accordance with the said contract of sale.

Dated 22nd May, 1987."

It was not until January 10, 1989, that the Summons was heard and on January 11, the following determination was made:

"1. Declared that upon a proper construction of a contract of sale of lands part of Chancery Hill, Mammie Hill and Shirley Castle in the Parish of Portland dated 14th November, 1985 and entered into between the Plaintiff as Purchaser and the Defendant as Vendor the Plaintiff is entitled to perform and enforce the said contract by the payment of the purchase price stipulated in the said contract viz. $260,000.00 less the sum of $71,000.00, the amount to which the Plaintiff is entitled to as compensation arising from a material discrepancy between the acreage stipulated in the contract, namely '130 acres, more or less' and the acreage the said land was found on survey to contain, namely, 94½ acres.

2. That the Defendant is restrained from selling, charging or dealing with the said lands otherwise than as required by or in accordance with the said contract of sale or from pursuing further any existing contract of sale in relation to the said land otherwise than to the Plaintiff."

The contract which called for construction is in the following terms:

"VENDOR:	DULCIE ERMINE TULLY of No. 17 Saint Andrew Park, Kingston 10, in the Parish of Saint Andrew, Retired Teacher, Executrix of the Estates of CYRIL LORENZO SHIRLEY, Deceased and MIMILI ERMINTRUDE SHIRLEY, Deceased.
PURCHASER:	ERIC CLIVE ROBINSON of Apartment 10, Ocean Towers, Ocean Boulevard, Kingston Mall in the Parish of Kingston, Aircraft Pilot and/or his Nominee.
DESCRIPTION OF PROPERTY:	ALL THOSE parcels of land part of Chancery Hill, Mammie Hill and Shirley Castle in the Parish of Portland, in the ownership of the Estates of CYRIL LORENZO SHIRLEY, Deceased, and MIMILI ERMINTRUDE SHIRLEY, Deceased, containing by estimation One Hundred and Thirty (130) Acres more or less, and butted and bounded on the North by lands owned and/or occupied by the Estates of the late WALTER HARRISON and ROBERT HARRISON, Deceased, and by the river known as 'Miss Bell', on the South by lands owned and/or occupied by the Estate of the late WALTER HARRISON, Deceased, and by lands owned and/or occupied by LEON WHYLIE, on the West by lands owned and/or occupied by the Estate of the late ALFRED DAWKINS, Deceased, and by lands owned and/or occupied by VINCENT DENNIS, and on the East by lands owned and/or occupied by LEON KING, and by lands formerly owned and occupied by the late ENOS SHIRLEY, Deceased, or howsoever otherwise the said lands the subject of this transaction may be butted, bounded, known, distinguished or described, and being the lands recently traversed by the Vendor and the Purchaser, the exact area of which lands is to be determined by Survey.
PURCHASE MONEY:	TWO HUNDRED AND SIXTY THOUSAND DOLLARS ($260,000.00).
HOW PAYABLE:	A deposit of $40,000.00 on the execution hereof payable to the Vendor's Attorney-at-Law as Stakeholder, and the balance on or before the 28th day of February 1986.
COMPLETION:	On the issue of a Registered Title for the lands the subject of this Agreement in the name of the Purchaser and/or his Nominee.

"POSSESSION:	Possession hereunder will be given to the Purchaser subject to existing tenancies and/or occupancies, on payment of the balance purchase monies and Purchaser's moiety of the costs herein.
TAXES, WATER RATES, RENT, ETC.:	To be apportioned as of the date of Possession.
TRANSFER TAX:	To be borne by the Vendor.
TITLE AND COSTS OF TRANSFER:	Registered Title under the Registration of Titles Act. The costs of survey herein are to be borne solely by the Purchaser, and all other costs of and incident to the issue of a Registered Title as aforesaid, and of and incident to effecting Transfer hereunder are to be borne equally by the Vendor and the Purchaser.
INCUMBRANCES, RESERVATION, RESTRICTIONS, & EASEMENTS:	Free from encumbrances other than the existing tenancies and/or occupancies referred to above.
CARRIAGE OF SALE:	Vendor's Attorney-at-Law, R.S. Fraser, Jr. of No. 16 North Avenue, Kingston 10.
PURCHASER'S ATTORNEY-AT-LAW:	Messrs. Dunn Cox and Orrett (Mrs. Janice Causwell) of No. 46 Duke Street, Kingston.
SPECIAL CONDITIONS: (1)	It is understood and agreed between the parties hereto that the lands which are being conveyed under the provisions of this Agreement are those hereinbefore described and the parties further agree that the purchase price herein is payable without reference to the quantum of land being conveyed, and that the said purchase price will not be variable in any manner whatsoever in the event that a subsequent survey of the said lands discloses an increase or decrease in the area of the same stated herein.
(2)	The parties hereby agree that all the purchase monies paid hereunder, less such of the same as is required for stamp duty and otherwise to implement the provisions of this Agreement, will be held by the Vendor's Attorney-at-Law in an interest-bearing Escrow Account until Completion as defined herein, and that pending completion, all interest accruing from such account will be for the sole benefit of the Vendor.

"(3) The Vendor hereby undertakes to execute all documents, and to do and perform all other acts and things necessary to secure the issue of a Registered Title for the lands being conveyed hereunder the name of the Purchaser and/or his Nominee.

(4) The Attorney's Fees for preparing this Agreement for Sale fixed at the sum of FOUR HUNDRED DOLLARS ($400.00) shall be borne by the Vendor and Purchaser equally and each party shall bear his share thereof on the signing of this Agreement."

The inescapable question is why was it necessary to resort to litigation to secure the construction of what appears to be a straight-forward contract? Resort must be made to the available evidence to find the answer to that question. The vendor did not file any affidavit. Accordingly all that is known is what is contained in the purchaser's affidavit.

