JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 23/84

BEFORE: THE HON. MR. JUSTICE KERR, PRESIDENT (AG.)
THE HON. MR. JUSTICE ROSS, J.A.
THE HON. MR. JUSTICE CAMPBELL, J.A.

BETWEEN:	GEORGE WHITE	DEFENDANT/APPELLANT
A N D :	ESMENA MORRIS	PLAINTIFF/RESPONDENT

Mr. Carl Rattray, Q.C., and Mr. Norman Samuels for the appellant.

Mr. H. Haughton Gayle for the respondent.

June 3 & 4 and December 18, 1985

KERR, P. (AG.):

In her action, the plaintiff/respondent sought against the defendant/appellant:

(i) Specific performance of an oral agreement (which had been part performed by the plaintiff) made during or about the month of September, 1976 of certain freehold property at Treadways in the parish of St. Catherine.

(ii) In addition to or alternatively in lieu of specific performance damages for breach of contract.

(iii) A declaration (a) that the defendant having put the plaintiff in possession of the said freehold property and encouraged the plaintiff to build her house thereon and the plaintiff having with the knowledge and consent of the defendant expended money in building the said house is entitled to have the defendant convey and transfer the said freehold property to her and (b) that the defendant is a trustee for the said property.

The particulars and averment in support of the plaintiff's claim were specifically denied and/or traversed by the defendant in his pleaded defence and he in turn counter-claimed against the plaintiff for recovery of land occupied by the plaintiff and as described in his counter-claim; alternatively a declaration that the defendant is entitled to an agreement for the lease to the plaintiff of the said land and an injunction restraining the plaintiff, her servant or agent from entering or being upon any portion of the defendant's land outside the area described in this counter-claim.

Bingham, J. after a careful review of the evidence and consideration of the cases cited, rejected the defendant's claim and found wholly for the plaintiff by ordering specific performance and granting the declarations as prayed.

On appeal, the challenge to the correctness of the judgment was two pronged:

(i) That the trial judge was wrong in granting specific performance as the evidence failed to establish an enforceable contract; that in so doing he wrongly applied the doctrine of part performance.

(ii) That the trial judge erred in granting the declaration that the plaintiff was entitled to the land the subject of the action since the declaratory judgment implied the existence of substantial rights which, without a valid contract, the plaintiff could not acquire.

The plaintiff now well past middle age had lived at Treadways for many years until she married and removed to live in Kingston. During her sojourn at Treadways there existed a close friendship between herself and the defendant's family, in particular, his mother from the days when the defendant was a boy. On the death of plaintiff's father in 1960, she inherited 3 3/4 acres of land at Treadways. This land she sold to the defendant in 1970 and the transfer was effected by Registered

Title. The present dispute is over a portion of that land.

The plaintiff, a higgler, an occupation now given by bureaucracy the onerous title of Informal Commercial Vendor, continued to visit the area and in fact plied her weekly trade in the neighbouring Linstead Market.

During the political pre-election violence in 1976, her home at Jones Town was partially burnt down to the extent that she took up temporary lodgings in the Banbury Church premises in St. Catherine. She communicated her plight to defendant and her nephew Bertie Graham. Both attended on her at Banbury. In response to her express desire to purchase a place in the area, defendant offered her a house spot on the land he had bought from her. It is from this point there is divergence.

The plaintiff in her evidence stated that she declined his offer of a gift insisting that it was a sale not a gift she was seeking. Her efforts to buy land in the area were unsuccessful. As a result of a conversation between herself and defendant on a Saturday in September 1976, accompanied by Bertie Graham, she went to the defendant's home the following day. There and then he pointed out the boundaries of land he was prepared to sell her. She offered $60.00 and after apparently friendly persuasion he agreed and she paid him this amount some time in 1977. She then set about the building of her house. The defendant offered her a plan and recommended a builder. She declined his offer as her son-in-law, George Sutherland, persuaded her she could otherwise more cheaply build. Notwithstanding, building materials were from time to time received by defendant and his wife and stored on his premises. The plaintiff said she first moved when two bedrooms were completed but she caught a cold as the house had no ceiling and had to move out until the ceiling was finished. The house was finally completed in 1977.

The relationship between the parties deteriorated. Dispute arose as to the area in which she was put in possession and stakes were placed by defendant to indicate a more limited area she should occupy. She in turn made a claim against him for his goats trespassing on the land in her possession.

Bertie Graham gave evidence corroborating the plaintiff as to the boundaries pointed out by the defendant; to the plaintiff refusing to accept land as a gift and offering $60.00 for it. He denied hearing any talk of a lease.

George Sutherland, a mason, gave evidence as to the building of the house by himself and two others; of the defendant pointing out the area as claimed by the plaintiff and his saying "This is the area I sold Mrs. Morris". He estimated the present value of the building at $65,000.00.

Defendant in evidence contended that the price for the 3 3/4 acres was not $560.00 as alleged by the plaintiff but $2,900.00. He denied any agreement for sale or the receipt of $60.00. According to him on the Sunday, when plaintiff visited him he told her "I can't give you the land, I lease you one square" and the plaintiff agreed. He pointed out the boundaries as described in his counter-claim. There was no agreement on the terms of the lease or price. It was agreed that there should be a grace period and that she should build a house of one room of concrete block and steel room. He did receive some materials for a time. However, when he saw additions being made to the building he protested but the workmen threatened him and fearing for his life he took no further action.

