

1023

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. E.2/1982

BETWEEN	ENID PHANG SANG	PLAINTIFF
AND	CONLEY J. SUDEALL	FIRST DEFENDANT
AND	JOYCE SUDEALL	SECOND DEFENDANT

W.B. Frankson Q.C. for Plaintiff.

R. Carl Rattray Q.C. and Clarke Cousins for Defendants.

Heard: 18th, 19th and 20th April 1983

10th and 11th October 1983, 22nd October 1984

Wolfe J.

The Plaintiff and her husband Sydney Phang Sang are the registered proprietors of land under the Registration of Titles Act and registered at Volume 955 Folio 243 in the Register Book of Titles. The action by the Plaintiff is for rescission of a contract, dated the 30th day of March 1979, inter alia.

By an agreement dated the 30th day of March 1979 the Plaintiff agreed to sell the Defendants all that parcel of land part of Anchovy in the parish of Portland being the lot numbered One on the plan of Anchovy prepared by Mr. R.T. Gooden, Commissioned Land Surveyor on the 31st day of October 1978 with house thereon and being part of the land registered at Volume 955 Folio 243 of the Register Book of Titles for the price of Fifty Thousand Dollars (\$50,000.00). The terms of payment as set out in the agreement are as follows:

"Five Thousand Dollars (\$5,000.00) on the signing of this Agreement and the balance of Forty Five Thousand Dollars (\$45,000.00) within ninety (90) days from the date hereof".

Up to this point in time the balance of the purchase money has remained unpaid.

On the 27th day of August 1979 the Plaintiff's Attorneys-at-Law Messrs Robinson, Phillips and Whitehorne addressed the following

letter to the Defendants' Attorneys-at-Law Messrs F.V. Grossett and Co.:

"HIGHGATE

27th August, 1979.

Messrs. F.V. Grossett & Company,
Attorneys at Law,
P.O. Box 36,
2 Harbour Street,
Port Antonio,
Portland.

Dear Sirs,

RE: SUBDIVISION LANDS PART ANCHOVY - PORTLAND
SALE SYDNEY PHANG SANG ET UX TO CONLEY J. SUDEALL
ET UX

We refer to previous correspondence herein ending with your letter to us of the 12th June, 1979, wherein you advised us that the pre-checked diagram in regard to the above-mentioned matter has been lodged with the Titles Office.

As you are now aware, we are acting on behalf of the Phang Sangs in the above-mentioned matter and have prepared and hand you enclosed herewith Transfer in respect of the lot part Anchovy, being sold by the Phang Sangs to your client.

You will note that the Transfer has already been signed by the Vendors and we would be obliged if you would have same signed by your clients as soon as possible, and returned to us.

We understand that the full purchase price is \$50,000, with a deposit of \$5,000 payable on signing of the Sale Agreement, the balance of \$45,000 to be payable in exchange for Title. We are to confirm that the deposit has been paid to your(sic) clients and the only thing left to be paid is the balance of \$45,000, together with your clients' moiety(sic) and the costs therein.

As you are aware, we came into this transaction after same had been commenced and we do not at this stage have enough money in hand to pay transfer tax and stamp duty on the sale, and in view of the large amount for these duties, we are not in a position to advance same.

In the circumstances, we write to request that you ask your clients to make to us a further payment on account of the balance purchase price of \$45,000 and we would suggest a further amount of \$5,000. We trust you will have no objections to our suggestion and would ask that you send us your cheque in this amount when returning the duly executed Transfer.

We would also ask that you send us with the Transfer and the aforesaid amount, your clients' moiety (sic) with costs which are arrived at as under:-

3.

"Stamp duty on Transfer \$1,325.00
Registration fee on Transfer .. 50.00
Attorneys costs - preparing
and completing Transfer 1,020.00
TOTAL COST \$2,395.00

one-half thereof payable by your clients \$1,197.50.

We look forward to hearing from you in the very near future and receiving your cheque in the afore-mentioned amounts, together with the duly executed Transfer.

Yours faithfully,
ROBINSON PHILLIPS & WHITEHORNE

WCM/vb

P.S.

Please advise us of Mr. Sudeall's occupation when replying."

Before a response was received to the above letter the Plaintiff's Attorneys-at-Law addressed a letter dated the 12th October 1979 to the Defendants' Attorneys-at-Law in the terms set out hereunder:

"HIGHGATE

WCM/pb:B:875

12th October, 1979.

Messrs. F.V. Grossett, & Company,
Attorneys-at-Law,
P.O. Box 36,
2 Harbour Street,
Port Antonio,
Portland.

