C.A. Land – Agreement for Sale – Specific Performance – Enforceability of contract – authority of attorney to sign – whether misrepresentation – whether enforceable by virtue of Exchange Control Act – Damages to which plaintiffs entitled – assuming entitled – liability of attorney-at-law? [Sued against owners of land and attorney at law by purchasers] Appeal dismissed – whether findings by trial judge correct or adequate. Judgment of Elliott set aside – New trial ordered. [Wolfe J.A. dissents]

JAMAICA

[Cases referred to p 40 (end)]

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 55/92

COR: THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE WOLFE, J.A.

BETWEEN	BERTRAM ALEXANDER WATKIS	DEFENDANT/APPELLANT
A N D	ANTHONY CHRISTOPHER SIMMONS SANDRA PAULINE SIMMONS	PLAINTIFFS/RESPONDENTS

SUPREME COURT CIVIL NO. 64/92

BETWEEN	ANTHONY CHRISTOPHER SIMMONS SANDRA PAULINE SIMMONS	PLAINTIFFS/CROSS APPELLANT
A N D	BERTRAM ALEXANDER WATKIS	1ST DEFENDANT/CROSS RESPONDENT
A N D	JANICE WATKIS	2ND DEFENDANT/CROSS RESPONDENT
A N D	GEORGE DESNOES	3RD DEFENDANT/CROSS RESPONDENT

R.N.A. Henriques, Q.C. & Dennis Morrison, Q.C.
for Appellant

Ian Ramsay, Maurice Tenn & Mrs. Jacqueline Samuels-Brown
for Respondents

April 25, 26, 27, 28, 29 & May 2,3,4, & July 29, 1994

CAREY, J.A.:

By a Writ dated June 23, 1982, Mr. and Mrs. Anthony Simmons, the respondents and the plaintiffs sued Mr. Bertram Watkis the appellants, his wife Janice and the late Mr. George Desnoes, an Attorney-at-law for specific performance by Mr. and Mrs. Watkis of an agreement for sale dated December 17, 1980, in respect of six acres of land and a house thereon situate at Belgrade in St. Andrew. Alternatively, they claimed for an order that Mr. Watkis as 'tenant in common in equity' transfer his half share in the said premises

to the plaintiffs for half of the agreed contract price. Further , they claimed the sum of $309,322.38 and continuing with interest thereon until payment or judgment under the following heads:

> "(i) damages in lieu of specific Performance against the First and Second-Defendants; and/or
>
> (ii) damages for negligence against the Third Defendant;
>
> (iii) damages for breach of contract against the First and Second Defendants;
>
> (iv) damages for breach of warranty or authority against the First and Third Defendants;
>
> (v) damages for careless/negligent misstatement against the Third Defendant and/or misrepresentation against the First and Third Defendants."

The action was heard between April 15 to 26, 1991 before Ellis, J. who delivered a reserved judgment about a year later on May 7, 1992 in which he entered judgment against Mr. Watkis and Mr. Desnoes. That protracted delay, I fear, prevented a proper consideration of the facts in this case as will appeal hereafter. He dismissed the action insofar as it related to Mrs. Watkis. He entered judgment for the Simmonses in the sum of $4,450,600, detailed as under:

"Damages for loss of bargain	$4,315,000.00
Rental for a period of five years	
1/4/81 - 31/3/82	21,600.00
1/4/82 - 31/3/83	24,000.00
1/4/83 - 31/3/84	26,400.00
1/4/84 - 31/3/85	30,000.00
1/4/85 - 31/3/86	33,600.00
	$4,450,600.00 "

He ordered that the total should bear interest at 2% from March 31, 1981, the date on which the contract should have been completed, and that the $28,500 deposit should be returned to the plaintiffs with interest.

The appeal to this court against that judgment is taken by Mr. Watkis on whose behalf a number of grounds were filed. These grounds raise the following issues:

- did Mr. Desnoes have authority to sign the agreement for sale on behalf of Mr. Watkis?
- did Mr. Watkis by misrepresentation induce Mr. & Mrs. Simmons to enter into an agreement?
- was the contract enforceable by virtue of the Exchange Control Law?
- assuming liability, what was the nature of damages to which the plaintiff was entitled? Does the rule in Brain v. Fothergill apply?

The learned trial judge found from the evidence given by the witnesses and the admissions of (Mr. Watkis) that Mr. Watkis was aware of the Simmonses' interest in purchasing his property. He then continued:

> "... I am also convinced that he instructed the the third Defendant to sign the agreement on his behalf and to act for him in the conveyance of the property.
>
> The behaviour of the first Defendant induced the Plaintiffs to enter into the contract in the belief that he was solely entitled to sell. It was a misrepresentation as to title by conduct."

We will need to examine the evidence and the trial judge's analysis of it, to see whether these findings, challenged in the grounds of appeal, are justified. The plaintiffs had to show that Mr. Desnoes was authorized by the owners of the property to sign a contract of sale in respect of the property. That was so because Mr. Desnoes who practiced as an Attorney-at-law had executed the agreement for sale. See Grant v. Williams (unreported) SCCA 20/86 delivered June 25, 1987. It was accepted on all hands that there was no direct evidence in this case that any such authority was conferred by Mr. Watkis upon Mr. Desnoes. The learned trial judge helpfully, isolated the evidence on which he based the liability of Mr. Watkis as follows:

(i) Mr. Watkis gave the keys to the premises to a Mr. Foster, a real estate dealer.

(ii) Mr. Simmons, having been shown the property attended at Mr. Desnoes' office.

(iii) A Mr. Dennis Chin, a realtor, spoke to Mr. Watkis about the purchaser's interest in acquiring the property.

(iv) Mr. Watkis admitted that Mr. Desnoes, ... handled all his conveyances and rent collections.

(v) Mr. Watkis acknowledged meeting Mrs. Simmons at the property and discussing furniture. He however gave no instruction to sign to Mr. Desnoes.

On that evidence, the judge said, he found that Mr. Watkis gave instructions for Mr. Desnoes to sign the agreement on his behalf. A comment which can be made, is that the admission by Mr. Watkis, that Mr. Desnoes handled all conveyances and rent collections, is not the same thing as an admission that Mr. Desnoes had authority to sign the particular agreement for sale in this matter. It is not a necessary implication from the admission that Mr. Watkis in past transactions with Mr. Desnoes, had authorized his Attorney to sign contracts on his behalf. The opinion of Danckwerts L.J. in Gavaghan v. Edwards (1962) 2 All E.R. 477 at p.479 is opposite:

> "It is no doubt correct (and there are cases in which it was so held) that the mere fact of the relationship of solicitor and client being constituted in regard to a particular purchase does not by implication give a solicitor any authority to make a contract or to sign a memorandum, and I may refer to Forster v. Rowland (1861), 7 H. & N. 103 and Smith v. Webster (1876), 3 Ch.D. 49. But that is not a hard and fast rule which is not capable of alteration. On the facts of the case, as it seems to me, from the way in which the instructions are given to the solicitor, he may by implication be entitled to sign a memorandum which will bind his client. There are cases where such an authority has been implied from the terms of the particular relationship created on the facts of the case. Rosenbaum v. Belson (1900) 2 Ch. 267 is such a case."

There was no evidence other than the admission referred to above, from which the terms of the relationship between Mr. Watkis and Mr. Desnoes could be implied.

Mr. Ramsay was not slow to appreciate that these findings could hardly prove a conferring of authority to sign. Accordingly, he submitted a number of other factors to which the judge had not adverted to support the learned judge's conclusion of authority to sign. I would itemize them as under:

(i) Mr. Watkis left the title deeds of the property in the hands of Mr. Desnoes.

(ii) Mr. Desnoes himself sold the property to Mr. & Mrs. Watkis.

(iii) Mr. Watkis asked realtors to seek purchasers.

(iv) A realtor told Mr. Watkis he had purchaser for $300,000 viz. Mr. and Mrs. Simmons, and advised him he would be taking purchasers to Mr. Desnoes. Mr. Watkis promised to speak with Mr. Desnoes.

(v) Mr. Desnoes confirmed that Mr. Watkis had spoken to him and he had been expecting the purchaser.

(vi) Mr. Desnoes said he had authority to sign.