After his review of the evidence and submissions of Counsel, the learned trial judge concluded thus (pp. 9-10):

> "On the evidence there can be little doubt that whichever version is accepted as to the subject matter of the agreement entered into, that is, whether it was a sale or lease, an equity clearly arises in favour of the plaintiff.

> "On the plaintiff's own account which is supported by the testimony of both Reuben Graham and George Sutherland the fact that the agreement was oral would not ipso facto make it unenforceable by virtue of section 4 of the Statute of Frauds as there is ample evidence capable of amounting to acts of part performance, by the entry of the plaintiff into possession of the land and the expenditure of a considerable sum of money in erecting what is on the evidence a substantial building. These acts of part performance are sufficient to take the case out of the provision of the Statute.
>
> I find as a fact that there was an oral agreement for the sale of two squares of land as on the evidence it is highly improbable that had the agreement been a lease as the defendant contended, a lease of what on the evidence was still a period of uncertain duration, that the plaintiff, a woman of mature age and some experience would have taken the risk of expending such a large sum amounting to $40,000 to construct a house, which on the defendant's evidence is likely to last for at least sixty years. Her conduct therefore, is consistent with that of an absolute owner and that which one would expect from someone who had an interest in land not merely of a certain duration but of some degree of permanence."

He then considered the alternative, namely, the equity arising in the event it could be said that he erred in so finding and after referring to the cases - Kingswood Estate Co. vs. Anderson (1963) 2 Q.B. 169; Dillwyn vs. Llewelyn (1862) 4 De F.G. & J. 517, and Chaproniere vs. Lambert (1917) 2 C.L. 365, said at p. 11:

> "The cases cited by Mr. Haughton Gayle were all supportive of the contention that the effect of the factual circumstances as I have found them to be is that an equity now fastens unto the fee simple of the whole estate which is vested in the defendant until he discharges his obligation under the agreement between the plaintiff and himself, that is, does equity. On the facts, therefore, as I have found, however, I am in complete agreement with the observation of Mr. Haughton Gayle that as the evidence is overwhelmingly in favour of the existence of an agreement for a sale of two squares of land the equity is best satisfied by ordering a transfer of the fee simple of the parcel of land in question to the plaintiff."

In support of his contention that there was no enforceable contract Mr. Rattray submitted that regardless of what view was

taken of the evidence it did not prove the existence of a contract for the sale of land with respect to the following essentials:

(1) The subject matter of the alleged agreement.

(2) The price.

(3) Mutuality of agreement.

In that regard on the plaintiff's own evidence the defendant offered the land as a gift and the whole idea of selling came from the plaintiff with no agreement from the defendant. Accordingly, as there was no memorandum in writing to satisfy the Statute of Frauds for the equitable doctrine of part performance to be applicable, there must be clear evidence of a contract, certain and definite in its terms. In the instant case, neither the evidence of the plaintiff nor of her witnesses was sufficient to prove the existence of a contract. Further, the contract must first exist and being in existence, the acts as looked on must be such as are consistent with the existence of that contract. He cited in support Maddison v. Alderson (post) and McBride v. Sandland (post). Accordingly, the learned trial judge erred in using the acts purported to be of part performance as evidence of the creation of a contract when the purpose of part performance is to permit enforcement of contract deficient in writing. In short, the evidence did not support the conclusion that there was an agreement between the parties for the sale of land and the acts relied on as part performance are not sufficiently unequivocal to refer to the contract as alleged and to no other.

On the contrary, he Mr. Rattray was promoting a situation as in Inwards v. Baker (1965) 1 All E.R. 446, and on that basis the plaintiff would therefore be entitled to occupation as long as she lived. He conceded that on such a finding the defendant must lose his counter-claim. He was therefore submitting that an

equity arose as there was encouragement from the defendant upon which the plaintiff relied and expended money in building the house with the expectation of occupying it as long as she lived. There was therefore a "benefaction and not a bargain." The equity which existed did not confer a right to title but merely use and occupation of the land.

For the factual basis for these submissions Mr. Rattray relied on his interpretation of the plaintiff's evidence and in particular the cross-examination concerning (i) her allegation that she paid defendant $60.00 as purchase price for the land; (ii) the conversations between herself and the defendant leading up to her entry into possession on the land and (iii) the terms and conditions under which she so entered.

In that regard the following excerpts are informative:

" .....

Q: You told the court yesterday that you paid Mr. White the $60 some months after he pointed out the land. Can you give the court any assistance as to when you paid for the land?

A: It was while I was living in the house for the first time.

Q: So where were you when you gave him the money?

A: Down at my house.

Q: Anybody else was present?

A: No sir.

Q: What happened when you gave him the money?

A: He told me that he is not selling me the land but is I who giving him the money. He then took the money.

Q: Do you remember how the money was made up?

A: It was made up of $10 and $2 bills but I don't remember how much of each. He gave me no receipt and I did not ask for any.

.....

