Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN COMMON LAW
CL A 083 OF 1994

BETWEEN	**HARRY ABRIKIAN**	**FIRST CLAIMANT**
AND	**KOLLEEN RUSSELL**	**SECOND CLAIMANT**
AND	**ATHOL SMITH**	**THIRD CLAIMANT**
AND	**ARTHUR WRIGHT**	**FIRST DEFENDANT**
AND	**VERA WRIGHT**	**SECOND DEFENDANT**

Mrs. Jacqueline Samuels-Brown and Miss Thalia Maragh for the claimants
Mr. Charles Piper instructed by Piper and Samuda for the defendants

May 30, 31, June 1, 2, 9 and 16, 2005

SPECIFIC PERFORMANCE OF CONTRACT FOR SALE OF LAND, ACTS OF PART PERFORMANCE, SECTION 36 OF THE STAMP DUTY ACT, SECTION 16 OF THE KINGSTON AND ST. ANDREW BUILDING ACT

SYKES J

1. This matter has its genesis in an unstamped, undated document headed *agreement for sale* in which Harry Abrikian, Kolleen Russell, Athol Smith (the claimants) and Arthur Wright (the first defendant) agreed to purchase land known as 5 Widcombe Way, from Vera Wright (the second defendant). The property is registered at Volume 991 Folio 688 of the Register Book of Titles.

2. Vera Wright has failed to transfer the property. The claimants, in an amended statement of claim, have sued for specific performance. They claimed damages in the alternative and damages in any event. Both defendants have resisted the claim on several grounds. Arthur Wright is the son of Vera Wright. Vera Wright's defences to the claim are:

(a) the claimants and first defendant were not co-purchasers of 5 Widcombe Way;

(b) Arthur Wright, on behalf of the claimants and himself, asked permission to use 4 Widcombe Way to make a house for her and use the property to make self-contained town houses with a common area;

(c) to give effect to the plan, she signed an agreement for sale in 1988 with completion set for June 30, 1991;

(d) the claimants paid Arthur Wright $256,500 between April 1991 and March 1993;

(e) Arthur Wright told her that the Kingston and St. Andrew Corporation had denied subdivision approval;

(f) she is not in breach of the agreement for sale for the reasons set out at (a) – (e) above;

(g) when she was told that subdivision approval was not granted she told Arthur Wright to refund the claimants their money;

(h) at the time of the execution of the agreement the claimants failed to pay the deposit. This failure prevented the stamping of the agreement. It was not stamped therefore the agreement is void and unenforceable;

(i) section 36 of the Stamp Duty Act made the written unstamped document inadmissible and unenforceable;

3. It is clear that what Vera Wright says at (b) and (e) was quite likely based upon what Arthur Wright told her because there is

no evidence that Vera Wright communicated directly with the claimants at any time.

4. Arthur Wright's defence is as stated below:

(a) he denies that he and the claimants are co-purchasers of 5 Widcombe Way from Vera Wright;

(b) there was an agreement between himself and the claimants that they would seek subdivision approval for 5 Widcombe Way and make individual self-contained town houses;

(c) subdivision approval and building permission were conditions precedent to the sale. If any or both approvals were not granted then the sale was off;

(d) an agreement for sale was signed by the claimants, Vera Wright and himself in 1988 with completion set for June 30, 1991;

(e) the deposit of $45,000 was not paid on execution of the agreement and this is why the stamp duty and other relevant taxes were not paid;

(f) the money paid by the claimant was returned to them but they rejected it. This was in August 1994.

5. Only two witnesses testified in this matter. Miss Kolleen Russell gave evidence for all the claimants and Mr. Arthur Wright gave evidence for both defendants.

The areas of agreement

6. It is convenient to state the agreed facts:

(a) Arthur Wright was the agent of Vera Wright;

(b) Arthur Wright, at all material times, had authority to act as the agent of Vera Wright;

(c) an agreement for sale was executed by the claimants, Arthur Wright and Vera Wright;

(d) on or about April - June 1991, the claimants paid $225,000 to Arthur Wright;

(e) the claimants gave Arthur Wright a further $42,750 in 1993 to pay for drawings for the houses;

Analysis of the evidence

7. Mr. Wright was so thoroughly discredited that in virtually every area in which it was possible to test his evidence against documents, he was found wanting.

Was the sale agreement concluded in 1988?