(vii) Mr. Desnoes varied the price to $275,000.

(viii) Conversation between Mr. Watkis and Mrs. Simmons over purchase of furniture by Mrs. Simmons in course of which an offer is made by Mr. Watkis that if she bought the remainder of property and furniture, he would give early possession. Mrs. Simmons promised to discuss it with her husband.

The item (vi) plainly is not evidence against Mr. Watkis and is therefore inadmissible in proof of an authority by Mr. Watkis for Mr. Desnoes to sign the agreement for sale. In my view, all that those other bits and pieces of evidence tended to demonstrate, was, that Mr. Watkis was selling his property and was aware of the Simmonses' interest therein. The suggestion by Mr. Ramsay that Mr. Watkis knew of the sale to the Simmonses and approved it, is not borne out by any evidence which the learned judge accepted at the trial. Item (viii) is not evidence from which it could be inferred that Mr. Watkis knew that the Simmonses had signed an agreement for sale. The judge, it must be pointed out, did not in his review of the facts from which he derived his conclusions, allude to this particular piece of evidence. Unless the judge had made a necessary

finding of fact, this Court is not in any position to make any finding for him. A rehearing by this Court does not allow for such an exercise.

The evidence as to the conversation between Mrs. Simmons and Mr. Watkis differred as related by each. Mrs. Simmons said that in addition to their speaking of the furniture, she wished to purchase from him, Mr. Watkis had told her that since she had purchased the six acres and the house thereon, she should purchase the remainder of the property as well. Mr. Watkis acknowledged that furniture was discussed but denied offering her the remainder of the property. If that is an unresolved conflict, this Court would not be at liberty to interfere seeing that the judge nowhere in his judgement, dealt with the credit of the parties. We must perforce assume that the only facts he accepted as proved, are those to which he specifically referred in his review of the facts.

In dealing with liability, the judge said this at p.95:

> " It is necessary to deal with each Defendant's liability separately.
>
> Is there evidence on which to find liability of the first Defendant?"

He then reviewed the evidence he presumably regarded as relevant and said this (p. 96):

> " I have emphasized the above area of the evidence as I am of the opinion that it is from that area, which evidence if any, may come to place liability on the first Defendant.
>
> From the evidence given by the witnesses and the admissions of the first Defendant I find that the first Defendant was aware of the Plaintiff's interest in purchasing his property at 101 Belgrade Heights. I am also convinced that he instructed the third Defendant to sign the agreement on his behalf and to act for him in the conveyance of the property."

It would seem to me as clear as can be that on the issue of liability he must have been confining himself to the evidence which he said he had emphasized. I cannot agree with Mr. Ramsay that this Court is at liberty to find facts as proved where the judge has made no finding either specifically or impliedly.

In my view, the matter stands thus. There was evidence from Mrs. Simmons which if believed, could have persuaded the judge that Mr. Watkis must have authorized Mr. Desnoes to sign the contract for sale. Mr. Watkis however denied that evidence. The judge was obliged to resolve that conflict but he did not. The claim fails not because the plaintiffs on whom the burden lay, did not discharge their burden but because the judge did not adjudicate. He did not accept Mrs. Simmons' version of the conversation in whole, nor did he accept Mr. Watkis'. He did not deal with the respective creditworthiness of either witness. The evidence given by Mrs. Simmons was of crucial significance in determining liability. I must hold that he abdicated his responsibilities. That is not the fault of the plaintiffs, nor is it the fault of the defendant, Mr. Watkis. That failure should not favour one side rather than the other.

The interests of justice require that the matter should be resolved at a trial, seeing that this court is not at liberty to assume the role of a trial judge. In the result, the judgment cannot stand and must be set aside.

Out of deference to the arguments urged upon us on the other issues raised in the appeal, I desire to express some views on one other issue.

Mr. Henriques, Q.C. attacked the judge's finding that: "the behaviour of the first defendant induced the plaintiffs to enter into the contract in the belief that he was solely entitled to sell. It was a misrepresentation as to title by conduct." As was mentioned earlier, the allegation in the statement of claim against Mr. Watkis (para 17) was of breach of warranty that is, he warranted that he had the authority of Mrs. Watkis to sell the property or transfer a registrable transfer to the purchasers:

Paragraph 17 pleads as follows:

> "17. Further and in the alternative, in the premises the First Defendant warranted that he had the authority of the Second Defendant to sell the said property or transfer a

"registered Title or give a registrable transfer in respect of the said property to the Plaintiffs."

The judge found that Mr. Watkis by his conduct, misrepresented the true position to the purchasers. Mr. Henriques, Q.C. submitted that there were no facts to support such a finding. There was, he said, no specific finding as to breach of warranty but he did find misrespresentation by conduct. He argued that it is well established law that a person can only be guilty of misrepresentation inducing a contract, if such misrepresentation is made to the other party prior to the contract. The evidence he submitted, was that at the time the purchasers were shown the property, Mr. Watkis was off the island and the first contact between the parties occurred when Mr. Watkis spoke with Mrs. Simmons in February 1981 which was some two months after the contract was executed. He pointed out that the conversation, according to the evidence adduced in that regard, did not concern Title.

Mr. Ramsay's response to this argument was, I fear, not easy to follow. He said that if Mr. Desnoes had authority to sign the specific contract in one name only, the proper inference was that Mr. Watkis authorized the contract to be drawn in that way. The inference could also be drawn that representations in the contract bound the principal. But, in my view, this argument begs the question: it assumes what must be proved. He further pointed to the following facts:

(i) Watkis dealt with realtors without reference to Mrs. Watkis as a joint owner.

(ii) Watkis in conversation with a realtor did not mention needing his wife's approval whilst instructing the realtor to call on Desnoes.

(iii) Desnoes as Watkis' agent made no reference to Mrs. Watkis' interest in discussions with the purchasers.

(iv) Watkis' failure to disclose to realtors that he had transferred all his beneficial interest to Mrs. Watkis as from 1978;

as evidence of breach of warranty.

The onus on the plaintiffs on the issue of breach of warranty was to show that Mr. Watkis had represented to the Simmonses that he had the authority of his wife to sell or that he could give a registrable transfer in respect of the property. The plaintiffs alleged this in paragraph 17 of their statement of claim and were obliged to prove that averment. But in the carefully selected pieces of evidence in that regard which Mr. Ramsay put forward for consideration, no representation whatever as to title was made by Mr. Watkis. In the only conversation between Mr. Watkis and Mrs. Simmons, the question of title was never broached nor was there any reference to it by either party. The learned judge based his conclusion on the conduct of Mr. Watkis. The behaviour which Mr. Ramsay identified, related to the omission of Mr. Watkis to tell (i) realtors and (ii) Mrs. Simmons that there were joint owners of the property or that he needed his wife's approval or that he had transferred his interest to his wife. Insofar as the realtors were concerned, there was no requirement for them to be told about the proprietorship of the property. The extent of their responsibility was to find an interested purchaser and take them to the lawyer, Mr. Desnoes. So far as Mrs. Simmons was concerned, there is no evidence that the sale of the premises was discussed because at the time of the only discussion between Mr. Watkis and Mrs. Simmons, the contract for sale had already been signed by Mrs. Simmons. Accordingly, no act of omission attributed to Mr. Watkis could have induced Mrs. Simmons to enter into the agreement. Mr. Henriques, Q.C. is correct therefore, when he submitted that this was a finding not supported on the facts of the case.

The learned judge relied on Watts v. Spence (1976) Ch 165: he said it was on point. I am not altogether clear whether it was prayed in aid on the question of the measure of damages or as to misrepresentation as to title by conduct. That case which was at first instance, does involve the issue of the measure of damages arising from innocent misrepresentation. The judge in that case,

found that the vendor had made a false representation by his conduct that he was the owner of the house in question and therefore able to sell to the plaintiff and that the plaintiff relied on this representation and was induced to enter into the contract by it. But in that case, there was evidence which warranted such a finding. That case is, quite obviously, not on all fours with the instant case and is easily distinguishable.

In the result, as it seems to me, the plaintiff's claim also fails under this head of liability.

