JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL 123/2000

BEFORE: THE HON MR. JUSTICE FORTE, P.
THE HON MR. JUSTICE BINGHAM, J.A.
THE HON MR. JUSTICE PANTON, J.A.

BETWEEN: DUDLEY C. GRANT		DEFENDANT/APPELLANT
AND	DAVID L. McHUGH	PLAINTIFF/RESPONDENT

Dr Lloyd Barnett and Ian G. Wilkinson for the appellant

Garth McBean instructed by DunnCox, for the respondent

<u>October 10 &11 2002 & September 29, 2003</u>

<u>BINGHAM, J.A</u>:

On the aforementioned dates this Court heard submissions in respect of this appeal at the end of which we allowed the appeal and set aside the judgment entered below. We entered judgment for the appellant and ordered costs both here and below to him, such costs to be taxed if not agreed.

At the time of handing down our decision we promised to put our reasons in writing. This is a fulfillment of that promise.

The matter giving rise to these proceedings arose out of an Agreement for Sale of certain lands situated at 128 Brunswick Avenue, Spanish Town in Saint Catherine. On September 26 1986, the defendant/appellant in his capacity as, and hereinafter described as, the "vendor" of the said property, and, the plaintiff/respondent hereinafter referred to as the "purchaser" executed an Agreement for Sale. The agreement reads as follows:

> "AGREEMENT FOR SALE MADE THIS 26TH DAY OF SEPTEMBER 1986 WHEREBY IT IS AGREED AS FOLLOWS:
>
> | | |
> |---|---|
> | VENDOR: | MR. D.C. GRANT
22 ~~ALEX~~ANDER ~~PLACE,~~ HIGHFIELD
SPANISH TOWN 2. |
> | PURCHASER: | MR. D. McHUGH
22 CLARENCE AVENUE
HAMPTON GREEN, SPANISH TOWN |
> | DESCRIPTION: OF PROPERTY | PORTION OF 128 BRUNSWICK AVE
SPANISH TOWN |
>
> Further to our many discussions on the subject the conditions of Sale and Agreement are stated hereunder:
>
> It is a vital part of this agreement and should be adhered to, that whatever is the name of your present Assembly "The Church of Jesus - 128 Brunswick Avenue" shall prefix that name.
>
> Further to our talk and subsequent deliberations with my parties concerned the decision was taken to sell the portion of the premises, on which the church building is being constructed, for Two Hundred and Thirty Thousand Dollars ($J230,000.00). A down payment of One Hundred Thousand Dollars (J$100,000.00) is required. However, to conform with your request,

we have agreed to accept the down payment in two parts as follows: Eighty Thousand Dollars ($80,000.00) which is to be paid by the 25th instant and Twenty Thousand Dollars ($20,000.00) is to be paid six months from the date of the first down payment. The frontage of this portion of the premises is approximately 83 ft wide, n. side 200 ft and s. side approximately 190 ft. And the church building is 41x105 ft., including office, rest rooms, prayer room, etc.

The portion of the premises on which is the three section shed has a frontage of approximately 60ft. This portion is not for sale at the present time. But I can assure you that whenever I am ready to dispose of same, if you so desire, you will be given first preference. It will be officially valued and sold to you – "The Church" at a price to be negotiated.

Whenever you have made the first down payment you may start to occupy the premises in accordance with the terms of the Agreement.

After thirty-six months of the final down payment of Twenty Thousand Dollars (J$20,000.00) you should then start paying to the writer, his wife or his daughter Elaine Jones the balance which will be in the form of monthly installments. This payment will cover a period of seven years and conform to the then current mortgage rate of interest, less five percent (5%) given by commercial banks and other similar lending agencies.

If you so desire to close the deal before the prescribed periods a rebate of interest will be given in accordance with that obtained from commercial banks and similar lending agencies. It must also be borne in mind that after the first down payment is made if you failed to pay the final down payment of Twenty Thousand Dollars (J$20,000.00) within the prescribed six months period, without consultation and agreement, fifty percent (50%) of the first down payment will be regarded as being forfeited, and the whole transaction will become null and void. In such a situation, if you have carried out any improvement on the building, satisfaction would be obtained as stated in the other section of this Agreement.

Please continue to be reminded that the section of the premises on which is the church building was officially valued at Two Hundred and Seventy Thousand Dollars (J$270,000.00) and, it must be remembered that the amount which will be accepted for the portion of the premises represents a very great reduction of that which it is worth, and must be regarded as my extra contribution towards the establishing of the church on site.

It must also be borne in mind that the fees for the government, attorney, et al, must not be part of the amount which is to be paid to me. You having obtained the premises so cheaply such fees are really infinitesimal indeed. If it is a legal demand that the vendor must pay the fees himself upward adjustment will have to be made to the selling price of the premises to suit the situation.

