JUDGMENT

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. E111/1982

BETWEEN	**ANTHONY SIMMONS**	**1ST CLAIMANT**
AND	**SANDRA SIMMONS**	**2ND CLAIMANT**
AND	**MARINO SAKHNOR (EXECUTRIX FOR ESTATE OF BERTRAM WATKIS)**	**1ST DEFENDANT**
AND	**JANICE WATKIS**	**2ND DEFENDANT**
AND	**EDITH DESNOES (EXECUTRIX FOR ESTATE GEORGE DESNOES)**	**3RD DEFENDANT**

Mrs. Jacqueline Samuels-Brown and Ms. Tamika Jordan for the 1st Claimant.

Mr. Conrad George and Ms. Latoya Boyd instructed by Hart Muirhead Fatta for the 2nd Claimant.

Mr. Christopher Dunkley and Ms. Jodi-Ann Maxwell instructed by Phillipson Partners for the 1st Defendant.

Heard : 28th, 29th, 30th April 2010, 5th and 14th April 2011.

RETRIAL-PRINCIPLES INVOLVED-WHETHER RES JUDICATA APPLICABLE- CLAIM FOR SPECIFIC PERFORMANCE- DAMAGES IN LIEU OF SPECIFIC PERFORMANCE- WHEN IS IT APPROPRIATE TO ORDER-STUMBLING BLOCKS TO SPECIFIC PERFORMANCE- WHETHER DATE FOR ASSESSMENT OF DAMAGES IS DATE OF BREACH OF CONTRACT OR DATE OF JUDGMENT- ROLL BACK OF DATE OF ASSESSMENT TO TAKE ACCOUNT OF DELAY

Mangatal J:

1. This claim involves an Agreement for Sale of Land dated 17th December 1980 in respect of property forming part of Lot 101 Belgrade Heights, Saint Andrew, registered at Volume 1057 Folio 522 of the Register Book of Titles. The Claimants are seeking the remedies of specific performance and/or damages.
2. The matter has had quite a history which at a later stage I will attempt to summarize. On the last day of hearing evidence, in accordance with applications made, I granted permission to the Claimants to file and serve Amended Statements of Case by the 4th of May 2010. I also granted permission for the First Defendant to file an Amended Defence, if so advised, by the 10th of May 2010. I ordered that written closing submissions were to be filed and served in place of oral submissions, along with copies of any authorities relied upon, by the 4th of June 2010. The parties have all filed Amended Statements of Case, Submissions and Authorities. The late filing of the 1st Defendant's Submissions and Authorities on the 11th June 2010 is allowed to stand.
3. This matter arose for retrial some 28 years after the Writ of Summons and the Statement of Claim were filed on June 23, 1982. I am told by the Attorneys that the Supreme Court file has been misplaced upon a number of occasions. They have had to assist in reconstructing the file several times. All of the exhibits which were admitted in the first trial have not been located. This lapse of time has presented other challenges. I have done my best to grapple with this plethora of problems.
4. There have been numerous interlocutory applications and court decisions. One of the most well-known of these amongst civil litigators is that involving an application for a mareva injunction, (under the current Civil Procedure Rules, 2002 called "freezing orders").

5. The first trial lasted from April 15- 26, 1991. Ellis J. on May 7, 1992 delivered judgment in favour of the Claimants against the 1st and 3rd Defendants for damages in lieu of specific performance in the sum of $4,500,000.00. The 1st and 3rd Defendants were also ordered to return the deposit of $28,500.00 plus interest. Judgment was in favour of the Second Defendant against the Claimants. Costs were awarded to the successful parties.
6. At the first trial, the Claimants, who are named as purchasers in the Agreement for Sale, gave evidence along with two witnesses called on their behalf, namely Noel Foster, now deceased, who had in his possession at the time of the sale the keys to the premises, and Mr. Dennis Chin, realtor.
7. Mr. Bertram Watkis, now deceased, was and is registered on the Title along with his wife the Second Defendant Janice Watkis. Mr. Watkis gave evidence at the first trial. Although represented at the trial, the Second Defendant, did not elect to give evidence, although there was cross-examination by Counsel on her behalf. At the time of the earlier trial, Mr. Desnoes, the Third Defendant was represented by an Administrator Ad litem, the Court having been informed that Mr. Desnoes was suffering from a mental condition that made his appearance impossible.
8. Mr. Watkis appealed the decision of Ellis J., and the Claimants cross-appealed seeking specific performance of the Agreement for Sale. By a majority, the Court of Appeal (Carey, Forte J.J.A and Wolfe J.A. dissenting) decided that a retrial was necessary in the interests of justice.
9. The Claim then was, as it is now, for enforcement of the Agreement for Sale which was signed by the Claimants as purchasers, on the one hand, and by Mr. Desnoes allegedly on behalf of Mr. Watkis on the other hand. The Claimants seek specific performance of this Agreement and /or damages and interest. Alternatively that as a

Tenant-in-Common in Equity, Mr. Watkis should transfer his half share of the premises to the Claimants for half the purchase price, and/or damages in the sum of $134,729,407.30 and further damages in respect of continuing losses.

10. The entire property registered at Volume 1057 Folio 522 contains a residential house and approximately 11.8 acres of land. The subject matter of the Agreement for Sale was the residential house and 6 acres of land most proximate to it. The Agreement was subject to the condition that subdivision approval would have to be obtained.
11. As regards Mr. Desnoes, both Claimants have elected not to proceed against him this time around. The 1st Claimant has however filed a Notice of Intention to Rely upon Affidavit evidence of George Desnoes provided at an earlier stage in the proceedings. In a further hearing which I asked the parties to attend on the 5th of April this year, it was clarified that the Affidavits of Mr. Desnoes were not in fact part of the evidence placed before me at the retrial. In any event, the Court of Appeal made it quite clear that the evidence of Mr. Desnoes could not be used against Mr. Watkis in determining what authority, if any, Mr. Watkis had conferred upon Mr. Desnoes. At the hearing on the 5th, it was also clarified that the Affidavit of Bertram Watkis filed May 30th 2000, alluded to by Mr. Dunkley in his Closing Submissions, was not part of the evidence in the retrial.
12. The Court of Appeal did not say that the 2nd Defendant was no longer a party to this matter. Ellis J. had dismissed the action as it relates to her, and this finding was not expressly disturbed. Nor did the Second Defendant take an active part in the Appeal.
13. The parties expressly agreed, after I raised the issue, that there is no question of liability on the part of the Second Defendant for me to determine and that no issue of law arises in relation to her. It was from the start Mr. Dunkley's position that the Second Defendant was not now involved in the trial. I raised the issue because in my view the

manner in which the case had proceeded and the state of the pleadings made it unclear whether the Claimants were proceeding against the Second Defendant. The Statements of Facts and Issues prepared for the extensive pre-trial review which I conducted in January 2010 made no mention whatsoever of the Court being called upon to adjudicate on liability in relation to the Second Defendant. Indeed, on the first day of trial Mrs. McIntosh-Bryce, Attorney-at-law indicated that whilst she had received notice of the matter, and had acted for Mrs. Watkis in another matter, (the details of which I can't recall being given) she had no instructions in relation to this Suit.

14. However, the 1st Claimants' Attorneys-at-Law appear to have reversed their position in their closing submissions where they say that they are asking for judgment against the Second Defendant. I am not prepared to deal with a claim against the Second Defendant. In any event, it is precisely because there was much initial argument before me as to whether the Second Defendant was at this stage a party in this trial that the Attorneys agreed their position. In fact, even at the pre-trial review I was assured by the parties that they were not proceeding against the Second Defendant at this time. The parties have the right to choose who they will proceed against. An indication in that regard must surely be something that the Court can rely on. The premise upon which the trial proceeded was that it did not involve the Court in considering liability against the Second Defendant. It cannot in my view be fair or permissible to now unilaterally and with hindsight, reverse that position at the stage of closing submissions, particularly having regard to the fact that the Further Amended Statements of Case referring to a Marital Settlement Agreement between Mr. Watkis and the Second Defendant were not served on the Second Defendant or her representative prior to trial. That would be to unravel the entire retrial of this 28 year old case which took place before me and would amount to a colossal waste of time.