The appellant also attacked the judgment on the ground that the contract was invalid in that it was made in breach of the Exchange Control Act. Any discussion on that aspect of the appeal is, in my opinion, largely academic. In the first place, this Court has held in Grant v. Williams (unreported) SCCA 20/85 delivered June 25, 1987 that a contract made in breach of the Exchange Control Act was not illegal ab initio and could be cured by ex post facto approval from the Exchange Control Authority. I would not revisit that case which we have continuously accepted as binding on us. It is also right to add that the Act has now been repealed by the Exchange Control (Repeal) Act 1992.

The appellant having succeeded on both heads with regard to his liability, it is not necessary to consider the question of damages or that of whether specific performance could be granted either in the first instance or on the fresh evidence advanced in this Court. I would reserve for future consideration in an appropriate case, the applicability or otherwise of the rule in Bain v. Fothergill (1874-80) All E.R. Rep 83 to contracts for the sale of land in this jurisdiction.

In the final result, I would set aside the judgment of Ellis, J. and would order that a new trial be had. The appellant is entitled to the costs of the appeal but the costs of the first trial should abide the result of the new trial.

FORTE J A

As the judgment of Carey J A has given in summary the history and factual events of the case, no benefit will be gained by a repetition and consequently reference will only be made to such facts as are necessary to deal with the issues raised in this appeal. In addition, having regard to my conclusions in relation to the first two areas of complaint, there will be no necessity to deal with matters concerning the claim for specific performance, or the method by which damages should be assessed in matters such as this.

The areas in which this appeal fallsto be decided in my view, can be restricted to the following two issues:

(i) Was the learned trial judge, correct in concluding that the evidence which he accepted, was sufficient to lead him to the conclusion that the appellant had given authority to his Attorney - the third named defendant Mr. George Desnoes to sign the agreement on his behalf?

(ii) Was there evidence upon which the learned trial judge could correctly conclude that the appellant misrepresented to the respondents that he could make good title to them given the fact that he, unknown to the respondents held the property in joint tenancy with his wife whose name did not appear on the agreement?

In the event that the first question is answered in the negative, then it would follow that there was no valid or enforceable contract between the respondents and the appellant for the sale of the property, and consequently this appeal would succeed.

1. **Authority to Sign**

In cases where an Attorney represents a client in negotiations in relation to a conveyance of real property, that representation cannot be taken without more, to include an authority to the attorney to sign the agreement on behalf of the client. There must be specific authority given to the Attorney to do so.

This Court, per Kerr J A in the case of **Barbara Grant v. Derrick Williams** SCCA 20/85 dated 25th June 1987 (unreported) after examining numerous authorities on the subject matter stated:

> "From these cases I extract the principle that when a vendor authorises an estate agent to sell property at a stated price, or a solicitor to have the carriage of sale, it must not be taken that they are empowered to do more than in the case of an estate agent to agree with a prospective purchaser, the essential term i.e. the price, and in the case of a solicitor or attorney to protect the vendor's interest and prepare the necessary documents to complete the transaction. In short, to be able to act as agent beyond the normal role of their respective professions, specific authority must be conferred. In either case the authority to enter into a binding agreement for sale must not be lightly inferred from vague or ambiguous language. There must be definite instructions to that effect or the conduct and circumstances in the particular case must be such that the estate agent or attorney must reasonably have understood that he was authorised to make the particular contract and to sign the agreement for sale."

In the instant case the learned trial judge in determining this question examined carefully "the area of evidence" from which he opined that any finding as to liability would have to be made.

The area of evidence to which the learned trial judge referred is set out in his judgment as follows:

> "Is there evidence on which to find liability of the first defendant? There is evidence that first Defendant Watkis gave the keys to the premises at Lot 101 Belgrade Heights to Mr. Foster with instructions to show prospective purchasers around. He did show the property to the Plaintiffs whom he understood to have been potential purchasers. That is the first piece of evidence which links the first Defendant to the Plaintiffs.
> Mr. Anthony Simmons as a consequence of his being shown the property at Lot 101 Belgrade Heights went to the third Defendant's office. He said the third Defendant Desnoes told him,

"in the presence of the second Plaintiff and Chin, that first Defendant Watkis had authorised him to conduct the sale of the property to him and his wife. The third Defendant thereupon dictated the terms of an agreement (exhibit 2) to a secretary. The third Defendant also agreed to reduce the purchase price from $300,000.00 to $285,000.00 provided first Defendant would not be required to pay any commission fee to Chin. On being asked who would sign on behalf of the first Defendant the third Defendant assured them of his authority to sign for him. A deposit of $28,500.00 was made and third Defendant gave a receipt for that amount (exhibit 1).

Mr. Dennis Chin said in evidence that he spoke to the first Defendant on the telephone concerning the Plaintiffs' interest in purchasing the property at Lot 101 Belgrade Heights. He attended the third Defendant's office with the Plaintiffs on the 17th December, 1980 and confirmed the events in that office as stated by the first Plaintiff.

The second Plaintiff also stated that assurance was given by the third Defendant that he had the authority to sign on behalf of first Defendant. She suported first Plaintiff and Chin as to the events in third Defendant's office. Second Plaintiff met and spoke with the first Defendant on the 4/2/81 and spoke of her purchasing several items of furniture which were in the house which first Defendant was willing to sell for $5,000.00.

The first Defendant in his evidence in chief denied the Plaintiffs' evidence as to what transpired at third Defendant's office but admitted that he met Mrs. Simmons on the 4/2/81 at 101 Belgrade Heights. On cross-examination, he admitted that third Defendant who was an Attorney-at-law handled all his conveyances and rent collections. He might have given third Defendant instructions over the telephone. He said a Mr. Gordon Hay would introduce purchasers to him and he would telephone third Defendant and instruct him what to do. He however said he gave no instruction in this case. He admitted that he was acting on his wife's behalf as to the sale of the property 101 Belgrade Heights. He said that when he saw the second Plaintiff he did not inform her that third Defendant had no authority to sign the contract on his behalf.

> "I have emphasized the above area of the evidence as I am of the opinion that it is from that area, which evidence if any, may come to place liability on the first Defendant. From the evidence given by the witnesses and the admissions of the first Defendant I find that the first Defendant was aware of the Plaintiff's interest in purchasing his property at 101 Belgrade Heights. I am also convinced that he instructed the third Defendant to sign the agreement on his behalf and to act for him in the conveyance of the property.

It is clear from the words of the learned judge that the evidence as outlined by him, convinced him that "he (the appellant) instructed the third defendant to sign the agreement on his behalf and to act for him in the conveyance."

It is necessary therefore to examine that evidence with care, to determine whether such a conclusion was therein supported. It reveals the following:

(1) That Watkis gave the keys to the property to Mr. Foster with instructions to show it to prospective purchasers;

(2) Mr. Foster showed the property to the plaintiffs/respondents;

(3) As a result of being shown the property, the respondents along with Mr. Chin attended the office of the third defendant and were told by him that Watkis had authorised him to conduct the sale of the property to the respondents. The third defendant agreed to reduce the price from $300,000 to $285,000 and thereafter instructed his secretary to prepare the contract;

(4) On being asked who would sign the agreement on behalf of the appellant the third defendant assured them of his authority to sign for him;

(5) The second respondent met and spoke with the first defendant/appellant on the 4th February, 1981 and spoke of her purchasing several items of furniture which were in the house which he was willing to sell for $5,000;

(6) The appellant admitted that he met the second respondent (Mrs Simmons) on the 4th February 1981 at 101 Belgrade Heights. He did not inform her on that occasion that the third defendant had no authority to sign the contract on his behalf;

(7) The appellant admitted that the third defendant was his attorney who handled all his conveyances;

(8) The appellant admitted he was acting on his wife's behalf as to the sale of the property.

Before examining the cumulative effect of this evidence, two things ought to be noted:

(i) The evidence discloses that the house was actually shown to the respondents by Mr. Chin and Mr. Foster and not solely by Mr. Foster as the learned trial judge recorded in his judgment, and

(ii) There are other areas of evidence excluded by the learned trial judge in his consideration of this issue, the relevance and effect of which will be discussed later in this judgment.