Dear Sir:

RE: SUBDIVISION LANDS PART ANCHOVY - PORTLAND,
SALE SYDNEY PANG SANG ET UX TO C.J. SUDAL ET UX

We refer to our letter to you of the 27th August, 1979, to which we have not yet received a reply.

We are to bring to your attention that we have now been handed Copy Sale Agreement dated the 30th March, 1979, and made between the venders (sic) and the purchasers.

We note form (sic) the copy Sale Agreement that the Balance Purchase Price of Forty-five Thousand Dollars was made payable within ninety days from the 30th March, 1979, which time has now long past.

In view of the foregoing we now write to demand that you pay to us on behalf of our clients the Balance Purchase price of Forty-five Thousand Dollars, (\$45,000.00), together with the further sum of One Thousand One Hundred and Ninety-Seven Dollars and Fifty Cents making a total of Forty Six Thousand One Hundred and Ninety Seven Dollars and Fifty Cents (\$46,197.50), by the 30th day of November, 1979 of which date, time, is hereby made of the essence of the contract of sale

"Should you fail to let us have the aforesaid amount of Forty-six Thousand One Hundred and Ninety-seven Dollars and fifty cents by the said 30th November, 1979 our clients will have no alternative, but to rescind the Contract of Sale and to forfeit the deposit paid thereunder.

(sic)

Please let us hear from you by the said date and we would be obliged if you would when replying, return the duly executed transfer to us together with your cheque.

Yours faithfully,
ROBINSON PHILLIPS & WHITEHORNE

PER:

WCM/pb
REGISTERED".

The Defendants remained inactive notwithstanding the letters set out above and as a consequence thereof the Plaintiff by notice dated the 17th day of March, 1980 purported to make time of the essence of the contract. The notice making time of the essence evoked only a partial response from the Defendants who by letters dated the 18th and 19th March 1980 forwarded to the Plaintiff's Attorneys-at-Law the Defendants' half costs of Title and the Transfer, duly executed. The balance of the purchase price was not forthcoming. This inaction on the part of the Defendants as to the balance of the purchase price incurred the wrath of the Plaintiff and on the 8th day of April 1980 the Plaintiff through her legal representatives addressed the following letter to the Defendants' Attorneys-at-Law:

"HIGHGATE

WCM/pb: B-875

8th April, 1980.

Messrs. F.V. Grossett & CO.,
Attorneys at Law & Notaries Public,
P.O. Box 36,
2 Harbour Street
Port Antonio, Portland.

Dear Sir:

RE: PROPOSED SALE SYDNEY PANG SANG ET UX TO
CONOLLY J. SUDEAL ET UX

We refer to previous correspondence herein ending with your letter to us of the 19th March, 1980, and are to refer to our Notice of Rescission(sic) and forfeiture dated the 17th March, 1980.

"As we have not received the balance purchase moneys together with the costs in accordance with the Sale Agreement, we write to advise you out of courtesy that the Contract of Sale herein is hereby rescinded and the deposit of five thousand dollars paid by your clients to the vendors is hereby forfeited.

As a result, of this action we are returned (sic) enclosed herewith your cheque in the sum of One Thousand One Hundred and Ninety Seven Dollars and Fifty Cents, representing the payment of the purchaser's costs in this matter.

Please be good enough to have your clients now take steps to vacate the premises, the subject of the Sale by the 30th April, 1980, failing which we will have no alternative but to file action in the Resident Magistrate's Court to recover possession.

Yours faithfully,
ROBINSON PHILLIPS & WHITEHORNE
PER:
WCM/pb
ENCLOSURE

Such was the tone of the above letter that the Defendant sought refuge in a change of Attorney and Mr. Victor Robinson Attorney-at-Law by letter dated the 25th day of April 1980 took up the fight on behalf of the Defendants. It is important to recite the contents of the said letter because for the first time during the mass of correspondence which flowed between the Plaintiff and Defendants one is given a birds eye view of what the Defendants contend:

"Your Ref. WCM/pb: B - 875

25th April, 1980.

Messrs. Robinson Phillips & Whitehorne,
Attorneys at Law,
P.O. Box 2,
Highgate P.O.,
St. Mary.

"Attention" Mr. William McCalla

Dear Sirs,

re: Proposed Sale - Sydney Pang Sang
et ux to Conley J. Sudeal et ux

Please be advised that I now act for the Purchasers Mr. & Mrs. Sudeal in this matter.

With reference to your letter dated 8th April, 1980, I would bring to your attention that my clients have been at all material times ready, willing and able

to complete the transaction. However, it would seem that your client has been dragging his feet in that, although Mr. Lawrence had indicated to Mr. & Mrs. Sudeal, prior to the agreement being signed, by letter and telegram (copies of which we have) that a registered Title was available, for the relevant lot, up to now no title has been prepared.