8. Mr. Wright said the claimants and he conceived of a plan to build town houses at 5 Widcombe Way. He said that in order to do this, it was agreed that he would build a dwelling house for his mother on 4 Widcombe Way after which he and the claimants would build town houses on 5 Widcombe Way. He said that upon reaching agreement with the claimants he immediately began construction of the house for his mother (see paras. 6 and 7 of Arthur Wright's witness statement). The clear implication being that he did not begin to build his mother's house until (a) after he met all the claimants and (b) after they and he had concluded the agreement to purchase the property from his mother.

9. This account is untrue because the evidence from Miss Russell, which I accept, is that she did not meet Mr. Wright until after Hurricane Gilbert. This most powerful of hurricanes struck Jamaica on September 12, 1988. This is such a notorious fact that I can take judicial notice of it. This means that Miss Russell did not meet Mr. Wright until after September 12, 1988. Miss Russell provided credible evidence that convinced me that she did not meet Mr. Wright until late 1988. She gave an account of her places of abode before September 1, 1988, when she moved

to Carriage House. Before this date, she lived at Maryfield Apartments. It is agreed that the social relationship developed and blossomed to the point where they began to visit each other. She says that Mr. Wright only visited her at Carriage House.

10. Under cross-examination, Mr. Wright agreed that he began the construction of the house for his mother **before** Hurricane Gilbert. He had dug the trenches. He said that because of the hurricane he had to clear the trenches and trees. If this is so, then he and the claimants could not possibly have agreed that he (Wright) would make a house for his mother 4 Widcombe Way. The construction of the house had begun already. Later in cross-examination, he said that the house at number 4 Widcombe Way took two years to complete after it came out of ground. On this evidence, he began to make the house for his mother before he met Miss Russell. It necessarily follows that he is not speaking the truth when he said that he "immediately commenced construction of the dwelling house for my mother" after reaching agreement with the claimants.

11. The evidence from Miss Russell, which I accept, is that Mr. Abrikian and Mr. Wright met and became friends around 1989/90. Miss Russell was the mutual friend. This means that Mr. Wright and Mr. Abrikian did not meet in 1988 and therefore did not discuss the construction of a house for Vera Wright in 1988 as alleged by Mr. Wright. One of the inevitable consequences of this conclusion is that the claimants and Mr. Wright did not conclude any sale agreement in 1988, despite the appearance of the year "1988" in the document.

12. Miss Russell testified that at some point during her friendship with Mr. Wright, he told her that he wanted to sell a house that he had built for his mother. I accept her evidence on

this point. I also believe her when she said that the first time she saw the house at 4 Widcombe Way, it was more or less finished. I accept that she saw the house before there was any concluded agreement for the sale of 5 Widcombe Way. This finding reinforces the conclusion that there was no agreement in 1988 between Vera Wright, Arthur Wright and the claimants concerning the sale of 5 Widcombe Way.

When was the agreement concluded?

13. Miss Russell testified that Mr. Smith and she visited 5 Widcombe Way. She said that during the visit, Mr. Smith said that he was not interested in the house at 4 Widcombe Way but he would be interested in **a lot** on which town houses could be built. She testified further that at that point Mr. Wright said that 5 Widcombe Way could be used for that purpose. The import of this conversation is that the house for Mr. Wright's mother was completed.

14. Miss Russell said that Mr. Harry Abrikian, Mr. Smith and she had discussions among themselves about purchasing 5 Widcombe Way. She spoke to one Mr. Vivian Brown about joining them in the purchase but he was unable to do so. Mr. Wright on the other hand contends that the claimants and he agreed to purchase the lot from his mother and a condition precedent of that purchase was that subdivision and building permissions had to be obtained. I do not accept Mr. Wright's account on this issue.

15. There is what may appear to be an inconsistency in Miss Russell's testimony which I now examine. She said in her witness statement that if it was possible they desired separate titles. In cross-examination she said that they agreed to purchase the lot with all names appearing on the title. She said, additionally, that

the decision for separate titles came after the agreement and money was paid. Mr. Wright tried to seize upon this to argue that this is proof that they all agreed to separate titles which in the context of town house construction could only have meant that subdivision and building approvals were necessary pre-conditions for the sale.

