Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

CLAIM NO HCV 2314 OF 2005

BETWEEN	**NATION HARDWARE LTD**	**CLAIMANT**
AND	**NORDUTH DEVELOPMENT COMPANY LTD**	**FIRST DEFENDANT**
AND	**ADRIAN NORTON**	**SECOND DEFENDANT**

IN CHAMBERS

Mr. Harold Brady instructed by Brady and Company for the claimant

Mr. Crafton Miller and Mrs. Patricia Roberts-Brown instructed by Mr. Michael Palmer of Palmer, Smart and Company for the defendants

September 26, 27, 28, 29 and October 3, 2005

EXTENSION OF INTERIM INJUNCTION, CONTRACT FOR SALE OF LAND, PART PERFORMANCE, SUFFICIENT MEMORANDUM IN WRITING

SYKES J

1. The defendants have robustly resisted the application for the extension of the interim injunction and their submission can be summed up in this expression, more commonly used by philosophers than lawyers, ex nihilo nihil fit, nothing comes from nothing. The defendants say that there is no contract between the claimant and the defendants with the consequence that there is no right or interest existing in law that demands protection by an injunction. On the other hand, the claimant says that there is a contract between it and the defendants. It relies on the doctrine of part

performance evidenced by a receipt dated, May 6, 2005. It also says that there is a sufficient memorandum in writing signed by the party to be charged as required by the Statute of Frauds.

2. This is an inter partes hearing to determine whether an ex parte interim injunction I granted on August 16, 2005 should be continued until trial. The injunction I granted on August 16 enjoined the defendants until reconsideration of the injunction from taking steps whether by their directors, servants and/or agents or howsoever otherwise from transferring or permitting the transfer of lands registered at Volume 1049 Folio 417 of the Register Book of Titles or parting with possession of the aforesaid property by way of lease, rent or otherwise.

3. The dispute between the parties is accentuated because Mr. Hubert Williams and family, by virtue of an executed agreement for sale dated July 5, 2005, have entered into possession of the property. Mr. Williams has paid a deposit of $5,400,000. He has been in possession from at least early July, a full month before the injunction was granted. This was unknown to me at the time the injunction was granted. Had Mr. Williams' occupation been known at the time of the ex parte injunction it is quite likely that I either would not have granted it or granted it in the same terms (see Campbell J.A. in ***Esso Standard Oil S.A. Ltd v Lloyd Chan*** (1988) 25 J.L.R. 110, 112G).

The claimant's case

4. Mr. Ian Hayles describes himself as a director of Nation Hardware Limited (Nation), the claimant in this matter. Nation by a claim form dated August 10, 2005, is asking for

a. A declaration that there is a valid agreement between the claimant and the defendants entered into for the sale of lands registered at

Volume 1049 Folio 417 known as Duthieson in the parish of Westmoreland;

b. Specific performance of the said agreement between the claimant and the defendants evidenced by a receipt issued by the second defendant dated May 6, 2005, in respect of the sale and purchase of lands registered at Volume 1049 Folio 417 and known as Duthieson in the parish of Westmoreland;

c. An injunction restraining the defendants from transferring the property or granting possession by lease, rent or otherwise;

d. Damages;

e. Such further or other relief as may be just.

5. Mr. Hayles swore an affidavit dated August 10, 2005 on behalf of Nation. I shall use this affidavit as the basis of stating the basis of the claim. The claimant is a limited liability company incorporated in Jamaica with registered offices at 14 Bell Road, Kingston 13 in the parish of St. Andrew. Norduth Development Company (Norduth), the first defendant, is the registered proprietor of lands registered at Volume 1049 Folio 417 of the Register Book of Titles. Mr. Adrian Norton, the second defendant, is a director of Norduth. Nation alleges that after negotiations commenced in April 2005 all the parties agreed that the land would be sold for $36,000,000. On May 2, 2005, Nation states that it, through Mr. Hayles, paid $200,000 to the defendants who issued a receipt. It is being said that Nation would acquire the land, it being the sole asset of the company, by purchasing all the shares of Norduth instead of a transfer of land to the claimant.

6. Arising from this alleged agreement, Nation says that the firm of Palmer, Smart and Company, attorneys for the defendants drafted a sale of shares

agreement and sent it to Nation's then attorneys, Messieurs Grant, Stewart, Phillips and Company who were appointed to act for Nation in this transaction. In keeping with this request, Mr. Palmer, the senior partner in Palmer, Smart sent a draft document for the sale of Norduth's shares to Grant, Stewart, Phillips and Company. This draft was accompanied by a letter dated May 31, 2005, stating that Palmer, Smart act for Norduth. The letter says

> *We have been requested by Mr. Ian Hayles a director of Nation Hardware Limited to forward the enclosed Share Sale Agreement for your perusal and comments.*

7. In the sequence of events this letter was sent after the May 6, 2005, receipt was signed by Mr. Norton. Mr. Hayles said that after May 6, 2005, he carried out a search of the companies' register. What he saw caused him to doubt whether Norduth's shares could be transferred. According to Mr. Hayles, Mr. Norton told him that he (Norton) needed the consent of a number of beneficiaries before the documents could be executed.