"Q: You told court that you paid Mr. White Sixty Dollars for land which he took from you and never gave you back. You also told court that after the house came to perfection, that you and the Whites were in bad blood. How do you know what happened to the Sixty Dollars you gave to the defendant?

A: No sir.

Q: You and Mrs. White apart from the incident where she had threaten you, was there any other incident in which Mrs. White used hard words to you?

A: I don't remember.

Q: Mr. White is saying that he never sold you any land at all. What he had agreed to lease you a portion of land?

A: He sold me the land. We never argued on any lease at all.

Q: Did he ever mention lease to you at all?

A: No sir.

Q: Did you mention lease to him?

A: No sir.

Q: He is saying that there was no discussion or agreement about selling you any land?

A: He had said that he wanted to give me a bit of land and I told him that I did not want him to give me that I would pay him for it and I did so.

.....

Q: He is saying that he told you that he would lease you some land to put up a temporary building to make your home?

A: What do you mean by a temporary building?

(Explained to witness).

I never made no such arrangements with the defendant to put up any such building.

.....

Q: You kept your part of the bargain. You paid him for the land?

A: Yes sir."

Now in Maddison v. Alderson (1883) 8 A.C. 467, Thomas Alderson induced the appellant M to serve him as housekeeper without wages and to give up other prospects of establishment in life by a verbal promise to make a will leaving her a life estate in land and afterwards signed a will not duly attested but by which he purported to leave her the life estate. She served him for many years down to the time of his death. The will being invalid for want of proper attestation there was an intestacy. The appellant having possessed herself of the title deeds, the respondent, A, as heir at law brought an action to recover them. By her statement of defence and counter-claim she insisted she was entitled to the same benefits that she would have taken had the will been properly executed by virtue of a parol agreement alleged to have been made with the deceased for sufficient consideration and partly performed by her.

In the course of his judgment the Earl of Selborne, L.J. said at p. 479:

> "I am not aware of any case in which the whole purchase-money has been paid without delivery of possession, nor is such a case at all likely to happen. All the authorities shew that the acts relied upon as part performance must be unequivocally, and in their own nature referable to some such agreement as that alleged."

And then later after dealing with the particular facts of the case said at pp. 480-1:

> "The law deducible from these authorities is, in my opinion, fatal to the appellant's case. Her mere continuance in Thomas Alderson's service, though without any actual payment of wages, was not such an act as to be in itself evidence of a new contract, much less of a contract concerning her master's land. It was explicable, without supposing any such new contract, as easily as the continuance of a tenant in possession after the expiration of a lease."

Mr. Rattray apparently relied upon what may be considered a narrower view of the doctrine of part performance expressed by Lord O'Hagan in Maddison v. Alderson at p. 485:

> "But there is no conflict of judicial opinion, and in my mind no ground for reasonable controversy as to the essential character of the act which shall amount to a part performance, in one particular. It must be unequivocal. It must have relation to the one agreement relied upon, and to no other."

Lord O'Hagan was merely stating briefly the grounds for concurrence in the judgment of the Lord Chancellor. His remarks should not be taken as differing from the statement of the law in the passage quoted that the acts must be referable to 'some such agreement as alleged."

The statement of the principle in my view should not be so narrowly applied as to fetter the court in its pursuit of substantial justice. It is as stated in Kingswood Estate Co. Ltd. v. Anderson (1963) 2 Q.B. 169 by Willmer, L.J. at p. 181:

> "I do not understand, however, that part performance must necessarily be referable to the agreement, and only the particular agreement, relied on. I cite from Anson on Contract, 21st ed., p. 75, where the principle is stated, as I think correctly, in the following terms: 'The acts of performance relied upon must of themselves suggest the existence of a contract such as it is desired to prove, although they need not establish the exact terms of that contract.' As I understand it, if there is evidence of such part performance that is sufficient to warrant the admission of oral evidence to prove what the exact terms of the contract were."

In McBride v. Sandland (1918) 25 C.L.R. 69 the plaintiff and defendant were father and daughter. A number of properties were about to be sold by private auction. At the request of the plaintiff the defendant's husband agreed not to bid against the plaintiff on the plaintiff's promise that on his purchase of the properties at the auction, the husband should have the particular property by paying five percent on whatever he, the plaintiff should give for it, that the defendant should have the right to take the property at the plaintiff's death on what it cost him and the defendant's husband should have possession as soon as the purchase was completed. The following day the plaintiff

bought the properties and the husband went into possession. Upon the plaintiff seeking a declaration that he was entitled to take an estate in fee simple on the land subject only to the defendant's tenancy by the year, the defendant relying on the conversation contended that a contract was established between the plaintiff on the one hand and the defendant and husband on the other involving a right to purchase the property a reasonable time after the death of the plaintiff upon paying to the personal representative of the plaintiff, the amount of the purchase money. It was held (i) that the conversation did not establish a contract and (ii) if there was any such contract as alleged, the evidence did not show any part performance to take it out of the Statute of Frauds. In the joint judgment of Isaacs and Rich, JJ., the following is worthy of note (pp. 76-7):

> "It is necessary in the first place to point out that eventually, as argued on the respondent's behalf, it was claimed only that she had a 'right to purchase,' that is, an option, and not that she had already 'purchased' by exercising the option so as to be presently entitled to the fee simple in equity subject to the appellant's life estate, but with a right of possession in the meantime."