In fact the learned trial judge earlier in his judgment did refer to some evidence in such a way that makes it clear that he accepted those areas as factual. He stated:

"There is no doubt that the Plaintiffs were shown the premises Lot 101 Belgrade Heights and that they decided to purchase the said property. There is also no doubt that the Third Defendant acted as the Attorney-at-law, if not for the First Defendant and the Plaintiffs, certainly for the First Defendant. There is also the admission that the Third Defendant did evince to Plaintiffs some authority to sign and act for the First Defendant at least. It is common ground that the Plaintiffs have not obtained the property which they agreed to purchase."

It would be fair to conclude therefore that the evidence contained in the above passage in so far as it included matters not mentioned in the area of evidence referred to later by the learned judge, and on which he stated his finding would be based, would nevertheless have been in his consideration when determining the question as to whether the first defendant authorised the third defendant to sign the agreement.

It was argued before us that the following paragraph of the judgment, repeated hereafter for emphasis, disclosed that the learned judge was not restricting himself to the "areas of evidence" he had recorded and consequently this Court should not conclude that his subsequent finding was based solely on that evidence. The passage reads:

> "From the evidence given by the witnesses and the admissions of the first Defendant I find that the first Defendant was aware of the Plaintiff's interest in purchasing his property at 101 Belgrade Heights. I am also convinced that he instructed the third Defendant to sign the agreement on his behalf and to act for him in the conveyance of the property."

This passage comes immediately after the learned trial judge had stated that he had emphasised the "above area of evidence" as he was of the opinion that "it is from that area, which evidence if any, may come to place liability on the first Defendant." In my view, his reference to the "evidence given by the witnesses and the admissions of the first Defendant" must necessarily relate to the evidence which he had earlier recorded, and so it is on that evidence that his conclusion as to "authority" must have been based.

What then was the cumulative effect of this evidence?

The evidence reveals that the plaintiffs were shown the property; expressed an interest; were taken by Mr. Chin to the third Defendant, who negotiated a reduction in the price, and informed the plaintiffs that he had the authority to sign on behalf of the first defendant. It also revealed that the first defendant was interested in selling the property, and did give authority to real estate dealers to seek a purchaser. The only "evidence," found by the learned trial judge which attempts to establish that the authority was given is the fact that the third defendant informed the plaintiffs that he had such an authority. That, in my view, is not evidence which could be admissible in determining the case against the first defendant, who put the matter in issue by denying having given any such authority. That not being evidence against the first defendant, there is no evidence to be found in the reasoning of the learned trial judge that could lead to the conclusion to which he came, that is to say, that the third defendant was authorised by the first defendant to sign the agreement. In order to succeed, the plaintiffs had to show that the third defendant had the specific authority to sign the agreement and cannot rely merely on the fact that the third defendant was the Attorney for the first defendant in the negotiations for the sale. In my view, the evidence found by the learned trial judge fell short of what was necessary.

There was however, another aspect of the evidence, to wnich the learned trial judge did not refer, and which consequently, it must be concluded that he did not have in his contemplation when coming to his decision on the issue. It arose in the evidence of the second plaintiff Mrs. Simmons, who testified to having visited the property subsequently to signing the agreement and having a conversation with the first defendant. That conversation, as related in the evidence is as follows:

> "I spoke to Chin again and I went to see Watkis at Belgrade on 4/2/81. I saw and spoke to person. I introduce myself and apologised for not keeping previous appointment. He accepted apology. Person is Watkis. He showed me a list of furniture and appliances and said it was prepared by Mrs. Watkis and I should choose what I wanted from the list. We went around house looked at prices on list and I decided on pieces I wanted to buy. I made notes on side of list. I selected items of furniture, Watkis was prepared to sell item of furniture for $5,000, I agreed. We went and walked around the property (6 acres). It had been pointed out by Chin and Watkis - pointed out boundaries. Watkis showed me a post at back of premises. I raised matter early possession of property and he said since I had bought property for $285,000 why did'nt I buy the remainder along with furniture for $215,000 and he would let me have early possession. I said I would have to discuss it with my husband." [Emphasis added]

This evidence if it had been accepted by the learned judge, could establish albeit by inference that the first defendant was well aware of the agreement and was treating it at that stage as valid and effective. This is demonstrated by his pointing out the boundaries, accepting that the second plaintiff had already bought the property for $285,000, and offering the remainder for sale, and granting early possession if that offer was accepted. In those circumstances, the only conclusion would be that he did acquiesce in the signing of the agreement by Mr. Desnoes, or at the least, that he ratified or adopted it at a later date (see **Keen v. Mear** [1920] 2 Ch D 574 where Russell J stated at page 578-9:

> "It is no part of an estate agent's duty to deal with title: indeed as a rule (as was the fact in this case) the estate agent would know nothing about the title to the property which is placed in his hands for sale. Notwithstanding this Samuel Mear became, in my opinion bound by the contract because he subsequently approved of it and adopted it. [Emphasis added]

However, that evidence was contradicted by the first defendant who testified inter alia as follows:

After admitting to having met with Mrs. Simmons and having a discussion with her, he stated in examination-in-chief -

> "I handed Mrs. Simmons a list. (furniture) She did not raise question of early possession of Lot 101. I did not know that a contract had in fact been drawn. I know Pltffs. were interested in acquiring the property. I did not tell her I would consider early possession if she would buy additional acreage and furniture. I suggested that she bought the whole of Lot 101 for $1M."

Then in cross-examination:

> "When I saw Mrs. Simmons in Feb. 1981 I know she was one of the interested parties in the purchase. We had a discussion about the sale of residence and 6 acres. I know she had signed a contract re house and 6 acres at Belgrade. I knew that in Jan. I did say I knew they had signed a contract. I did not tell her contract was no good as I did not sign. I did not tell her Desnoes had no authority to sign. Did not tell her I did not approve sale. I told her I was not in agreement with sale. I offered her property in entirety for $1million."

Although the first defendant admitted a conversation, and knowledge that the second plaintiff/respondent had signed a contract, there was no admission by him as to an acceptance that the plaintiffs had bought the property. In the face of this denial by the first defendant, this area of fact ought to have been resolved by the trial judge.

It was not resolved, and consequently this Court must now determine what is the correct approach in these circumstances, where, had it been resolved in favour of the respondent, the Court could have found that the first defendant either gave authority to the second defendant to sign the contract on his behalf or at the least, adopted the agreement thereafter. Contra, had it been resolved in the first Defendant's favour there would have been no proof that he gave the authority. Though the determination of an appeal is in the nature of a re-hearing, this Court has no power to determine the truth where there are disputed facts, and consequently this question cannot be resolved by us. It however would be unfair to the respondents, to allow this appeal, and deprive them of a judgment which may or could have been theirs, had this issue of fact been considered and determined by the trial judge. Consequently, in my view the interest of justice would demand, the ordering of a new trial. Nevertheless, it may be useful to examine the merits of the contention, that in any event there was no evidence that the first Defendant misrepresented to the Respondents that he had the authority to transfer title to them.

2. Misrepresentation

An examination of the statement of claim discloses the following allegation against the appellant:

> Para. 17 "Further and in the alternative, in the premises the First Defendant warranted that he had the authority of the Second Defendant to sell the said property or transfer a registered Title or give a registrable transfer in respect of the said property to the Plaintiffs."

The learned trial judge came to the following conclusion:

> "The behaviour of the first Defendant induced the Plaintiffs to enter into the contract in the belief that he was solely entitled to sell. It was a misrepresentation as to title by conduct. The case of **Watts v. Spence** [1976] Ch. 165 is on point. Although the judgment there is founded on the English Misrepresentation Act of 1967 full references to and reliance was placed upon **Bain v. Fothergill** [1874-1880] All E R 63 to make it in my opinion, an important case for consideration."

And later (page 98) firstly he exonerates the second defendant by stating:

> "The second defendant goes from the case from the point of liability. There is no evidence whatsoever on which a court could hand any liability on her part. She made no representation to the Plaintiffs and she authorised no one so to do."

Then in dealing with the appellant and third Defendant he states:

> "The third Defendant's liability if any, must depend on his connection with the first Defendant. The first Defendant in his evidence both in chief and under cross-examination presented a picture of a very close association between himself and the third Defendant. He admitted that he might have given verbal instructions over the phone to third Defendant regarding the transaction which has given rise to his case. The third Defendant in his statement of defence admits that he prepared the Agreement for Sale and signed "for vendor" (first Defendant) and accepted the payment of deposit. At paragraph 12 of his defence, he represented that he was fully authorised by first Defendant to sign the Agreement. I find on the evidence that the third Defendant closely associated with the first Defendant to misrepresent an ability to convey Lot 101 Belgrade Heights to the Plaintiffs. He is jointly liable with the first Defendant.