8. Mr. Hayles says that in June 2005 he heard that Mr. Norton was holding discussions with Mr. Herbert Williams with a view to selling him the land. He says that he called Mr. Norton on June 27 who did not deny that he was having discussions with Mr. Williams. Mr. Hayles met Mr. Norton on June 28. On this date, Mr. Norton told Mr. Hayles that the beneficiaries' consent had been obtained. Mr. Hayles then said that he would be prepared to complete the sale. Mr. Brady of Brady and Company presented a $6,000,000 cheque and two agreements to the defendants. These agreements were an agreement for the sale of land and an agreement for the sale of chattels. The cheque was returned on June 30. Also on June 28 Mr. Hayles told Mr. Norton that the reason he did not sign the agreement was due to encumbrances on the company revealed by the search of the

companies' registry. Mr. Hayles further states that at the time of the presentation of the cheque and agreement Mr. Norton was told that Nation would be prepared to accept a direct transfer of the title to the property having regard to the state of the records of Norduth as revealed by the searches carried out at the Registrar of Companies. In Mr. Hayles' own words when the cheque and two draft sale agreements were presented to Mr. Norton he (Norton) said that he would have to discuss the matter with his attorneys. Nation says that the reason why it failed to sign the agreement for the purchase of shares was that Mr. Norton did not tell Mr. Hayles that the beneficiaries' consent had been obtained.

9. On July 5, 2005, the claimant's attorney wrote to the defendants' attorneys indicating its willingness to complete the sale and requested the relevant documentation. The claimant states that at all material times it was ready, willing and able to complete the purchase of the property for the agreed price of $36,000,000 within sixty days as agreed.

10. The affidavit adds that Mr. Norton told Mr. Hayles that Mr. Williams was offering him $42,000,000 and he (Norton) would be proceeding with the sale to Mr. Williams, whereupon Mr. Norton was reminded by Mr. Hayles that they had a binding agreement for the sale of land for $36,000,000 which was evidenced by the receipt (Hayles receipt) acknowledging payment of $200,000.

11. There is evidence that show that Allison Pitter and Company, chartered surveyors, sent a letter dated March 11, 2005, to Palmer, Smart requesting them to prepare a sale agreement between the defendants and the Williams family. That letter contained all the essential information to enable the preparation of a proper contract. There was certainty of subject matter, certainty of parties, certainty of purchase price, the amount of the deposit and the completion date.

12. It appears that a copy of the letter was sent to Messieurs DunnCox, a firm of attorneys, because there is a letter from DunnCox to Palmer, Smart, dated March 29, 2005, which refers to the Allison Pitter letter and then goes on to say that they confirm that Mrs. Grace Norton, widow of Mr. Harry Norton and an Executrix of his Estate, is agreeable to the proposed sale and the terms set out in the Allison Pitter letter.

13. Palmer, Smart responded to the DunnCox letter by asking that Mrs. Grace Norton and the other executor of the estate of Mr. Harry Norton sign, jointly, a memorandum to the effect that [they] agree to the proposed sale on the terms out in [the Allison Pitter letter]. This letter was dated April 6, 2005.

14. July 5, 2005, was a watershed day. Many things happened. I shall say what they were but this is not to say that they occurred in the sequence I have listed them. First, Mr. Brady wrote, in a letter dated July 5, 2005, to Palmer, Smart telling them that Nation and the defendants had entered into a contract for the sale of land and further that Nation had paid $200,000. Nation now wished to complete the sale. There is no mention of shares in the letter. This July 5 letter was preceded by a letter from Brady and Company dated June 29 alleging that Mr. Hayles was one of a number of beneficiaries under the will of Mr. Harry Norton. Second, there is a letter dated July 5, 2005, written by Palmer, Smart addressed to whom it may concern indicating that Hubert Williams and family had entered into possession of the land that Norduth owned. Third, there is a sale agreement for land dated July 5, 2005, between Norduth and the Williams family. There is a transfer dated July 5, 2005 transferring land from Norduth to the Williams family. I now turn to the affidavit of Mr. Adrian Norton.

Mr. Adrian Norton's affidavit

15. I shall state only the relevant portions of the affidavit. He acknowledges that he received $200,000 and that he signed a receipt. This receipt is different in some ways from the Hayles receipt. I shall call this receipt the Norton receipt. Mr. Norton says that this money was a personal loan and not a deposit. Mr. Norton says that he met Mr. Hayles in April 2005. A few days later Mr. Hayles told him that he was interested in purchasing the Duthieson property. After this initial discussion Mr. Hayles wrote him on the letterhead of a company known as Cherian Consultancy Incorporated. This letter dated April 20, 2005, stated

We are hereby formally expressing an interest in the acquisition of the property located a Dutchieson in the parish of Westmoreland.