If at the expiration of the thirty-six months period, plus three months, you fail, without consultation and agreement, to start paying the monthly installment, the amount of One Hundred Thousand Dollars (J$100,000.00), which you deposited as down payment will be regarded as being forfeited. Also, the transaction will be considered forfeited if after you have started to pay the monthly installment you, without consultation and agreement, fail to continue to do so for a continuous period of three months or an aggregate of six months.

Upon such eventuality I think that it would be only reasonable to have a valuation carried out on the premises, bearing in mind the improvement that you have made to same over the period, with a view of having it sold to a suitable organism, and reparation made proportionately to all parties concerned, and so bring the matter to satisfaction. Reparation will not be a part of any down payment which will have already been forfeited.

It should be noted that the sale of the church premises does not include any of the material in and outside of the shed, nor any metal, excluding reinforcing steel bars, in and outside of the church building. All material used as decking will be on loan to the purchaser until the slab is casted.

However, the floor tiles – about 1,500 of them, 6" building blocks – about 500 of them and eight sheets of ½" ply board are included in the sale, also all windows similar to those already installed in the rear section of the church building. It might be necessary for me to inform you that I have title and diagram for the premises; registered at Volume 1143 Folio 80 and it has no encumbrances. The new title will be prepared for you to coincide with the completion of payment.

Signed D.C. Grant
Vendor

Witness

Signed D.L. McHugh
Purchaser

Witness."

The Agreement for Sale was not one drawn up by an attorney-at-law versed and skilled in the art of Conveyancing Law and executed after consultation and negotiation between the parties and their legal advisers.

Such a course would have no doubt produced a draft agreement which would then be examined for any changes to be made and arising out of this would have been the final formal contract engrossed drawn up and executed by the parties and their respective attorneys-at-law. The parties for reasons best known to themselves undertook to be their own conveyancers.

Following the Agreement for Sale, there was an exchange of letters between the parties. These were concerned at the outset with accusations of a personal nature. Later they related to the subject premises.

On September 25 1987, the purchaser wrote to the appellant making an offer of $50,000.00 to purchase a lot of land referred to as 128A Brunswick Avenue, which was part of the land registered at Volume 1482 Folio 80 but which was not part of the land the subject of the Agreement for Sale (the church land). The vendor had undertaken to give "the right of first preference" to the purchaser if and when he decided to dispose of this portion of the property. This offer of $50,000.00 was rejected by the vendor in a letter dated July 20 1987. It is of some importance that the Agreement for Sale had provided for an official valuation of this portion of the property carried out by the vendor as a pre-condition of any offer for sale being favourably considered. As the letter stated, the right of first refusal was dependent on the purchaser within two weeks of the receipt of the letter, indicating acceptance of the vendor's offer to purchase the land in question for $70,000.00. If the offer was accepted, the purchaser was required to pay the entire amount within two months of October 7, 1987.

The response of the purchaser was to make a counter offer in a letter dated October 30, 1987. He now offered to purchase that portion of the property for $60,000.00.

It was following this exchange of correspondence that the purchaser consulted their attorneys-at-law, Milholland Ashenheim & Stone, and by letter dated November 26. 1987 they wrote to the vendor (appellant) a memorandum couched in the following terms:

> "Mr. D.C. Grant
> 22 Alexander Place, Highfield
> Spanish Town 2
>
> Dear Sir,
>
> Re: 128 & 128A Brunswick Avenue, Spanish Town
>
> We act for Mr. D.L. McHugh and have been instructed to represent our client in connection with the purchase of the abovementioned premises
>
> We would be grateful if you would let us have a copy of the title or titles relating to both portions of the premises and the sub-division approval with all attached conditions, if any.
>
> With regard to the purchase of the portion of the premises not containing the church

building, we note from your letter of June 8 1987, that you referred to the fact that our client was not agreeable to your asking price and requested to make an offer. Our client has in fact made two offers both of which have been rejected by you. In the circumstances, we would be grateful if you would let us know what amount under your asking price you would consider an acceptable sum for our client to offer.

We look forward to hearing from you at your earliest convenience.

Yours faithfully,
Milholland, Ashenheim & Stone (Sgd.)"

From the tenor of the letter the attorneys were contending that it was the vendor ~~who~~ had refused to negotiate an acceptable offer for the purchase of the remainder of the property. The correspondence exchanged between the parties indicate however, that there was a firm offer made by the vendor in his letter of October 7, 1987 which was not accepted by the purchaser. This letter stated:

"If within another two weeks of the receipt of this letter, I obtain your assurance that ere two months of the date of this letter you will purchase the premises in question for the amount of Seventy Thousand Dollars ($70,000.00) in full, you will have the premises without fail.