It was on the basis that the Title was available that my clients entered into the agreement for sale. It is to be noted, by way of interest, that time was not deemed to be of the essence.

At the expiry of the ninety-day period Mr. Lawrence and my clients met in Mr. Grossett's chambers and my clients indicated to Mr. Lawrence that they were now ready willing and able to complete and that they would pay if the registered Title could be produced. Mr. Lawrence said that all he was interested in was for the balance of Forty Five Thousand Dollars (\$45,000.00) to be paid. In the circumstances, my clients refused to pay over the money.

At this point in time my clients are willing, ready and able to complete the sale, with the assistance of short-term financing, but, needless to say, they are insisting on the Title being produced, in keeping with the terms of the agreement.

In the circumstances, therefore, it would seem that, at the highest, your clients would only be able to RESCIND the contract, but with the full deposit being returned to my clients. This course need not be adopted, however, since the matter can be quite easily resolved without causing undue hardship to either of the parties.

Could you therefore, stay whatever Court proceedings you may contemplate pending a discussion into this matter with a view to arriving at a settlement as early as possible.

Yours faithfully,

(Sgd.) Victor L. Robinson
VICTOR L ROBINSON "

This letter does not, in my view, enhance the position of the Defendants. With deference to the writer thereof the contents clearly indicate that the writer is out of his depths. I say this because the writer alleges that the basis of the Agreement was that the balance of the purchase money would be paid in exchange for title under the Registration of Titles Act, a condition which the

Plaintiff failed to meet and has failed to meet up to this point in time. Notwithstanding this alleged breach on the part of the Plaintiff Mr. Robinson is of the view that the Plaintiff would be able to rescind the contract. The basis for this concession, I must confess, is not evident. The ambivalence reflected in Mr. Robinson's letter was treated charitably by the Plaintiff's Attorneys-at-Law as is reflected in the letter dated 5th May 1980:

"HIGHGATE

5th May, 1980.

WCM/pb : B875

Mr. Victor L. Robinson,
Attorney at Law,
23½ Orange Street,
Montego Bay.

Dear Victor:

RE: Sale Sydney Pang Sang Et Ux to Conley J. Sudeal
Et UX

I thank you for your letter of the 25th April 1980 and in order that you may be more properly put into the picture herein I am enclosing herewith photocopy of letters that we exchanged between Messrs. P.V.Grossett and Company who were acting on behalf of the Sudeals before you entered the picture.

You will note from the photocopy letter of the 24th October, 1979, that time was made of the essence of the Contract of Sale and you will further note that a subsequent Notice dated the 17th March, 1980 was sent to the Sudeals by Registered Post as well as to their Attorneys.

In the circumstances, I do not agree with you when you say that my clients will only be able to rescind the contract but will have to return the full deposit paid.

If there was any delay in the matter it is evident from the correspondence that this was caused by the purchasers Attorney at law, acting for them at the time and if the Sudeals have been prejudice then their recourse can only be against the said Attorneys at Law.

Please be good enough to let me know as soon as possible when your clients will be vacating the premises, so that court proceedings can be avoided.

Kindest regards.

Yours sincerely,

W.C. McCalla.

/pb
Enclosures: "

8.

The receipt of this letter must have driven Mr. Robinson to ponder the adage "fools rush in where Angels fear to tread". This letter signalled the exit of Mr. Robinson from the scene. The Defendants fell back on the services of Messrs F.V. Grossett & Co. as is indicated by the letter dated 30th October 1980:

30th October 1980

"Messrs Robinson, Phillips & Whitehorne
Attorneys at Law & Notaries Public
P.O. Box 2
Highgate

Dear Sirs:

Re: Proposed Sale - Sydney Phang Sang
et ux to Conolly J. Sudeal et ux -
Your Ref. WCM/pb: B-875

With reference to previous correspondence in this matter, our clients are prepared to complete the sale and are able to pay now the \$30,000.00 together with their half costs of Title and the balance of \$15,000.00 as soon as you advise us that the title is ready, and to show their good faith, they have requested us to enclose herewith cheque for the \$30,000.00 plus cheque for \$1,197.50 representing their half costs.

Yours faithfully,

IVG/h
encs.

F.V. Grossett & Co. "

Economic depression notwithstanding the amount of Thirty Thousand Dollars was not enough to cause the Plaintiff to change her position as was indicated in the letter of the 8th April 1980 supra. No doubt, the Plaintiff had hope in the promised deliverance. The cheques referred to in the above letter were returned to the sender with the request that the Defendants vacate the premises by the 15th November 1980 failing which legal proceedings would be commenced.