16. I do not accept Mr. Wright's view of the matter. Miss Russell's testimony on the point is consistent with no hard and fast position taken on the question of individual titles. The best, from Mr. Wright's perspective, that can be said is that the claimants wished individual titles but it did not matter seriously to them whether or not they got individual titles.

17. The competing dates put forward by the evidence on the conclusion of the agreement are 1988 and April 1991. Based upon my analysis of the evidence so far, Miss Russell is a far more credible witness than Arthur Wright. I accept her testimony when she says that the written agreement was made in April 1991 after they had previously agreed, orally, the terms of the sale. It is convenient, at this point, to deal with the question of subdivision and building approvals.

Was subdivision and building approvals conditions of sale?

18. On the totality of the evidence before me, I conclude that what the claimants were saying to Mr. Wright was that the property had to be suitable for the construction of town houses not that subdivision and building permissions were conditions precedent. I accept that Mr. Athol Smith told Mr. Wright he (Smith) would purchase the property if town houses could be built. I understand that mean that the land itself had to be fit for that purpose.

19. It is true that Miss Russell said that after seeing the land and before the agreement was signed, Mr. Wright did say that he wanted a section for himself. The sense that I got was that Mr. Wright came into the purchase after Mr. Brown was unable to join the claimants in the purchase. Miss Russell said that the parties then stated that each would have a ¼ section but that the lot would be divided into five sections with a common area including a swimming pool. This does not cast any doubt on my previous conclusion. This discussion is typical of purchasers of property who begin to look into the future about the possibilities of the land they are buying. These discussions were simply ideas being discussed but they never rose to essential preconditions of sale.

20. On the question of subdivision and building approvals the claimants called Mr. Bennett, secretary to the building committee of the KSAC. Mr. Piper submitted that his testimony did not establish that the KSAC granted subdivision and building approvals. I shall indicate why Mr. Piper's position is not acceptable.

21. It will be recalled that Mr. Wright's case is that without subdivision and building approval there was no sale. He produced a letter purportedly signed by Mr. Grant of the KSAC, dated May 11, 1993, which stated that subdivision approval was granted but the building permission was revoked because they did not meet the "single family structures in the locality". I pause to note that the terms of this letter refer to a prior subdivision and building approval but building approval was now being revoked.

22. Mr. Errol Bennett said that although Mr. Grant could sign on behalf of the Town Clerk, it was his (Bennett's) assigned task to give effect to all decisions of the building committee. Mr. Grant

never had that function. Mr. Bennett added that when Mr. Grant attended building committee meetings, he did so in his capacity as a surveyor. Mr. Bennett's unchallenged and in my view reliable evidence is that the applications for subdivision and building approval at 5 Widcombe Way were granted. This is consistent with the letter of May 11, 1993. Mr. Bennett said there was never a time when building approval was granted and then revoked. In this case, there is no voice more authoritative than Mr. Bennett's on this issue.

23. Mr. Piper sought to discount Mr. Bennett's evidence by saying that Mr. Bennett has not produced a record complying with section 16 of the Kingston and St. Andrew Building Act. Unless I am bound by authority, that section does not say that the only way to prove the matters stated there is by the document signed and countersigned by the parties mentioned in the provision. The section is only one method of proof but not the only method. In any event, the point of calling Mr. Bennett was not so much to prove that subdivision and building approvals were granted as it was to show that Mr. Wright was not speaking the truth. This is not the claimants' case. What the claimants were doing is proving how unreliable Mr. Wright is. He is inconsistent with his own documents. In other words, even on Mr. Wright's case, subdivision approval was granted. The claimants go further to say that even if I were to find that the contract was executed in 1988, subject to subdivision and building approvals, all the parties treated the contract as still on foot in 1993. The implication being that the non-payment of the deposit in 1988, assuming that to be true, did not affect the performance of the contract because Vera Wright at no time repudiated the agreement herself or through her agent.

24. On a balance of probabilities, I do not believe that Mr. Grant wrote this letter. If Mr. Grant wrote this letter, it is not clear why and on what authority he would have done so. The fact that it is on the letterhead of the KSAC does not alter my conclusion. I have come to this conclusion for a number of reasons. First, Mr. Bennett, who has not been proven to be unreliable, knew Mr. Grant's signature. While he was not prepared to say it was not Mr. Grant's signature, he was equally not prepared to say it was. His actual evidence was that the signature *appears* to be that of Mr. Grant.