If the above amount or a suitable sum and adjustment according to what you have mentioned in your letter of September 29 1987, cannot be made to procure the rest of the premises within the time stated in the letter, I will have no alternative than to immediately after that, sell same to other interested parties."

As the offer by the vendor (appellant) was one made in keeping with the terms and conditions laid down in the written Agreement for Sale dated September 26, 1986 the effect of this refusal by the respondent meant that the vendor was entitled as a result to regard the right to first refusal as determined, and, to look to other interested parties to acquire the remaining portion of the property.

The attorneys-at-law for the purchaser (respondent) by letter dated June 8 1989, (Milholland Ashenheim & Stone to W.A. Rhoden), to the attorney-at-law for the vendor, made a subsequent offer of $75,000.00 for the remaining part of the property.

The response of Mr. Rhoden in a letter dated August 10 1989, indicated that this offer was not accepted. The reasons for the refusal of the offer as set out in the letter were to this effect:

> "As was pointed out in mine to you dated the 17th April 1989, my client is now obtaining an official valuation on his behalf upon the receipt of which you will be advised of the price he is asking, for the premises to be sold."
>
> (Emphasis added)

As can be seen the terms on which the vendor (appellant) undertook to sell the remaining portion of the property to the purchaser (respondent) were expressly set out in the agreement of sale. It was on the basis of a price fixed on an official valuation done at the vendor's request. The consideration price was not one, given the tenor of the correspondence passing from the purchaser and his attorneys-at-law for them to make. In this regard the valuation report mentioned and referred to in the letter dated June 8 1989, (Milholland, Ashenheim & Stone to Winston A. Rhoden) referring to the subject property and describing the price being offered stated inter alia:

> "As you can see the fair market value is appraised at Seventy-Five Thousand Dollars ($75,000.00). Our client has instructed us to advise you that he is prepared to purchase the said balance for that price."

However well meaning and intentioned that offer may have been, it was not in compliance with the strict terms and conditions set out in the contract ~~made by the~~ parties.

The vendor (appellant) sought to rely on four original grounds and six supplementary grounds of appeal. These read:

> "**(1)** That Mr. Justice Harrison ("the learned trial judge") erred in law in ruling that there shall be specific performance by the defendant of the said Agreement for Sale.
>
> **(2)** The learned trial judge erred in law in failing to find that the plaintiff had no right to specific performance as he had failed to pay the sums due within the time specified in the said agreement and as such the defendant was entitled to repudiate the said agreement.
>
> **(3)** The learned trial judge erred in law in declaring that under or by virtue of the said Agreement for Sale the plaintiff was entitled to a right of first refusal for the balance of the said land situate at Brunswick Avenue aforesaid as there was no consideration from the respondent.

(4) The learned trial judge erred in law, in that he misinterpreted the case, ***Enid Phang Sang v Sudeall & Sudeall*** (1988) 25 J.L.R. 226 (CA.; Jam) in respect of its application to the facts of the instant case.

(5) The learned trial judge erred in finding that on a construction of exhibit 2 (letter dated 16th February 1990, from plaintiff's attorneys-at-law to defendant) and exhibit 3 (letter dated 22nd February from defendant to plaintiff's attorneys-at-law) there was an unequivocal acceptance of the offer made by the plaintiff (p. 27 of the Record of Appeal).

(6) The learned judge erred in law in finding that time was not of the essence of the contract in respect of the payments which were to have been made thereunder by the purchaser.

(7) The learned judge erred in law in ruling that the case ***Enid Phang Sang v Sudeall & Sudeall*** (1988) 25J.L.R. 226 (C.A., Jam.) was distinguishable from the facts of the instant case.

(8) The learned judge erred in law in misinterpreting and/or misunderstanding the case, ***Smith v Morgan*** [1975] 2 All E.R. 1500, particularly regarding its application to the instant case.

(9) The learned judge erred in law in finding that on the evidence, the appellant/defendant deprived the plaintiff of the opportunity to exercise his right of first refusal.

(10) The learned trial judge erred in law in declaring that under and by virtue of the said Agreement for Sale the plaintiff was entitled to a right of first refusal for the balance of the said land as no such relief was claimed in the Writ of Summons."

In advancing his submissions Dr Barnett sought to argue grounds 1, 2 and 5, and to follow this with grounds 4, 6 and 7, which dealt with "The Right of First Refusal."

Referring to the Agreement for Sale (exhibit 1) and having read the document, counsel submitted that from the agreement itself it was clear that the parties themselves agreed that a failure to pay the final down payment of $20,000.00 would have amounted to a breach of the contract leading to a forfeiture of 50% of the deposit.