Mr. Hayles signing in the capacity of Chairman of Cherian Consultancy Inc. signed it.

16. Mr. Norton said that he told Mr. Hayles that Mr. Williams was interested in purchasing the property for $36,000,000 and that he was waiting on the consent of the executors of Harry Norton's estate. After further discussion he said that Mr. Hayles offered him $36,000,000 and a further $6,000,000. According to him Mr. Hayles, in May agreed to lend him $500,000 to clear debts. Mr. Hayles produced a typed receipt. Mr. Norton says that he crossed out all that was typed and wrote the word *delete* between the two lines. He said that Mr. Hayles then wrote that the $200,000 represented a part of the arrangement between Norton and the claimant. He denies signing the Hayles receipt. Mr. Norton exhibits a cheque for $6,000,000 dated June 28, 2005, payable to Palmer, Smart, attorneys for the defendants. He also exhibits two documents: one headed agreement for sale of land and the other agreement for the sale of chattels. These documents were presented to him along with the $6,000,000 cheque.

The undisputed evidence

17. From the affidavits before me the following is not disputed:

a. Mr. Hayles and Mr. Norton had discussion about the sale of shares of Norduth;

b. Cherian Consultancy Incorporated sent a letter to Mr. Norton stating that it, Cherian, is interested in purchasing the property

c. Mr. Hayles gave Mr. Norton $200,000 and a receipt was signed by Mr. Norton and Mr. Hayles on May 6, 2005. This receipt indicated that Nation had some arrangement with the defendants;

d. The receipt had typed words originally. The typed portion was struck out and Mr. Hayles wrote on the receipt to which both parties signed;

e. On Mr. Hayles suggestion Palmer, Smart sent a draft agreement for the sale of Norduth's shares to Grant, Stewart, Phillips and Company, attorneys for the claimant, for their perusal and comment;

f. No response came from the claimant's attorneys regarding the draft sale of shares agreement;

g. The claimant's new attorneys Brady and Company sent a cheque of $6,000,000 along with two draft sales agreement for the sale of land and chattels on June 28, 2005. These two agreements introduced for the first time a possible third purchaser, namely ARC Systems Ltd;

h. Mr. Hayles filed another affidavit dated September 22, 2005, in which he indicated that the purchaser would not be ARC Systems but a company that is not yet incorporated.

The applicable law

18. In this section I shall state the principles of law that are applicable to this case. Before beginning to determine whether there is an enforceable contract for the sale of land between the parties to this action I need to set out, in response to Mr. Brady's eloquent submissions, why I believe that I can make that determination on the evidence before me at this point. Mr. Brady submitted that I could not determine whether there was a contract between the parties at this interlocutory stage because there is no agreement on the facts. He added that pleadings are not closed. In fact, he says, the defendants have not filed a defence and so unlike the situation in ***Barnett Limited v Emanuel Olasemo*** (1995) 32 J.L.R. 284 where there was no factual dispute but simply whether the documents in question were sufficient to establish a contract as alleged, in the present case the affidavits have much contested material and at this stage the court is not in a position to resolve the issues. Mr. Brady further submitted that in accordance with ***American Cyanamid Co v Ethic on Ltd*** [1975] 1 All ER 504, the court is not to embark upon a minitrial. Learned counsel sought to distinguish the case of ***Richard Salm v Sundivers*** (1990) 27 J.L.R. 99 on the basis that in that case the endorsement on the writ that was filed without a statement of claim did not reveal the existence of a contract. Therefore, the court had no basis upon which to grant an injunction. It seems to me that these two cases do not depend upon the narrow ground of deciding an issue where there is an agreed set of facts but depend upon a larger principle of which these two cases are but instances. The larger principle, implied by Lord Diplock, is this, where the facts alleged by the party seeking the interim injunction, resolving all disputed matters in his favour, do not in law establish his case then there is no basis on which to grant an interim injunction. This larger principle can be applied in this case. Lord Diplock in ***American Cyanamid*** could not

have meant that an injunction should be granted in circumstances where despite the conflict of evidence the claimant's case is not sustainable in law even if all the facts are resolved in his favour. At page 510e, Lord Diplock said that if the material available to the court at the hearing fails to disclose that the claimant has a real prospect of succeeding at the trial then there is no need for the court to consider the balance of convenience. The now hackneyed phrase "serious question to be tried" cannot mean one that the claimant takes seriously but, while not limited to what I am about to state, cannot include a situation where although not frivolous or vexatious is nonetheless on close examination unsupportable. Consequently a judge is entitled to take the most favourable view of the claimant's case and if on that view the claimant would fail at trial, as the two decisions from the Court of Appeal demonstrate the judge at the interlocutory stage should not pass on to the trial judge what he can do himself. It is well known that any document relied on as a sufficient memorandum in writing must all contain the essential terms of the contract (see ***Patrick Grant v Laurel Maloney*** (1989) 26 J.L.R. 240); ***Mclean v Espuet*** (1991) 28 J.L.R. 92); ***Tiverton Estates v Wearwell*** [1975] Ch 146). One way of determining whether the memorandum in writing contains all the terms of the alleged oral contract is by looking at the facts alleged in the affidavit of the proponent of the oral contract (see Lord Denning MR at page 161 in ***Tiverton Estates***).