15. Mr. Desnoes died before judgment was delivered in the first trial and Mr. Watkis died on or about the 21st of December 2000. Ms. Marino Sakhno, was the executor to whom Probate of Mr. Watkis' estate was granted in 2004.
16. On the 13th April 2010 an order was made that Marinha Sackno (Executrix in the Estate of Bertram Watkis) be substituted for the 1st Defendant herein, and also, that Edith Desnoes, Executrix of the Estate of George Desnoes, be substituted for George Desnoes, deceased.
17. It is important to have an understanding of precisely what is involved in this retrial. On the first day of trial, Counsel for all the parties were agreed as to what they considered to be the main issues before me.
18. The issues identified were these:
    (i) Whether or not Mr. Desnoes had the authority to act as Mr. Watkis' agent in relation to the sale of his property, in particular, the signing of the Agreement on his behalf;
    (ii) Alternatively, if there was no original agency, whether or not Mr. Watkis subsequently ratified the acts or purported agency by Mr. Desnoes;
    (iii) The applicability, and legal significance of, the Marital Settlement Agreement, and its factual interpretation by Kent Wheeler's Affidavit, an Attorney-at –Law licensed to practice in the State of Florida.
19. Interestingly, in the Closing Submissions filed June 11 2010, the First Defendant's Attorneys-at-Law to my mind, appear to have "back-pedaled" somewhat, see paragraphs 2, 3, 9- 13.
20. Having perused the Court of Appeal Judgment in detail, I am of the view, and was at the time of Counsels' announcement of the same view, that these agreed issues are, broadly speaking, the issues required to be determined at this retrial. This is in addition to the overarching requirement of assessing the credibility of the parties. Issues (i) and (ii) were live before Ellis J. as between the Claimants and

Mr. Watkis. The retrial is a new trial. However, in this trial, neither the Second Defendant nor Mr. Desnoes were proceeded against by the Claimants. Whilst I agree with Mr. Dunkley that the doctrine of res judicata cannot be waived, I disagree with his application of the doctrine to the relevant facts. In my judgment, whilst this Court is bound by such legal analysis as was undertaken by the Court of Appeal, it is clear to me that the Court of Appeal did not at all constrain the Claimants to "eliciting new evidence as to the 1st Defendant giving prior authority to the Third Defendant." as submitted by Mr. Dunkley. It is in my view open to this Court to find, on any of the evidence elicited in this trial, whether or not it was already in existence and elicited from Mr. Watkis at the first trial, whether with or without combination with other evidence, that Mr. Watkis gave prior authority to Mr. Desnoes. I disagree with Mr. Dunkley that the only primary issue before the Court at this retrial is ratification. **Bobolas v. Economist Newspaper Ltd.** [1987] 1 W,L,R, 1101, at 1105, is authority for the proposition that the issues decided in the first trial are not res judicata and that the second trial is wholly independent of the first trial.

21. There is in addition issue (iii) which is concerned with the Marital Settlement Agreement entered into between Mr. Watkis and the Second Defendant in 1986, and forming part of matrimonial proceedings in Florida.

OTHER ISSUES

22. In the event that I find in favour of the Claimants, an additional issue that would arise is the nature of the remedy to which they would be entitled. Would justice best be served by making a decree of specific performance or by an award of damages?
23. If it is damages that would do justice between the parties, what is the correct way and time at which to measure the damages, and is it on the basis of loss of bargain.

NOTES OF EVIDENCE AT FIRST TRIAL

24. Originally it was the Attorney-at Law for Mr Watkis who alone wished the Notes of Evidence of the first Trial to be admitted in evidence. However, by consent, the Notes of Evidence of the first trial, and the Exhibits entered therein (at any rate, those that were located) were tendered in evidence at this retrial. In discussing the status of this evidence with Counsel, all were agreed that such evidence would really constitute hearsay evidence in relation to the instant trial. I will discuss the significance of this factor further, since of course it means that in this trial, the Claimants have not had the opportunity to cross-examine the deceased Mr. Watkis. Nor have I had the opportunity to assess his demeanour and countenance while giving evidence, often times a most useful tool in assessing credibility. I do therefore feel quite handicapped in approaching the task of trying this matter some 28 years after it was originally filed, having regard to the circumstances heralded by the passage of time. I will however try to do my best to arrive at the most just resolution of the matter in the circumstances.

25. It was also agreed by the parties, that all documents attached to Witness Statements were agreed and to be admitted as exhibits in this trial.

The Claimants' Case

26. It is the Claimants' evidence that having indicated an interest in purchasing a home in which to live, realtor Mr. Dennis Chin, introduced them to the property. On the 16th and 17th of December 1980 they attended the property along with Mr. Chin. Mr. Foster, the caretaker opened up the premises for them. The Claimants indicated their interest in purchasing the premises. Mr. Chin subsequently took them to the offices of Mr. George Desnoes, the 3rd Defendant where Mr. Desnoes said that he was expecting them, having spoken to Mr. Watkis

the previous night. Mr Desnoes finalized a sale price of $285,000.00, drafted an Agreement for Sale, and signed the Agreement in the section provided for "vendor". On the Claimants' evidence, from the outset Mr. Desnoes declared himself as having the authority of the owner, Mr. Watkis. The 2nd Claimant states that before they signed the Agreement for Sale she asked Mr. Desnoes who would sign for the vendor. Mr. Desnoes' response was that he had authority to sign for Mr. Watkis and that she was not to worry as he had been looking after Mr. Watkis' affairs for more than 15 years. After the Claimants signed the Agreement dated 17th December 1980 as Purchasers and Mr. Desnoes signed as vendor, the Claimants paid Mr. Desnoes the deposit of $28,500.00. The Claimants indicated in evidence at the first trial that they planned to raise the balance purchase price by way of mortgage.

27. At the time of signing the Claimants did not see the name Janice Watkis on the document and Mr. Desnoes did not mention her name. The only name on the document in the section for vendor was "BERTRAM ARNOLD WATKIS".

28. On Mr. Chin's evidence, he operated on the authority of Mr. Watkis, having spoken directly to him on the 16th December 1980 and informed him of the prospective purchasers.

29. Further, on the Claimants' case, Mr. Watkis spoke to the 2nd Claimant by telephone. Subsequently by pre-arrangement the 2nd Claimant met with Mr. Watkis on the 4th February 1981 at the property to discuss early possession and the purchase of the furniture in the home. Mr. Watkis then offered the 2nd Claimant the additional 5 acres of land adjoining the property and which forms a part of the parcel of land contained in the registered title. The 2nd Claimant says that Mr. Watkis gave her a list of appliances he wished to sell and showed her around the property. Mr. Watkis discussed the sale of land in addition to the house and land she was already buying, making a total of 11 1/2 acres of land. He said that if she bought all this and the furniture for an

increased total of $500,000.00, he would let her have early possession at no extra cost. She indicated that she would have to discuss it with her husband, the 1st Claimant, who was not in Jamaica at the time.

30. The 2nd Claimant invited Mr. Watkis to dinner on her husband's return. Mr. Watkis said that he had to go out of town but would call her on his return to Kingston.

31. Mr. Watkis did not call and so the 2nd Claimant called him instead. Mr. Watkis told her that he had not called because he did not know how to tell her the sad news. The 2nd Claimant asked "What sad news?" while her husband picked up the extension phone. Mr. Watkis indicated that his wife did not wish to sell the property anymore. He said that she had heard how well things were doing in Jamaica after the election and wanted to come home. The 2nd Claimant asked him what the sale of the property had to do with his wife. Mr. Watkis said that he was a joint owner of the property with his wife. The 2nd Claimant's response was that noone had told herself and the 1st Claimant of this joint ownership . Further, that it was too late for his wife to change her mind because the Agreement for Sale was already signed, the deposit was paid and completion was set for 31st March 1981.