25. Second, I accept Miss Russell's testimony that Mr. Wright told her that he had a friend named *Grantie* who is at the KSAC who was monitoring the subdivision approval. I find that he did not show any letter to any of the claimants as alleged by him. This latter finding relates to testimony from Mr. Wright that after he showed the claimants the letter they told him that they would "fix it". This never happened.

The meaning of the payments for subdivision approval and building permission

26. There is evidence that the claimants paid for a subdivision application and building permission. The applications were made in either 1992 or 1993. Mr. Wright admitted that he took $42,750 from the claimants to pay for the design of town houses. This total comprise two cheques: one from Mr. Harry Abrikian dated March 23, 1993, in the sum of $14,250 (ex. 3 (c)) and the other from Mr. Athol Smith dated March 24, 1993, in the sum of $28, 500 (ex 3 (d))

27. These payments are consistent with the testimony of Miss Russell that it was **after** the agreement that a clear decision was taken that town houses should be built on the land. I accept her

evidence on this point. This explains the delay between 1991 when the claimants paid the full price, less the portion due from Mr. Wright, and 1993 when they paid for architectural drawings.

Further erosion of Mr. Wright's credibility

28. Mr. Wright's credibility was severely battered by what I am about to describe. A seemingly harmless question was asked of him. He was asked by Mrs. Samuels-Brown if he terminated the services of Messieurs Gaynair and Fraser. He said no and volunteered that Gaynair and Fraser were his mother's lawyers, not his. Another seemingly innocuous question was asked of him, namely whether he knew that his mother's first defence filed in the matter stated that he (Wright) was not her agent and neither did she know of any contract involving her son and the claimants. I attach no significance to the fact that his affidavit is dated April 1, 2003, but when the affidavit was given to him to read under the *Peter Blake rule*, he still adhered to his answers. He only conceded the points when his signature was proved and four paragraphs were read to him (which presumably he had read when the document was first shown to him). The significance of the affidavit was that it was filed in support of an application by him and his mother to set aside judgment against them and to amend the defence of his mother. The question then is, if he did not know of his mother's defence how could he swear an affidavit in support of an application to amend her defence? Is it that he was acting out of loyalty, supporting something about which he knew not or was he simply not speaking the truth? I conclude that it is the latter. When the truth has to wrenched from a witness in this manner a court is unlikely to have much confidence in his testimony.

29. It is only proper to point out that Vera Wright had filed an intial defence in which she denied

(a) any agreement between the parties;

(b) that Mr. Wright was her agent;

(c) knowledge of any agreement for sale.

30. This defence of Vera Wright to which I referred in paragraph 2 is the amended. Indeed in light of the evidence, the original defence was not true. She changed her position no doubt because her signature was on the agreement for sale about which she said (a) did not exist; (b) she did not sign; (c) her son had no authority to enter into any such agreement. Given this volte-face can I place any reliance on her defence? She chose to hinge her case on her son's testimony which is not only deficient but also patently and obviously untrue. How can a court have confidence in a defence that was launched, not upon a misunderstanding but a blatant falsehood?

Section 36 of the Stamp Duty Act and part performance

31. Section 36 of the Stamp Duty Act provides:

> *No instrument, not duly stamped according to law, shall be admitted in evidence as valid or effectual in any court or proceeding for the enforcement thereof.*

32. Mr. Piper said that this section made the signed agreement for sale inadmissible and I cannot have regard to its terms. I disagree.

33. The uncontradicted evidence from Miss Russell is that Mr. Wright took all six executed agreements with him. He never left any with the claimants. The claimants asked him for their executed agreement. I accept this evidence. What this means is that Mr. Wright by his conduct put it out of the reach of the

claimants to stamp the document even if they wanted to do so. I therefore reject the interpretation of the section that would permit the defendants to benefit from their wrong doing. In coming to this conclusion, I rely on the dictum of Downer J.A. in ***Lloyd Bent v Maurice Fong*** (1995) 32 JLR 67, 69F. In that case, the appellant made several mortgage payments and received receipts drawn by the wife of Mr. Fong, the respondent. The receipts were unstamped. The respondent sought to argue that the receipts were inadmissible because they were not stamped. Downer J.A. said, obiter, that although the appellant was not seeking to enforce the receipts, any construction of the section that permitted the respondent to benefit from his own wrong doing would be absurd. This case before me has even stronger elements of wrong doing on the part of the defendants. They received the purchase price. The document was executed. They kept the documents and refused to give the claimants an executed agreement which had the effect of preventing the claimants from stamping the document if they wished. Were I to adopt any other approach I would be creating a fraudster's charter.