19. I find support for my position from the case of ***Daulia Ltd v Four Millbank Nominees Ltd*** [1978] Ch 231. In that case, the decision of the trial judge to strike out a claim for specific performance was upheld by the Court of Appeal in the face of opposition on the basis that the issues raised by the claim should be resolved by trial. The Court of Appeal said that the claimant's case at that point was as good as it was going to get and could

not be improved at trial. What has been put before me on the totality of the evidence is the claimant's best possible case. That is to say taking into account the payment of $200,000, the receipt (whichever one is genuine), the share sale agreement, the two agreements for sale of land and chattels respectively and the $6,000,000 cheque.

20. The final point I wish to make at this stage is the well known principle of contract law that if there is a counter offer which has not been accepted then there is no contract (see ***Barnett v Olasemo*** (1995) 32 J.L.R. 284; ***Chang v Salmon*** (1993) 30 J.L.R. 383).

21. I shall not refer to the submission of Mr. Miller. I hope he accepts my explanation that they have found favour with me and it is more important that the losing party understands why I rejected the submissions made on its behalf. I now turn to an analysis of the evidence put forward by the claimant supporting his case for a contract for the sale of land. In so doing, I shall respond to the points as they were put forward orally and the written submissions submitted to me.

The submissions of Mr. Brady

22. Mr. Brady mounted his case, at least initially, based on part performance. Logically, when a claimant alleges part performance it usually, perhaps not invariably, involves an implicit concession that there is an insufficient memorandum in writing. Part performance is predicated on the proposition that there is an oral contract between the parties and because there is an insufficient memorandum in writing, the proferror of the oral contract usually points to some conduct that is explicable (I hesitate to say only) on the basis that there must have been a prior agreement for the sale of land between the parties.

23. In this case Mr. Brady relied upon the payment of $200,000 to the defendants as the act of part performance. He draws support for this from Lord Reid in ***Steadman v Steadman*** [1976] 536 at page 539 – 541. In those pages, Lord Reid questioned the approach of the Courts of Equity which had in effect declared that payment of money, simpliciter, could not amount to an act of part performance. Lord Reid stated that to express the matter in that way confused two rules. The first was that one looks first at acts of part performance without looking at the oral evidence in order to determine whether the acts are consistent with such a contract. If the act is consistent with the existence of a contract then the oral evidence can be examined. The second rule is that in a civil trial facts are proved on a balance of probabilities. According to Lord Reid what the Courts of Equity did was to remove the fact of payment of money from the realm of evidence into the realm of an equitable doctrine which stated that payment of money alone could never suffice. ***Steadman*** has been acted upon in this jurisdiction by both the Supreme Court and the Court of Appeal. Mr. Brady sought solace from the implication of Lord Reid's analysis which is that because the question of whether an act is sufficient part performance is a matter of evidence rather than a legal rule of equity then there is a serious issue to be tried since one cannot know, without a trial, whether an act is sufficient until the full circumstances are known. This is impeccable logic but the law is also founded on the anvil of experience and there are times when experience prevails over logic because there may be a principle underlying the application of the law by the courts that pure reason does not always reveal or reveal clearly.

24. I have not yet found a single case since ***Maddison v Alderson*** 8 App. Cas. 467 in which payment of money alone has been held to be a sufficient act of part performance. ***Maddison*** was not such a case.

Steadman was not such a case. The question now is, is there an explanation for the position taken by the Courts of Equity regarding payment of money alone? The judgment of the Lord Chancellor in ***Maddison*** provides the explanation. I admit that what was stated was obiter dictum but the Lord Chancellor explained the position because in his view there seemed to have been a suggestion that the conduct of Miss Maddison could amount to part performance. The Lord Chancellor began his analysis by stating the obvious: the Statute of Frauds did not make oral contracts for the sale of land void; it merely barred remedies on them. In other words the person relying on an oral contract was never told there was no contract, he was told, "You cannot enforce this contract because you have no sufficient memorandum in writing." The doctrine of part performance came into its own after the Statute of Frauds in 1677. Part performance existed long before the statute but the passing of the statute gave it new life and vigour. In this resurgence, the courts had to balance two competing principles. These were giving effect to the policy behind statute while at the same time preventing the statute from causing undue hardship.