It is worthy of note that prior to the Plaintiff's making time of the essence of the contract by Notice dated the 17th day of March 1980 the Defendants had by notice dated the 16th day of August 1979 served a notice upon Messrs. F.V. Grossett and Company, who at that time acted for both parties to the transaction, requiring the Plaintiff to complete the transaction and making time of the essence

of the contract:

"NOTICE OF REQUIRING COMPLETION
OF PURCHASE AND MAKING TIME OF
THE ESSENCE OF THE CONTRACT

TO: ENID PHANG through her Agent JASPER LAWRENCE

c/o Messrs G.V. GROSSETT & COMPANY
Attorneys-at-Law,
2, Harbour Street,
Port Antonio P.O.
PORTLAND.

CONLEY JOSEPH SUDEALL and JOYCE ESETA SUDEALL as Purchasers of the freehold lands, IN ALL THAT parcel of land part of Anchovy in the Parish of Portland comprising in area AO;R1: P16.75 being lot numbered ONE on the plan prepared by Mr. R.T. Gooden, Commissioned Land Surveyor from survey made by him on the 31st day of October, 1978 with building thereon contracted to be sold by you as contained in the Agreement of Sale dated the 30th day of March 1979 that we are ready, and had been ready and willing as communicable to you on various occasions, to complete the purchase of the premises contracted to be purchased and require you to complete the sale of the said premises within Twenty-One (21) days from the date hereof and in respect of this demand make TIME OF THE ESSENCE OF THE CONTRACT and give you notice that we are holding you liable for any loss or damage which maybe incurred by us by reason of any delay or default on your part in completing the said sale or otherwise in relation to the said contract and will take such steps as we maybe advised to enforce the contract specifically and to claim damages for its breach and/or to rescind the same and to recover the deposit made, thereunder in the event of the sale not being completed within the time herein specified.

Dated this 16th day of August, 1979.

Conley Joseph Sudeall

Joyce Eseta Sudeall".

These proceedings were commenced on the 18th day of January 1982 when all other means failed to resolve the situation. The Plaintiff sought the following reliefs:

- (a) An Order rescinding the said contract.
- (b) A declaration that the Defendants have forfeited the sum of \$5,000.00 paid as a deposit in respect of the sale of the said premises.
- (c) Damages for breach of contract.
- (d) Mesne Profits.
- (e) Damages for waste in respect of the said premises.

- (f) An immediate order for possession of the said premises.
- (g) Costs.
- (h) Such further and other relief as to the Honourable Court seem just.

The Defendants counterclaimed and sought the reliefs set out hereunder:

- (a) A Declaration that the purported rescission of the contract by the Plaintiff is invalid and therefore the contract still subsists.
- (b) A decree of specific performance of the contract.
- (c) Further and other relief as may seem just.
- (d) Costs.

The Primary issue to be resolved is whether or not the Defendants are in breach of the Agreement dated 30th March 1979 and if so is the Plaintiff entitled to rescind the contract. The breach alleged by the Plaintiff is the failure of the Defendants to pay the balance of the purchase money within the stipulated time.

For the Defendants it was contended that payment of the balance of the purchase money was conditioned upon the production of a registered title which the Plaintiff had failed to produce. It was further submitted that in determining the issue the Court had to have regard to what the parties had agreed to or put another way what was the intention of the parties when they entered upon the agreement.

In answer to this approach by the Defendants the Plaintiff argued that the Agreement of the 30th March 1979 represented all the contract between the parties in which all the rights and obligations of the contracting parties had been set out. As a consequence of the foregoing the Plaintiff submitted that representations antecedent to the signing of the Agreement could not be read into the contract for the purpose of interpreting same. Put more succinctly it is the final written contract executed by the parties which represents the Agreement between them. To this end parole evidence or correspondence

preceding the final written contract are inadmissible to interpret the contract unless there is some ambiguity in the final contract.

In Hutton v. Watling [1948] 1 All E.R. 803 at p.805 The Master of the Rolls Lord Greene observed:

"The true construction of a document means no more than that the court puts on it the true meaning, and the true meaning is the meaning which the party to whom the document was handed or who is relying on it would put on it as an ordinary intelligent person construing the words in a proper way in the light of the relevant circumstances".

Marnan J. in Attorney General v. McDoom [1960] 2 W.I.R. 373 at p.414 in dealing with the approach to be used in construing a document said:

"It is trite law that a written contract must be construed to give effect to the intentions of the parties, and that those intentions must be ascertained from what has been written, and not from what the parties may be supposed to have intended. Nevertheless, the overriding principle is to ascertain and give effect to the intentions of the parties, and for that purpose not only must the whole of the contract be examined, but the Court must have regard to what are proved or agreed to be the circumstances in which the contract was made. It will not give effect to particular words so as to achieve a result which was never intended." (emphasis mine).