The purchaser states that he became aware of the property in question when he saw an advertisement in the "Daily Gleaner" for the sale of a property containing one hundred and forty-five acres but no price was stated. Contact was made with the vendor and together with the caretaker, one Mr. Dennis, they traversed the boundaries while the vendor identified to him the extent of the land. When he sought proof of the acreage the vendor was unable to produce any but said that she paid taxes on one hundred and thirty-five acres. It was agreed after discussion that for the purposes of determining the price she would treat the land as containing one hundred and thirty acres and thus the cost of survey estimated at ten thousand dollars ($10,000) would be accommodated by the value of the five acres, that is, two thousand dollars ($2,000) per acre. The deposit of forty thousand dollars ($40,000) was duly paid but difficulties arose when the survey, commissioned by the purchaser, disclosed the true acreage to be ninety-four and one half acres, that is, thirty-five and one half less than the estimate given by the

vendor around which acreage the contract was formed. The surveyor's letter confirming the result of the survey is dated July 16, 1986, that is, eight months from the date of the contract. But up to January 27, 1987, when the purchaser's attorney wrote to the vendor's attorney the under-mentioned letter, the problem posed by the difference in the acreage had not been resolved. Here is that letter:

"Mr. Reginald Fraser, Jnr.
Attorney-at-law
16 North Avenue
Kingston 10

Dear Sir:

Re: Sale - Land at Shirley Castle, Portland
Dulcie Tully to Eric Clive Robinson

We refer to various discussions between yourself and our Mrs. Causwell.

Your client has sold our client 130 acres 'more or less' on terms that the purchase price is payable 'without reference to the quantum of lands being conveyed.' The meaning and effect of these words in a contract or sale of land has been widely considered in the authorities and academic works, and the position is that their effect depends upon the degree of divergence between the actual acreage and that stated in the contract.

The authorities are clear that having regard to the degree of divergence in this case, our client is entitled, at his option, to rescind and claim back the deposit expenses such as the $8,000.00 he has spent on surveyor's fees, and compensation or to claim specific performance of the agreement with compensation in the form of an abatement of the purchase price - in this case by roughly $2,000.00 per acre for each of the 30 acres. Our client elects the latter option.

Please confirm to us within ten (10) days that your client agrees to approach the completion of the sale on this basis.

Yours truly,

Dunn, Cox & Orrett

Per: W. John Vassell."

The response to this letter revealed, if anything, a hardened position:

"Dear Sirs,

Sale of Lands at Shirley Castle, Portland - Dulcie E. Tully to Eric C. Robinson

I write further to your letter of the 27th January 1987, the delay in replying to which is regretted, and to my recent telephone conversations with your Mr. Vassell.

I have advised myself as to my client's legal position in this matter and taken instructions from my client. I do not agree with your conclusions of the effect of the legal authorities on the instant case, having regard to the provisions of the Agreement for Sale herein and to all the other circumstances of the matter.

I accordingly enclose herewith Notice Making Time of the Essence which is self-explanatory, and you should be advised that my client intends to enforce the provisions thereof.

I accordingly look forward to hearing from you.

Yours truly,

R. S. Fraser."

Here, too, is the Notice referred to in the letter:

"1. The Vendor is ready and willing to complete sale of ALL THOSE parcels of land part of Chancery Hill, Mammie Hill and Shirley Castle in the Parish of Portland, in the ownership of the Estates of CYRIL LORENZO SHIRLEY, Deceased, and MIMILY ERMINTRUDE SHIRLEY, Deceased containing by estimation One Hundred and Thirty (130) acres more or less, and butted and bounded on the North by lands owned and/or occupied by the Estates of the late WALTER HARRISON and ROBERT HARRISON, Deceased, and by the river known as 'Miss Bell', on the South by lands owned and/or occupied by the Estate of the late WALTER HARRISON, Deceased, and by lands owned and/or occupied by LEON WHYLIE, on the West by lands owned and/or occupied by the Estate of the late ALFRED DAWKINS, Deceased, and by lands owned and/or occupied by VINCENT DENNIS, and on the East by lands owned and/or occupied by LEON KING, and by lands formerly owned and occupied by the late ENOS SHIRLEY, Deceased, or howsoever otherwise the said lands the subject

"of this transaction may be butted, bounded, known, distinguished or described, and being the lands recently traversed by the Vendor and the Purchaser, the exact area of which lands is to be determined by Survey (hereinafter called 'the said property') which was contracted to be purchased by you under the terms of the Agreement for Sale made between you and the Vendor and dated the 11th day of November, 1985 (hereinafter called 'the said Agreement').

2. You have made default in complying with the terms of the said Agreement in that you have failed to pay the balance purchase money by the 28th day of February, 1986 as required by the said Agreement.

3. You are hereby required to pay the said balance purchase money as aforesaid within THIRTY (30) days from the date hereof as to which the Vendor HEREBY MAKES TIME OF THE ESSENCE of the said Agreement.

4. In default of compliance with this Notice the Vendor shall rescind the said Agreement and avail herself of her legal remedies in respect thereof."

On the last day of the notice period the purchaser's attorney replied paying an abated balance of $149,000 to complete payment for the 94½ acres. He wrote the vendor as follows:

"Dear Madam:

Re: Sale of Land Part of Chancery Hill, Nammie Hill and Shirley Castle, Portland
Yourself to Clive Robinson

We act for the Purchaser, Mr. Clive Robinson, and enclose our cheque in the sum of $149,000.00 being what our client considers to be the balance purchase price in this matter. You have our undertaking to pay to your Attorney-at-law the half-costs transfer as soon as we are advised of the amount.

We would have sent this cheque to your Attorney, but when we telephoned his office, he was out.

Yours truly,

DUNN, COX & ORRETT."

On the following day, May 22, 1987, the vendor's attorney took drastic action. He purported to rescind the contract and refunded the deposit of forty thousand dollars ($40,000) as well as the one hundred and forty-nine thousand dollars ($149,000) paid in purported compliance with the demand for the balance. Momentum had grown and peaked with the issue on the self-same day of the Originating Summons (supra). It is not clear, therefore, why it took almost two years for the case to be heard.

It is clear that before litigation the purchaser had demonstrated his ability and willingness to pay for the amount of land which the vendor was competent to sell and convey while the vendor was insisting on being paid the contract price for the amount of land which she thought she had and which she had induced the purchaser by her representation to think that she was selling and he was buying. The vendor's position would have been unassailable if she had advertised a property of unknown acreage and either in the advertisement or when contacted by the purchaser she had stated the price she wanted for the property regardless of the actual acreage. But that is not what happened although Mrs. Forte seems to think that in effect that is what Special Condition 1 is saying.

Before Special Condition 1 was inserted in the contract the subject-matter of the sale had been clearly defined as "containing by estimation One Hundred and Thirty (130) Acres more or less" as well as "being the lands recently traversed by the vendor and the purchaser, the exact area of which lands is to be determined by Survey." It is difficult to come to a conclusion that the vendor had no interest in the survey. What if the survey had revealed not a deficiency of thirty-five and one half acres but an excess of thirty-five and one half acres? Could the vendor, a trustee, regard such a difference as being of no moment and allow the sale to proceed? I doubt that very much.