It appears then, that it is the "conduct" of the first defendant which led the learned trial judge to find that "he induced the plaintiffs to enter into the contract in the belief that he was solely entitled to sell." The aspect of that conduct to which the trial judge referred in the paragraph cited above, is the appellant's close association with the third defendant and his admission that "he might have given verbal instruction over the phone to the third defendant <u>regarding the transactions which has given rise to his case."</u> [Emphasis added] The evidence however reveals that the underlined words is an incorrect record of the first defendant's testimony in which having stated that he would phone the third defendant [generally] and instruct him what to do, he then stated "It did not happen in this case."

What then was the conduct on which the trial judge based his conclusion? An inducement to the respondents to enter into the contract, obviously must have occurred before the contract. The only evidence of acts by the appellant is that (i) he placed the property for sale, and his uncontested testimony is that he did so with the approval of the joint tenant, his wife and (ii) the evidence of Mr. Dennis Chin, which was apparently accepted by the trial judge that he called him (first defendant) who agreed that he (Chin) should take the purchasers to the third defendant's office. Thereafter, there is no evidence of any act done by the appellant, because all negotiations were done by the third defendant who though having filed a defence took no part in the trial because of his failing health. It appears that the trial judge relied on admissions made by the third defendant in his pleading to come to conclusions adverse to the appellant. This is so obviously wrong that it seems unnecessary to state it. Indeed, there really is no evidence from which the trial judge could find that by his conduct the appellant induced the respondents or made any misrepresentation to them as to his sole entitlement to sell the property to them.

However, there was evidence from which it could have been determined that the third defendant was the agent of the first defendant. The evidence of Mr. Chin discloses that after he had shown the property to the plaintiffs/respondents, and they having expressed an interest in negotiating the purchase of the property, he called the appellant. Mr. Chin informed him that he had interested purchasers who would purchase for a price of $300,000. The appellant was then alleged to have approved Chin's suggestion that he take the respondents to the third defendant Desnoes.

On their arrival Desnoes informed them that he was expecting them, thereafter Desnoes negotiated the sale of the property with the respondents, and had his secretary prepare the agreement for the signature of the respondents. Of significance, and the point of complaint in this issue, is that in the agreement, the name of the first defendant was entered as the sole vendor. As the first defendant had never had a discussion with the respondents before they signed the agreement, it cannot be said that he personally made any (mis) representation to them. It follows then that the only evidence upon which the learned judge could have properly come to his conclusion must be evidence of representations made by the third defendant as agent for the first defendant. Consequently, a resolution of the conflict in the conversation between Mrs. Simmons and Mr. Watkis is of utmost relevance to the question of whether, Mr. Desnoes, as agent of Mr. Watkis made the alleged representation on his behalf and with his approval or that he (Mr. Watkis) later ratified it.

For these reasons, I would set aside the order of the Court below, and in the interest of justice order a new trial. I agree with the order for costs prepared by Carey, J A.

WOLFE, J.A.:

This appeal raises three issues in so far as liability is concerned. In this judgment I propose to refer to the evidence only in so far as it may be relevant in dealing with issues raised by the grounds of appeal.

The first issue to be resolved is whether or not Ellis, J. was correct in holding that George Desnoes, Attorney-at-law and third defendant, was vested with the authority to sign the sales agreement, dated December 17, 1980, on behalf of the appellant.

Henriques, Q.C. for the appellant posited the following propositions:

"FIRST ISSUE:

1. It is well established law that an Attorney's authority to act for his client relates specifically to the basis of his retainer. In non-contentious business such as the sale of land, an attorney has no general authority to bind his client and such authority will not be presumed by the Court unless it is expressly conferred upon him or is implicit in his terms of retainer. See CORDERY ON SOLICITORS 8th ED. pages 76 and 85.

2. It is a question of fact in each case whether the Attorney has authority to sign the document relied upon and the onus of establishing that authority as in all cases of agency rests upon the persons alleging the agency. See STONEHAM ON VENDORS AND PURCHASERS, page 81 et seq. See BOWEN vs DUC d'ORLEANS (1900) 16 T.L.R. 226; KEEN vs MAIR (1920) A.E.R. Rep. 147; GAVAGHAN vs EDWARDS (1961) 2 A.E.R. 447 and RAINGOLD vs. BROMLEY (1931) A.E.R. Rep. 822.

3. It is further well established law that where an agent who is known to have no general authority to enter into a transaction of a certain kind but who nevertheless represents to a third party that he obtained specific authority to enter into transaction, cannot in the absence of any representation by the principal concerning the agents authority bind the principal by the agents actions. The agent cannot by representation confer on himself authority which is not vested in him or he does not ostensibly have

" so as to bind the principal, if the agent is to have such authority then it must come from representations or actions of the principal not the agent. See ARMAGAS LTD. vs. MUNDOGAS S.A. (1986) 2 A.E.R. 385.

4. Further, it is well established that an Attorney does not have the apparent, ostensible or implied authority to bind a client in a sale of land transaction by executing the agreement on his clients' behalf. This can only be done where the client confers such authority on the Attorney to carry out the transaction in accordance therewith. See BARBARA GRANT vs. DEREK WILLIAMS, Sup. Court, C.A. NO:20 OF 1985, 25TH JUNE 1987.

5. In this matter, the onus was on the Plaintiffs to show that the Thirdnamed Defendant as an Attorney-at-law who had no apparent, ostensible or implied Authority to sign the agreement on behalf of the Firstnamed Defendant, had authority so to do."

The appellant contended that the respondents had failed to discharge the onus which rested upon them, in that they failed to adduce any evidence whatsoever to show that the appellant had conferred any authority either actual or implied on George Desnoes, the Attorney-at-law, to execute the Agreement for Sale on his behalf. It was further contended that the only evidence adduced in the case was that the appellant, when told by the real estate agent that he was taking the respondents to George Desnoes, the appellant said he would contact Desnoes right away and that Desnoes had said that the appellant had contacted him on the matter.

Ellis, J. was of a contrary view. In dealing with the question of liability, he said as follows:

" LIABILITY

I must say at this point that I do not accept the contention that the Contract in this case is unenforceable it being in breach of The Exchange Control Act. I find, from consideration of the evidence and the Exhibits 5m, that there was compliance with the provisions of The Exchange Control Act.

It is necessary to deal with each Defendant's liability separately.

"Is there evidence on which to find liability of the first defendant?

There is evidence that first Defendant Watkis gave the keys to the premises at Lot 101 Belgrade Heights to Mr. Foster with instructions to show prospective purchasers around. He did show the property to the Plaintiffs whom he understood to have been potential purchasers. That is the first piece of evidence which links the first Defendant to the Plaintiffs.

Mr. Anthony Simmons as a consequence of his being shown the property at Lot 101 Belgrade Heights went to the third Defendant's office. He said the third Defendant Desnoes told him, in the presence of the second Plaintiff and Chin, that first Defendant Watkis had authorised him to conduct the sale of the property to him and his wife. The third Defendant thereupon dictated the terms of an agreement (exhibit 2) to a secretary. The third Defendant also agreed to reduce the purchase price from $300,000.00 to $285,000.00 provided first Defendant would not be required to pay any commission fee to Chin. On being asked who would sign on behalf of first Defendant the third Defendant assured them of his authority to sign for him. A deposit of $28,500.00 was made and third Defendant gave a receipt for that amount (exhibit 1).

Mr. Dennis Chin said in evidence that he spoke to the first Defendant on the telephone concerning the Plaintiffs' interest in purchasing the property at Lot 101 Belgrade Heights. He attended the third Defendant's office with the Plaintiffs on the 17th December, 1980 and confirmed the events in that office as stated by the first Plaintiff.

The second Plaintiff also stated that assurance was given by the third Defendant that he had the authority to sign on behalf of first Defendant. She supported the first Plaintiff and Chin as to the events in third Defendant's office. Second Plaintiff met and spoke with the first Defendant on the 4/2/81 and spoke of her purchasing several items of furniture which were in the house which first Defendant was willing to sell for $5,000.00.