25. Even though we now call it the Statute of Frauds, it seems that the passage of time has dimmed our understanding of the reason why the statute was passed. The Act was actually entitled *An Act for the Prevention of Frauds and Perjuryes* and it was passed *For prevention of many fraudulent Practices which are commonly endeavoured to be upheld by Perjury and Subornation of Perjury.* Section 4 states

> *No Action against Executors ... upon a special promise, or upon any Agreement, or Contract for Sale of Lands, ... unless Agreement, ... be in Writing and signed. Noe Action shall be brought [...] whereby to charge the Defendant upon any special promise to answere for the debt*

default or miscarriages of another person [...] unlesse the Agreement upon which such Action shall be brought or some Memorandum or Note thereof shall be in Writing and signed by the partie to be charged therewith or some other person there unto by him lawfully authorized.

26. Before the passing of the Act oral contracts for the sale of land were sufficient. Apparently, there was no shortage of convincing mendacious witnesses. A method of cutting down on the *many fraudulent practices which [were] commonly endeavoured to be upheld by Perjury and Subordination of Perjury* would be to require writing as a prerequisite for enforceability. Therefore any act of performance had to be very cogent because one was now starting from a position of non-enforceability. Given this situation it is hardly surprising that judges said that the act of performance had to be referable not just to a contract, but to a contract for the sale of land. Some even went as far as saying that the act had to be referable not just to a contract for the sale of land but to the land in question and no other. Once this is understood then the rejection of payment of money alone as a sufficient act of part performance should not surprise anyone.

27. I should point out that shortly after the Statute of Frauds was passed some judges thought, no doubt because of the purpose of the Act which I have set out above, that where there was no risk of perjury or fraud then an oral contract for the sale of land could be enforced even if there was no writing. This led some to think that sale of land by auctioneers and brokers were outside the statute. This view was eventually rejected (see Lord Blackburn in ***Maddison*** at page 488). All this reinforces the demand for an unequivocal act which payment of money alone could not provide.

28. The Lord Chancellor went back to 1701 and traced the decisions of the courts in order to make the point that in balancing these two principles

identified in paragraph 24 the issue was what type of evidence had the cogency to pull the contract away from section 4 of the Act. It necessarily follows from this that the type of evidence required would have to be quite cogent and difficult to explain on any other reasonable and rational basis other than a prior oral agreement. Consequently, acts such as taking possession and expenditure of money, unsurprisingly, became the quintessential acts of part performance. These acts by their nature tended to be unequivocal. In fact, these acts but for the contract would have been trespasses. It does not require a great deal of imagination to appreciate that in this context payment of money, simpliciter, paled in comparison to taking possession and expenditure of money on the property by the purchaser. The conclusion would be even stronger if the purchaser who did these acts was a stranger to the vendor.

29. The Lord Chancellor in ***Maddison*** was not saying that payment of money could not, from the standpoint of pure logic, suffice as evidence of part payment. What he was demonstrating was that the long practical experience of equity judges determined, with good reason, payment of money alone, does not have the evidential cogency of other acts of part performance. The reason why payment of money alone was not accepted is that such an act is equivocal. It is simply not cogent enough to point to a contract much less a contract for the sale of land. The equity judges had to be mindful that in developing the doctrine of part performance they did not achieve judicial repeal of the Statute of Frauds, thereby in effect putting the law back to pre 1677 when oral contracts for land were enforceable. Mendacious witnesses were not be resurrected by judges after Parliament had laid them to rest.

30. It is true that some courts in the distant past took tentative steps in the direction to holding that payment of money alone was sufficient (see Lord

Harwicke in ***Gunter v Halsey*** Amb 586). That view was roundly rejected repeatedly that by the time of ***Maddison*** the Lord Chancellor could confidently assert that "it must be taken as settled that part payment of purchase-money is not enough; judges of high authority have said the same even of payment in full" (see page 478 – 479). I have gone through all this to demonstrate that I do not agree with Lord Reid that the Courts of Equity confused the two rules to which I have referred earlier at paragraph 23. On the contrary, the review of the cases by the Lord Chancellor showed that there was a period, however brief, that payment of money alone was a basis for specific performance. The Courts could have done so only if the evidence was actually accepted. What happened was that the Courts of Equity, after some period of vacillation eventually came down on the side of rejecting the evidence of payment of money alone as a sufficient act of part performance. So it is not accurate to say that the Courts of Equity confused the two rules but rather it would be more accurate to say that the consistent rejection of evidence of payment of money alone as evidence of part performance eventually led to a formal position in the Courts of Equity that payment of money alone was insufficient as an act of performance. This formal position was not an equitable principle but a rule of evidence. The legal advisors of would be litigants got the point. This may explain why in over 100 years there is no reported case of a claimant relying on payment of money alone. The cases in which money was paid usually have some other element, however tenuous. I see no reason to depart from the principle asserted and explained by the Lord Chancellor in ***Maddison***. I must add that no subsequent decision has identified any errors in analysis in the Lord Chancellor's outstanding erudition of the law.