As I seek to give meaning to the contract between the parties I shall be guided by the approach of Marnan J.

What then are the proved or agreed circumstances in which the contract was made? The Plaintiff is at a distinct disadvantage here, as the Plaintiff's agent who conducted the negotiations is now deceased. However the circumstances of the negotiations which culminated in the contract may be gleaned from correspondence which flowed between the Plaintiff's agent and the Defendants. At the risk of being considered tedious I set out hereunder in extenso the contents of six letters addressed to the male Defendant by the Plaintiff's agent between 9th September 1978 and 20th March 1979. I have chosen this course, as a reading of these letters sequentially gives a vivid picture of the circumstances in which the contract was made:

12.

53 Red Hassell Rd.
Port Antonio
9.9.78.

"Dear Mr. Sudeall

This is to advise you that I have been successful in finding out how far the papers in connection with the preparation of the Title for the house at Anchovy have reached.

I am now confirming that the Sub-Division Plans have been approved by the Portland Parish Council and are with the firm of Surveyors Milner T. Goodin. They advised me that no action was taken to cut off the land on which the house is situated as they were awaiting such instructions. This is now being done and the diagram will be ready in about six to eight weeks time.

On receipt of this you will be advised. You may then make arrangements to meet Mrs. Phang Sang and I at your Lawyer for the preparation of the necessary documents to be prepared for the sale. I suggest that no less than \$40,000 be made available until the Title is ready. This will take a few months to be done. ½ costs to be paid by you.

Your father in law called on me today and I was happy to be advised that he worked for 25 years as Bookkeeper with my nephew Magnus Lawrence who was then overseer on the same property he is now in charge of. You may therefore be assured that your business is in good hands.

Kind regards and best wishes.

Yours Sincerely,

J.E.Lawrence.

53 Red Hassell Rd.
Port Antonio
3.10.78

"Dear Mr. Sudeall

Quite possible you will recall me telling you on your last visit that I had a purchaser who was willing to pay thro his Lawyer a certain amount as deposit on the house belonging to Mrs. Phang Sang in which you are interested until the diagram from which the Title will be prepared is ready but I advised him I had already done business.

I have yet another such offer and in the event still keeping the sale open for you as promised, you should make it possible to give me some amount of assurance in writing of your intention to buy as it stands you can have your mind changed and my two buyers seek some other place and up set my plans.

13.

I was able to contact the Surveyor for the diagram and he has arranged for me to have it in approx. 5 or 6 wks time at a cost of \$400. As I told you if you are able to sell your home go ahead and I will arrange for you to live at the house free of rental until the diagram is ready when you will be called upon to make your down payment with other documents relative to the sale. You will also be given permission to carry out any repairs required to your comfort but will receive no refund if you forfeit.

Please let me hear from you early.

Kind regards and best wishes.

Yours Sincerely

J.E. Lawrence

53 Red Hassell Rd.
Port Antonio
16.10.78

Dear Mr. Sudall

As promised I contacted Mr. Smart who represent Mr. Grosett where loans are concerned. He is responsible for all such matters. He advised me that Mr. Grosett will lend no money large or small amounts without a Registered Title. The Bank of Nova Scotia is in a similar position.

As hinted before I can not say how long it will take to obtain a Registered Title, it will be therefore impossible to give free occupancy for an indefinite time.

The question of sale will be left open to intending purchasers when the title is ready and ~~not~~ the diagram as was previously decided. I have two interested persons from abroad who is willing to rent at the rate of \$200 per month with intention to purchase as soon as the title is ready. If you would be interested in that direction preference would be given to you.

This would be as from 1st November 78.

Kind regards and best wishes.

Yours Sincerely

J.E. Lawrence.

53 Red Hassell Rd.
Port Antonio

14.

53 Red Hussell Rd.
Port Antonio
2.11.78

Dear Mr. Sudall

I sincerely hope that you and family are quite o.k.

This is just a note to advise you on one or two points concerning the house. The diagram should be in hand in the next 3 or 4 weeks time and my son there told me he will be able to get the title in about 6 to 8 weeks time. Consequently I would say the early part of February 79 all papers should be available. If you are still interested you could make your plans accordingly. I must however advise you that Mr. Grosett does not lend amounts as much as what you are thinking and in view of the fact that the Lawyer of the Building Society there will be looking about the title it would be a good bet to speak with them. Your loan payment would be on a longer basis and you are right on spot. If however you would rather the bank having the title you should have no problem.

Well this is just my suggestion for you to give a thought if you care to.

Kind regards and best wishes.

Yours Sincerely

J.E. Lawrence

N.B. Please bear in mind that we will soon have what it takes to sell.