While Higgins, J. had this to say: (p. 94):

> "But I prefer to rest my decision on the point that there is no contract at all - no intention to create a legal bond, and no consideration moving from the defendant for any promise made to her or with regard to her. A mere statement of intention or promise does not become a contract enforceable by our law because of the fact that the person promised has, in reliance on the promise, adopted an altered course of living or conduct."

Both Maddison v. Alderson and McBride v. Sandland, upon which Mr. Rattray relied, are clearly distinguishable. In the former the terms of the arrangement were nebulous and the acts of part performance relied on were equivocal. The plaintiff's relationship and her remaining with the intestate until his death were "attributable to very many reasons, having no relation whatever to the contract on which she would now rely," per Lord O'Hagan in Maddison v. Alderson at p. 486. In the

latter case the claim was based upon an option and an inchoate and outstanding promise - in short, a manifestly imperfect gift. In the instant case although the learned trial judge in his written judgment made no specific finding of the payment of the $60.00 as purchase money he accepted the plaintiff's evidence wihout any reservation. Accordingly, in his finding of agreement for sale of the land described by the plaintiff, the finding of the purchase price offered by the plaintiff and accepted by the defendant was implicit.

There was therefore:

(i) An executed consideration, the price paid.

(ii) The entry into possession of the lands pointed out by the defendant.

(iii) The building and occupation of a house of respectable size and worth.

Accordingly, I am of the view that there was sufficient evidence to establish an agreement for sale of the land as described by the plaintiff and the acts of part performance were referable by their very nature to such a contract as alleged. I am therefore in agreement with the learned trial judge that in the circumstances an order for specific performance was the appropriate remedy.

With reference to the alternative plinth of this judgment I am of the view that a finding that there was an agreement for sale render it unnecessary to consider the equity that may arise from any inducement or encouragement offered by the defendant. The positions taken by the parties were clearly defined in the pleadings and the nature and conduct of their respective cases. The plaintiff rested her claim on an agreement for sale; the defendant that the plaintiff was put in possession pending the agreement on the terms and execution of a proper lease. The learned trial judge having rejected the defendant's case, Mr. Rattray's contention that the plaintiff's claim was

in the equity arising from the defendant's encouragement to the plaintiff to build her house on his land, rested upon an astute but unwarranted severance of that part of the plaintiff's evidence that the defendant offered the land as a gift, whereas from her evidence clearly the defendant because of her importunity in the end accepted the $60.00 as the purchase price of the land.

In granting the declarations as prayed the learned trial judge was clearly influenced by the judgment and order in Dillwyn vs. Llewelyn (1862) 4 De F. G. & J. 517. Because of the firm opinion which I have expressed, it is unnecessary to indulge in any comparative and close analysis of the facts in that case with those of the instant case. It is enough to say that I prefer to regard the decision and consequential order made in that case as resting on its particular facts and the statements therein in the context in which they were made as appropriate to the special circumstances therein rather than a recognition of any general power in the Court to elevate without more an equity such as that arising in Inwards v. Baker into an entitlement to the fee simple of the land.

On the issue in contention and the findings of fact of the learned trial judge there was no need to pray in aid the dicta in Dillwyn vs. Llewelyn.

There remains the question of whether or not the order of specific performance should include an order that the transfer be by Registered Title.

It is true that when the plaintiff sold to the defendant in 1970 the transfer was by Registered Title and it is reasonable that the plaintiff as stated in her evidence would desire and expect the transfer in the present case to be in like manner. However such desire and expectation are not enough. Although transfer by Registered Title is now the usual method it is not

the only or essential mode of conveyance. Having regard to the circumstances under which the agreement came into being, and to the bargain price paid for the land, I am unwilling to read into or infer in the agreement for sale an undertaking by the defendant to provide or meet the attendant costs of a Registered Title.

For the reasons contained herein, I would dismiss the appeal and affirm the judgment in the court below to the extent of an Order for specific performance as indicated herein.

CAMPBELL J.A.

By an amended Statement of Claim filed on November 9, 1981 the respondent claimed specific performance and other reliefs in respect of an oral agreement made with the appellant in or about the month of September, 1976. Under this agreement the respondent asserted that the appellant agreed to sell to her for the price of $60.00 a demarcated part of his land at Treadways in the parish of St. Catherine of which he the appellant was the registered owner. The respondent by her said claim further pleaded that pursuant to the agreement she was put into possession of this demarcated parcel of land and in reliance on the agreement and with the knowledge and consent of the appellant she part-performed the oral agreement by constructing on the land a sturdy and permanent dwelling house which at the date of construction in 1977 was valued at $40,000.00. She complains that the appellant has now refused and/or neglected to effect a transfer of the land to her which transfer she said was orally agreed to be a registered transfer.

The appellant by his defence denied that there was any agreement for sale. He however admitted that he put the respondent into possession of a part of his land in September 1976 and that the respondent commenced living on this portion of land since November, 1976. This portion of land he pleaded is less than that claimed by the respondent. Further, he pleaded, she was put into possession under an agreement for a lease which was to be executed at a later date. Under this agreement for a lease she was given permission to establish a home on the land but only by erecting a temporary building.