32. Up until February of 1981 no one advised the Claimants that the property was jointly owned by Mr. and Mrs. Watkis. The Claimants decided to get legal advice and went to their Attorney-at-Law Edward Ashenheim the next morning. The Agreement for Sale in fact had a clause in it that stated that the Claimants, the purchasers, were represented by Mr. Edward Ashenheim. However, in cross-examination the 1st Claimant stated that at the time of signing the Agreement for Sale Mr. Ashenheim was not the Claimants' Attorney-at-Law. He stated that at the time of the signing of the Agreement Mr. Desnoes was their lawyer. The Claimants were, on meeting with Mr. Ashenheim, shown a copy of the Registered Title to Lot 101 Belgrade Heights. The Title revealed that it was owned by Mr. Watkis and the

2nd Defendant as joint tenants, and that Mr. Desnoes had in fact been a previous owner.

33. Under cover of letter dated February 24, 1981, Mr. Desnoes returned to the Claimants' Attorneys a cheque in the amount of $28,500.00, representing the deposit that the Claimants had paid.
34. The cheque was subsequently returned by the Claimants' Attorneys under cover of letter dated February 26, 1981 in which it was stated that the Claimants considered Mr. Watkis bound by the Agreement. In addition, by letter dated 18th March 1981, the Claimants indicated that they were ready, willing and able to complete. The Claimants also lodged a caveat on the Title to Lot 101 to protect their interest.
35. Expecting to have the purchase completed by March 31, 1981, as set out in the Agreement for Sale, and to move into the house, the Claimants gave notice at the premises they were renting, that they would vacate by March 31 1981. When the notice expired, the Claimants had to rent other premises. They also tried to find alternative premises to purchase, but they say that they could not afford the prices as property values had escalated tremendously.
36. The Claimants decided to sue and this Suit was filed on June 23, 1982.
37. According to the Claimants, at no time during the first trial did Mr. Watkis make reference to there being a Settlement Agreement between himself and his wife. Further, his defence was put forward on the basis that the Belgrade property was jointly owned by himself and Mrs. Watkis in all respects, or alternatively, that the beneficial interest belonged to Mrs. Watkis. Indeed, Mr. Watkis during the trial in examination –in-chief spoke of Mrs. Watkis as still being his wife. It was only in cross-examination that he then admitted to his divorced status.
38. The 1st Claimant states that after the judgment was delivered , he made contact with several Attorneys in Florida and finally found a Mr. Kent Wheeler, an attorney who carried out searches and enquiries in relation

to the Watkis' divorce and its terms. Mr. Wheeler subsequently provided the 1st Claimant with photocopies of the Marital Settlement Agreement and Final Judgment .

39. The Marital Settlement Agreement , part of Exhibit 3 in this trial, has the following very interesting provisions:

> ***6. <u>EQUITABLE DISTRIBUTION AND LUMP SUM ALIMONY</u>***
>
> ***A. <u>LUMP SUM ALIMONY</u>*** *: Husband shall pay the Wife Lump Sum Alimony as a property settlement in the total sum of FIVE HUNDRED THOUSAND ($500,000.00) DOLLARS. This obligation shall survive the death of either party and shall be specifically enforceable against the Husband's estate and further, shall give rise to a cause of action on the part of the heirs or devises of the Wife. …..*
>
> *The aforementioned Lump Sum Alimony in the amount of FIVE HUNDRED THOUSAND ($500,000.00) DOLLARS shall be paid in full by the Husband to the Wife within seven (7) years of the execution of this Agreement. However, the Husband shall pay to the Wife no less that TWENTY THOUSAND ($20,000) DOLLARS per year during each calendar year, commencing with the year of the execution of this Agreement. In addition, the Wife shall receive all of the proceeds which may be collected upon a sale of the Belgrade (Kingston, Jamaica) house and the receipt of the proceeds shall likewise count towards a reduction of the sum of FIVE HUNDRED THOUSAND ($500,000.00) DOLLARS to be paid by the Husband to the Wife.*
>
> ***B. <u>REAL PROPERTY :</u>*** *The Wife is the owner of the following described parcels of real property, to wit:*
>
> ***…****..2130 North 54 Avenue, Hollywood, Florida*
>
> *<u>And:</u>*
>
> *….. 2003 North 46th Avenue, Hollywood, Florida*

The Husband hereby waives any right, title and interest he may have in said parcels of property of real property to the Wife. The Wife agrees to indemnify and hold the Husband harmless in connection with any and all liabilities incurred in connection with said parcels of real property.

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

*….**...***

21. <u>BINDING EFFECT</u>

Except as otherwise stated herein, all of the provisions of this Agreement shall be binding upon the respective heirs, next of kin, executors and administrators of the parties.

……

23. <u>SURVIVAL OF AGREEMENT</u>

This Agreement shall survive any Final Judgment of Dissolution of Marriage that may be entered by a court of competent jurisdiction and shall be forever binding on the parties.

(Emphasis mine).

40. The 1st Claimant indicates that the findings of Mr. Wheeler were put before the Court of Appeal as fresh evidence as an exhibit to an Affidavit sworn to by him.

41. The majority of the Court of Appeal did not adjudicate on this fresh evidence. This Marital Settlement Agreement and the opinion of Mr. Wheeler if relevant, relate to the issue whether, if the Claimants succeed, they are entitled to the remedy of specific performance. This is because a Court of Equity can, and does, take account of the possibility of performance as at the date that the proposed order is made, or is to operate-**Spry on Equitable Remedies**, 6th Edition, at page 132.

42. After argument, I admitted into evidence as Exhibits 1A, 1B and 1C respectively a Caveat, Statutory Declaration filed with the Registrar of Titles on behalf of Attorney-at-Law Carol Pickersgill dated 28th January 2004, and Agreement for Sale dated March 1991. In this Agreement Mr. Watkis was, in March 1991, contracting to sell to Mrs. Pickersgill the property registered at Volume 1057 Folio 522, as well as property registered at Volume 1057 Folios 354 and 355 for a total purchase price of $230,000. The Agreement for Sale named Mr. Watkis alone as vendor.

43. Mr. Dunkley on behalf of the First Defendant had objected on the grounds of relevancy and had submitted that the Caveat and Agreement for Sale had not existed at the time of the Agreement between the Claimants and Mr. Watkis in 1981 and therefore it could not be appropriate to use these documents to impute a certain disposition to Mr. Watkis in 1981. My ruling was that it was relevant in that it goes to the issue of the manner in which Mr. Watkis dealt with the property registered at Volume 1057 Folio 522 which was in the joint names of himself and his wife, and which he claimed as part of his Defence in this case, to have transferred to his wife previously. In

addition, at the time of giving his evidence in April 1991, Mr. Watkis would have been stating the position as he did, i.e. that the property had been transferred to his wife from 1978, a mere one month after entering into this contract to sell Mrs. Pickersgill the whole property by himself. This also took place without any mention whatsoever by Mr. Watkis at the trial, of the 1986 Marital Settlement Agreement. In any event and in addition, I was of the view that all activity in respect of the subject property is relevant as regards the issues before the Court, in particular what remedies are available to the Claimants if they succeed.

44. The Claimants also led evidence from Mr. Mervyn Down, a valuator who is the Director of Valuations at D.C.Tavares & Finson Realty Ltd. The Valuation Report prepared by him and dated March 9th 2010 was admitted in evidence as Exhibit 4. Mr. Down valued the entire property of 11.8 acres at a market value of $170,000,000, with a forced sale value of $135,000,000. He explained the process by which he used this valuation of the entire property to arrive at the value of the land and residence the subject of the Agreement of Sale, being in respect of 6 acres of the land. This he valued at in the region of $120,000,000-$125,000,000 with the house. He indicated that the forced sale value for the 6 acres with house would be in the region of $95,000,000-$100,000,000.

THE FIRST DEFENDANT'S CASE

45. As indicated before, the parties by Consent agreed that the Notes of Evidence at the first trial, were to be admitted into evidence at this trial. I note that Mr. Dunkley refers to the Court's admission of the evidence of Mr. Watkis as being an order that the First defendant could rely upon that evidence as his examination-in-chief at this trial. That is not quite the same thing. I only allowed the evidence, including the cross-examination at the First trial, to be admitted as hearsay evidence.