The court's attention was drawn to the condition in the agreement as to the responsibility for the fees and costs of obtaining title in the purchaser's name. This provided for the purchaser to undertake this obligation, failing which, were the vendor required to pay his half share of the costs, there would have to be an upward adjustment in the purchase price to compensate the vendor for the reduction in same.

Dr Barnett submitted that from the terms of the agreement it would appear that there had to be strict conformity with the requirement as set out in the agreement.

On a reading of the final paragraph it appears that:

1. The first payment of $80,000.00 had to be paid and was paid on time.

2. The balance of the deposit was paid in April 1987.

The remainder of the purchase price of $130,000.00 was due to be paid over seven years, commencing as from April 1, 1990.

Dr Barnett argued that the dispute arose over the conflicting views of the provisions in the agreement. These related to (1) the timetable in relation to the payment for costs of abstracting title (2) the responsibility for the same and (3) the terms in the agreement providing for an upward adjustment in the purchase price should the vendor be called upon to bear his half cost of obtaining title. The vendor contended that there was never any variation of the contractual terms.

The purchaser's contention was that there was a variation of the contractual terms in so far as there was an offer of earlier payment of the balance of the purchase price. Dr Barnett drew the court's attention to the following:

1. A letter dated February 12 1988 (Grant to McHugh) (at pages 19 to 20 of a supplemental bundle).

2. A letter dated February 16 1990 written by the purchaser's attorneys (exhibit 3) at pages 9 to 10 supplemental bundle.

This letter is treated as amounting to an offer or proposal of an earlier payment of the purchase price by the purchaser.

Dr Barnett submitted that this is not so in law as the proposal did not take into account the original agreement that a vendor would receive the price (net $130,000.00) free of any payment towards the costs of preparing title.

Counsel argued that the counter offer in McHugh's letter cannot in law be treated as an acceptance of the offer made by the vendor. He submitted that the correspondence confirms that the parties were not ad idem as to the proposed variation of the contractual terms.

Dr Barnett referred to the letter of May 16, 1990 (exhibit 6) from Milholland Ashenheim and Stone to Dudley Grant (page 15 of the supplemental record of documents). He argued that in that letter the purchaser's attorney-at-law was contending that given the terms in the collateral contract the balance of $70,000.00 would not be paid until the vendor produced a registered title in the name of the purchaser. He submitted that in any event the purchaser never accepted the vendor's counter offer. By his response to that of the purchaser he contended that the new conditions as to earlier payment of the balance of the purchase price related to the conditions as to price and nothing else. Since this situation remained unresolved, the purchaser not accepting the terms offered, the vendor was therefore entitled to treat the contract as at an end.

The question which then falls for consideration, was whether in those circumstances there was an agreement for sale. As there was no conformity with the terms of the agreement as to the balance of the purchase price, this would have to be answered in the negative.

Counsel argued that in this case time was made of the essence of the contract as the parties had by their agreement, so indicated by setting out a timetable for payment of the purchase price. The learned trial judge by concluding therefore that the purchaser was entitled to treat the contract as rescinded, as no "time of the essence notice" was served on him, misses the point, given the schedule of payments laid down in the Agreement for Sale. This made a failure to comply with that schedule, a breach of an essential term of the contract thereby entitling the vendor to rescind the contract.

The learned trial judge's finding, [which amounted to an acceptance of the submissions of learned counsel for the plaintiff (purchaser)] as to no time of the essence notice being served on him, was founded on an erroneous premise. It completely overlooked:

1. The timetable for payment and the sanctions laid down in the agreement which could only be interpreted as calling for strict compliance with its terms.

2. Notices making time of the essence are part of the Law Society's Conditions of Sale in England. Such a condition may be imported into Agreements for Sale in Jamaica drafted by parties to contracts for sale of land. In this case, however, these conditions were not incorporated into the terms of the Agreement.

3. It is to the wording of the agreement as to its terms that one needed to look to determine whether time was being made of the essence of the contract.

The question of the right of first refusal (Grounds 4, 6 & 7)

Dr Barnett argued that from a proper reading of the Agreement for Sale the language in which these terms regarding the right of first refusal are couched indicates that it was not intended to be treated there and then as a legally binding obligation, but an invitation to treat in the future. This statement was not expressed in any way as a condition of the agreement and required provisions which ensure that pre-emptive rights are enforceable. Moreover that portion of the agreement which refers to the other parcel of land was conditional on a valuation being done by the vendor.

He argued that of the three essentials for a binding and enforceable agreement namely:

1. a defined subject matter;
2. a defined property;
3. an agreed purchase price

the only ascertainable matter is the property.