Gordon, J. at pages 2 - 3 of his brief judgment crystalized the issues before him thus:

> "What falls to be considered is Special Condition 1 of the Contract. Mr. Vassell submits that notwithstanding that clause the Plaintiff is entitled to have an abatement of purchase price because when land is sold stipulating an acreage more or less a small variation would not affect the contract but massive variation would and despite the special condition in the contract the Plaintiff is entitled to rely on the principles in WHITTEMORE VS WHITTEMORE, Mallins VC dictum at p 600 - Despite the fact that in that case there was a condition similar to the present it was held that the Plaintiff was entitled to an abatement - WHITTEMORE V WHITTEMORE was approved in Watson v Burton.
>
> Mr. Frankson contended that the contract is clear and unambiguous and that the parties entered into it with proper advice from their respective Attorneys-at-Law and the Plaintiff cannot now complain and that the complaint is not maintainable. That the Agreement for Sale is the entire Agreement, that there is no ambiguity and that paragraphs 1 - 11 should not be contemplated by the Court. He was prepared to concede that in the events that happened the acreage of land was found not to be 130 acres and to that extent there was a misdescription but the area of land as stated in the contract did not determine the area, but what was viewed by the parties prior to the execution of the contract.
>
> It is to be observed that in WHITTEMORE V WHITTEMORE the area of the premises was described by the Vendor, was inspected by the purchaser and after that the contract was entered into. There was a clause denying compensation but the purchaser did not get it."

The misdescription conceded by Mr. Frankson, Q.C., attorney-at-law for the vendor, is in fact a misrepresentation - innocent though it be - of the amount of the acreage of the land the vendor was contracting to sell unless the term "more or less" can be made to encompass the difference of thirty-five and one half acres.

Unless Special Condition 1 can be regarded as reflecting a change of heart on the part of the vendor, which is impermissible, then it must be so construed as to harmonize with and not

to obstruct, the performance of the contract which is to sell and convey "130 acres more or less." In other words, it must be construed to give business efficacy to the contract and so cannot be allowed a construction which is repugnant to the purpose of the contract to which it has been appended.

The term "more or less" is by no means novel and has been judicially considered over a vast span of time. Examples are to be found in **"Words and Phrases Judicially Defined"** 4th Edition, supplied by Mr. Vassell, in support of his contention that the term means "about so much"; "approximately" and in fact contemplates a slight divergence either way but not a considerable departure from the stated figure. See **Hill v. Buckley** (1811) 17 Ves 394 where a difference of thirty acres was held to be outside the contemplation of "more or less." In **Townshend (Marquis) v. Stangroom** (1801) 6 Ves 328 at 340, 341 Lord Eldon, L.C. said:

> "As to the expression 'more or less', I do not say, those words in a contract will not include a few additional acres: but if the parties are contending about three acres, it would be very singular upon those words to add twenty-four map acres."

In **Belfrage v. McNaughton** (1924) V.L.R. 441 (at 443, 444) a property described in a contract as comprising two hundred and eighty acres "more or less" was found after accurate measurement to be two hundred and sixty-two acres two roods six perches. Macfarlan, J. in resolving the issue said at pages 443, 444:

> "I am not suggesting that the words 'more or less' are in every case to be limited to a deficiency arising from errors in measurement, but I think that that is primarily what those words are intended to cover; and I also think that nowadays, when the facilities for accurate measurement are so much greater than formerly in all parts of the country, a smaller discrepancy should be held to be outside the words, 'more or less' than in earlier times. But in the present case I have no doubt in my own mind - and I do not think any authority compels me to decide otherwise - that a discrepancy of eighteen acres in an area of 280 acres is outside the qualifying words 'more or less'."

He declined the invitation to fix the limits within which the term should be thought operative but expressed the view that in that case a discrepancy of five acres might be thought to be a liberal margin.

In **Whittemore v. Whittemore** (1969) 6 Equity Cases 603, a purchaser's action seeking compensation or rescission, relied on by Gordon, J. property **stated** in the particulars to contain "753 square yards or thereabouts" turned out to be only 573 square yards and although one of the conditions **of** sale provided that:

> "...if any error, mis-statement, or omission in the particulars should be discovered, it should not annul the sale, nor should any compensation be allowed by the vendor or purchaser in respect thereof,"

it was held that that condition applied to small errors and did not cover so large a deficiency, and that the purchaser was entitled to compensation.

Was Gordon, J. correct in accepting guidance from this case? Not unnaturally Mrs. Forte joins issue here. She conceded the point that where there has been a deficiency in the subject-matter of the contract a purchaser can claim compensation. However, bearing in mind the claimed effect of Special Condition 1 she maintains that there is no deficiency in the subject-matter of the contract because the purchaser could get the whole of the subject-matter for which he contracted. Further, she submitted that Special Condition 1 ruled out any claim for compensation. I think that, having regard to the view already expressed as to the construction of Special Condition 1, that submission is demonstrably wrong. She holds to the view that in rescinding the contract the vendor had acted within the rights conferred upon her by the contract. She sought support from **In re Terry and White's Contract** (1886) 32 Ch 14; **Rudd v. Lascelles** (1900) 1 Ch 815; **Watson v. Burton** (1956) 3 All E.R. 929.

In re Terry and White's Contract (supra) the purchaser, refuting the vendor's claim to rescind the contract, took out a summons under the Vendor and Purchaser Act 1874 for Specific Performance and compensation but was met with conditions of sale which disallowed compensation in certain events which had occurred as well as entitling the vendor to rescind. His claim failed. There are no such conditions in the instant contract. **Rudd v. Lascelles** (supra) was also a purchaser's action for specific performance for the sale of certain premises which were affected by restrictive covenants of which the vendor, to the purchaser's knowledge, was unaware. Accordingly, the purchaser could not invoke the equitable estoppel which would have operated in his favour had he been induced to enter the contract by the vendor's representation. [See **Mortlock v. Buller (1804) 10 Ves 292, 315; 7 R.R. 417**]. **But even had it not been so the purchaser would not have been able to obtain specific performance** with compensation because of the impossibility of assessing the deficiency occasioned by the restrictive covenants. The point to note is that the purchaser did not fail because there was no provision for compensation but for the other reasons stated above. This case does not support Mrs. Forte's position.