34. The document also had another significance that went to the credit of Mr. Wright. The document was prepared by a lawyer instructed by Mr. Wright. Mr. Wright accepted that he gave the names of the parties and other information to the lawyer. The document is inconsistent with Mr. Wright's assertions. The agreement shows that the property was to be transferred to the claimants and Mr. Wright as *tenants in common.* This lawyer had already acted for him in previous land transactions. It cannot be said that Mr. Wright is a neophyte in these matters. He agreed, under cross-examination, that he collected the draft from the attorney and took it to the claimants. He said that he left it with

them to read **and, if they agreed, to sign it.** After the claimants signed, he signed and then took it to his mother who also signed. From this conduct, the only reasonable inference is that Mr. Wright was satisfied that the document captured the understanding of all the parties. If it were that subdivision and building permissions were essential preconditions why then didn't the lawyer prepare a draft that reflected this? Why would a lawyer without good reason not execute the wishes of his client? Why didn't Mr. Wright take it back to the lawyer and say, "Look here, you have not properly drafted this agreement. The agreement must state that subdivision and building permissions are conditions precedent to this contract. Please redraft it to reflect this"?

35. If section 36 makes the agreement inadmissible, I am prepared to hold and do hold that there was an oral agreement between the parties and there were sufficient acts of part performance by the claimants. I accept Miss Russell's evidence that the parties had concluded all the essential terms of the contract before the instrument was drawn up.

36. Section 36 does not invalidate agreements. The section suppresses evidence – evidence captured in an instrument but not evidence captured by the ear. It does not affect the equitable doctrine of part performance – a doctrine which I now examine.

37. The House of Lords in ***Steadman v Steadman*** [1976] A.C. 536, cited by Mrs. Samuels-Brown, has exploded the idea, if it was ever the law, that payment of money can never amount to part performance. The case is instructive because it is an attempt by the House of Lords to extricate the doctrine of part performance from the danger of being encrusted with a particular pronouncement (that tended to derogate from the

doctrine) while at the same time recognizing that (i) the purpose of section 4 of the Statute of Frauds (replaced by section 40(1) of the Law of Property Act, 1925) is a salutary one (i.e. prevention of frauds) and (ii) that the doctrine of part performance should not erode the statute. The pronouncement of which I speak is, payment of money can never suffice as part performance. The facts of ***Steadman*** (supra) are that a husband and wife arrived at an agreement whereby the wife would surrender her interest in the matrimonial home for £1,500, her maintenance order against the husband be discharged, the order in respect of the child continue and that the arrears of maintenance would be remitted except for £100 that would be paid by a specified date. This agreement was announced to the justices by the husband's solicitor. Subsequent to this announcement in court, the husband paid the £100, paid the £1,500 to his solicitor who then prepared the deed of transfer and sent it to the wife. The wife refused to sign the transfer and filed suit under section 17 of the Married Women's Property Act. The husband claimed that these acts were sufficient acts of part performance and his wife was bound to transfer the property. The wife said the agreement was unenforceable because there was no memorandum in writing and the acts by the husband were insufficient acts of part performance. By a majority of 4:1 the House of Lords (Lord Morris dissenting) agreed with the husband and upheld the Court of Appeal's and county court judge's order for specific performance. I begin my analysis by relying on this statement from Lord Simon of Glaisdale at 558

> *This is one of those difficult situations where two legal principles are in competition. The first legal principle is embodied in section 40 (1) of the Law of Property Act 1925, which states:*
> *"No action may be brought upon any contract for the sale or other disposition of land or any interest in land, unless*

the agreement upon which such action is brought, or some memorandum or note thereof, is in writing, and signed by the party to be charged or by some other person thereunto by him lawfully authorised."