I do not think it could properly be said that his cross-examination at the first trial forms part of his examination-in-chief at this trial.

46. Mr. Dunkley on behalf of the First Defendant indicated that he would be relying upon the Notes of Evidence and all the exhibits and his cross-examination of the Claimants and their witnesses at the trial. There was therefore no viva voce evidence presented by or on behalf of Mr. Watkis at this trial.

47. In the Amended Defence of the First Defendant, filed on the 11th of May, 2010, it is pleaded that Mr. Watkis was at all material times registered as joint tenant with the Second Defendant of the property comprised in Certificate of Title registered at Volume 1057 Folio 522 of the Register Book of Titles. Further, that the Second Defendant is the beneficial owner of the property in that in or about the month of December 1978, Mr. Watkis executed a transfer of the property to her. It is denied that Mr. Desnoes was the agent of Mr. Watkis and it is contended that Mr. Desnoes had no authority to act as he did. Mr. Watkis' Defence avers that he also did not ratify the acts of Mr. Desnoes and had no intention of so doing.

48. As regards the Marital Settlement Agreement, whilst Mr. Watkis admits that he and the Second Defendant executed a Marital Settlement Agreement in or about 1986, he states that the Duplicate Certificate of Title for the property at issue was never transferred and remained in the names of Mr. Watkis and the Second Defendant. The Defence goes on to make a number of pleas, which are really law, and not facts.

49. In the 1991 trial Mr. Watkis in examination in chief, stated that he was a real estate developer for 41 years. He had known Mr. Desnoes for nearly forty years, personally as a lawyer and that Mr. Desnoes and other members of his firm had done legal work for him over that time. Mr. Desnoes had prepared Agreements of Sale for prospective purchasers of property belonging to Mr. Watkis and he, Mr. Watkis

would instruct Mr. Desnoes as to the terms and prices and would see the Agreements which Mr. Watkis had to sign. He claimed that over the forty years he had never given Mr. Desnoes the authority to execute a sale agreement on his behalf.

50. There was a sale of the property registered at Volume 1057 Folio 552 to a "Coptic church" which was aborted. He knew Mr. Gordon Hay who was an insurance man who dabbled in real estate. He met Mr. Dennis Chin around that time with Mr. Hay which was about 1979. He said that he believes that a Sale Agreement was prepared by Mr. Desnoes in relation to the sale to the Coptic church but he didn't recall seeing it, and the sale did not go through.

51. He stated that after that contract he next saw Mr. Chin when the Coptic church was interested in another property in Westmoreland. The coptics did not end up buying. He thereafter saw Mr. Chin on the 4th February 1981. He says that he did not speak to Mr. Chin on the telephone over that period. In particular, he denied having a conversation with Mr. Chin on the 16th of December 1980. He claims that he was in Jamaica until the 11th December 1980 when he left for Miami and returned to Jamaica on the 25th of January 1981.

52. He had no conversation with Mr. Desnoes until February 1981. He had heard of the Simmons' interest in the property before he had come back to Jamaica. Mr. Hay had called him just before the new year. He saw Mr. Chin on the 4th of February 1981 when he brought the Second Claimant to Lot 101 Belgrade. This was the first time he was meeting the Second Claimant. The purpose for their meeting was because the Second Claimant was interested in buying carpets or rugs. He had a discussion with her but he handed her no list. The Second Claimant did not raise the question of early possession of Lot 101 and he did not know that at that time a contract had in fact already been drawn. He did not tell the Second Claimant that he would consider early possession if she would buy the additional acreage and furniture. He

suggested to her that she should buy the whole Lot for $ 1Million. He did not speak to the Second Claimant on the telephone and he did not tell her that his wife did not wish to sell the property anymore.

53. He attended at Mr. Desnoes' office on the 10th February 1981 and Mr. Desnoes showed him a signed contract. Mr. Desnoes had no authority to sign for him and he told him so. He claimed that he protested about the signing and reminded Mr. Desnoes that he Mr. Watkis did not own the property, that he had transferred the property to his wife, and that Mr. Desnoes had the Title and the transfer to register. The Transfer, which was admitted as Exhibit 9, is dated 5th December 1978.

54. Mr. Watkis claims that he discussed the matter with his wife because Mr. Desnoes had asked him to see if he could get his wife to agree. The 2nd defendant however indicated she was not going to sell. Mr. Watkis states that he did not promise to persuade the Second Defendant; he promised to talk it over with her. He told Mr. Desnoes that he was unable to get her consent.

55. Mr. Watkis was quite extensively cross-examined. Mr. Watkis indicated that he did a lot of transfers with Mr. Desnoes and Mr. Desnoes handled his conveyances and collections. He found him trustworthy.

56. He claimed that he was still attached to his wife. However, he now indicated that he was divorced from the Second Defendant since 1986. He claimed that the transfer was signed by both himself and his wife but not at the same time. Both Mr. Watkis' and the Second Defendant's signatures were witnessed by Mr. Desnoes. Mr. Watkis claims that he signed this transfer before the 5th December 1980 but he was not there when the Second Defendant signed in Florida. The document has one date on it and appears as if it was signed on the one date and witnessed on the one date but, Mr Watkis claimed that it was not so. Mr. Watkis claimed that there was no need to give written instructions to Mr. Desnoes regarding the stamping and registering, these were

verbally given. He was not accustomed to giving Mr. Desnoes verbal instructions in real estate matters. However, he probably did give him verbal instructions over the phone regarding the transfer to his wife. He and Mr. Desnoes had done business together and he had sold him the land at Lot 101 together with Mr. Selvin Lee. Mr. Desnoes had never assisted him in finding purchasers but had assisted him in relation to Agreements for Sale. He stated that he did all of his negotiations himself. Gordon Hay was not his agent but he would introduce purchasers to him. He would report to Mr. Watkis in Miami and then Mr. Watkis would phone Mr. Desnoes and instruct him what to do. However, Mr. Watkis claims that did not happen in this case.

57. Mr. Watkis said that he assumed that Mr. Chin was entitled to part of the commission. He left Mr. Hay and Mr. Chin with no instructions to sell but the place was still for sale in 1980. He was acting on his wife's behalf in relation to sale in 1980 and was still negotiating on her behalf. She knew what he was doing, and he claimed that he did not need her authority to negotiate, only needed it to complete.
58. Mr. Watkis did not tell the coptics of his wife's interest in the property because it did not matter.
59. Although Mr. Watkis claimed that the transfer was with Mr. Desnoes from 1978, he left no money for the stamping and registering of the Transfer. He also said that it was in 1980 that he reminded Mr. Desnoes about the document and between 1978 and 1981 he had no conversation with the Mr. Desnoes about the existence of the Transfer. However, Mr. Watkis denied a suggestion that the transfer was designed to defeat the Claimant's claim.
60. In 1978-79 land prices were depressed. He had "one foot here and one in Florida". He set up residence in Florida in 1978. The Second Defendant stayed there and he came to Jamaica. The onus of conducting business fell on him. He could not recall if the price quoted to the coptics for the house and 6 acres was $250,000 but $250,000 in

1978 might have been acceptable. $300,000 months later might have been acceptable. Elections were in October 1980 and changes in prices started a little before the elections. During the 1970's the Second Defendant did not want to come back; but after the election she did rethink returning.