Dr Barnett submitted that a pre-emptive right could only be secured on the basis that the purchaser pays the price demanded by the vendor or the highest price obtainable on the open market. This price is that fixed in a sales agreement or a price fixed by some mechanism arranged between the parties. Unless one were to strike out the provision in the agreement relative to "price to be negotiated" there is no mechanism for fixing the price. Counsel submitted that there would be the need therefore, for some negotiation before fixing the price by way of valuation.

Dr Barnett submitted that the order made by the learned judge does not reflect such a state of affairs. Since price is an enforceable part of any Agreement for Sale of land, a declaration of rights can only be enforceable if it is related to the enforceability of such rights.

He relied in support on ***Smith v Morgan*** [1971] 2 All E.R. 1500 and ***Brown v Gould et al*** [1971] 2 All E.R. 1505.

In the earlier case in the absence of machinery to fix the selling price, the vendor's obligation to negotiate in good faith and to state the price which he is willing to accept was a matter to be considered. In the latter case, there was a lease with an option to purchase the said property.

In the instant case there is no uncertainty as to what the parties intended but there was uncertainty as to how the price was to be fixed. There first had to be some negotiations between the parties with a view to arriving at an agreed price. The court's attention was directed to pages 8 to 9 of the notes of evidence. Counsel agreed that from an examination of the evidence contained therein it would not be correct to say that the vendor acted in bad faith in these negotiations. The parties failed to come to a concluded agreement.

Dr Barnett submitted that when the correspondence which were exchanged between the parties were examined, no right of first refusal could survive what took place. The court's attention was directed to the following correspondence in the original bundle of documents viz:

1. Letter dated January 8 1987, Dudley Grant to David L. McHugh (pages 3 to 4).

2. Letter dated July 20 1987, David L. McHugh to Dudley Grant (page 5).

3. Letter dated July 31 1987, Dudley Grant to David L. McHugh (pages 6 to 8).

4. Letter dated September 9 1987 David L. McHugh to Dudley Grant (pages 9 to 10).

5. Letter dated October 7 1987, Dudley Grant to David L. McHugh (pages 11 to 12).

6. Letter dated October 30 1987, David L. McHugh to Dudley Grant (page 13).

7. Letter dated November 2 1987, Dudley Grant to David L. McHugh (page 14).

8. Letter dated February 13 1988, Dudley Grant to David L McHugh (page 27).

Counsel submitted that from the correspondence it is not possible for the respondent to say that he was not given <u>the first preference</u> or right of first refusal to purchase the said property as:

1. He either put forward offers which did not show that he was accepting the vendor's offer and

there was always a failure on his part to arrive at an acceptable purchase price.

2. All the negotiations over a period of 2 years failed to come up with a price acceptable to both parties. Added to this, there was nothing in the evidence indicating any bad faith on the part of the vendor.

He submitted that the basis reached by the learned trial judge, therefore, for ordering the declaration sought, was fundamentally flawed.

Dr Barnett contended that it is clear that the dispute which arose in the case was over terms in the agreement and the price. He relied in support on ***Australian Hardwoods Property Ltd. v Commissioner for Railways*** [1961] 1 All E.R. 731.

In the instant case, the respondent not having paid the balance of the purchase price could not show that he was ready, willing and able to complete the Agreement for Sale. He cited in support ***Enid Phang Sang v Conley Sudeall et al*** [1988] 25 J.L.R. 226.

Dr Barnett submitted that on the basis of the reasoning of the court in that case, the respondents in the instant case were not entitled to the order for specific performance. In the result he argued that the appeal be allowed with the requisite order for costs as follows the event.

Mr McBean for the purchaser (respondent) in responding argued that the learned trial judge made a finding that the appellant had repudiated the contract before the time had expired for the payment of the balance of the purchase price. He submitted that there was no issue as to the payment of the deposit. The payment of the balance should have begun on March 25 1990. Under the original agreement the payment would have become due on March 25 1990. The evidence shows that the repudiation occurred before that date.

Mr McBean drew the court's attention to a letter dated February 22 1990, from Dudley Grant to Milholland, Ashenheim & Stone (pages 11 to 12) (original bundle of documents). This letter reads:

"February 22, 1990

> Milholland, Ashenheim & Stone
>
> <u>Attention: Miss Joanne E Wood</u>
>
> Thank you for your letter of 16th February 1990, which came to hand today. This serves to convey my favourable response to your proposal of a two-part payment of the balance of $130,000.00 which is now owing to me. However, it is the responsibility of Mr McHugh your client to pay for all costs to satisfy the transfer of the title which will be signed by me as soon as the final payment is realised.
>
> With regards to your letter of 16th February 1990, I am expecting the payment of Seventy Thousand Dollars ($70,000.00) in March next.
>
> Upon payment of the whole balance of One Hundred & Thirty Thousand Dollars ($130,000.00) and acknowledgment of same by the writer, the ownership of the portion of the premises in question will undoubtedly be to your client, Mr McHugh. You could then at your own leisure prepare the title document for my signature.
>
> If the final payment, according to your letter of 16th February 1990, is not made before the time

> prescribed in the agreement, which dealt with monthly payment, that which is stated in the agreement will hold good still. And the amount and conditions of monthly payment will be as stated in same.
>
> In such an eventuality you could then, reasonably, according to the agreement, work out in equal payment the balance of Sixty Thousand Dollars ($60,000.00) and have same forwarded to me.