The first Defendant in his evidence in chief denied the Plaintiffs' evidence as to what transpired at third Defendant's office but admitted that he met Mrs. Simmons on the 4/2/81 at 101 Belgrade Heights. On cross examination, he admitted that third Defendant who was an attorney-at-law handled all his conveyances and rent collections. He might have given third Defendant instructions over the telephone. He said a Mr. Gordon Hay

> "would introduce purchasers to him and he would telephone third Defendant and instruct him what to do. He however said he gave no instruction in this case. He admitted that he was acting on his wife's behalf as to the sale of the property 101 Belgrade Heights. He said that when he saw the second Plaintiff he did not inform her that third Defendant had no authority to sign the contract on his behalf.
>
> I have emphasised the above area of the evidence as I am of the opinion that it is from that area, which evidence if any, may come to place liability on the first Defendant."

Counsel for the appellant urged that from the evidence set out above the judge could not possibly have found that the appellant had conferred authority on the Attorney-at-law to sign on his behalf. The record, however, discloses that the learned trial judge went on to say:

> "From the evidence given by the witnesses and the admissions of the first Defendant I find that the first Defendant was aware of the Plaintiff's interest in purchasing his property at 101 Belgrade Heights. I am also convinced that he instructed the third Defendant to sign the agreement on his behalf and to act for him in the conveyance of the property."

This court is being asked to say that the above extract refers to the evidence which the judge says he has emphasised because in his opinion "it is from that area which evidence if any, may come to place liability on the first Defendant." I find myself unable to place such a narrow interpretation on the words "from the evidence given by the witnesses." I take the view that these words must be understood to mean all of the evidence and not just the highlighted portions.

The emphasised area has the admissions of Watkis and the learned judge found that he could resolve the issue of liability against Watkis on that aspect of the evidence. Further, when he considered the rest of the evidence, he was convinced on a balance of probabilities that Watkis had given instructions to Desnoes to convey the property. It is necessary, therefore, to examine the record to ascertain if there is any other relevant

evidence to support the learned judge's finding that Watkis authorised Desnoes to act as agent on his behalf.

What was the other evidence in the case? At page 113 of the record the female respondent gave the following account of a meeting between the appellant and herself at the premises, subject matter of the purported contract:

> "I selected items of furniture, Watkis was prepared to sell items of furniture for $5,000, I agreed. We went outside and walked around the property (6 acres). It had been pointed out by Chin and Watkis - pointed out boundaries.
>
> Watkis showed me a post at back of premises. I raised matter early possession of property and he said since I had bought property for $285,000 why didn't I buy the remainder along with furniture for $215,000 and he would let me have early possession. I said I would have to discuss it with my husband.
>
> Husband was not in Jamaica at time. I invited him to dinner on husband's return. He said he had to go visit friend, but would call on return to Kingston.
>
> Watkis did not call. I called him the week after my first visit to him. My husband looked up the number and I dialled. I spoke to Watkis. He said he had not called because he did not know how to tell me the sad news. I asked 'What sad news?' My husband picked up extension. Watkis said his wife did not wish to sell property anymore, I was shocked. He said his wife had heard how well things were in Jamaica after election and wanted to come home, I said what did it have to do with wife.
>
> He said wife was joint owner of property, I said no one told us of joint ownership and it was too late to change mind because agreement was already signed and deposit paid and completion was on 31/3/81. He said she did not want to sell, I said I sympathise but it was too late to change her mind. I went to see E. Ashenheim next morning."

Earlier on at page 112 of the record, the following note of the second plaintiff's evidence was made by the learned judge:

> "I spoke to Chin again and I went to see Watkis at Belgrade on 4/2/81. I saw and spoke to person. I introduced myself and apologise for not keeping previous appointment. He accepted apology. Person is Watkis.

> "He showed me a list of furniture and appliances and said it was prepared by Mrs. Watkis and I should choose what I wanted from the list. We went around house looked at prices on list and I decided on pieces I wanted to buy. I made notes on side of list."

That the learned judge considered all the evidence on this crucial aspect of the case can be seen when he referred to the second plaintiff's evidence at page 95 of the record thus:

> "The second plaintiff met and spoke with the first defendant on 4/2/81 and spoke of her purchasing several items of furniture which were in the house which first defendant was willing to sell for $5,000.00."

It is obvious that in recording this passage, the learned judge was adverting to the entire conversation between the second plaintiff and Watkis and was merely emphasising that in addition to speaking about the property they spoke also about furniture. All matters which Watkis himself confirmed. Worthy of note also is that reference was made to this aspect of the evidence before the pivotal passage in the judgment that Desnoes was the agent of Watkis.

If this evidence is accepted, it clearly demonstrates that on 4/2/81 the appellant knew of the existence of the sales agreement and raised no objections thereto. As a matter of fact, he would have admitted that the property had been bought by the respondent and invited her to purchase the remaining portion of the land. This evidence is denied by the appellant and it is contended by the appellant that even if it was taken into consideration by the learned trial judge he failed to make a finding as to whether or not he accepted the respondents' version or the appellant's version.

I am not impressed by this line of argument. It is clear that the judge had considered the episode at the site. In referring to admissions made by the appellant, the judge was including the appellant's admission at page 118 of the record when he said, "I suggested that she bought the whole of the lot 101 for $1M." This conversation, according to the respondent,

took place in the context of the discussion in which the respondent said the appellant admitted that she had bought the place and was inviting her to purchase the remaining portion of the estate. It is clear from reference to this admission that the learned trial judge did consider this evidence and from his finding that he was convinced that the appellant authorised the Attorney-at-law to sign on his behalf, it is reasonable to infer that he accepted the respondents' version of the episode in preference to that of the appellant. There can be no other rational explanation for such a finding. Once the judge accepts the version of the respondent, it goes not only to the question of the authority but also to the appellant's knowledge of the contents of the sales agreement. I am satisfied that there was evidence in the case to support the finding of the learned trial judge that the appellant had authorised the Attorney-at-law to sign on his behalf and also that the contents of the contract formed a part of his instructions to the Attorney-at-law; he not having raised any objections thereto in his discussion with the female respondent.

At page 121 of the record the appellant is recorded as saying:

> "When I saw Mrs. Simmons in Feb. 1981 I know she was one of the interested parties in the purchase. We had a discussion about the sale of residence and 6 acres. I know she had signed a contract re house and 6 acres at Belgrade. I knew that in Jan. I did say I knew they had signed a contract.
>
> I did not tell her contract was no good as I did not sign. I did not tell her Desnoes had no authority to sign. Did not tell her I did not approve sale. I told her I was not in agreement with sale. I offered her property in entirety for $1million. Gordon Hay knew that contract was not good."

All this evidence has to be considered as part of the admissions referred to by the learned trial judge at page 96 of the record. Here is a person who has knowledge that a sale agreement has been executed on his behalf without his authority. He is in possession of this information since January, 1981. He meets

with one of the parties to this unauthorised agreement in February 1981 and offers to sell her the entire property for $1M without a word being said about the unauthorised agreement. I am satisfied that the learned trial judge consider all this evidence from what he stated at page 96 of the record and his conclusion recorded thereat is a clear demonstration that he accepted Mrs. Simmonds' version of what transpired in February at the site in preference to the appellant's version which was characterised by prevarication.

Finally, it must be borne in mind that authority to sign may be implied from the terms of the particular relationship created on the facts of the case. In **Gavaghan v. Edwards** [1961] 2 All E.R. 477 at 479 Danckwerts, L.J. said:

> "It is no doubt correct (and there are cases in which it was so held) that the mere fact of the relationship of solicitor and client being constituted in regard to a particular purchase does not by implication give a solicitor any authority to make a contract or to sign a memorandum, and I may refer to **Forster v. Rowland** (1861) 7 H & N 103 and **Smith v. Webster** (1876) 3 Ch.D. 49. But that is not a hard and fast rule which is not capable of alteration. On the facts of the case, as it seems to me, from the way in which the instructions are given to the solicitor, he may by implication be entitled to sign a memorandum which will bind his client. There are cases where such an authority has been implied from the terms of the particular relationship created on the facts of the case. **Rosenbaum v. Belson** [1900] 2 Ch. 267 is such a case, although the circumstances of that case are no doubt different from the present."
>
> [Emphasis supplied]

Is there any evidence in this case as to the relationship between Desnoes and Watkis from which the authority to sign could be implied. I am of the view there is. At page 119 of the record Watkis gives the following evidence in reference to the relationship between Desnoes and himself:

> "There was no need to give written instructions re stamping and registering. They were verbally given. It was important but I did not put them in writing. I was not accustomed to give him verbal instructions in real estate matter. Maybe I gave him verbal instructions. Probable over the phone.