61. Mr. Watkis denied that the reason that the contract did not go through was to get a higher price. He did not contract to sell Lot 101 to the Claimants. The value of the property was now J $4-5 M.
62. Mr. Watkis admitted that he knew Noel Foster and that he had given him the keys for Belgrade. It was he admitted true that he had told Mr. Foster to open the house when Mr. Gordon Hay told him to do so. He gave Gordon Hay authority to allow inspection by intended purchasers. He admits that he heard him say that he had in 1980 opened the house for the Claimants.
63. Mr. Hay had called him in December 1980 by telephone. He had Mr. Watkis's number to call if there were purchasers. Mr. Hay told him that he had a purchaser at an asking price of $300,000. Mr. Watkis claimed that he did not know in January that a contract had been signed regarding the purchase of Lot 101. He knew that the Claimants had been to Desnoes. He had obtained that information from Mr. Hay. When he saw the Second Claimant in February 1981, he knew she was one of the interested parties in the purchase. Mr. Watkis in cross-examination now said that he did have a discussion with the Second Claimant about sale of the residence and six acres. He knew she had signed a contract. He did not tell her the contract was no good as he did not sign and nor did he tell her that Mr. Desnoes had no authority to sign. He did not tell her that he did not approve the sale but he did tell her that he was not in agreement with the sale. He offered her the property in its entirety for $1 Million.
64. He viewed what Mr. Desnoes had done not as a betrayal of trust but as a mistake. He expected him to unravel this mistake. He did not

immediately change lawyers. Mr. Watkis admitted that it was not until 1982 that there was anything written to the Claimants on his behalf stating that Mr. Desnoes had no authority to act for him.

(i) Whether or not the 3rd Defendant had the authority to act as the 1st Defendant's agent in relation to the sale of his property, in particular, the signing of the agreement on his behalf.

The Law, including the guidance of the Court of Appeal

65. The majority in the Court of Appeal made it plain that the admission by Mr. Watkis that Mr. Desnoes had acted as his Attorney-at-Law in previous conveyancing transactions and rent collections, did not carry with it the necessary implication that Mr. Watkis had authorized Mr. Desnoes to sign contracts on his behalf-page 4 of the judgment per Carey J.A. Nor does the fact that an Attorney-at-Law is acting for a client in relation to a particular land sale by implication give the Attorney-at-Law authority to sign contracts or an agreement for sale on behalf of the client. See the judgment of Forte J.A. at page 11, the decision in **Gavaghan v. Edwards** [1962] 2 All E.R. 477 at 479, referred to by Carey J.A. at page 4, and the unreported local decision of **Barbara Grant v. Derrick Williams** SCCA 20/85, delivered June 25 1987, referred to at pages 3 and 12 of the Court of Appeal judgment.

66. It was also clear from the majority in the Court of Appeal's judgment that Mr. Desnoes' evidence that he was authorized by the First Defendant to sign the Agreement for Sale, whether in the form of what the Claimants state Mr. Desnoes said to them, or whether in terms of what evidence there is as to what Mr. Desnoes himself said, is not admissible in determining the case against Mr. Watkis, who had put the matter in issue by denying giving such authority-pages 5 and 7 of the judgments of Carey and Forte J.J.A.s respectively.

67. The Court made it clear that there had to be either direct or indirect evidence that Mr. Watkis had conferred upon Mr. Desnoes authority to sign the Agreement for Sale on his behalf. At page 3 of the judgment, Carey J.A. stated that "It was accepted on all hands that there was no direct evidence in this case that any such authority was conferred by Mr. Watkis upon Mr. Desnoes". In this retrial, it appears to me that the same obtains, i.e. that there is no direct evidence that any such authority was conferred.

68. Indeed, what the majority in the Court of Appeal indicated is that the case had to be retried mainly because the learned trial judge had failed to resolve a factual issue depending on the resolution of a conflict between the Second Claimant and Mr. Watkis as to the content and nature of the conversation which took place between them on the 4th of February 1981.

RESOLUTION OF CONFLICTS OF EVIDENCE AND FINDINGS OF FACT

69. I am cognisant of the fact that I have not had the opportunity to observe the demeanour of Mr. Watkis during this trial. I have also not had the benefit of seeing him tested by cross-examination, although I have been able to read the notes of cross-examination that took place at the first trial. These are matters that I remind myself of, and I must weigh them in the balance in determining credibility and in deciding on the facts of this case.

70. In my judgment, the Claimants were credible, forthright and honest witnesses. I also found Mr. Chin to be an honest and convincing witness. The Second Claimant gave her evidence as to the conversation which she says took place between herself and Mr. Watkis very convincingly and in my judgment, she was not shaken during cross-examination before me.

71. On the other hand, the evidence which Mr. Watkis gave at the First trial had glaring inconsistencies, and some of his contentions strained the limits of credibility. Although in his examination in chief, Mr. Watkis stated that when he met with the Second Claimant in February 1981 she did not raise the question of early possession and he did not know that a contract had in fact been drawn, in cross-examination he now said that he did have a discussion with Mrs. Simmons about sale of the residence and six acres. He contradicted himself when he said that he knew she had signed a contract regarding the house and 6 acres at Belgrade. He did not tell her the contract was no good as he did not sign and nor did he tell her that Mr. Desnoes had no authority to sign.
72. I find as a fact that Mr. Chin did speak to Mr. Watkis on the 16/12/80 on the telephone and indicated that he had found the Claimants as purchasers who would purchase for a price of $300,000. That Mr. Watkis approved Mr. Chin's suggestion that he take the Claimants to Mr. Desnoes. I am satisfied on a balance of probabilities that the Second Claimant met with Mr. Watkis on the property on the 4th of February 1981, Mr. Watkis pointed out the boundaries to her, and they walked around the 6 acres. I find as a fact that the Second Claimant raised the matter of early possession of the property. Further, that Mr. Watkis did say that since she had bought the property for $285,000 why didn't she buy the remainder along with the furniture for $215,000 (total $500,000) and that he would let her have early possession. I am also satisfied that the Second Claimant telephoned Mr. Watkis and he told her that he did not know how to break the "sad news" that his wife did not want to sell the property anymore. Further, that Mr. Watkis told the Second Claimant that his wife had heard how well things were doing in Jamaica after the elections, and that this accounted for her change of mind. In cross-examination Mr. Watkis admitted that it was not until 1982 that any written document was sent to the Claimants stating that Mr. Desnoes had no authority to act for

Mr. Watkis. If he had not authorised Mr. Desnoes to sign, I would have expected correspondence to that effect to have been forthcoming earlier. I do not however attach great weight to this last point.

73. It seems quite incredible that Mr. Watkis claims to have transferred the property to the Second Defendant in 1978, yet he was busily negotiating to sell the 6 acres and residence to the coptics in 1980. All this without telling them of the Second Defendant's interest in the property. Further, Mr. Watkis' credibility has been further eroded by the fact that he entered into an Agreement for Sale with Carol Pickersgill to sell the property to her in March 1991, on the eve of the trial. What interest would he have to sell or transfer to Ms. Pickersgill if he had indeed transferred the property to the Second Defendant from as far back as 1978? Why are the Agreements for Sale in his name alone? It seems to me that this alleged transfer to his wife, by Mr. Watkis, a real estate developer for over four decades, amounts to a "Transfer of convenience", floating around and prayed in aid only sometimes when it suited Mr. Watkis .

74. I am of the view that the evidence establishes by inference that Mr. Watkis was well aware of the Agreement for Sale and treated it in his discussions with the Second Claimant as being valid and effective. This is, as Forte J.A. foreshadowed at page 18 of the Court of Appeal's judgment, demonstrated by Mr. Watkis pointing out the boundaries, accepting that the Second Claimant had already bought the property for $285,000, and offering the remainder for sale, and granting early possession if this offer was accepted. In these circumstances I draw the reasonable inference that Mr. Watkis did authorize Mr. Desnoes to sign the Agreement for Sale on his behalf , and that he acquiesced in that signing of the agreement by Mr. Desnoes.

(ii) Alternatively, if there was no original agency, whether or not the 1st Defendant subsequently ratified the acts or purported agency by the 3rd Defendant;

75. In my judgment, this alternative is made out. I find that even if Mr. Watkis did not initially authorize Mr. Desnoes to sign the Agreement for Sale on his behalf, it is clear that he subsequently ratified or adopted it at a later date, certainly by the time he met with the Second Claimant on 4th of February 1981. He did so by indicating the boundaries and, accepting without objection or protest that the Claimants had already bought the property for $285,000. In addition, he went on to offer the remainder for sale and agreed to grant early possession if the offer to purchase the remainder of the property was accepted.