Sgd. D. Grant."

This letter was written in response to one sent to the vendor by the purchaser's attorneys-at-law dated 16th February 1990.

By the letter of February 16. 1990 Milholland Ashenheim & Stone acting for the purchaser (respondent) wrote to the vendor (appellant) proposing a variation of the terms of the Agreement for Sale with a view to shortening the period for payment of the balance of the purchase price. This called for:

> "**(1)** The sum of $70,000.00 to be paid to the vendor on or before March 31 1990.
>
> **(2)** The balance of $60,000.00 to be paid on the completion, <u>that is on your production of a Registered Title for the land in question with the purchaser's name endorsed thereon as the registered proprietor</u>.
>
> <u>If these terms are agreeable to you kindly let us have your written acceptance as soon as possible"</u>. (Emphasis added)

This letter which on first reading would have seemed to be proposing to vary the terms as to payment of the balance of the purchase price further sought to vary the conditions as to completion of the contract by demanding title before making the full payment of the purchase price. This not only sought to vary the terms of the written contract but went against what is known to be the settled conveyancing practice in Jamaica. This requires the transfer to be executed and the purchase price paid or an undertaking tendered from a reputable firm of attorneys-at-law or a financial institution acceptable to the vendor or his attorneys, vide ***Phang Sang v Sudeall & Sudeall*** (supra)

From the correspondence counsel for the respondent submitted that the appellant showed an unwillingness to provide the respondent with a registered title in his name. He argued that there was a refusal to perform by the appellant. What the respondent was relying on, he submitted, is stated in the letter dated February 22, 1990 Milholland, Ashenheim & Stone to Dudley Grant.

He submitted that the clause in the agreement as to fees relate to the ultimate costs of transfer upon completion of contract viz Transfer Tax, Stamp Duty, Registration Fees and Attorney's costs. This did not relate to costs of obtaining a new title but just to the other costs mentioned. By 1990, it seemed highly probable that a separate title was going to be required and the steps to obtain a new title as distinct from transferring the entire property including the church lands rested with the vendor pursuant to the agreement. The words in the letter dated February 22

1990, from Dudley Grant to Milholland, Ashenheim & Stone (exhibit 4) (at pages 11 to 12) (supplemental record of documents,) read inter alia:

> "You could then at your own leisure prepare the
> title documents for my signature."

Counsel argued that the terms and conditions as to the costs of obtaining title in the purchaser's name, sought to place the responsibility for preparing title on the purchaser.

He then submitted that it was on this letter that the learned trial judge based his finding that it indicated an unwillingness on the part of the vendor to reach a concluded agreement which resulted in the order for specific performance.

From the submissions advanced before us by learned counsel for the parties, it is clear that the outcome of the appeal turned on the construction to be placed upon the Agreement for Sale drawn up by two lay persons in which they have clearly set out the terms and conditions by which they both have agreed to be bound.

In Jamaica unlike England there are no standard form contracts for sale of land which the parties to the contract must follow to govern the contract. The law which applies to written as distinct from parol contracts, whether drafted by an attorney-at-law or lay persons is that where the contracting parties (as in this case) have set out in writing the terms and conditions by which they have agreed to be bound, in the absence of any ambiguity or where a collateral term may be found to exist in the contract, a court of law will construe that agreement in a manner so as to give effect to the intention of the parties. What the court will not do is to re-write a contract for the parties in an attempt to interpret the written agreement in a manner that in its view it considers to be the pre-conceived intention of the parties. This is precisely what the learned judge has done in this case.

It is against this background that the Agreement for Sale dated September 26, 1986 drawn up and executed by the parties to this action falls to be considered. The content of the agreement has caused a long drawn out and prolonged negotiation by which the parties sought to arrive at an amicable solution. When this failed, the attorneys-at-law for the parties entered into the matter and in intervening have sought to place their own interpretation as to the meaning of the written agreement.

In the Agreement for Sale the parties have set out their own timetable and in so doing have provided that the payment of the balance of the purchase price should precede the transfer of title to the purchaser. The Agreement for Sale required the purchaser to pay over the balance of the purchase price before title could be had by him. A failure to comply with this condition meant that:

1. The purchaser through his attorney-at-law was by his conduct evincing an intention no longer to be bound by the strict terms of the written contract.