> "We did do business together. He sold me land. He assisted me in the transactions of land. He has never assisted me in finding purchasers. He assisted me in Agreement for Sale. I did all my negotiations myself. Gordon Hay was not my agent. He introduced purchasers to me. Gordon Hay would report to me in Miami. Then I would phone Desnoes and instruct him what to do. It did not happen in this case."

In the light of this evidence and in the face of the uncontroverted evidence that Watkis actually encouraged the real estate agent to take the respondents to Desnoes by saying "I will contact Desnoes right away", it could reasonably be implied that he had given Desnoes authority to sign. The words "right away" indicate the urgency of the situation. In such circumstances it may reasonably be implied that he gave Desnoes authority to sign so as to bind the deal. In addition thereto, the appellant testified that he had knowledge that Mrs. Simmonds had signed a contract re house and six acres of land at Belgrade. He became aware of this in January 1981. He spoke to her in February 1981. He did not then disavow the authority of Desnoes to sign, neither did he mention to her that he had not signed the contract. Having heard that she had signed the contract, one would have thought that he would have taken steps to sign the contract in order to make it binding, or he would have indicated that the contract had not been signed, but he did no such thing. From this evidence, I hold that it can reasonably be implied that he had given Desnoes the authority to sign. The conduct of Watkis, the appellant, makes such an inference inescapable.

I am firmly of the view that the finding that Desnoes was clothed with authority by the appellant is unassailable and cannot be properly disturbed.

The second issue raises the question as to whether or not the appellant, by misrepresentation, induced the respondents to enter into the contract. The learned trial judge found that "the behaviour of the first defendant induced the plaintiffs to enter into the contract in the belief that he was solely entitled to sell. It was a misrepresentation as to title by conduct."

The appellant complains that this finding is not supported by the evidence, as there is no evidence that the appellant and the respondents were in communication with each other prior to the signing of the agreement. On the contrary, the parties first met in 1981, some two months subsequent to the signing of the contract. The learned trial judge having properly found that Desnoes was clothed with authority to execute the contract, the question arises as to whether in so empowering him, the appellant was by conduct representing to the respondents that he was sole owner of the subject-matter of the contract and was, therefore, entitled to dispose of same. To contend that there could be no representation on the part of the appellant which induced the respondents to enter into the contract in that the parties met and communicated subsequent to the signing of the contract is, indeed, untenable. A representation of fact may be made by words or conduct. The phrase includes a case where one party has approved and adopted a representation made by some third person. See Bradford Building Society v. Borders [1941] 2 All E.R. 205 at 211. In vesting Desnoes with authority to execute the agreement for sale on his behalf, an agreement in which he was mentioned as the vendor, the appellant, in effect, was representing to the purchasers that he was the sole owner of the property and was entitled to convey the title to the said property to them. He through his agent misrepresented to the respondents the position regarding the subject-matter of the contract. However, the question of misrepresentation is now academic having regard to the fresh evidence which was adduced and which clearly shows that the appellant was the sole beneficial owner of the land at the time of trial. I will, of course, deal with this aspect of the case later in my judgment as it is relevant to the issue of the primary remedy of specific performance.

The third issue raised as to liability was whether or not the contract is illegal by virtue of the provisions of the Exchange Control Act. This agreement was entered into on December 17, 1980,

and it is accepted on both sides that on that date Exchange Control approval had not been sought and obtained. Subsequent to the formation of the contract, namely, on November 9, 1983, permission was obtained from the Bank of Jamaica. The appellant submitted that the permission must be obtained prior to the formation of the contract and that the requirement of section 33(1) of the Exchange Control Act, now repealed, was not retrospective in effect. This point is not a novel one. The same line of argument was pursued in **Watkis v. Roblin** [1964] 8 J.L.R. 444 when Douglas, J. held that the effect of the statute was to strike at performance not formation. In **Bank of London & Montreal v. Sale** [1967] 10 J.L.R. 319, this court held that the breaches of the Exchange Control Act could be cured by ex post facto approval. More recently in **Barbara Grant v. Derrick Williams** S.C.C.A. No. 20/85 (unreported) delivered on June 25, 1987, this court again reinforced its decision in the earlier case of **Bank of London & Montreal v. Sale** (supra).

Finally, in **Carol Friend v. Florence Tulloch** P.C. Appeal No. 54 of 1992 (unreported) delivered on January 27, 1994, Lord Templeman, delivering the opinion of the Board, on the said point, held that failure to obtain exchange control permission prior to the formation of the contract did not result in the contract being unlawful but prevented the completion of the contract until the consent of the Minister was given or ceased to be necessary.

As between the appellant and the respondents, the learned trial judge, in my view, rightly concluded that there was a binding contract between the parties.

The equitable remedy of specific performance was denied the respondents on the basis that Janice Watkis, the joint owner of the land, was not a party to the contract and had in no way authorised the formation of the contract and had not acquiesced thereto. Before addressing the appellant's complaints as to the judge's assessment of the measure and the computation of damages, I find it convenient to deal with the respondents'

cross-appeal against the refusal of the Equitable Remedy of Specific Performance.

The respondents on a motion were granted leave to adduce fresh evidence to show that contrary to the evidence of the appellant that he and his wife Janice were joint owners of the property, the appellant himself was the sole beneficial owner of the property. This parcel of land was purchased from George Desnoes and Selvin Lee by the appellant and his wife Janice as joint tenants.

By a Marital Settlement Agreement made on the 24th day of June, 1986, between the appellant and his wife Janice, the parties agreed the following:

> "The aforementioned Lump Sum Alimony in the amount of FIVE HUNDRED THOUSAND ($500,000) DOLLARS shall be paid in full by the Husband to the Wife within seven (7) years of the execution of this Agreement. However, the Husband shall pay to the wife no less than TWENTY THOUSAND ($20,000) DOLLARS per year during each calendar year, commencing with the year of the execution of this Agreement. In addition, the wife shall receive all of the proceeds which may be collected upon a sale of the Belgrade (Kingston, Jamaica) house and the receipt of the proceeds shall likewise count towards a reduction of the sum of FIVE HUNDRED THOUSAND ($500,000) DOLLARS to be paid by the Husband to the Wife."

They further agreed as follows:

> "The parties jointly own that certain parcel of real property called SWALLOWFIELD ESTATE, being part of Belgrade, in Kingston, Jamaica, together with the house and all buildings thereon. (See Exhibit 'A' attached hereto specifically incorporated by reference herein). The Wife shall convey all her right, title and interest in said property to the Husband by Quit Claim Deed or as otherwise required by Jamaican law. The Husband shall indemnify and hold the Wife harmless in connection with any and all liabilities incurred in connection with said property, including, without limitation, any and all transfer fees or taxes. Notwithstanding the foregoing, the parties hereto reiterate the fact that upon a sale by the Husband of the property or upon his death, or at the expiration of seven (7) years of the execution of this Agreement, whichever occurs first, the Wife shall receive all proceeds therefrom, receipt of which shall reduce monies due to the Wife from the Husband pursuant to Paragraph 6 'A' of this Agreement."

In a final Judgment of Dissolution of Marriage between the said parties, the Circuit Court of the Seventeenth Judicial Circuit in and for Broward County, Florida, ordered as follows:

> "The Marital Settlement Agreement between the parties dated the 24th day of June, 1986, and introduced into evidence and marked Wife's Exhibit '1' was executed voluntarily after full disclosure, is fair and equitable and is approved by this Court and the parties are ordered to comply with it. However, the Marital Settlement Agreement is not merged with this Judgment and shall continue to have independent legal significance without the ambit of this Judgment and shall be subject to enforcement by either party as an independent contract. The parties shall have the option of enforcing the terms of the Marital Settlement Agreement by way of an independent action seeking such enforcement or by way of initiating proceedings before this Court in this case and the pursuit of one remedy shall not thereafter preclude the pursuit of the other."