31. In light of all that has been said it is vital that the correct approach to part performance evidence be understood. This approach I am about to describe is the prescribed judicial method of dealing with part performance evidence. It is an effective gatekeeper that blocks claims that do not meet the rigorous demands of equity. Unless the analysis is done in the way prescribed there is the ever present danger that the court may fall into error by looking at the parol evidence first and then looking to see if the acts are consistent with the parol evidence. I daresay, respectfully, Mr. Brady has repeated the same error 122 years later that Lord O'Hagan sought to correct. Lord O'Hagan said at page 483

> *Next, assuming that the action must be considered maintainable, if at all, for the purpose of enforcing a parol contract, partly performed, the course of the argument appears to me to have been further erroneous in this, that, instead of seeking to establish primarily such a performance as must necessarily imply the existence of the contract, and then proceeding to ascertain its terms, it reversed the order of the contention. The Court was asked, from the finding of the jury, and the testimony supporting them, to say there was a sufficient contract; and then to discover in the conduct of the parties acts of performance sufficient to validate the bargain so previously ascertained. Too much attention was bestowed upon the proof of the contract and too little on the sufficiency of the performance, which was the more substantial part of the burden on the appellant in supporting her claim.*

32. Sir James Wigram in ***Dale v Hamilton*** 5 Hare 381 said much the same thing:

> *It is in general the essence of such an act that the Court shall, by reason of the act itself, without knowing whether there was an agreement or not, find the parties unequivocally in a position different from that which, according to their rights, they would be in if there were no contract ... .* ***But an act which though in truth done in pursuance of a contract admits of explanation without supposing a contract, is not in general admitted to constitute an act of part performance***

taking the case out of the Statute of Frauds; as for example the payment of a sum of money alleged to be the purchase money. The fraud, in a moral point of view, may be as great in the one case as in the other, but in the latter cases the Court does not in general give relief. (my emphasis)

33. Lord Reid in ***Steadman*** confirmed this approach to analyzing part performance evidence (see page 541-542). One of the curious things about ***Steadman*** is this, if Lord Reid has adopted the analytical approach to part performance as suggested by Lord O'Hagan on what basis then could Lord Reid then go on to say that there is no general rule that says that payment of money alone could not amount to part performance? Is he and the majority (Lords Simon and Salmon) saying that payment of money alone is unequivocal? When Lords Reid, Simon and Salmon say that in appropriate circumstances payment of money alone may suffice as a sufficient act of part performance, it is my view, that you can arrive at this position in one of two ways, the first of which would be analytically inconsistent with the correct approach to part performance evidence and the second would necessarily mean that payment of money alone is a sufficient act of part performance. I now demonstrate my conclusions just stated. When the three Law Lords just mentioned speak of appropriate circumstances that could only mean looking at the oral evidence since by definition payment of money alone, has no other circumstance to examine. Since it has been accepted that payment of money alone is not sufficient it begs the question of how would the Law Lords get to "know" the other circumstances? The second conclusion is implicit in the first. The Law Lords would have to be saying that part payment alone has that evidential congency to pull the case away from section 4 of the Statute of Frauds. If they are correct then in my view the law has gone back to pre 1677 and would have overruled ***Maddison*** something that no one has argued that

Steadman did. There is no doubt that the effect of dicta in ***Steadman*** is to lower the bar of part performance. My position remains the same even though I recognise that since ***Maddison*** the test may no longer be that the act of part performance must be referable only to a contract for the sale of land, or if one prefers the stricter formulation, referable only to a contract for the sale of the particular piece of land and no other. The modern test appears to be that the acts of part performance should simply predicate the existence of a contract (see Lord Reid in ***Steadman*** and UpJohn LJ in ***Kingswood Estates Co Ltd v Anderson*** [1963] 2 QB 169). It is my view that the lower test could not go as far as accepting payment of money alone without effectively abolishing the Statute of Frauds.

34. In the face of this, Mr. Brady submitted that there was memorandum in writing. This being a receipt signed by the party to be charged, to use the language of the Statute of Frauds. I now turn to the receipts.

The tale of two receipts

35. There are two receipts in this case. Each side maintains that their receipt is the original. It as agreed that whichever receipt is genuine the receipt had typed information. It is further agreed that the typed information was crossed out before Mr. Hayles wrote on it and before it was signed by Mr. Hayles and Mr. Norton. In my view it is immaterial which receipt is the true one since my conclusion is the same. I shall reproduce the receipts and indicate the differences between them.

Nation Hardware
14 Bell Road
Kingston 11

May 6, 2005

Received from Nation Hardware the sum of Two Hundred Thousand Dollars ($200,000.00), which represents down payment on the Dutchieson (Farm Pen) property (135 acres) located in the parish of Westmoreland. The folio number and the volume are 417 & 476 and 1328 & 1047 respectively.

Received by

.....