2. The purchaser was thereby in breach of an essential term in the contract.

In either case the vendor would be entitled to accept the purchaser's breach as putting an end to the contract or to treat the contract as still subsisting and claim against the purchaser for specific performance or in damages for breach of contract.

What has occurred in this case is that the purchaser was put into possession of the property to be sold on the payment of the deposit. He has not sought to tender the balance of the purchase price thereby exhibiting that he is ready, willing and able to complete the purchase of the said property. Nevertheless he has been able to bring an action against the vendor claiming specific performance and succeed. The success of such a claim would require the purchaser to exhibit to the court that he had done all that was necessary on his part to fulfil the terms of the agreement. This he has failed to do.

It is now necessary at this stage to look at the judgment of the learned trial judge in order to determine the circumstances that may have led him to the conclusion to which he came. In approaching the matter, one needs to first examine the manner in which the learned trial judge dealt with the Agreement for Sale as it related to the church property and following this the provision in the agreement as it touched and concerned the matter of the granting of the right of first refusal to the purchaser (the respondent) in relation to the remainder of the property.

The church property

The learned judge in his determination properly found that there was no issue raised as to the validity of the Agreement for Sale of this portion of the property which included the unfinished building. He found that there was an issue as to which party was responsible for the payment of the costs of obtaining a title in the purchaser's name.

The Agreement for Sale, however, in providing that "a new title would be prepared to coincide with the completion of payment", clearly envisaged two conditions which had to be satisfied by the respondent viz:

1. The full payment of the balance of the purchase price was to be made to coincide with an executed transfer signed by the vendor (appellant). This is consistent with the settled conveyancing practice in Jamaica which lays down that the perfecting of title in the purchaser's name and the full payment of the balance of the purchase price and such costs to be borne by the purchaser were concurrent conditions. See dictum of Carberry, J.A. in ***Phang Sang v Sudeall and Sudeall*** [1988] 25 J.L.R. 226 (at p. 230-231and in particular at p. 232B-C).

2. The payment of the costs for obtaining the splinter titles in respect of the subdivided portions described as 128 and 128A Brunswick Avenue. This amount would be dependent upon the attorney's costs for preparing the application for the surrender of the Registered Title and the application to the Registrar of Titles for the cancellation of the Parent title and the issuance of the two titles with diagrams in respect to the separate parcels of land.

Being church property it is common ground that there could be a waiver granted by the statutory authority in respect of the Stamp Duty and Transfer Tax . The only legal costs remaining to be met by the parties would be borne 50/50, that is, if the purchaser persisted in requiring the vendor bearing his share of the costs. In that event, if such was the case then the vendor could invoke the term in the Agreement for Sale which provided for an upward adjustment in the purchase price.

The learned trial judge in accepting the submissions of learned counsel, Mr McBean, came to the conclusion that the appellant's response to the letter from the respondent's attorney-at-law of 16th February 1990, amounted to an unqualified acceptance of their proposal not only as to a variation of the existing terms in the contract as to payment, but also as it related to the making of title in the respondent's name before the receipt of the full balance of the purchase price, and the incidental costs for making title.

On a careful examination of the appellant's letter, with the utmost respect to the attorneys-at-law for the purchaser, and the learned trial judge, it cannot be interpreted as having any such meaning. While accepting the proposal as to earlier payment of the purchase price, the writer went on to state categorically that:

> "However, it is the responsibility of Mr McHugh your client to pay for all costs to satisfy the transfer of the title which will be signed by me as soon as final payment is realised."

Then for the avoidance of doubt the writer said:

> "Upon payment of the whole balance of one hundred and Thirty Thousand Dollars ($130,000.00) and acknowledgement of same by the writer, the ownership of the portion of the premises in question will undoubtedly be to your client, Mr McHugh." (Emphasis supplied)

The appellant did not stop there but indicated that failing payment of the sum proposed by March 31, 1990 resort was to be made to the terms for payment set out in the Agreement for Sale which was to commence by monthly payments from that date.

The purchaser's attorneys-at-law responded by a letter dated March 26 1990. In this letter they adopted a stance which was a consistent one on their part and in which they were seeking to impose their own terms in an attempt to vary the essential terms in the Agreement for Sale as to payment and the procurement of title.

The legal effect of their maintaining this position indicated quite clearly that they were evincing an intention not to be bound by the terms of the written contract entered into between the parties. Looked at in isolation, this conduct on their part had the effect of giving to the vendor (appellant) the right to rescind the contract and to counterclaim in damages.