This provision replaced that part of section 4 of the Statute of Frauds 1677 which related to interests in land. The preamble to the Statute of Frauds explained its object: "For prevention of many fraudulent practices, which are commonly endeavoured to be upheld by perjury and subornation of perjury;..." The "mischief" for which the statute was providing a remedy was, therefore, that some transactions were being conducted orally in such a way that important interests were liable to be adversely affected by a mode of operation that invited forensic mendacity. The remedy was to require some greater formality in the record of such transaction than mere word of mouth if it was to be enforced. The continuing need for such a remedy for such a mischief was apparently recognised as subsisting when the law of landed property was recast in 1925.

The second, competing, legal principle was evoked when, almost from the moment of passing of the Statute of Frauds, it was appreciated that it was being used for a variant of unconscionable dealing, which the statute itself was designed to remedy. A party to an oral contract for the disposition of an interest in land could, despite performance of the reciprocal terms by the other party, by virtue of the statute disclaim liability for his own performance on the ground that the contract had not been in writing. Common Law was helpless. But Equity, with its purpose of vindicating good faith and with its remedies of injunction and specific performance, could deal with the situation. The Statute of Frauds did not make such contracts void but merely unenforceable; and, if the statute was to be relied on as a defence, it had to be specifically pleaded. Where, therefore, a party to a contract unenforceable under the Statute of Frauds stood by while the other party acted to his detriment in performance of his own contractual obligations, the first party would be precluded by the Court of Chancery from claiming exoneration, on the ground that the contract was unenforceable, from performance of his reciprocal obligations; and the court would, if required, decree specific performance of the contract. Equity would not, as it was put, allow the Statute of Frauds "to be used as an engine of fraud." This became known as the doctrine of

part performance - the "part" performance being that of the party who had, to the knowledge of the other party, acted to his detriment in carrying out irremediably his own obligations (or some significant part of them) under the otherwise unenforceable contract. This competing principle has also received statutory recognition, as regards contracts affecting interests in land, in section 40 (2) of the Law of Property Act 1925.

38. What this passage does is to demonstrate, albeit in the context of a different statute, the conceptual approach a court can use where a statute suppresses evidence of an agreement for the sale of land if there are acts of part performance. I adopt his remarks for this purpose. The tension referred to by Lord Simon is here in this case: giving effect to the evidence-suppressing intention of Parliament while preventing a party who knows that the other has acted upon the terms of the agreement from taking advantage of the non-stamping of the document. In the same way equity was used to reconcile section 4 of the Statute of Frauds with acts of part performance so too can equity do the same today in respect of section 36 of the Stamp Duty Act and acts of part performance.

39. The main point of disagreement between Lord Morris and the other Law Lords was that Lord Morris took the view that the acts of part performance did not indicate the existence of a contract between the parties, to say nothing of indicating that there was a contract involving land. For Lord Morris the acts must show, unequivocally, the existence of a contract relating to land and not just a contract between the parties. This major premise of Lord Morris is founded upon the proposition that the doctrine of part performance was developed in relation to sale contracts for land and in his view there is no good reason for not insisting on this requirement where the issue arises in a sale of land dispute. Implicit in Lord Morris' analysis is the view that unless this

requirement is insisted upon in every case, there is the danger that this "expansion" of the doctrine may reach the point where the statute is swallowed by the doctrine which itself may become an avenue for fraud. Therefore, he concluded that none of the acts of the husband whether taken singly or cumulatively was capable of showing that there was a contract at all to say nothing of a contract relating to land. This is why, according to Lord Morris, the actual taking possession of land was such a powerful act of part performance. Similarly, is the expenditure of money on land.

40. The Court of Appeal of Trinidad and Tobago in ***Crevelle v Affoon*** (1987) 42 WIR 339 gave a graphic example of possible dire results if the doctrine of part performance is not kept "pure". The facts there that pursuant to an oral agreement the purchaser agreed to purchase land. After this agreement, the purchaser instructed his solicitor to draft the conveyance, paid $500 for his services and sent the draft to the vendor who refused to execute the conveyance. At first instance, the judge granted the decree of specific performance on the basis of the acts done by the purchaser. The Court of Appeal reversed the trial judge. The court in ***Affoon*** (supra) was concerned to prevent unilateral acts which were not brought to the attention of the party to be charged upon the equities derived from the alleged acts of part performance. That is, the court wanted to prevent the doctrine developing to the point where acts done by the claimant and unknown to the defendant being relied on as acts of part performance. If this were allowed, according to Narine J.A., there was every danger that a claimant could do "secret" acts and then claim that those acts amounted to part performance. These are important concerns and cannot be glossed over. These concerns are resolved by asking what is the

inference to be drawn from proven facts rather than declaring that certain acts cannot amount to part performance.