Watson v. Burton (supra) was a vendor's action to secure specific performance of a contract which provided specifically against annulment or compensation for:

> "...any error or mis-statement found in the contract whether or not it materially affects the description of the property."

The property described as approximately 3,900 square yards turned out to be approximately 2,360 square yards - a difference of 1,560 square yards. The vendor failed because inter alia:

> (i) the statement of the site area was a term of the contract and could not be rejected under the maxim "falsa demonstratio non nocet".

(ii) the purchaser could not be given what he had bargained for.

Accordingly, the purchaser's rescission even after he had completed payment of the deposit, taken possession and had repairs done was allowed to prevail. I fail to detect any support from the case for the appellant's contention.

What then is the effect of the deficiency in the instant case? Did it enable the vendor to serve notice as was done and thereafter to rescind the contract? A distinction is clearly recognised between the position of a vendor seeking specific performance of a contract and a purchaser seeking the same result. The significant difference is that a vendor cannot obtain specific performance unless he is ready and willing to perform his obligations. **Bechal v. Kitsford Holdings** (1988) 3 All E.R. 985. Accordingly, where the vendor is in no position to transfer the area contracted to be sold it is incompetent for him to serve a notice to complete and the purchaser can rescind. It follows, therefore, that by reason of the deficiency in the acreage the appellant's notice to complete was without legal effect. But whereas the vendor cannot compel the purchaser to accept a lesser area even with compensation the purchaser is enabled to accept what the vendor can give with abatement in the purchase price. The distinction under consideration is well recognised. **Hill v. Buckley** (1811) 30 English Reports page 153 was a case in which the contract acreage was erroneously stated to be some twenty-six acres more than the actual acreage. In a purchaser's action for specific performance with abatement of the purchase price Sir Wm. Grant, M.R. stated the position thus at page 155:

> "Where a misrepresentation is made as to the quantity, though innocently, I apprehend, the right of the purchaser to be to have what the vendor can give; with an abatement out of the purchase-money for so much as the quantity falls short of the representation. That is the rule generally; as, though the land is neither bought nor sold professedly

> "by the acre, the presumption is, that in fixing the price regard was had on both sides to the quantity, which both suppose the estate to consist of. The demand of the vendor and the offer of the purchaser are supposed to be influenced in an equal degree by the quantity, which both believe to be the subject of their bargain; therefore a rateable abatement of price will probably leave both in nearly the same relative situation in which they would have stood, if the true quantity had been originally known..."

In **McKenzie v. Hesketh** (1877) 7 Ch D 675 a not dissimilar question arose. The defendant had in error accepted an offer to lease 249 acres for £500 but in fact the available acreage was 214 acres. After stating how the mistake arose, Fry, J. continued (at page 682):

> "What is the effect of that mistake? It is contended on behalf of the Defendant that the effect is to enable him absolutely to refuse the contract, except upon the terms of receiving a rent of £500 for 214A. 1R. 13P. The Plaintiff, on the other hand, contends that he is entitled to require the Defendant to grant him a lease of the 214A. 1R. 13P. at a reduced rent by way of compensation for the deficiency of the acreage. In my opinion the Plaintiff's contention is well founded. It appears to me that the mistake is not one which goes to the corpus with which the contract deals; it is not a mistake as to the essential terms of the contract. A mere difference in quantity has never been held to be a bar to specific performance. The Court of Chancery always drew a distinction between the essential and non-essential terms of a contract, and allowed the incapacity to perform it in non-essential terms to be made the subject of compensation. If the incapacity of the Defendant to perform this contract had arisen from some other cause, such as the act of God, that would clearly have been a proper subject of compensation, and I think it is not the less so because the incapacity arose from a blunder of the Defendant's agent."

There are, therefore, authorities of respected antiquity as to how the deficiency in a case such as the present should be resolved, that is, that the purchaser is entitled to specific performance with a rateable abatement out of the purchase price.

In the result it is my decision that the judgment of Gordon, J. is correct and ought to be affirmed. Accordingly, I would dismiss the appeal and affirm the judgment of the Court below. Costs of appeal to the respondent to be agreed or taxed.

DOWNER, J.A.

In a purchaser's summons before Gordon, J., in the Supreme Court, Eric Clive Robinson secured a declaration in his favour as to the true construction of the contract of sale for a property in Portland. The vendor was Dulcie Ermine Tully who is the Executrix of the property. The declaration in part reads that the purchaser:

> "... is entitled to perform and enforce the said contract by the payment of the purchase price stipulated in the said contract viz. $260,000.00 less the sum of $71,000.00, the amount to which the Plaintiff is entitled to as compensation arising from a material discrepancy between the acreage stipulated in the contract, namely '130 acres, more or less' and the acreage the said land was found on survey to contain, namely 94½ acres."

Further, the purchaser secured an injunction, the terms of which provided that the vendor:

> "... is restrained from selling, charging or dealing with the said lands otherwise than as required by or in accordance with the said contract of sale or from pursuing further any existing contract of sale in relation to the said land otherwise than to the Plaintiff."

The vendor has appealed against this order so the issue on appeal is to determine whether the order made below is correct and ought to be affirmed, as the purchaser has contended.

On the face of it, the declaration seems odd in two respects. Firstly, if the contract price was $260,000 the payment of $189,000 ordered by the court seems to relate to a different contract. Likewise for the purchaser to claim and be awarded 94½ acres and compensation of $71,000 instead of 130 acres more or less which he had stipulated for, seems to be a markedly different bargain especially when a compensation clause was not part of the original contract. The clue to this problem is whether in the circumstances of this case, the purchaser can elect for specific performance with compensation, on the basis of an equitable

estoppel precluding the vendor from resiling from the contract.

On the true construction of the contract

The introductory part of the agreement for sale reads as follows:

> " AGREEMENT FOR SALE
>
> AGREEMENT FOR SALE made this 14th day of November 1985 WHEREBY IT IS AGREED that the Vendor shall sell and the Purchaser shall purchase ALL THOSE parcels of land more particularly described herein upon the terms set out as follows: ..."