The appellant further asserted that despite protestations from him, the respondent continued enlarging the original

improvised room which she had constructed in October, 1976 while at the same time, since at least from around November, 1977 refusing to discuss much less to execute the contemplated lease.

The suit was heard by Bingham J. who on March 12, 1984 gave judgment for the respondent with reasons in these words:

> "The cases cited by Mr. Haughton Gayle were all supportive of the contention that the effect of the factual circumstances as I have found them to be is that an equity now fastens unto the fee simple of the whole estate which is vested in the defendant until he discharges his obligation under the agreement between the plaintiff and himself that is, does equity. On the facts, therefore, as I have found, however, I am in complete agreement with the observation of Mr. Haughton Gayle that as the evidence is overwhelmingly in favour of the existence of an agreement for sale of two squares of land the equity is best satisfied by ordering a transfer of the fee simple of the parcel of land in question to the plaintiff.
>
> Judgment accordingly for plaintiff for:
>
> 1. Declaration as prayed
>
> 2. Specific performance
>
> 3. Costs to the plaintiff to be taxed if not agreed."

Against this judgment the appellant has appealed on grounds which Mr. Rattray has summarized and argued under three heads namely:

1. No contract was proved on the evidence;

2. If to the contrary a contract is held to have been proved, there was no part performance;

3. Even if both contract and part-performance are held to have been established, nonetheless the appellant cannot be ordered by virtue of the order for specific performance, to grant a registered title to the respondent.

Dealing with the first of his submissions Mr. Rattray submitted that bearing in mind the evidence of the close and intimate relationship between the parties as the background against which the alleged oral contract of sale is projected, the conversations between the respondent and the appellant relative to the land transaction establish no more than an intention by the appellant to benefit the respondent. The exchanges fell short of constituting a bargain, because they were inconclusive, imprecise and lacked mutuality as to whether a sale was intended as distinct from the manifestation of a mere benefaction. In this regard Mr. Rattray relied heavily on McBride v. Sandland (1918) 25 C.L.R. p. 69. The relevant evidence of the defendant in that case which the learned trial judge accepted in giving judgment for her is summarized thus by Higgins J. on appeal at pages 91-92:

> "The evidence of the defendant is that the father, on the eve of the sale of several Killicoat properties, in August, 1885, said to Sandland, his son-in-law, in the presence of his daughter (the defendant) that he would purchase all the properties when sold in one lot subject to annuities:
>
> 'I will arrange that Carrie' (the daughter) 'shall have that' (the Flagstaff property) 'by paying 5 percent on whatever I give tomorrow, she will have the right to take it at my death at what it cost me and you shall have possession as soon as the purchase is complete, and you can put your stock on it right away .....' Then says the defendant': 'my husband thanked him and said he did not wish to oppose him at the bidding, but he must have more land to enable him to maintain his wife and family. I thanked him also. The sale took place the next day, and my father bought the whole lot, including the flagstaff. After the purchase my husband moved his sheep from Stony Gap in due course into the Flagstaff, and from the Adelaide Road too he moved his sheep into the Flagstaff. He had his sheep on the Flagstaff and worked it till the time of his death.' The husband died in 1909, leaving his wife his sole legatee."

On this evidence Higgins J. having opined that unless a contract could be extracted from the conversation no contract as alleged by the defendant existed, concluded thus at page 92:

> "There is a promise on the words used, not an agreement,"

and at page 93 he further concluded that the alleged contract was wanting in mutuality. He said thus:

> "The 'thanks' with which both Sandland and his wife received the intimation of McBride's intentions as to the Flagstaff confirm the view that the transaction was regarded as being essentially a benefaction and not a bargain."

In my view the conversation from which an oral contract is to be established in the present case is clearly and materially different from that stated by Higgins J. in McBride v. Sandland supra.

Before considering the evidence of the conversation from which the oral contract emerges I will deal with a subsidiary submission of Mr. Rattray which is that in considering whether any oral contract emerges from the conversation only the evidence as given by the plaintiff/respondent is to be considered and if from such evidence no oral contract emerges, supportive evidence from bystanders which would fill gaps in the evidence of the plaintiff and so establish a contract will not save the situation.

This is a proposition which in my opinion is neither well founded in principle nor by the rules of evidence nor on the basis of common sense. What if the plaintiff who seeks to enforce the contract is the successor in title of the person, now deceased, with whom in the absence of the plaintiff the defendant orally contracted? Is his claim to be defeated because his predecessor is not around to testify as to what was said even though there are alive persons who witnessed the conversation? What if a plaintiff through oversight omits part of a conversation? Is a bystander precluded from giving evidence of this? This proposition is

quieted by the very case namely McBride v. Sandland (supra) relied upon by Mr. Rattray because the evidence of the conversation which was relied on as establishing a contract with Sandland/was the husband in fact given by the wife/defendant who was a bystander. Again in Kingswood Estate Co. Ltd v. Anderson (1963) 2 Q.B. 169 evidence of a conversation with the plaintiff out of which the oral contract emerged was given not only by the Defendant Mrs. Anderson but also by her daughter Mrs. Brown who was present. Further, evidence by another daughter of a conversation with the plaintiff subsequent to the first conversation was also admitted in evidence. This had the effect of an admission by the plaintiff of the truth of the conversation which he had previously had with the defendant.