53 Red Hussell Rd.
Port Antonio
6.1.79

Dear Mr. Sudeall

Let me sincerely hope that you and family are all well and had an enjoyable Xmas and new year.

This is really just a note to advise you that I have obtained the go ahead for you to occupy the house at Anchovy until the title is available.

Mrs. Phang Sang was still asking that the peper corn rental be \$150 but I have over ruled that and have decided and asked that \$100 be paid.

It will be necessary for you to sign an agreement to the effect. I have already made it out and have enclosed a copy of what it is like for you to see.

The original and duplicate are now in type written form to be signed by both yourself and Mrs. Sudall and witness by a J.P. If acceptable to you let me know when you would like to move in so that I can make the necessary arrangements for the caretaker of the place to hand over the keys to you.

title is supported by the evidence of Mr. William McCalla, Attorney-at-Law, who took up the cudgel on behalf of the Plaintiff after she had dispensed with the services of Messrs. F.V. Grossett and Co. Mr. McCalla was the author of the letter dated 27th August 1979, supra, and notwithstanding that he did so prior to receiving a copy of the written agreement, he unequivocally stated that the said letter accurately reflected the instructions which he received from his client. It is reasonable to infer therefore that the client herself was of the view that the balance of the purchase money was payable in exchange for a registered title. The problem as to payment of the balance of the purchase price arose for the first time when Mr. McCalla received the written agreement and sought to interpret the paragraph dealing with the terms of payment. He sought to apply the letter of the law in interpreting the contract without any regard to the spirit and intention with which the parties had engaged themselves in the contract. The Plaintiff had instructed Mr. McCalla that the balance was payable in exchange for title but Mr. McCalla super imposed his legalistic approach upon what was the clear intention of the parties. I have no doubt but for this legalistic approach the matter would have been amicably completed.

The Defendant in explaining how ninety days was arrived at for the payment of the balance testified that in order to make "assurance doubly sure" he suggested that the time be extended to ninety days instead of six weeks as mentioned in Exhibit 21 dated 20th March 1979. He further testified that on the 30th June 1979 following the expiration of ninety days he attended at the office of F.V. Grossett and Co. ready, willing and able to complete the transaction but Lawrence who was in attendance was unable to produce the necessary title in exchange for the balance of the purchase money. Lawrence produced a parent title in respect of the three lots which comprised the entire sub-division. The balance of the

purchase money was not paid as the Plaintiff's agent failed to produce a registered title in respect of Lot One.

It is significant that notwithstanding the failure to pay the balance of the purchase price at the expiration of ninety days as required by the Agreement Exhibit 1 Mr. Lawrence took no steps to rescind the contract. I find that Lawrence's failure due to act was/to the fact that he also understood that the balance was payable in exchange for registered title.

The failure to obtain a registered title in six weeks as stated in the letter dated 20th March 1979 (Exhibit 21) may properly be regarded as a turn of event which the parties did not contemplate.

In British Movietonews v London Cinemas [1950] 2 All E.R. 390 at p. 395 Denning L.J. said:

"The judgments show that, no matter that a contract is framed in words which, taken literally or absolutely, cover what has happened, nevertheless, if the ensuing turn of events was so completely outside the contemplation of the parties that the court is satisfied that the parties, as reasonable people cannot have intended that the contract should apply to the new situation, then the court will read the words of the contract in a qualified sense; it will restrict them to the circumstances contemplated by the parties; it will not apply them to the unanticipated turn of events, but will do therein what is just and reasonable.

This principle as Devlin, J., has since pointed out, is the same principle as that which underlies the ejusdem generis rule and the suspension clauses in frustration cases. See Chandris v Isbrandtsen - Moller Co. Inc. ([1950] 1 All E.R. 772) It is, as he says, a recognition of the fact that parties with their minds concerned with the particular objects about which they are contracting are apt to use words, phrases or clauses which, taken literally, are wider than they intend, or I may add, cover situations which they never contemplated. Recognizing this fact, the court refuses to apply them literally to an unanticipated turn of events. This does not mean that the courts no longer insist on the binding force of contracts deliberately made. It only means that they will not allow the words in which they happen to be phrased to become tyrannical masters. The court qualifies the literal meaning of

the words so as to bring them into accord with the contemplated scope of the contract. Even if the contract is absolute in its terms, nevertheless, if it is not absolute in intent, it will not be held absolute in effect. The day is gone when we can excuse an unforeseen injustice by saying to the sufferer: "It is your own folly you ought not to have passed that form of words you ought to have put in a clause to protect yourself". We no longer credit a party with the foresight of a prophet, or his lawyer with the draftsmanship of a Chalmers. We realise that they have their limitations and make allowances accordingly. It is better thus. The old maxim reminds us that qui haeret in litera, haeret in cortice, which being interpreted means: He who clings to the letter clings to the dry and barren shell and misses the pith and substance of the matter".