Adrian Norton

Norduth Development Ltd

Witnessed by

.....

Ian Hayles

Nation Hardware Ltd

I now deal more fully with the Hayles receipt. To the right of the part to be signed by the witness are these words *Document Representing signing of contract on Dutchieson property.* The numeral 1 is circled and written between the words just stated and the typed portion of the document where the witness should sign. Below the words *Document Representing signing of contract on Dutchieson property* is the following

Two Hundred Thousand Dollars Represent A part of Such Arrangement Between Mr. Adrian Norton And Nation Hardware. A

Balance of $5,800,000 will be Due to Mr. Norton upon signing of contract.

Thereafter it purports to be signed by Mr. Adrian Norton and Mr. Ian Hayles. To the left of these words is the circled numeral 2.

The document put forward by the defendants is exactly the same as the typed version of the document exhibited by the claimant. This document also has the typed part with lines through it. It also bears handwriting. What is written on this document is identical to that written on the Hayles receipt except that it does not have the words *Document Representing signing of contract on Dutchieson property* or the circled numeral 1. The second significant difference is the words *to purchase Dutchieson property* comes after the last word *contract* in the Hayles receipt. This is the Norton receipt.

36. It is well known that the memorandum in writing must contain the essential terms of the contract. The cases have been cited already. It is plain that the receipts do not contain all the essential terms of which the most important is the price. The affidavit of Mr. Hayles sworn to on August 10, 2005 says that the agreed price was $36,000,000. There is no reference to this in the receipt. The typed portion of the receipt clearly spoke of a sale of land yet it was struck out and a vague and imprecise word namely *arrangement* was used. The basis for me to use the affidavit of Mr. Hayles to say that the memorandum does not contain all the terms is Lord Denning MR in ***Tiverton Estates*** at page 161 where he did just that.

37. Mr. Brady's next submission said that the receipt referred to signing of a contract. This, he said, contemplated the production of a formal

document. Therefore, said he, since there are other documents now in existence, this establishes that there are serious issues to be tried concerning those documents. I reject that argument and I now say why.

38. It is common ground that Mr. Palmer prepared the sale of share agreement and sent it to Mr. Hayles' then attorneys. That document does no refer to the sale of land. The document makes no reference to the payment of $200,000 thereby begging the question of why the $200,000 was paid. This demonstrates the wisdom of the Courts of Equity in rejecting payment of money simpliciter as evidence of part performance. I adopt the wise word of Cotton LJ in ***Britain v Rossiter*** in 11 QBD 123, at 130 - 131

> *It has been further argued that the contract may be enforced, because it has been in part performed. Let me consider what is the nature of the doctrine as to part performance.* ***It has been said that the principle of that doctrine is that the Court will not allow one party to a contract to take advantage of part performance of the contract, and to permit the other party to change his position or incur expense or risk under the contract, and then to allege that the contract does not exist; for this would be contrary to conscience. It is true that some dicta of judges may be found to support this view, but it is not the real explanation of the doctrine, for if it were, part-payment of the purchase-money would defeat the operation of the statute.*** *But it is well-established and cannot be denied that the receipt of any sum, however large, by one party under the contract, will not entitle the other to enforce a contract which comes within the 4th sect. What can be more contrary to conscience than that after a man has received a large sum of money in pursuance of a contract, he should allege that it was never entered into? The true ground of the doctrine in equity is that if the Court found a man in occupation of land, or doing such acts with regard to it as would, prima facie, make him liable at law to an action of trespass, the Court would hold that*

there was strong evidence from the nature of the user of the land that a contract existed, and would therefore allow verbal evidence to be given to show the real circumstances under which possession was taken. (my emphasis)

39. Lord O'Hagan in ***Maddison*** said at page 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 be sufficient, and without any other information or evidence, to satisfy a Court, from the circumstances it has created and the relations it has formed, that they are only consistent with the assumption of the existence of a contract the terms of which equity requires, if possible, to be ascertained and enforced.

40. Lord O'Hagan described this as an indispensable condition. In order to demonstrate the importance of this condition Lord O'Hagan said of the claimant in ***Maddison*** that her conduct was consistent with her case but her conduct viewed outside of the parol evidence was simply not sufficient to show that there must have been a prior contract.

41.I do not see how a share sale agreement that only refers to land as an asset of the company can become an agreement for the sale of land. Be that as it may there is a more fundamental reason for objecting to Mr. Brady's submission. Let us assume for the purpose of this case that the share agreement was an agreement for the sale of land. Let us assume further that the receipt, whichever one is relied on, and the agreement together constitute the memorandum, it is plain that the terms were never accepted by Nation because Nation did not respond to Mr. Palmer's letter that accompanied the draft.