(iii) The applicability, and legal significance of, the Marital Settlement Agreement, and its factual interpretation by Kent Wheeler's Affidavit, an Attorney-at –Law licensed to practice in the State of Florida.

76. Without more, under the operation of the normal principles of land law, upon a joint tenant dying, the property by right of survivorship would pass automatically to the surviving joint tenant. Therefore, upon Mr. Watkis death in 2000, the property would, all things being equal, have become the sole property of the Second Defendant.

77. It may well be that the opinion of Mr. Wheeler is correct as to the Law applicable to this Agreement, in particular paragraph 6 thereof as being that "the wife gives up all her interest in and entitlement to the property itself, and retains an interest only in the proceeds of sale or a portion thereof, to the extent of any alimony payment outstanding at the time of such sale".

78. However, I am, I agree with Mr. Dunkley, not at liberty so to decide . This is because the Claimants have not elected to proceed against the Second Defendant, and did not amend their pleadings to allege this new turn and twist in the events of this convoluted, aged case until, in the case of the First Claimant after all of the evidence had been led in

the instant trial, and in the case of the Second Claimant, until April 20 2010. I am of the view that this affects my ability to grant specific performance at this time.

WHETHER CLAIMANTS ENTITLED TO SPECIFIC PERFORMANCE-WHETHER IT WOULD BE MORE JUST TO GRANT SPECIFIC PERFORMANCE THAN TO AWARD DAMAGES

79. The subject matter of the Agreement for Sale in respect of which the order for specific performance is sought is land. Land is property that has a fixed location and a special value, and ordinarily at least damages are not to be regarded as an adequate substitute for the right either to acquire or to dispose of an interest in it-**Spry on Equitable Remedies, 6th Edition** at page 61 and the cases there referred to . Also **Sudbrook Trading Estate Ltd. v. Eggleton and ors** [1983] 1A.C. 444 at 478 F-H, a decision of the House of Lords.

80. The learned authors of **Spry on Equitable Remedies, 6th Edition**, at pages 129-133, conduct a very interesting discussion on the interrelationship between specific performance and impossibility of performance. Further on at pages 289-292 the authors discuss Compensation and Abatement regarding Sale of Land, and at page 302, proceedings by the purchaser for specific performance. The discussion which I wish to refer to at page 129 commences by enunciating the principles involved where performance will only be possible if the consent of a third person is obtained. It is stated:

> *Page 129…Here an absolute order of specific performance might involve requiring the defendant to do something that in truth he cannot do. If a contractual obligation is itself conditional on the obtaining of consent, any order of specific performance should likewise be conditional, since until the consent has been obtained "that obligation has not yet arisen", though it may be found as a question of*

construction that the defendant has also undertaken to take the steps to obtain the consent, which in a proper case he may be compelled to do. A different analysis is appropriate where the contractual obligation in question is absolute and not conditional, so that there will be a breach of contract if it is not performed even although, for example, the failure to perform has arisen only because a necessary consent has not been obtained. But here also if at the hearing a substantial doubt arises as to the obtaining of the consent it may be appropriate that any order of specific performance should be drawn in such a way that the direction to the defendant to perform the term in question does not apply if the necessary consent is refused and performance is impossible. Indeed, whether the obligation of the defendant is absolute or conditional, if it is sufficiently clear that the appropriate consent will not be able to be obtained, no order of specific performance at all is made, and the parties are left to their other remedies. Conversely, if it is established that the required consent can be obtained it may be preferable that the material order be made unconditional. So, for example, it is not ordinarily necessary that the order of the court should be made conditional if the third person has already indicated his intention to consent. ….

Page 131…

It has sometimes been suggested that a defendant will not be permitted to rely upon impossibility of performance, as providing a defence to proceedings for specific enforcement, wherever that impossibility has been brought about by his own breach of contract or wrong. These suggestions are not, however, sound. For if an act cannot be performed the defendant will not be required to do what cannot be done, even though it is through his own acts or omissions that the obstacle in question has arisen….

81. Also at pages 302-304, the authors discuss "Proceedings by Purchaser" as follows:

> *PROCEEDINGS BY PURCHASER*
>
> *When proceedings are brought, not by the vendor, but by the purchaser, entirely different considerations apply. Here there is not the case of a party in breach attempting to force deficient performance on the other side; rather there is the case of the innocent party requiring the party in breach to perform at least such of his obligations as he can. Hence the balance of justice or injustice is commonly found to incline considerably more clearly towards the grant of specific performance. Indeed, in cases of this nature a purchaser is, in the absence of special discretionary considerations, granted specific performance with compensation even though the land or the interest therein that is in question is found to be substantially smaller or less valuable than that which the vendor has agreed to sell. This position was established by the time of Lord Eldon, who said that "if a man, having partial interests in an estate, chooses to enter into a contract, representing it, and agreeing to sell it, as his own, it is not competent to him afterwards to say, though he has valuable interests, he has not the entirety, and therefore the purchaser shall not have the benefit of his contract"; and he added, "For the purpose of this jurisdiction, the person contracting under those circumstances is bound by the assertion in his contract; and, if the vendee chooses to take as much as he can have, he has a right to that, and to an abatement; and the court will not hear the objection by the vendor, that the purchaser cannot have the whole." Lord Eldon appeared to suggest here that this rule arose through a kind of equitable estoppel, but in principle it appears to be preferable to rest it on more flexible equitable considerations. So if a party has agreed to do several things, and it appears eventually that he is able to do only some of them, generally it is not inequitable that he should be compelled at least to perform his obligations as far as is possible, unless special considerations are shown, such as hardship on*

> *his part, that are of such a nature that the grant of relief would be unjust or, as it is sometimes put, "highly unreasonable". Examples of this jurisdiction are found even when it appears that the area of land to be conveyed is very much less than that which was contracted to be sold, or when the vendor is able to provide, not an absolute interest, but a partial interest, such as that of a tenant in common or of a tenant for life or of a remainderman". Here, however, the knowledge of the parties at the time of entry into the contract that the vendor, or one of several vendors, may not be able to make out a complete title may be relevant, for it may appear, as a matter of construction of the contract, that there is a condition precedent to the rights of the purchaser, such as a condition that the agreement is to proceed only if a complete title is made out or if a third person joins in the sale.*

82. In my judgment, these authorities suggest that the fact that the Agreement had as a condition precedent, the condition as to subdivision approval so that the Claimants could acquire the land with the house thereon referred to in the Agreement, would not without more point in the direction away from an award for specific performance. This is because there is no evidence that Mr. Watkis ever attempted to obtain the requisite approval or took reasonable steps to do so. There is also no evidence that such approval could not in fact be obtained. However, because the approval would be dependent on the approval of the appropriate authority, and there is no evidence as to the likelihood or unlikelihood of such approval being obtained, then any order for specific performance would have to be, as referred to in Spry, a conditional order for specific performance.
83. In addition, I am of the view that the Agreement for Sale entered into by Mr. Watkis with Ms. Pickersgill could also not affect the Claimants' ability to obtain a decree of specific performance since that Agreement was entered into a decade after the Agreement for Sale to the Claimants.

84. In relation to the fact that the express agreement of the Second Claimant to the Agreement for Sale was not obtained by Mr. Watkis, in my judgment there was no genuine attempt by Mr. Watkis to obtain any consent from the Second Defendant. Indeed, he dealt with the property as if it was his own. I do not believe that Mr. Watkis was speaking the truth when he claimed that he had transferred this property to the Second Defendant in December 1978. Further, I accept the Second Claimant as a witness of truth and I believe and find as a fact that in their telephone conversation in February 1981 Mr. Watkis did tell her that his wife did not want to sell the property anymore. I accept that Mr. Watkis did volunteer that his wife had heard how well things were going in Jamaica after the election and that she wanted to come home. Mr. Watkis in cross-examination admitted that his wife had been interested in returning to Jamaica after the elections. This alleged lack of consent by the Second Defendant would not have the effect of denying the Claimants a decree of specific performance, even if the decree would have had to be conditional.