On appeal the House of Lords, per Viscount Simon, [1951] 2 All E.R. p.617 at p.624 observed the necessity to avert the possibility of misunderstanding arising from the passage quoted above and cited with approval from Earl Loreburn's judgment in F.A. Tamplin S.S. Co., Ltd. v Anglo Mexican Petroleum Products Co. Ltd. [1916] 2 A.C. 403, 404 where the principle is expressed thus:

".... A court can and ought to examine the contract and the circumstances in which it was made, not of course to vary, but only to explain it, in order to see whether or not from the nature of it the parties must have made their bargain on the footing that a particular thing or state of things would continue to exist. And if they must have done so, then a term to that effect will be implied, though it be not expressed in the contract... No court has an absolving power but it can infer from the nature of the contract and the surrounding circumstances that a condition which is not expressed was a foundation on which the parties contracted".

As I understand it, the area of disagreement between the House of Lords and Denning L.J. has to do with whether or not it is an exercise of a recent extension of judicial practice or simply a question of construction.

Relying upon the dictum of Denning L.J. as qualified by Viscount Simon I am satisfied that from the nature of the

contract and the surrounding circumstances that it was a condition of the contract, albeit not expressed, that the balance of the purchase money would be paid in ninety days in exchange for a registered title and that this condition was a foundation upon which the parties contracted.

I am further fortified in that view upon a careful examination of the contract. It is to be observed that the contract is silent as to the date of completion. In contracts of this nature the date of completion is a fundamental term. Surely, it cannot be that completion date is at large. Completion involves the element of reciprocity viz the payment of the purchase price by the purchaser on the one hand and the production of title by the Vendor on the other hand. Both are concurrent conditions. This being so one must examine the terms of the contract to ascertain if anything can be gleaned therefrom as to the fundamental question of completion. The terms of payment as set out therein disclose that the balance of the purchase money would be payable within ninety days from the date of the agreement. Upon the payment of the balance the purchaser would have discharged his obligations under the contract. It would therefore be incumbent upon the vendor to reciprocate by producing title in favour of the plaintiff bearing in mind that the elements of completion are concurrent conditions. Such a view is consistent with the surrounding circumstances as is evidenced by Exhibit 21.

In the light of the foregoing I hold that the balance of the purchase money was payable in exchange for a registered title, which it was the duty of the vendor to procure.

The Plaintiff urged that the Defendants having been let into possession without the payment of interest explains why the clause setting out the terms of payment was so worded. I

find this reasoning untenable. I am more inclined to the view that the Plaintiff ~~refrained~~ from exacting interest because the date of completion as contemplated by the parties was a short period.

The question therefore arises was the Plaintiff in a position to make time of the essence of the contract? A party seeking to make time of the essence must be in a position to perform his side of the bargain. The evidence unmistakably shows that had the purchasers paid the balance of the purchase money at the time of demand the vendor would not have been in a position to satisfy the concurrent condition of supplying the registered title. In any event it was the Plaintiff who was dilatory in performing the contract by failing to obtain a registered title considering that the Defendants had signed and returned the transfer from the 19th March 1980 two days after the date of the Notice making time of the essence. It must also be observed that by notice dated the 16th August 1979 the Defendants had made time of the essence of the contract. I am of the view that the Plaintiff's attempt to make time of the essence and the subsequent rescission of the contract based thereon are both invalid and I hold that the contract still subsists.

The Plaintiff prays by way of relief an order for rescission based upon the Defendants non compliance with the terms of the contract. Having regard to my finding as to the construction to be placed upon the terms of payment the relief sought must be denied. The declaration that Defendants have forfeited the sum of \$5,000.00 paid as a deposit in respect of the sale of the said premises is also refused. The claims in respect of damages for breach of contract and mesne profits suffer the same fate.

There is a further claim by the Plaintiff for damages for waste. In support of this claim the Plaintiff relied upon the evidence of Mrs. Beverly Phang Sang a daughter-in-law of