Then after referring to the vendor and the purchaser, the important clause with a marginal note describing the property appears. It reads thus:

> "DESCRIPTION OF PROPERTY
>
> ALL THOSE parcels of land part of Chancery Hill, Mammie Hill and Shirley Castle in the Parish of Portland, in the ownership of the Estates of CYRIL LORENZO SHIRLEY, Deceased, and MIMILI ERMINTRUDE SHIRLEY, Deceased, containing by estimation One Hundred and Thirty (130) Acres more or less, and butted and bounded on the North by lands owned and/or occupied by the Estates of the late WALTER HARRISON and ROBERT HARRISON, Deceased, and by the river known as "Miss Bell," on the South by lands owned and/or occupied by the estate of the late WALTER HARRISON, Deceased, and by lands owned and/or occupied by LEON WHYLIE, on the West by lands owned and/or occupied by the Estate of the late ALFRED DAWKINS, Deceased, and by lands owned and/or occupied by VINCENT DENNIS, and on the East by lands owned and/or occupied by LEON KING, and by lands formerly owned and occupied by the late ENOS SHIRLEY, Deceased. or howsoever otherwise the said lands the subject of this transaction may be butted, bounded, known, distinguished or described, and being the lands recently traversed by the Vendor and the Purchaser, the exact area of which lands is to be determined by Survey."

The first set of critical words to construe is "containing by estimation one hundred and thirty (130) acres more or less," as part of the description of the property. This must be the vendor's description and it must be linked to and harmonise with the provision in the same clause for the protection of the purchaser. That phrase reads "the exact area of which lands is to be determined by survey." These words emphasise the importance of the reliance being placed on the estimate of "one hundred and thirty (130) acres more or less" and suggests that if there is a shortfall or surplus within a narrow range as revealed by the survey, then both parties would abide the terms of the contract. The phrase "and being the lands recently traversed by the vendor and purchaser" indicates the area being sold and shows the intention of the vendor to convey such lands to the purchaser.

It is clear that there was no registered title. So a specific provision was made as regards costs before and on registration. Here is the specific wording:

> "TITLE AND
> COSTS OF
> TRANSFER:
>
> Registered Title under the Registration of Titles Act. The costs of Survey herein are to be borne solely by the Purchaser, and all other costs of and incident to the issue of a Registered Title as aforesaid, and of and incident to effecting Transfer hereunder are to be borne equally by the Vendor and the Purchaser."

Implicit in the provision that the costs of survey were to be borne by the purchaser is that such costs are reflected in the purchase price. The stipulation as regards price was as follows:

> "PURCHASE MONEY:
>
> TWO HUNDRED AND SIXTY THOUSAND DOLLARS ($260,000.00)."

As this was not an open contract, there are a number of special conditions of which the first is relevant. Also it was one of the issues on which the parties take a different approach. The clause reads:

> "SPECIAL CONDITIONS:
>
> (1) It is understood and agreed between the parties hereto that the lands which are being conveyed under the provisions of this Agreement are those hereinbefore described and the parties further agree that the purchase price herein is payable without reference to the quantum of land being conveyed, and that the said purchase price will not be variable in any manner whatsoever in the event that a subsequent survey of the said lands discloses an increase or decrease in the area of the same stated herein."

A contract for the sale of land is invariably followed by a conveyance and thus special condition makes it clear that the "lands which are being conveyed under the provisions of this Agreement are those hereinbefore described." So the pertinent question is how are these lands described in the agreement? To reiterate the description of the property is lands "containing by estimation one hundred and thirty (130) acres more or less" and "being the land recently traversed by vendor and purchaser." The further description is that "the exact area of which lands is to be determined by survey."

The special condition also stipulates that the purchase price of $260,000 is payable "without reference to the quantum of land being conveyed." This special condition must refer to the estimate of "one hundred and thirty (130) acres more or less." So if the survey reveals a narrow range either upwards or downwards in the acreage then the price of $260,000 will stand. The further condition that the price will not vary if the subsequent survey reveals an increase or decrease, underscores the provision that

$260,000 is for 130 acres more or less. Acreage must be important as the traditional method of pricing land especially for an estate, is price per acre.

Do the authorities support this construction of the contract?

Mr. Vassel for the respondent helpfully cited a collection of cases from Words and Phrase Legally Defined Vol. (K-Q) 3rd edition p. 176 showing how the courts have construed the words "more or less." The earliest and perhaps the best is:

> "In the lease there are but ten acres demised, and these words (more or less) cannot in judgment of the law extend to thirty or forty acres, for it is impossible by common intendment, and the rather because the land demanded by the declaration is of another nature than that which is mentioned in the per nomen: Anon (1609) Yelv 166 at 166, per cur."

Two others will suffice:

> " 'As to the expression 'more or less,' I do not say those words in a contract will not include a few additional acres: but if the parties are contending about three acres, it would be very singular upon those words to add twenty-four map acres.' Townshend (Marquis) v. Stangroom (1801) 6 Ves 328 at 340, 341, per Lord Eldon L.C."

Then the following is:

> " 'The effect of the words 'more or less,' added to the statement of quantity, has never been yet absolutely fixed by decision (Hill v. Buckley (1811) 17 Ves 394); being considered, sometimes as extending only to cover a small difference, the one way, or the other; sometimes, as leaving the quantity altogether uncertain, and throwing upon the purchaser the necessity of satisfying himself with regard to it.' Winch v. Winchester (1812) 1 Ves & B 375 at 376, 377, per Grant M.R."

Where therefore the unchallenged evidence of the surveyor is that the property is 94½ acres and the estimate was 130 acres more or less, then such a shortfall was never within the intendment of the parties and so could not have been provided for in the special condition.

The initial authority on equitable estoppel which ought to be considered is the statement of principle by Lord Eldon in **Mortlock v. Buller** (1804) 10 Ves 292, at 315, 316 or E.R. Vol. 32 857 at 866:

> "... I also agree if a man having partial interests in an estate, chooses to enter into a contract, representing it, and agreeing to sell it, as his own, it is not competent to him afterwards to say, though he has valuable interests, he has not the entirety; and therefore the purchaser shall not have the benefit of his contract. For the purpose of this jurisdiction, the person contracting under those circumstances, is bound by the assertion in his contract; and, if the vendee chooses to take so much as he can have, he has a right to that and to an abatement; and the Court will not hear the objection by the vendor, that the purchaser cannot have the whole. (1 Swaurt 54). But that always turns upon this; that it is, and is intended to be the contract of the vendor."