85. In the well known Text **McGregor on Damages**, 17th Edition, paragraph 22-009, in the Chapter discussing Sale of Land, the authors interestingly discuss the trend of rising land prices over time as being a form of consequential loss. It is stated, in discussing a number of authorities including **Wroth v. Tyler** [1974] Ch. 30 and **Malhotra v. Choudhury** [1979] 1 All E.R. 186 :

> ***22-009*** *The galloping inflation of the 1970s brought into sharp focus a new form of what is essentially consequential loss. As has been seen, for the normal measure the value of the land is taken, following general principle, at the time contractually fixed for completion, but such a measure could be grossly unfair to a buyer if prices had escalated between the contractual date for completion and the date of judgment in his action for damages, as the award he obtains will fall far short of giving him the means of acquiring an equivalent property. Of course*

he cannot complain of this if he ought to have acquired an equivalent property before the escalation of prices, but he may be able to show good reason why he did not do so. Thus if he brought a claim for specific performance in circumstances where he had a reasonable chance of obtaining such a decree but in the event was refused one and awarded damages instead, it would clearly be pointless for him to have acquired an equivalent property while he was awaiting the outcome of his specific performance suit. Again, prices might have already substantially increased between the making of the contract and the date fixed for its completion, and the buyer may not be in a position to raise the funds which even at that date he would require, in addition to those that he had earmarked for the transaction, to acquire an equivalent property. Both these points were available to the buyers in ***Wroth v. Tyler*** *–the claim for specific performance might well have succeeded, as there were possible ways of dealing with the seller's wife's rights under the Matrimonial Homes Act 1967 which constituted the stumbling block in the case, and the value of the property fixed for completion was already 25 per cent up on the contract price of £6,000, with the buyers, a young couple about to be married and buying their first house, having, to the seller's knowledge, no further financial resources-but it was the second point that was emphasised by Megarry J. in coming to the conclusion that a proper application of the general principle of compensation required that the normal measure be departed from and the value of £11,500, which the property had at the time of judgment, be taken rather than its £7,500 value at the time of breach. He then proceeded to award damages on such a basis not by a direct departure from the normal measure at common law but by invoking the equitable jurisdiction established by Lord Cairns' Act to grant damages in substitution for specific performance, being further of the view that a valuation at the time of judgment was not precluded, as being outside the contemplation of the parties, because, though a rise in house prices was contemplated, a rise of such dramatic proportions*

> *as in fact took place was not. Nonetheless there seems no good reason why similar damages should not be available at law in appropriate circumstances, and this had been accepted by higher authority in two cases where once again, before having had to turn to the damages remedy, a reasonable and proper attempt to compel the defendant specifically to perform had been made, namely in* ***Malhotra v.Choudhury*** *by the Court of Appeal, where however the valuation was moved back from the date of judgment by one year because of the buyer's delay in pursuing his claim….*

86. Section 48 of the **Judicature (Supreme Court) Act** speaks to this Court's power to concurrently administer law and equity as did the English Court of Chancery.

87. In my judgment, Mr. Watkis has clearly breached the contract to sell the property to the Claimants and he has been guilty of bad faith. As stated before I am not satisfied that he did make any efforts to persuade his wife as to the sale since he seems to have dealt with the property as if it was his own exclusively.

88. Whilst it does seem to me that the Claimants were themselves remiss in not having the Attorney-at-Law whose name appeared in the Agreement for Sale as representing them do the necessary Title checks before entering into the Agreement, I do not think that affects their right to have insisted on Mr. Watkis' fulfilment of that which he had contracted to do. In my judgment, the Claimants did have a reasonable prospect in this case of obtaining a decree of specific performance, save for a few "stumbling blocks". There may well have been possible ways of dealing with the fact that both the Second Defendant and Mr. Watkis' names appeared on the registered title, even if the decree would itself have had to have conditions attached to it, including for example that it would be conditional on subdivision approval being obtained. In those circumstances the Court could have given liberty to apply in order to allow for a reassessment of the situation if the

conditions could not be perfected. The evidence of the Claimants is also that they had intended to move into the house that they were buying. That finding other premises proved to be extremely difficult, as property values had increased tremendously. In fact, even between the date of making the contract for purchase price of $285,000(really $300,000 minus payment of realtor Mr. Chin's fee of $15,000), and the March date fixed for completion, prices appear to have substantially increased. The Claimants received a valuation from Noel Carby and Associates dated 10th February 1981 in which the market value of the property was appraised at $579,915.00.

89. In my judgment, for a variety of reasons, specific performance should not be ordered, conditional or otherwise, at this time though it was reasonable for the Claimants to pursue this remedy. This includes the fact that the Second Defendant has not been a party to this retrial and the property remains in her name legally, Mr. Watkis as a joint tenant having predeceased her. In relation to the Marital Settlement Agreement, it would seem to me that a Court would first have to render an opinion as to whether the effect of the Agreement is that Mr. Watkis is the beneficial owner of the subject property and that such a law suit would likely have to be at the instigation of Mr. Watkis, now his estate. I do not even know whether such a Law suit would have to be brought in the United States or whether it could be brought in Jamaica. Although I am of the view that there would be a real prospect of an argument succeeding and resulting in a declaration that the beneficial interest is that of Mr. Watkis, that outcome is uncertain, and so too is the question of whether any pre-conditions would be attached to such an order. There has also been no evidence of the obtaining, or the likelihood of obtaining subdivision approval. In short, there are many imponderables and conditionalities that do not favour the granting of the discretionary remedy of specific performance.

90. The reasoning of Megarry J. sitting as first instance judge in the English Chancery Court Division in **Wroth v. Tyler** [1973] 1 All E.R. 897, is apposite to this case. At pages 913 e-914 e, 915 f, and 923 h-j the learned judge conducts an excellent analysis of the doubts and difficulties that can be produced by a decree being made for specific performance. **Wroth v. Tyler** [1973] 1All E.R., 897, was referred to by Ellis J. in his judgment, and Megarry J.'s reasoning was adopted in **Malhotra v. Choudhury** , in particular at page 205. The cardinal principle of equity that the court should be slow to grant specific performance if any reasonable alternative exists was reinforced by Megarry J .

91. The Claimants had requested as an alternative relief that as a Tenant-in-Common in Equity, the Court order that the 1st Defendant should transfer his half share of the premises to the Claimants for half the purchase price. In my judgment, that would not be appropriate in this case for a number of reasons, including the fact that Mr. Watkis is now dead. More importantly, since the property the subject of this Agreement consists of a portion only of the land comprised in the Certificate of Title registered at Volume 1057 Folio 522, were the Court to grant this relief it would be ordering that the estate of Mr. Watkis transfer his portion or half share. But half share of what premises, since subdivision of the land and house covered under the Agreement for Sale, the six acres, has not yet been obtained? That would be a most cumbersome procedure which would create no end of difficulties for the Court in terms of supervision and the burden of determining complex or imprecisely defined, unclear obligations-see pages 103-109 of **Spry.** I note also that in In **Malhotra v. Choudhury** [1979] 1 All E.R. 186, neither the first instance court nor the English Court of Appeal were disposed to grant part specific performance-see pages 198 f-g, 199 c-e.

92. In my judgment, the Claimants ought to be granted damages in lieu of specific performance. I have found **Malhutra v. Choudhury** very useful in relation to the principles that should guide the Court in making an award of damages in this case. In particular, the decision points out that damages for loss of bargain, in appropriate circumstances, should, without more, be assessed as at the date of the judgment and not at the date of the breach of contract.