42. Mr. Brady referred to another set of documents that came into existence. These were the agreement for sale of land and agreement for

the sale of chattels. The documents were presented to the defendants. The terms of these documents were different from the terms of the share agreement in many respects. Let me quote directly from Mr. Hayles' affidavit of August 10, the response of Mr. Adrian Norton to these documents: *The 2nd Defendant responded that he would have to discuss the matter with the Defendant's Attorneys at law.*

43. In any language, these documents must be a counter offer. This counter offer was never accepted. I cannot see therefore on what basis Mr. Brady could insist that a contract was concluded between the parties. I have examined both of Mr. Hayles' affidavits filed in this matter as well as the affidavit of Mr. O'Brien Norton and they do not advance the case at all. The documents proferred by Nation on June 28 were a counter offer. In addition these documents introduced a new purchaser known as ARC Systems Limited. This company, based upon the affidavit, never had discussions with the defendants. There is no statement, however oblique and obscure, in the affidavits of Mr. Hayles or Mr. O' Brien Norton that Nation was acting as agent of ARC. In fact, the very claim is in the name of Nation and it is Nation who in its own right is seeking the remedies prayed for and not ARC. Mr. Brady said that there is an explanation for ARC Systems Limited introduction and that can be shown at trail. This submission misses the point. It is not whether there is an explanation for ARC's introduction but whether in law this amount to a counter offer and whether even on Nation's case, this counter offer was accepted by the defendants. Mr. Hayles' affidavit is clear. Mr. Norton said he wanted to speak to his attorneys – there was no acceptance of the counter offer and consequently there was no contract. Even then, the case is further undermined because in the affidavit of September 2, Mr Hayles went as far

as to say that ARC was not the purchaser but a company that was not yet formed.

44. Before concluding let me mention another document that has written on it 20% upon signing, 20% 30 days after and 60% closing. This does not help because the purchase price is no where stated.

45. Mr. Brady did mention that an issue in this case is whether the current occupiers are bona fide purchasers of the estate in fee simple without notice of the contract between Nation and the defendants. To raise this issue the affidavit of Mr. O'Brien Norton was filed. However if there is no enforceable contract between the parties to this claim then the question of whether the occupiers are bona fide purchasers is a non-issue.

46. Mr. Brady mustered his energies and launched one final assault in what had become a salvage operation. Mr. Brady said that an issue to be determined is whether the payment of $200,000 was part payment for sale of land or a loan as contended for by the defendants. I respectfully disagree. Just stating the submission demonstrates the point of the Courts of Equity – payment of money, without more, is too equivocal be a sound foundation securing a remedy based on part performance. Seeing my way clearly and resolving all matters in favour of the claimant there is no enforceable contract between the parties.

47. The best argument that can be made for Nation is if one argues that an agreement for the sale of shares that has the effect of disposing of land is a contract for the sale of land within the meaning of section 4 of the Statute of Frauds (see ***Daulia Ltd v Four Millbank Nominees Ltd***). However in light of what I have said about the offer and counter offer above there was no contract between the parties.

48. In the final analysis, Mr. Brady's case really amounted to payment of $200,000 alone. All the mass of evidence that Mr. Brady indicated really

went towards establishing by parol evidence the existence of a contract. The authorities are very clear that this is not the way in part performance cases. The starting point is the act of part performance and to assess its cogency. It is only if the act rises to the level where it makes the existence of contract the most likely explanation then and only then does it become permissible to examine the parol evidence. Payment of money alone does not meet this criterion. This position could not be improved upon at trial. There is no point in putting off the inevitable. It cannot be fair and just to wait three years for a trial that must end the same way.

Conclusion

49. Mr. Brady's strongest point is the payment of $200,000. This as the review of the law makes clear is insufficient to sustain an action for specific performance. The payment of money alone is equivocal. This has been the state of the law both here in Jamaica and England for over 100 years. It is not the law that one looks at the parol evidence first and then ask if the act done is consistent with it. If this were so then the Statute of Frauds would be deprived of its intended efficacy. All the evidence adduced by Mr. Brady only showed why the parties acted in the way they did. This is simply not good enough. There is no unequivocal act to which he can point taken individually or collectively that amounts to part performance.

50. The memorandum in writing, using either receipt, did not contain all the essential terms on the alleged oral contract. The share sale agreement which presumably had all the agreed terms was never accepted by Nation. The agreements for sale of land and sale of chattels were not accepted by the defendants. If there is no contract then the injunction cannot be extended. It follows from this that there is no reasonable grounds for

continuing the claim. The foundation of the claim has been eroded the claim cannot stand and is struck out. Ex nihilo nihil fit. The order of the court

a. Interim injunction granted on August 16, 2005, is discharged;
b. Caveat number 1367749 lodged by claimant is removed immediately;
c. Claim dismissed; costs to the defendants to be agreed or taxed;
d. Special certificate of costs for two counsel granted;
e. Leave to appeal granted;
f. The Registrar to conduct an enquiry as to damages. Enquiry stayed until outcome of appeal in the Court of Appeal, if appeal pursued.