41. The Achilles heel in Lord Morris' analysis is that his type of reasoning has the potential to exclude evidence that may prove part performance not because the law of evidence so dictates but because an equitable doctrine compels that result by deciding, before hand, that certain acts cannot amount to part performance. Thus the very point in issue may not be proved because equity has declared, in advance of the proof to be presented, that certain kinds of proof are unsatisfactory. Having said this I admit that it is not hard to see why payment of money, without more, may be regarded as equivocal. It is understandable why the judges would be looking for something more to tip the scales in favour of a conclusion that the payment was based upon a prior oral agreement for the sale of land. As stated already, the issue is really one of inference from the proven facts. Payment of money, without more, means that the inference may be harder, if not impossible, to draw that it is related to some prior agreement. If the court is unable, on a balance of probabilities, to draw the inference from the payment of money then it simply declines to draw the inference. This is a much more satisfactory solution than to erect as a formal proposition that in equity certain acts cannot under any circumstances amount to sufficient acts of part performance. In my view, it is analytically more accurate to say that the facts proven in any particular case do not enable the inference to be drawn instead of saying certain acts cannot amount to part performance.

42. Conduct such as the purchaser taking possession or expending money on the property in question is regarded as the classical act of part performance. These acts when contrasted

with payment of money, reinforces the conclusion that the real issue is one of drawing reasonable inferences from proven facts. The act of taking possession or expending money makes the inference easier to draw. Logically speaking, to require that an act be unequivocally referable to a prior oral contract is not the same thing as saying that a particular act, regardless of the facts and circumstances of the case, can never ever amount to part performance.

43. The court should not give the impression that it is ignoring an Act of Parliament. It is important that those involved in land transactions pay their lawful taxes. It is also equally important that the courts do not raise a rogue's license. In applying the doctrine of part performance, I must take care that the doctrine does not swallow section 36 of the Stamp Duty Act.

44. How then does one approach this doctrine of part performance? A combination of the judgments of Lords Reid and Salmon, judiciously applied, will provide an effective gate keeper to block unworthy claims. The warning sounded by Lord Morris and Narine J.A. (for that is how I interpret them) should not be ignored. Lord Reid pointed out in ***Steadman*** (supra), at pages 541-542:

> *In my view, unless the law is to be divorced from reason and principle, the rule must be that you take the whole circumstances, leaving aside evidence about the oral contract, to see whether it is proved that the acts relied on were done in reliance on a contract: that will be proved if it is shown to be more probable than not.*

45. Lord Salmon examined the question of proof of part performance more closely than the other Law Lords. His discussion is helpful. He stated that there is no logical reason why the spoken word could not be relied on as an act done in part performance of a contract for the sale of land (see page

564-565 of ***Steadman***). From the tenor of Lord Salmon's speech, if the spoken word, by itself, can amount to part performance in appropriate cases, can there be any logical reason to exclude contemporaneous oral declarations accompanying the acts being relied on as part performance?

46. I can see no reason why contemporaneous written declarations should be excluded from being considered along with the acts. His Lordship said that although the spoken word has the ability to "speak" more directly than the deeds that was not a sufficient reason for excluding them from being considered an act of performance. I would make the same comment in respect of the "written word".

47. Lord Reid indicated that one looks at the conduct independent of the oral agreement (page 541). Viscount Dilhorne said that oral evidence is not admissible to connect the payment of money to the contract but there may be acts that make a nexus with a contract the most probable hypothesis (page 556).

48. What then are the acts of part performance in this case? Between May and June 1991 Arthur Wright received the following payments on which he was named as the payee:

i. cheque from Athol Smith dated April 29, 1991, in the sum of $11,250 with these words "Deposit re purchase agreement re Lot. Vol. 991 Folio 68" endorsed on the back (ex 3(a));

ii. cheque from Harry Abrikian dated April 30, 1991, in the sum of $11,250 (ex 3(e));

iii. cheque from Athol Smith dated June 4, 1991, in the sum of $127,500 with the words "part payment for 2 lots at Widcombe Way" (ex. 3(f));