In my view the trial court has to consider the entirety of the evidence pertaining to the conversation as given in evidence by all the witnesses, and having resolved conflicts if such exist conclude from the salient facts emerging from such conversation whether those facts constitute a concluded oral contract.

Now to the evidence on record. The respondent states that following on her disaster in having her home in Kingston razed to the ground, the appellant in January, 1976 offered as a gift two squares of his land on which she could build a home. She declined his offer of a gift but intimated she would purchase the proffered land. She admitted that she did not then mention any price. Nothing further was heard of the appellant's offer of a gift and the respondent's inchoate offer to buy until about the latter part of 1976 when the respondent having failed in her effort to acquire land elsewhere for purchase, renewed her offer to buy to the appellant on a chance encounter with him on a Saturday in the Linstead market. The outcome of this chance encounter was that they agreed to meet on the immediately succeeding Sunday. On this date they met on the land. The respondent

was accompanied by her nephew one Bertie Graham. The land was demarcated by the appellant and the respondent there stated that she would be paying $60.00 to the appellant for this demarcated area. The exchanges which took place on the land which were elicited under cross-examination are better set out verbatim and are as hereunder:

"Q. Was there any talk about the price on the Sunday?

A. When the defendant pointed out the land to me he said in the presence of Bertie 'this is the piece I am going to give to you' I said I don't want it for nothing I am going to pay you for it. I told him then I would be giving him sixty dollars for it.

Q. So you fixed the price?

A. I told him that and he said 'I am not selling the land to you I am giving the land to you.'

Q. So no money passed that day?

A. No sir.

Q. You said that you paid this money months after?

A. Yes sir."

As regards the conversation on the land, Mr. Bertie Graham's evidence so far as is relevant is as follows:

"Q. So when you went to Mr. White's home was anybody else there?

A. I saw Mrs. Morris and Mr. White.

Q. Anybody said anything?

A. After a while Mr. White said that we must follow him let him show her a portion of his land that she is to build the home.

Q. Do you know what was the reason why Mr. White was pointing out this land to Mrs. Morris?

A. Yes sir.

"Q. Do you know from what was said as to whether Mrs. Morris was buying (sic) the land for nothing or whether she was getting the land in any other way?

A. Mr. White had said that he was giving her the land for nothing.

Q. What was Mrs. Morris response to that?

A. She said she would not like it for nothing she would give him $60.00 for it.

Q. Did Mr. White say anything to that?

A. He said 'whatsoever you do it is left to you."

As regards the actual payment of the $60.00 the evidence of the respondent is as hereunder:

"Q. You told the Court yesterday that you paid Mr. White the $60.00 some months after he pointed out the land. Can you give the Court any assistance as to when you paid for the land?

A. It was while I was living in the house for the first time.

Q. What happened when you give him the money?

A. He told me that he is not selling me the land but is I who giving him the money. He then took the money."

The evidence of George Sutherland on behalf of the respondent was that on an occasion when he and the appellant went on the latter's land, the appellant pointed to an area of land saying "this is the area I sold Mrs. Morris."

The appellant in his evidence admits substantially the respondent's evidence on the sequence of events. He however denied that he had at any stage agreed to make a gift of the land to the respondent or to sell her the land. He, to the contrary, states categorically that it was the respondent who from the very beginning was badgering him for a gift of a house spot. He

resisted her request until, about September 1976 he agreed to help her by agreeing in principle for her to have a lease of a house spot with the terms still to be agreed upon. This she accepted.

The learned judge found as a fact that the appellant was not a frank and truthful witness. He found on the other hand that the respondent was frank and straight-forward. He found that on the pleadings both parties admitted as a fact that there was an agreement, the only issue therefore was whether this agreement was one of sale or lease. He impliedly found that there was an oral agreement for sale when he delivered himself thus:

> "On the plaintiff's own account which is supported by the testimony of both Reuben Graham and George Sutherland the fact that the agreement was oral would not ipso facto make it unenforceable by virtue of section 4 of the Statute of Frauds as there is ample evidence capable of amounting to acts of part performance."

Later in his judgment he expressly found as a fact that there was an oral agreement for the sale of two squares of land. He delivered himself thus:

> "I find as a fact that there was an oral Agreement for the sale of two squares of land as on the evidence it is highly improbable that had the agreement been a lease as the defendant contended, a lease of what on the evidence was still a period of uncertain duration, that the plaintiff a woman of mature age and some experience would have taken the risk of expending such a large sum amounting to $40,000.00 to construct a house which on the defendant's evidence is likely to last for at least sixty years. Her conduct therefore is consistent with that of an absolute owner and that which one would expect from someone who had an interest in land not merely of a certain duration but of some degree of permanence."