The question which must now be answered is, "Had the learned trial judge been seized of this information, could he have ordered specific performance of the contract and would he have so ordered?"

Kent Wheeler, an Attorney-at-law entitled to practice law in the State of Florida, United States of America, by way of affidavit averred as follows:

> "6. That in my opinion, the Marital Settlement Agreement states and means that by virtue thereof, and in particular paragraph 6 thereof, the wife gives up all her interest in and entitlement to the property itself, and retains an interest only in the proceeds of sale or a portion thereof, to the extent of any alimony payment outstanding at the time of such sale.
>
> 7. That the Judgment is in Personam, and is a Final Judgment of the Court, and that further it has not been the subject of any appeal, rehearing, or review.
>
> 8. That the full equitable and beneficial interest in and powers of disposition over the property vested in the Husband from the date of signing and the Wife cannot in anyway interfere with or fetter the Husband's said interest or powers.
>
> 9. That in my opinion, a Court of the United States of America has power to order compliance with the said Agreement, and specifically a power to order the Wife to complete all legal formalities for transfer

" of the property and the title thereof to the Husband.

10. That the Wife's lawyer did not create any security interest in the property for her protection, other than her right to the proceeds of sale. He could have done otherwise, but he did not.

11. In my opinion, the lapse of seven years would have no legal effect on the Marital Settlement Agreement. That it is in force, and I am not aware of any other factor which would render it unenforceable."

From the affidavit evidence of Kent Wheeler it is clear that at the time of trial the appellant had full power of disposition of the subject matter of the contract. Accepting Kent Wheeler's evidence, which is not contradicted, this court has the power to order the Registrar of Titles to transfer the property to the respondents/cross appellants, the property being situated in Jamaica. There is, in my view, no need for the appellant to apply to the foreign court to compel his wife to transfer the property to him as is contended by counsel for the appellant. I find support for this view in the evidence of Kent Wheeler at paragraph 8 of his affidavit (supra), see the underlined words, and by virtue of section 158(1)(b) of the Registrar of Titles Act, which states:

"Upon the recovery of any land, estate or interest, by any proceeding at law or equity, from the person registered as proprietor thereof, it shall be lawful for the court or judge to direct the Registrar --

(a) to...

(b) to issue, make or substitute such certificate or title, instrument, entry of memorandum or do such other act, as the circumstances of the case may require,

and the Registrar shall give effect to that direction."

The circumstances are not dissimilar to those in S.C.C.A. No. 65/84 Jestina Smith v. Cyril Williams.

Williams and his former wife owned two houses jointly. He agreed with his former wife to transfer one house to her and

she in turn would convey the other house to him. He fulfilled his part of the bargain. She failed to honour her side of the bargain. The husband in the belief that his wife would have proved honourable contracted to sell the property to Jestina Smith. He refused to complete the contract on the basis that he was unable to locate his wife who had migrated to the United States and whose whereabouts were unknown. Gordon, J., as he then was, decreed specific performance of the contract on the basis that an enforceable agreement existed between Williams and his former wife and that Williams was duty bound to take steps to have her honour her side of the bargain. The fact that he might have had to bring an action to enforce the agreement between himself and his former wife was no barrier to decreeing specific performance. On appeal to the Court of Appeal, the judgment of the court below was affirmed (per Carey, Campbell, Wright, JJA). I must mention that there was no written reasons in the case but in dismissing the appeal the court must have accepted the rationale in the decision of Gordon, J.

In the conclusion of Kent Wheeler is enshrined the equitable principle established in **Walsh v. Lonsdale** (1882) 21 Ch.D. 9 that equity treats as done that which ought to be done. More fundamental, where the performance of an act is dependent upon a party taking steps to ensure the performance that party will not be allowed to set up the non-performance as a defence unless he can show that he had done everything in his power to ensure performance. Once the agreement between the appellant and his former wife is enforceable in the American Court, on principles which the courts of this country would assume jurisdiction, then that agreement is enforceable in Jamaica.

Even if the contention that the appellant would have to invoke the jurisdiction of a foreign court to compel the former wife to convey the property to him is sound that would be no barrier to this court decreeing specific performance. Following the decision in **Johnson v. Agnew** [1979] 1 All E.R. 883 (H.L.) where it was held:

> "A vendor who sought specific performance merely elected for a course which might or might not lead to the implementation of the contract; he was not electing for an eternal or unconditional affirmation of the contract but simply for the contract to be continued under the court's control. If he obtained an order for specific performance and it became impossible to enforce it, he then had the right to ask the court to discharge the order and terminate the contract."

By extension, this principle applies to purchasers.

In considering whether or not to grant the discretionary remedy of specific performance, a court must have regard to whether or not any of the discretionary bars of (1) delay (2) unfairness (3) hardship to third parties, apply to the circumstances. Without entering upon a detailed discussion of the discretionary bars, I am satisfied on the evidence that the bars do not apply in the instant case.

In contracts for the sale of land, the interest of the purchaser is in the real estate. The purchaser requires the property. Damages in lieu of specific performance is never an adequate remedy where the court can properly grant specific performance. See **Adderly v. Dixon** (1824) 57 E.R. 239; **Turner v. Baldin** [1951] 82 C.L.R. 463.

In the circumstances of this case, I would unhesitatingly decree specific performance of the contract of sale.

This effectively disposes of the appeal and cross appeal. Notwithstanding the copious arguments as to damages, I find it unnecessary to address them because of the conclusion to which I have arrived.

I would, therefore, order that the appeal be dismissed and that the cross appeal be allowed. The judgment of the court below be set aside and:

1. That Specific Performance of the contract dated December 17, 1980, is hereby decreed.

2. That the Registrar of Titles is directed to substitute the plaintiffs' names for that of the defendants on the Register Book of Titles and on the duplicate certi-

Certificate of Titles issued in respect of the said land, upon terms that the plaintiffs within three months of the date hereof, pay into court the purchase money and incidental costs of the transaction less the deposit and the interest which has accrued thereon as per letter dated 12th October, 1982, addressed to Milholland, Ashonheim and Stone by Judah, Desnoes, Lake, Nunes, Scholefield and Company.

3. The said deposit and interest accruing thereon to be paid into court within three months of the date hereof.

4. Livingston, Alexander and Levy to have carriage of sale and the appellant's costs of the transfer to be paid from the sums paid into court by Judah, Desnoes, Lake, Nunes, Scholefield & Company. If the said sum is insufficient to cover these costs the shortfall is to be made up from the purchase money paid into court on application to the Registrar of the Supreme Court.

5. That upon these orders being complied with, the Registrar of the Supreme Court shall inform the Registrar of Titles that the plaintiffs' names be substituted on the Register Book of Titles as aforesaid.

6. Costs of the appeal and cross appeal to the plaintiffs/respondents to be taxed if not agreed.

Cases referred to:

1. Grant v Williams (unreported) SCCA 20/85
2. Gavaghan v Edwards [1963] 2 ALL ER 477
3. Watts v Spence (1976) Ch 165
4. Bain v Fothergill (1874-80) All ER Rep 83.
5. Keen v Mear [1920] 2 Ch D 574
6. Bowen v Duc d'Orleans (1900) 16 TLR 226.
7. Raingold v Bromley (1931) All ER Rep 822
8. Armagas Ltd v Mundogas S.A (1986) 2 All ER 385
9. Bradford Building Society v Borders [1941] 2 All ER 205
10. Watkins v Roblin [1964] 8 J LR 214
11. Bank of London & Montreal v Sea [1967] 10 J.L.R 319.
12. Carol Friend v Florence Tulloch P.C.A Appeal No. 54 of 1992 (unreported) — 27/1/1994.
13. Jestina Smith v Cyril Williams SCCA 65/84
14. Walsh v Lonsdale (1882) 21 Ch D 9
15. Johnson v Agnew [1979] 1 All ER 883
16. Adderley v Dixon (1824) 57 E.R 239
17. Turner v Barclay [1951] 82 C.L.R 463