49. All these cheques including the ones endorsed with the purpose of the payment were received by Arthur Wright. He

negotiated them. There is no evidence that he questioned the writings on the back of the cheques. In my view, the writings on the cheques drawn by Athol Smith functioned to explain the payment. It stated the purpose of the payment. This is not a case of Mr. Smith unilaterally making a declaration of which Mr. Wright knew nothing. As I understood it the case proceeded on the basis that the writings on the back of the cheques were made by Mr. Smith before he handed them over to Mr. Wright. The principle then is that if a purchaser hands over a cheque as payment to the vendor's agent and makes a contemporaneous declaration to the agent that the payments are for land and there is no refutation from the agent, then that contemporaneous declaration, whether written or oral is capable of amounting to part performance, because the lack of refutation in the circumstances is capable of supporting the inference that the agent accepts as true the declaration of the purchaser. What could be more specific that written declarations that say "Deposit re purchase agreement re lot vol 991 folio 68" and "Part Payment for 2 lots at Widcombe Way"? At trial, Mr. Wright did not contend that he did not see the declarations. The contemporaneous written declarations which were apparently accepted by Mr. Wright established that the contract related to 5 Widcombe Way and no other parcel of land. I therefore conclude that these acts by the claimants are acts of part performance that establishes that there was a contract between the parties. This being so, it is now permissible to have regard to the testimony of Miss Russell that the claimants and Mr. Wright had orally agreed that he and claimants would purchase 5 Widcombe Way for $300,000. It would be unconscionable, at this late stage, to allow Arthur Wright to say that he did not accept the contemporaneous declaration accompanying payments.

Conclusion

50. Mr. Wright and the claimants did not and could not have entered into any agreement in 1988 for the reasons stated earlier. The agreement was entered into in April 1991 with completion set for June 30, 1991, as per the written agreement

51. The agreed purchase price was $300,000. The claimants and first defendant intended to purchase as tenants in common from Mrs. Vera Wright. I also conclude that each purchaser was to pay a proportionate share of the purchase price. I accept that the claimants have paid their portion of the purchase price and that this money was paid to Mr. Wright in his capacity as agent of Mrs. Vera Wright.

52. I conclude that subdivision approval and building permission were not pre-conditions that formed part of the agreement between the parties. All that the claimants required was that the property had the potential for town house development, not that it had to be approved for town house development and planning permission given.

53. Section 36 of the Stamp Duty Act, in the circumstances of this case, does not make the instrument inadmissible for the purpose of relying on what is contained in it. It would be inequitable and wrong to allow the defendants to rely on their wrong doing. If I am wrong on this, I find that there was an oral contract. Section 36 does not prevent the application of the doctrine of part performance.

54. There were sufficient acts of part performance that established that there was a prior contract between the claimants, Arthur Wright and the second defendant. That being established, I can examine the oral evidence concerning the contract. It is my view that there was an agreement that the

property would be sold for $300,000 to the claimants and the first defendant.

55. The defences raised by both defendants are rejected. I reject Arthur Wright's contention that the reason why the relevant taxes were not paid was that he failed to get sufficient funds to do the same. I conclude that Arthur Wright between May and June 1991 received $225,000 from the claimants.

56. Mr. Wright and his mother failed to pay the relevant duties.

57. The claimants are entitled to the decree of specific performance.

58. The court orders that

(a) There be specific performance of the agreement between the claimants and first defendant as purchasers and second defendant as vendor which was reduced into writing, signed in April 1991 but not witnessed and incorrectly bears the year 1988 and no other information dating the document;

(b) Any penalty imposed by the Stamp Commissioner arising out of the stamping of the agreement and payment of transfer tax out of time to be borne by the vendor;

(c) Claimants' attorney to have carriage of sale;

(d) In the event that original agreement cannot be found, a copy of that agreement shall be accepted by the Stamp Commissioner for all purposes as if it were the original;

(e) Defendants are to provide such funds as are necessary to that attorney having carriage of sale to effect the payment of all duties and taxes, fees and penalties on or before August 12, 2005;

(f) In the event that the defendants neglect or refuse to execute the instrument of transfer or to execute any document necessary to effect or facilitate the transfer of

title as ordered, within fourteen (14) days of being requested in writing to do so, the Registrar of the Supreme Court is empowered to execute the transfer and all such documents necessary to effect or facilitate the transfer of title;

(g) Liberty to apply

(h) Costs to the claimants to be agreed or taxed.