Mr. Rattray contended that flowing from the above extract from the judgment, it is clear that the learned judge's finding of an oral agreement was based on the evidence of the conduct of the respondent in entering upon the land and in constructing a substantial house thereon, which he found as amounting to acts of part performance. This approach of the learned judge says Mr. Rattray was wrong because the existence of an agreement must first be established independently of any purported acts of part performance.

I agree with Mr. Rattray that the existence of an oral agreement must be established by evidence independently of the acts or conduct which are claimed as amounting to acts of part performance. However the learned judge did not rely wholly on these acts of part performance as the basis of his finding that an oral agreement was established. He found that the evidence was overwhelmingly in favour of the existence of an agreement for sale. Thus he said:

> "On the facts, therefore, as I have found, however, I am in complete agreement with the observation of Mr. Haughton Gayle that as the evidence is overwhelmingly in favour of the existence of an agreement for a sale of two squares of land, the equity is best satisfied by ordering a transfer of the fee simple of the parcel of land in question to the plaintiff."

It is true that the learned judge did not particularize the facts found by him but his conclusion that the evidence is overwhelmingly in favour of a sale can only mean that he accepted the evidence of the respondent and her witnesses which disclose facts from which he could have found as he did that there was an agreement for a sale of two squares of land. The excerpts from the evidence of the respondent and her witness as to the

exchanges on the land when it was being pointed out by the appellant, and of the respondent on the occasion when the payment of $60.00 was being made, were such that the reasonable inference to be drawn therefrom and which must have been drawn by the learned judge was that even though the appellant, because of the long established good relationship with the respondent as a matriarchal figure to him, was reluctant to sell the two squares of land as against making a gift thereof, he was not resolutely averse to receiving the sum proposed and offered by the respondent as a purchase price if such was the respondent's wish namely to pay for the land and not to receive it as a gift. The evidence of Graham that on the day when the land was demarcated the appellant in response to the respondent's insistence on paying for the land did say "whatever you do is left to you" amounted to an acceptance of the respondent's counter-offer. Also the evidence of the respondent that on the date of payment the appellant, notwithstanding his earlier statement that he was not selling the land, did eventually accept the money after saying in consolation to himself, that it was the respondent who was insisting on paying for the land, was concrete confirmation of his acceptance from the date the land was pointed out, of the respondent's counter offer to purchase the aforesaid land at the price of $60.00. There is also on record the further evidence of George Sutherland amounting to an admission by the appellant on a date subsequent to the demarcation of the land that he had sold land to the respondent.

It must also be borne in mind that the appellant neither by his pleading nor in his evidence raised any issue as to the land having been disposed of by gift or of its having been occupied under a licence. His assertion is that the land albeit less than that claimed by the respondent, was given over to the respondent under an agreement for a lease the exact terms

of which were to be subsequently worked out. The appellant having thus admitted that there was an oral agreement affecting the land, the learned judge had only to decide by reference to the evidence whether the agreement was one of sale as pleaded by the respondent or one for a lease as pleaded by the appellant.

There was evidence from which the learned judge could find as he did that the oral agreement was for the sale of two squares of land, and though he did not make a specific finding as to the purchase price he must have found this inferentially namely that the aforesaid purchase price was $60.00 as given in evidence by the respondent. Such an inference is implicit in the finding that there was a sale because there was adduced in evidence no other competing purchase price. The learned judge was accordingly not in error in finding that there was an oral agreement nor did he commit the further error of basing his finding on the facts adduced in evidence by the respondent which were relevant only to establish acts of part performance by her.

The second submission by Mr. Rattray is that even if an oral contract of sale was established on the evidence, there were no sufficient acts of part performance.

In Maddison v. Alderson 8 App. cases 467 the Earl of Selbourne L.C. at page 469 stated the principle applicable to part performance as follows:

> "All the authorities shew that the acts relied upon as part performance must be unequivocally, and in their own nature, referable to some such agreement as that alleged." (emphasis mine)

Later at page 480 he said:

> "The acts of part performance, exemplified in the long series of decided cases in which parol contracts concerning land have been enforced, have been (almost, if not quite, universally) relative to the possession, use, or tenure of the land."

In the same case, Lord O'Hagan though expressly concurring both with the conclusions of the Lord Chancellor as well as with the reasons on which such conclusions were grounded, stated the principle of part performance somewhat differently and more restrictively than the Lord Chancellor. At page 485 he said:

> "But there is no conflict of judicial opinion and in my mind no ground for reasonable controversy as to the essential character of the act which shall amount to a part performance, in one particular. It must be unequivocal. It must have relation to the one agreement relied upon and to no other."

Mr. Rattray relied on Maddison v. Alderson and on McBride v. Sandland (supra) as laying down the principle by which and the limiting circumstances within which specific performance of an oral contract pertaining to land will be decreed. If I understand Mr. Rattray correctly, his submission is that since the respondent's entry on the appellant's land and her construction of a building thereon are as consistent with the appellant's benefaction having regard to their close and intimate relationship as with the oral contract which she alleges there are no unequivocal acts of part performance.

In so submitting Mr. Rattray in my view was relying on the statement of Lord O'Hagan namely that the acts of part performance "must have relation to the one agreement relied upon and to no other" (emphasis mine.)