That this principle applies to misdescription as to the acreage of land and was applied see **Hill v. Buckley** 14 E.R. (Ch) 153. At p. 155 Sir Wm. Grant, M.R. said:

> "... Where a misrepresentation is made as to the quantity though innocently, I apprehend, the right of the purchaser to be to have what the vendor can give; with an abatement out of the purchase money for so much as the quantity falls short of the representation. That is the rule generally; as, though the land is neither bought nor sold professedly by the acre, the presumption is, that in fixing the price regard was had on both sides to the quantity, which both suppose the estate to consist of. The demand of the vendor and the offer of the purchaser are supposed to be influenced in an equal degree by

> "the quantity, which both believe to be the subject of their bargain. therefore a rateable abatement of price will probably leave both in nearly the same relative situation, in which they would have stood, if the true quantity had been originally known; and I do not think, I could upon any principle in the case of **Martlock v. Buller,** to which this bears no resemblance, exempt these [402] Defendants from this equity upon the ground of their being trustees, and not owners."

Then in **McKenzie v. Hesketh** (1877) Vol. Ch. 682 Fry, J., said:

> "... It appears to me that the mistake is not one which goes to the corpus with which the contract deals; it is not a mistake as to the essential terms of the contract. A mere difference in quantity has never been held to be a bar to specific performance. The Court of Chancery always drew a distinction between the essential and non-essestial terms of a contract, and allowed the incapacity to perform it in non-essential terms to be made the subject of compensation. If the incapacity of the Defendant to perform this contract had arisen from **some** other cause, such as the act of God, that would clearly have been a proper subject of compensation, and I think it is not the less so because the incapacity arose from a blunder of the Defendant's agent." (Emphasis supplied)

Further Farwell, J., in **Rudd v. Lascelles** (1900) 1 Ch. 815 stressed the equitable nature of the remedy and stated it as follows at p. 818:

> " In my opinion the jurisdiction to enforce specific performance with compensation on a vendor, where the contract is silent as to compensation, rests on the equitable estoppel referred to in **Mortlock v. Buller** 10 Ves 292, 315; 7 R.R. 417, namely, that a vendor representing and contracting to sell an estate as his own cannot afterwards be heard to say he has not the entirety. It probably first arose in cases of small deficiency in the quantity of the land sold, e.g., if a vendor contracted to sell 100 acres and only had 90 acres he could not resist specific performance on the ground

> "that the contract was to sell 100 acres. This cy-pres execution was a purely equitable remedy. This view is borne out by the judgment of Giffard, L.J., in **Castle v. Wilkinson** L.R. 5 Ch. 534, 537: ' all those cases in which the contract has been enforced partially and a partial interest has been ordered to be conveyed, have been where the vendor has represented that he could sell the fee simple, and the purchaser has been induced by that representation to believe that he could purchase the fee simple.' "

This principle of equitable estoppel has been approved by the Privy Council in **Rutherford v. Adams** (1915) A.C. 866 where at p. 870 Lord Haldane said:

> "... Another possible case arises where a vendor claims specific performance and where the Court refuses it unless the purchaser is willing to consent to a decree on terms that the vendor will make compensation to the purchaser, who agrees to such a decree on condition that he is compensated. If it is the purchaser who is suing the Court holds him to have an even larger right. Subject to considerations of hardship he may elect to take all he can get, and to have a proportionate abatement from the purchase money. But this right applies only to a deficiency in the subject-matter described in the contract. It does not apply to a claim to make good a representation about that subject-matter made not in the contract but collaterally to it. In the latter case the remedy is rescission, or a claim for damages for deceit where there has been fraud, or for breach of a collateral contract if there has been such a contract."

Gordon, J., however was content to rely on **Whittemore v. Whittemore** (1869) L.R. 603 where at p. 3 of his judgment he said:

> "... He had entered into a contract to purchase 130 acres more or less. The survey showed that the land he had agreed to buy contained only 94½ acres. Special condition 1 stipulated that no decrease or increase in area should affect the price

> "agreed on. I accept **WHITTEMORE V. WHITTEMORE** as good law and applicable to the circumstances of this case."

As for **Whittemore**, Sir R. Malins, V.C., at p. 605 said:

> "... It turns out that this lot, instead of containing 753 square yards, contains only 573 square yards. Now that is a very material dificiency, and one which entitles the purchaser either to be relieved from his contract or to have compensation, unless he is excluded from relief by the conditions of sale. It is contended that the 14th condition excludes him from compensation, and that the 20th condition excludes him from rescission."

Be it noted that specific performance was not sought in this case, although compensation was sought and awarded. Another passage from the judgment relevant to the circumstances of this case is to be found in **Watson v. Burton** (1956) 3 All E.R. 929 at 934 Wynn-Parry, J., said:

> " In **Whittemore v. Whittemore** (1869), L.R. 8 Eq. 603, there was a misstatement as to area, and it was a misstatement of some substance. In his judgment, Sir Richard Malins, V.C. said (ibid., at p. 605):
>
> > 'I am firmly persuaded that the purchaser would have given exactly the same price for the property if those words had been omitted; but as they have been put in I must treat them as part of the contract.' "

The relevant words were "the site of the said messuages or tenements and out buildings contains 753 square yards or thereabouts."

> "Whatever else may be said by way of criticism of the Vice-Chancellor's decision in that case, I cannot find that in any of the later cases that passage has been the subject of criticism,..."

Against these formidable range of authorities, Mrs. Forte for the vendor sought to rely on **Cordingley v. Cheeseborough** 45 E.R. 1230 and **Re Terry & White's Contract** 32 Ch. 15. I am content to adopt the words of Buckely, J., (who subsequently became Lord Wrenbury) in **Jacobs v. Revell** (1900) Ch. 858 at 866

His Lordship said:

> " In **Cordingley v. Cheeseborough** (1862) 4 D.F. & J. 379, 384, the purchaser sought for specific performance with an abatement of the purchase-money. The contract contained a clause that the admeasurements were presumed to be correct, but that if any error was discovered therein no allowance should be made or required either way. The clause, therefore, excluded compensation; but the purchaser, alleging that he was getting less than he contracted to buy, asked for specific performance with compensation. He wanted to buy upon altered terms. The Court decreed specific performance without compensation. Lord Westbury L.C. says:
>
> ' In deciding this question it must be recollected exactly what is the nature of the present suit. It is not the suit of a vendor seeking to enforce a specific performance. It is the case of a purchaser coming for a specific performance, but insisting that he is entitled by virtue of the contract to a deduction from his purchase-money.' In other words, he was insisting on something which was not in the contract.
>
> In **Re Terry and White's Contract** 32 Ch. D 14 does not throw much light on the general question. In that case there was a clause excluding compensation; but the purchaser nevertheless asked for compensation. The vendor was not willing to give compensation, and under another condition he annulled the sale, and it was held that he was right in so doing."