IN THE EVENT THAT DAMAGES ARE TO BE AWARDED, WHAT IS THE BASIS AND MEASURE

93. In **Malhotra v. Choudhury** [1979] 1 All E.R. 186, it was held that :

(i) The rule that where a vendor of land was unable to make a good title the damages recoverable by his purchaser for breach of the contract were limited to his expenses incurred in investigating title and did not include damages for the loss of his bargain was an exceptional rule which only applied if the vendor was unable, through no default of his own, to carry out his contractual duty to make a good title. To obtain the benefit of the rule the vendor was required to prove that he had used his best endeavours to make a good title. Bad faith on his part, even without actual fraud, was sufficient to exclude the rule, and unwillingness to use his best endeavours to make a good title constituted bad faith. The statement that the defendant's wife refused to consent to a sale did not indicate that the defendant had tried to persuade her to consent and, in the absence of any other evidence to that effect, it was to be inferred that the defendant had not used his best endeavours to persuade his wife to agree to the sale and he was therefore guilty of bad faith. It followed that the Plaintiff was entitled to substantial

damages….*Bain v. Fothergill [1874-80] All E.R. Rep 83* distinguished. …

(ii) Damages awarded in substitution for an order for specific performance of a contract of sale of real property were to be assessed by reference to the value of the property at the date of the judgment and not at the date of the breach of contract. However, as there had been delay by the Plaintiff since 1975 in bringing the proceedings to a conclusion, the date for valuing the property would be moved back one year from the date of the judgment in October 1977 to October 1976. …

WHETHER DELAY, AND IF SO, CONSEQUENCES THEREOF

94. In their submissions at pages 9-12 (inclusive) the First Claimants' Attorneys set out exhaustively what they have labelled a" chronology (which) records the delay and their causes from 1999 up to trial". That aspect of the submission closes with the contention that these delays are not attributable to the 1st Claimant and ought not to operate his detriment. In **Malhotra v. Choudhury** at page 207f-j, in dealing with the question of whether there had been delay on the part of the Claimant which the Court ought to take into account, Cummings-Bruce LJ had this to say:

> *I do not think at this juncture it is necessary for me (I certainly would be very reluctant to do it) to begin a careful examination of every step in the proceedings stating the dates of every affidavit or summons and exhibiting expressly the intervals of time that have passed before the next step in the action. Suffice it to say, the plaintiff undoubtedly was engulfed in tactical and legal problems of substantial difficulty, as is evidenced by the fact that the unfortunate plaintiff is now having the privilege of paying for a second appearance of his legal advisers in the Court of Appeal.*

> *Nonetheless, when all is said and done, it is unfair to the defendant that the deliberation with which the plaintiff moved from the middle of 1975 until he issued the present proceedings in January 1977 should be allowed to enhance the damage which the defendant has to pay the plaintiff if the price level of real property has risen during that period. For my part I would think that justice is done between them by holding that the plaintiff did not sufficiently mitigate his damage by proceeding with greater celerity in the various and difficult legal convolutions they had been forced to undergo. The right order is that, for purposes of valuation of Novar, and the loss sustained by the plaintiff by the failure of the defendant to honour the contract for sale, the terminal date by reason of delay should be moved back from 20th October 1977 to 20th October 1976. Therefore the task of the assessment of damages is to arrive at the value on 4th June 1974 and the value in October 1976 and to award the plaintiff as one of the items in his damages the difference between these two sums.*

95. I think that the words of Carey J.A. at page 7 are also apposite:

> *I must hold that he* (the judge) *abdicated his responsibilities. That is not the fault of the plaintiffs, nor the fault of the defendant, Mr. Watkis. <u>That failure should not favour one side rather than the other</u>.* (my emphasis).
>
> These words highlight yet another unique feature of this case in assessing how to deal with inflationary trends, i.e. the fact that it is a Court of Appeal ordered retrial not occasioned by the fault of any party.

96. This Court is not really able to decifer who was at fault throughout the many individual twists and turns of this matter over the approximately eighteen year period since the judgment in the first trial, or what relative weight to attach to any particular fault over that extended period. Cummings-Bruce L.J. was not prepared to embark on such a formidable exercise for a two year period (1975-1977) in **<u>Malhotra v.Choudury</u>**. I certainly do not plan to attempt such an exercise for the

approximately eighteen year period involved in this case between the respective trial and retrial dates, or alternatively periods from the 1994 decision of the Court of Appeal until this retrial, or indeed for any other relevant period of time. Further, the failure of adjudication the first time around should not favour either side over the other. Suffice it to say that it is quite probable, given the lapse of time, that both the Claimants and the First Defendant have from time to time been responsible for delay in one form or another and must all bear some portion of responsibility. Indeed, there seems to have been an inexplicable delay between the date of the Court of Appeal's judgment in 1994 and 1999, though there appears to have been arguments about costs ensuing. However, my broad assessment of the matter is that the First Defendant would be more at fault for the delay than the Claimants, including the fact that applications for adjournment of the retrial fixed during 1999-2000, were made by Mr. Watkis' Attorneys, albeit on account of his illness, and illness being a condition over which none of us have complete control.

97. In my judgment, as in **Malhotra v. Choudhury** the right order is that, for the purposes of valuing the subject property, and the loss sustained by the Claimants by the failure of Mr. Watkis to honour the Agreement for Sale, the terminal date by reason of delay attributable in my broad assessment to the Claimants, should be rolled back 5 years from the date of the trial, which is unfortunately approximately 6 years from the date of this judgment. The delay in delivering the judgment I sincerely regret, which was due to pressure of other work coupled with the sheer complexity of this matter.

98. I accept the evidence of Mr. Mervyn Down that as at March 2010 the subject property had a market value of $120,000,000 -$125,000,000 and a forced sale value of $95,000,000-$100,000,000. I thought that Mr. Down proved a very experienced and logical witness and no doubt the

Claimants may seek his assistance in respect of the assessment and valuation which I intend to order.

99. I am not prepared to consider any award with regard to the rent which the Claimants say they had to pay since, had they completed the purchase, they would have had to be making mortgage payments.

100. The matter should be fixed for assessment of damages at an early date convenient to the parties. The task of the assessment of damages will be to arrive at the value on 14th April 2005 and then to award the Claimants as damages the difference between the April 2005 value and the purchase price of $285,000 at the date of the Agreement for Sale. As the property has not been the subject of sub-division approval, it may be more appropriate to use the forced sale value rather than the market value. However, I express no final view on that and will leave that issue to be determined at the Assessment.

101. In **Wroth v. Tyler** , pages 922 c- 923 h, the evidence was that a rise in the price of houses was in the contemplation of the parties when the contract was made. It was also held, in examining the common law remedy of damages for breach of contract, that it was only necessary to show a contemplation of the circumstances which embraced the head or type of damage in question; there was no need to demonstrate a contemplation of the quantum of damages under the head or type.

102. In **Wroth v. Tyler** at page 924 b-c, after awarding damages in lieu of specific performance using the market value on the date of judgment/assessment , and not the market value as at the date of the breach of contract, Megarry stated:

> *This is a dismal prospect for the defendant, but if the plaintiffs obtain neither a decree of specific performance nor £5,500 by way of damages, theirs is also a dismal prospect. Having made a binding contract to purchase for £ 6,000 a bungalow now worth £ 11,500, they would recover neither the bungalow nor damages that would enable them to purchase anything like its equivalent. It is the plaintiffs who are wholly*

blameless. Nothing whatsoever can be said against them, or has been, save as to the contention that delay barred them from a decree of specific performance. Nor do I think that there was any delay on their part that could affect the measure of damages.

103. I have, because of the alarmingly long time that this case has taken to be tried, thought it just to attribute some portion of blame to the Claimants which will affect the measure of damages. To some extent I echo the sentiments of Megarry J. set out above. However, the existence of the Marital Settlement Agreement between Mr. Watkis and the Second Defendant causes me to assess any hardship to Mr. Watkis at a reduced scale, since it may transpire that Mr. Watkis' estate may ultimately be able to sell the property and with the money so raised, be enabled to pay the Claimants their damages- see **Wroth v. Tyler** at page 924 for analogous reasoning.

104. In the result, there will be judgment for the Claimants against the First Defendant for damages in lieu of specific performance, being damages for loss of bargain. The amount of the damages shall be the difference between the contract price of $285,000 and the value of the property to be assessed as at April 2005.

105. I order an assessment of damages and inquiries as to the value of the property in April 2005. I will also ask the parties to attempt to agree a schedule, including a time frame for production of expert reports as to the requisite valuation. Costs are awarded to the Claimants against the First Defendant to be taxed if not agreed or otherwise ascertained.