This statement of Lord O'Hagan however found no support from the other Law Lords. Lord Blackburn did not essay a statement of the principle and Lord Fitzgerald in adopting the reasoning of the Lord Chancellor said at page 491:

> "I have had the advantage of reading the judgment of the Lord Chancellor on this question (a reference to part performance) and I adopt his reasons. The Lord Chancellor has well laid down that the acts relied on as performance to take the case out of the statute must be unequivocally and in their nature referable to some such agreement as that alleged, and I may add must necessarily relate to and affect the land the subject of that agreement."

In Kingswood Estate Co. Ltd. v. Anderson 1963 2 Q.B. 169 Wilmer L.J. in considering the principle of part performance at page 181 said thus:

> "It is said however that the act of the defendant in going into occupation was equivocal in that it might be referable to any kind of tenancy agreement. I do not understand however, that part performance must necessarily be referable to the agreement, and only the particular agreement, relied on. I cite from Anson on Contract, 21st ed. page 75 where the principle is stated, as I think correctly in the following terms. 'The acts of performance relied upon must of themselves suggest the existence of a contract such as it is desired to prove, although they need not establish the exact terms of that contract.' As I understand it, if there is evidence of such part performance, that is sufficient to warrant the admission of oral evidence to prove what the exact terms of the contract were."

Upjohn L.J. at page 189 had this to say:

> "However Mr. Blundell relies on the well-known conditions necessary to prevent the operation of the statute laid down by Warmington L.J. in Chaproniere v. Lambert and says that the acts of part performance here do not satisfy the first condition, namely, that the acts of part performance must not only be referable to a contract such as is alleged, but be referable to no other title. So he says that the acts of part performance here are equally consistent with a weekly tenancy and to a tenancy for lives so that it cannot be said that the acts of part performance are referable to no other title. This however

> "is a long exploded idea. The true rule is in my view stated in Fry on Specific Performance, 6th ed. p. 278, section 582. 'The true principle, however, of the operation of acts of part performance seems only to require that the acts in question be such as must be referred to some contract, and may be referred to the alleged one, that they prove the existence of some contract and are consistent with the contract alleged."

Thus it is the principle as stated by the Earl of Selbourne L.C. in Maddison v. Alderson (supra) which has been accepted and applied in practice. This means that the acts of part performance need not be referable exclusively to the contract alleged but will be sufficient if they refer to some contract of the general nature of that alleged.

In this case the evidence of close and intimate relationship does not create any uncertainty as to the basis on which the respondent entered into possession.

The appellant is quite specific that no question of benefaction arises. He says the respondent was let into possession under an agreement for a lease the terms of which were subsequently to be worked out and agreed upon. The respondent to the contrary said she entered into possession under an oral contract of sale. Her entry into possession and her construction on the land of a substantial building are acts which are therefore referable to "some such agreement as that alleged" by her namely an oral contract of sale. They were more consistent with the contract of sale stated by her than with the agreement for a lease as pleaded by the appellant. The learned judge so concluded. He said:

> "It is highly improbable that had the agreement been a lease as the defendant contended, a lease of what on the evidence was still a period of uncertain duration, that the plaintiff a woman of mature age and some experience would have taken the risk of expending such a large sum amounting to $40,000.00 to construct a house, which on the defendant's evidence is likely to last for at least sixty years. Her conduct therefore is consistent with that of an absolute owner and that which one would expect from someone who had an interest in land not merely of a certain duration but of some degree of permanence."

I am in complete agreement with the conclusion of the learned judge that these acts of the respondent were consistent with and referable to the oral contract established on the evidence and so constituted acts of part performance.

The third submission by Mr. Rattray is that even if the learned judge was right in his finding that there was an oral contract of sale and that there was sufficient act of part performance justifying a decree of specific performance, the appellant cannot on the evidence be ordered to give a registered title.

I am of the opinion that Mr. Rattray's submission is well founded. There was no evidence that the appellant had agreed to give a registered title. The evidence of the respondent at best amounted to no more than a hope and expectation that the performance of the oral contract by the appellant would crystallise in a registered transfer. The learned judge in decreeing specific performance properly did not prescribe that it should be by registered transfer, thus there is no warrant in such a mode of transfer being stated in the formal judgment as filed.

As regards the declaration granted by the learned judge, this by reference to the amended statement of claim was that:

> "The Defendant having put the plaintiff in possession of the said freehold and encouraged her to build a house thereon and the plaintiff having with the knowledge and consent of the Defendant expended money in building the said house, is entitled to have the Defendant convey and transfer the said freehold property to her."

This declaration by its nature was sought as an alternative to the claim for specific performance in the event that the plaintiff failed to establish the oral contract and acts of part performance. The learned judge having found as a fact that there was an oral contract of sale followed by acts which constituted part performance of that contract, properly ordered specific performance. It was accordingly otiose and unnecessary to grant the declaration as prayed on this alternative claim. The grant of this declaration must have been ex abundanti cautela manifested by the statement of the learned judge when he said:

> "If I am wrong in so finding that there was a sale then there is still the question of how the equity which clearly arises may best be satisfied."

For the reasons given I would dismiss the appeal and confirm the judgment of the learned judge in so far as it orders specific performance and costs to the plaintiff.

ROSS J.A.

I agree.