All these passages show that the vendor's contention that the special condition entitled her to resile from the contract after the survey was not tenable. On the contrary, they demonstrate that since there was an innocent misrepresentation in the contract, the purchaser could elect to compel the vendor to convey the estate which exists with an abatement of the purchase price. This is the essence of the respondent's case and the gist of the finding by Gordon, J.

The Facts

It is now permissible to examine the evidence in this case as the contract has been construed without resorting to the facts. The purchaser, in response to an advertisement in the "Gleaner" for the sale of a property containing 145 acres, sought out the vendor. They both inspected the property and she assured him that she paid taxes on 135 acres and that her price at $2,000 per acre was $260,000 and that he should bear the costs of the survey. She explained that she was out of funds and that costs would amount to $10,000. It was against this background that the contract was drafted by the vendor's attorney-at-law. After the deposit of $40,000 was paid and the survey completed, the vendor tendered $149,000 as the balance on the basis that there was a shortfall of 36 acres. It was in those circumstances that the purchaser, instead of rescinding, which he had a right to do, elected for specific performance with an abatement in the contract price. The vendor returned the purchaser's money and purported to rescind the contract. That was the origin of this action.

Conclusion

To reiterate, the analysis of the authorities demonstrates that on the true construction of the contract, the special condition did not disentitle the purchaser from obtaining a decree of specific performance with an abatement of the purchase price. The vendor had no legal or equitable right to rescind the contract and return the deposit and purchase price.

Since the purchaser could elect for specific performance, the court is entitled to examine the evidence to determine the extent of the compensation. Either on the basis of $2,000 per acre or on a pro rata basis the figure of $71,000 arrived at below was accurate. The order of Gordon, J., is therefore affirmed and costs of the appeal must go to the respondent/purchaser and it is to be agreed or taxed.

WOLFE, J.A. (AG.)

I have had the benefit of reading in draft the judgments of my brothers Wright and Downer, (JJ.A.) and wish to state that I agree with the conclusions at which they have arrived as well as the reasons for their so concluding. But for the important issues raised in this appeal I would have contented myself with concurring with their judgments.

The respondent, arising out of a contract entered into between himself and the appellant, sought a declaration:

> "... that upon a proper construction of a contract of sale of lands part of Chancery Hill, Mammie Hill and Shirley Castle in the parish of Portland dated 14th November 1985 and entered into between the plaintiff as Purchaser and the Defendant as vendor, the Plaintiff is entitled to perform and enforce the said contract by the payment of the purchase price stipulated in the said contract less such sum as he is adjudged entitled to as compensation arising from a material discrepancy between the acreage stipulated in the contract, namely '130 acres, more or less' and the acreage the said land was found on survey to contain namely, 94½ acres."

Gordon, J., as he then was, granted the declaration as prayed and ordered that the purchase price be abated by the sum of $71,000 being the amount to which the plaintiff is entitled as compensation arising from a material discrepancy between the acreage stipulated in the contract, namely "130 acres, more or less" and the acreage the said land was found on survey to contain, namely, 94½ acres.

On appeal the complaint is that in the light of Special Condition I it was not competent for Gordon, J., to order specific performance of the contract with abatement of the purchase price. Special Condition I, the appellant argued, precludes any adjustment of the purchase price irrespective of the difference between the contract acreage and the actual acreage.

Special Condition 1 stipulates:

> "It is understood and agreed between the parties hereto that the lands which are being conveyed under the provisions of this Agreement are those hereinbefore described and the parties further agree that the purchase price herein is payable without reference to the quantum of land being conveyed, and that the said purchase price will not be variable in any manner whatsoever in the event that a subsequent survey of the said lands discloses an increase or decrease in the area of the same stated herein."

Interestingly, in a detailed description of the property, the subject-matter of the contract, the land is described as containing by estimation -

> "One Hundred and Thirty (130) Acres more or less ... and being the lands recently traversed by the Vendor and Purchaser, the exact area of which lands is to be determined by survey."

Mrs. Forte for the appellant contended that the underlined words were of no significance and that ascertaining the exact acreage of the land was merely for conveyancing purpose. These words she further submitted did not indicate that the sale was one by acreage. It was a sale of a parcel of land without any refrence to the acreage and that the words "more or less" were covered by the Special Condition 1.

If one were to reduce Mrs. Forte's contention to the point of absurdity it would mean that if the actual acreage of the land proved to be ten (10) acres instead of 130 acres then by virtue of Special Condition 1 the Respondent had one of two options either to annul the contract or pay the full purchase price stipulated in the contract.

The first issue must be to decide what is the effect of the phrase "more or less" on the description of the land. The meaning of the words "more or less" has been judicially considered.

In words and Phrases Legally Defined 4th Edition Volume I to L, it is made clear that the phrase "more or less" contemplates a trivial and not a substantial divergence from what is stipulated in the agreement.

In **Townshend (Marquis) v. Stangroom** [1801] 6 Ves. 328 at 340, 341 Lord Eldon, L.C. said:

> " 'As to the Expression 'more or less' I do not say, those words in a contract will not include a few additional acres: but if the parties are contending about three acres, it would be very singular upon those words to add twenty-four map acres.' "

In **Winch v. Winchester** [1812] 1 Ves & B 375 at 376, 377 per Sir William Grant, M.R.:

> " 'The effect of the words 'more or less', added to the statement of quantity, has never been yet absolutely fixed by decision (Hill v. Buckley [1811] 17 Ves 394) - being considered, sometimes as extending only to cover a small difference, the one way, or the other; sometimes, as leaving the quantity altogether uncertain, and throwing upon the purchaser the necessity of satisfying himself with regard to it.' " [Emphasis added]

The underlined words give significance to the words "the exact area of which lands is to be determined by survey."

In **Goldsbrough, Mort & Co v. Carter** [1914] 19 C.L.R. 429 at 434, 438, per Griffith, CJ -

> " 'The contract sued upon in this case ... begins with a statement that the appellants (by their agents) 'have this day sold' to the respondent 'the undermentioned stock, more or less' ... A statement of a number with the words 'about' or 'more or less', or both, may, in my opinion, in some cases operate as a warranty, especially if the price is a lump sum.' "

Special Condition 1

What is the effect of Special Condition 1? Does it have the effect of avoiding any and every divergence between the contract acreage and the actual acreage? Bearing in mind the interpretation given to the phrase "more or less" in the decisions cited supra, can it be successfully contended that the purchaser was contracting that there would be no abatement of purchase price if the acreage was less than estimated and therefore abatement of purchase price is excluded in any situation. Surely, Special Condition 1 cannot be interpreted in a manner which is repugnant to the entire agreement. Any interpretation of Special Condition 1 must be such as to give meaning and purpose to the agreement entered into by the parties. In other words the condition must be construed to avoid repugnance or derogation.