the Plaintiff who stated that the house which is situated on Lot One was built by her husband on lands owned by the Plaintiff. The land had been given to her husband and herself but it had not yet been formally transferred to them. It is against that background that the witness testified of having visited the premises some three months before the date of her evidence and observing the premises^{to} in a horrible condition. Put briefly the house and grounds had been wrecked by the Defendants. She estimated that it would require approximately \$25,000.00 to restore the house and premises its once palatial state. When she was exposed to the search light of cross examination she quickly lost her composure and confidence. She became uncertain about the time she last visited the premises. She was not sure whether it was in 1977 or 1979 that she migrated to the United States of America. She was unable to recall when her husband ceased to occupy the house. It was only when she was confronted with the embarrassment of her husband's conviction and imprisonment in Florida in 1977 for the possession of ganja that her memory was resuscitated. It is even more interesting to note that Mrs. Phang Sang never entered the house at all. She made her observations by peeping through windows and doors. To be candid I was not impressed with Mrs. Phang Sang. Her demeanour suggested that she was a desperate woman determined to recover a valuable piece of real estate at all cost. Even if I had found that the Defendants were in breach of the contract I would not have made any award for waste, as Mrs. Phang Sang is not in my view a person upon whose testimony I ought to rely. It is patently clear that the witness and her husband migrated in 1977 and left the house locked up during which time the house fell into disrepair due to lack of maintenance. I am further satisfied that when the Defendants entered into

possession that Mr. Sudeall took steps to salvage the situation.

I propose to deal with the Plaintiff's claim for "an immediate order for possession" along with the Defendants' claim for Specific Performande.

"The remedy of Specific Performance is special and extraordinary in its character and the court has a discretion to grant it or to leave the parties to their rights at law. The discretion is, however, not an arbitrary or capricious discretion, it is a discretion to be exercised on fixed principles in accordance with previous authorities. The judge must exercise his discretion in a judicial manner. If the contract is valid in form and has been made between competent parties and is unobjectionable in its nature and circumstances, specific performance is in effect granted as of course, even though the judge may think it involves hardship. The existence of a valid contract is not in itself enough to bring about the interference of the court, the conduct of the Plaintiff, such as delay, acquiescence, breach on his part or some other circumstance outside the contract may render it inequitable to enforce it or the contract itself may, for example, on the ground of misdescription, be such that the court will refuse to enforce it". (See Halsbury's Laws of England 3rd Edition Volume 36 paragraph 359.)

The Plaintiff contended that on any view of the case Specific Performance should not be granted to the Defendants for reasons that the Defendants repudiated the contract. As to repudiation by the Defendants that issue has already been determined in favour of the Defendants. ~~Notwithstanding, the court~~ in exercise of its discretion must examine the evidence to ascertain if there is anything which would militate against the grant of this equitable remedy to the Defendants. It was further urged by the Plaintiff that the failure of the Defendants to sign and return the transfer

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to the Plaintiff's Attorneys-at-Law operated to delay the registration of the title. In my view, even if this contention is sound, for delay to operate as a bar to the grant of Specific Performance the delay must be such as is capable of being construed as amounting to an abandonment of the contract. Delay per se is not a bar to a claim for Specific Performance if the party seeking same has been in substantial possession of the benefits under the contract and is merely claiming the completion of the legal estate or if the delay is due to negotiations between the parties on the question in dispute nor can the benefit of delay be claimed by the party causing it by reason of improper objections taken by him. In Fry's on Specific Performance (6th Edition) paragraph 1110 reads:

"Where the contract is substantially executed, and the Plaintiff is in possession of the property and has got the equitable estate, so that the object of his action is only to clothe himself with the legal estate, time either will not run at all as laches to debar the Plaintiff from his right, or it will be looked at less narrowly by the court".

On analysis of the evidence I take the view that there is nothing in the conduct of the Defendants which could properly deny them ^{of your ple} the ~~favourable exercise~~ of the court's discretion. The primary cause of the delay in completion, was occasioned by the Plaintiff's interpretation of the terms of payment and the negotiations which ensued therefrom. The Defendants were at all times ready, willing and able to complete.

Finally it must be considered whether damages would be an adequate remedy. From the nature of the agreement, the tremendous increase in the value of real estate and the surrounding circumstances of the transaction it is my considered opinion that damages would not be an adequate remedy herein.

There will therefore be Judgment for the Defendants on the claim and counter claim.

It is hereby further decreed that the Plaintiff shall specifically perform the contract entered into with the Defendants on the 30th day of March 1979. The Defendants shall forthwith pay over to their Attorneys-at-Law the sum of \$45,000.00 being the balance of the purchase money and in addition thereto such amount to cover the Defendants half costs of obtaining title. The Defendants half costs to be paid over to the Plaintiff's Attorneys-at-Law immediately upon receipt of same whilst the balance of the purchase price is to be held in escrow and paid over to the Plaintiff in exchange for a registered title. The Defendants' Attorneys-at-Law shall inform the Plaintiff's Attorneys-at-Law as soon as he is in possession of the balance of the purchase money whereupon the Plaintiff's shall take all reasonable steps to procure a registered title in the names of the Defendants within a period of three months from the date hereof.

Costs to the Defendants to be taxed if not agreed.