In **Portman v. Mill** 1 Bing N.C. 370 38 E.R. 449 a contract for the purchase of a farm described it as containing "349 acres or thereabouts, be the same more or less"; and stipulated that the premises should be taken at the quantity above stated, whether "more or less" Lord Eldon, L.C., in dealing with the stipulation said:

> "As to the stipulation in the contract, that the parties shall not be answerable for any excess or deficiency in the quantity of the land, and that the premises shall be taken at the quantity before stated, I never can agree, that such a clause (if there were nothing else in the case) would cover so large a deficiency in the number of acres as is alleged to exist here."

As to whether or not the Specific Performance of the contract, with abatement of the purchase price could properly be ordered Gordon, J., relied upon the decision in **Whittemore v. Whittemore** L.R. (Equity Cases) Vol. VIII 1869 p. 603, where at a sale for auction under a decree the property sold was stated in the particulars to contain 753 square yards or thereabouts, and one of the conditions of sale provided that if any error, mis-statement,

or omission in the particulars should be discovered, it should not annul the sale, nor should any compensation be allowed by the vendor or purchaser in respect thereof. The property was found to contain 573 square yards only:

Held, that the condition only applied to small errors, and did not cover so large a deficiency, and that the purchaser was entitled to compensation. Sir Richard Malins, V.C., in delivering the judgment said at pp 605-606:

> "... Now that is a very material deficiency, and one which entitles the pruchaser either to be relieved from his contract or to have compensation, unless he is excluded from relief by the conditions of sale. ..."

Having referred to the special conditions of the contract he said in respect of the 14th condition, which is similar to the Special Condition in the instant case:

> "Now that 14th condition, if construed literally, certainly does in terms exclude the right to compensation in respect of any error or mis-statement as to quantity; but I think that, according to the principles laid down in Portman v. Mill 2 Russ 570 and Dimmock v. Hallett Law Rep. 2 Ch. 21, conditions of this kind must be construed as intended to cover small unintentional errors and inaccuracies, but not to cover reckless and careless statements, and that so large a deficiency as 180 square yards out of 753 does not come within the condition."

Whittemore v. Whittemore has been doubted by Lord Esher, M.R., and Lindley, L.J., in In re Terry and White's Contract 1886 Volume XXXII Ch. D. 14, while Lopez, L.J., was of the view that he would have been prepared to follow it but for two other conditions which were contained in the contract. It should however be noted that in **Whittemore's** case the purchaser was not seeking specific performance but rather resisting it unless compensation was granted.

In **Hill v. Buckley** E.R. Volume XXXIV page 153 the Bill prayed the specific performance of a contract for the sale of an estate by the Defendants, devisees in trust, to the Plaintiff, with an abatement out of the purchase money in respect of a deficiency in quantity. The property involved was represented as containing 217 acres and 10 perches. The actual acreage proved to be 26 acres less than that represented. Sir William Grant, M.R. held:

> "... Where a misrepresentation is made as to the quantity though innocently, I apprehend, the right of the purchaser to be to have what the vendor can give; with an abatement out of the purchase money for so much as the quantity falls short of the representation. That is the rule generally; as, though the land is neither bought nor sold professedly by the acre, the presumption is, that in fixing the price regard was had on both sides to the quantity, which both suppose the estate to consist of. The demand of the vendor and the offer of the purchaser are supposed to be influenced in an equal degree by the quantity, which both believed to be the subject of their bargain: therefore a ratuable abatement of price will probably leave both in nearly the same relative situation in which they would have stood, if the true quantity had been originally known; ..."

Similarly in **McKenzie v. Hesketh** [1877] Volume VII Chancery Division page 675: The plaintiff offered to take a lease of a farm belonging to the Defendant at a rent of £500 per annum, specifying in his tender the closes which he wished to take, with their acreage, which amounted in the whole to 249 acres. The Defendant's agent desired to let only 214 acres with this farm, but he accepted the Plaintiff's offer without looking at the acreage included in it. He had in fact already let one of the closes to another person. Another tender had been made by a former tenant for the same farm, as comprising 235 acres, and the Defendant's agent admitted in examination that he thought the Plaintiff had tendered for the same quantity of land as the former tenant. The Plaintiff commenced an action

for specific performance against the Defendant, and was willing to take a lease of the 214 acres at a proportionately reduced rent.

Held, that the Defendant must grant the Plaintiff a lease of 214 acres at a rent reduced from £500, in the proportion of 214 to 235. Fry, J., in delivering the judgment said:

> "... In my opinion the Plaintiff's contention is well founded. It appears to me that the mistake is not one which goes to the corpus with which the contract deals; it is not a mistake as to the essential terms of the contract. A mere difference in quantity has never been held to be a bar to specific performance. The Court of Chancery always drew a distinction between the essential and non-essential terms of a contract, and allowed the incapacity to perform it in non-essential terms to be made the subject of compensation."

Another ground of complaint in this appeal is that the learned trial judge erred in law in interpreting the agreement entered into by the parties, using extrinsic evidence to assist him in his interpretation.

It had been argued at the hearing below that extrinsic evidence could not be used to interpret the contract. The learned trial judge said:

> "It is generally agreed that extrinsic evidence cannot be admitted to vary or alter a contract, see **Enid Phang Sang v. Sudeal** Supreme Court Civil Appeal No. 71 of 1964; Carberry, J.A. There is in my view no attempt made by the Plaintiff to seek to use what is contained in his Affidavit to vary, alter or contradict any of the terms of the contract. He had entered into a contract to purchase 130 acres more or less the survey showed that the land he had agreed to buy contained only 94½ acres."

Clearly the trial judge did not embark upon an interpretation of the contract what he did was to ascertain the effect of the phrase "more or less" in terms of the Special Condition 1. Having satisfied himself of the legal effect of the Special Condition 1 and that

Specific Performance with abatement was permissible on the authorities he used the affidavit evidence to assist him in determining the rate of abatement.

For these reasons I would dismiss the appeal and affirm the order of the Court below.