On the question of the manner in which completion of the sale was to be effected, Carberry, J.A. in ***Phang Sang v Sudeall & Sudeall*** (supra), a case in which the facts were not too dissimilar to the instant case had this to say: (pp. 231 (i) – 232 (a-c).

> "There is a certain ambiguity in the trial judge's findings in this case, that the vendor's duty was "to provide a registered title in exchange for the purchase money." In whose name was the title to be registered? It seems clear however that what was being laid down was that a vendor of the registered land must go to the trouble and expense of registering the purchaser's name on the title before he is paid any money.
>
> What if the money never materialises? Yet the land has been transferred? It is not without interest to see, that apart from providing that the purchaser's money is to be paid to his own attorney-at-law the order eventually made by Wolfe, J. provides that the purchaser's attorneys-at-law on receiving the purchase money is to notify the vendor's attorney-at-law where upon the vendor will take the necessary steps to get the title in the name of the purchaser. The learned judge himself in his order seems to make the payment or the provisions of the purchase money and costs of transfer conditions precedent to the vendor's duty with respect of getting the title registered in the name of the purchaser. To summarise as I understand it unless the contract specifically so requires, it is not the duty of the vendor of registered land to secure the registration of the purchaser's name on the title to the land being sold before and as a condition precedent to receiving or collecting the purchase price". (Emphasis supplied)

Later on the learned Judge of Appeal at page 247 (b-c) cited with approval the dictum of Viscount Simons L.C. in **British Movietown News, London and District Cinemas** [1952] 1 A.C. 166 at 183 a decision of the House of Lords where the Lord Chancellor had this to say:

"The suggestion that an uncomplicated turn of events is enough to enable a Court to substitute its Notion of what is 'just and reasonable' for the contract as it stands even though there is no frustrating event appears to be likely to lead to some misunderstanding".

Carberry J.A. then referred to Phipson on Evidence 13th Edition 1982 paragraph 37-01 where the learned Editor said:

"When a transaction has been reduced to, or recorded in writing either by the requirement of law, or agreement of the parties, the writing becomes, in general, the exclusive memorial thereof and <u>no evidence may be given to prove the terms of the transaction except the document itself or secondary evidence of its contents".</u> (Emphasis supplied.)

The learned judge of appeal then referred to paragraph 38-01 of the same work where the learned Editor said:

"Where a transaction has been reduced to, or recorded in writing either by requirement of law or agreement of the parties, extrinsic evidence is in general, inadmissible to contradict vary, add to, or subtract from the terms of the document."

In the light of the above, it is clear that both in relation to the manner in which the terms of the written contract fell to be construed as to the timetable for payment, the manner in which title was to be abstracted as well as to responsibility for the costs of obtaining the same, the purchaser through their attorneys-at-law, failed to show that they were ready, willing and able to complete the contract. Such conduct on their part based on the principles to be applied where a litigant seeks the aid of a Court of Equity for a grant of specific performance, would in our considered opinion disentitle the purchaser to the relief sought.

The remainder of the property and
<u>the question of the right to first refusal</u>

Given the findings in relation to the Agreement for Sale in relation to the church property, this question as to the right to first refusal would appear to be of passing interest. As it falls to be considered in the realm of a collateral contract however, and because of the findings of the learned trial judge that it was the vendor's unreasonable conduct which led to there being no concluded agreement reached, it will now be examined.

The Agreement for Sale had stipulated that any sale of the remainder of the property 128 Brunswick Avenue, would be subject to a price fixed by the vendor following an official valuation of the property. What it did not state was that such a valuation was to be one undertaken at the request of the purchaser. Despite this, various stages throughout this period saw the purchaser initially, and later, his attorneys-at-law (vide letter to Winston Rhoden dated June 8 1989), seeking to vary the terms of the Agreement for Sale by seeking to fix the consideration for the purchase of this portion of the property.

It was this conduct on the part of the purchaser from the outcome of the negotiations and later by his attorneys-at-law, which no doubt prompted the attorney-at-law acting for the vendor to state in his letter of April 17, 1989 addressed to Milholland, Ashenheim & Stone that:

> "My client has instructed me that he has at all times given "first preference" to your client to purchase the balance of land comprised in Certificate of Title registered at Volume 1143 Folio 80 as stated in the Agreement for Sale. Your client has however, continuously refused to accept any of the offers made to him, always rejecting the price stated by my client. Instead he went ahead without any express or implied permission from my client to obtain his own valuation. My client has shown me several letters written by both Mr McHugh and himself which support this contention.
>
> Naturally my client is annoyed and upset at this high-handed manner of behaviour by your client, which he has quite rightly in my opinion, interpreted as a refusal by your client to purchase the balance of land.
>
> Despite all of this <u>he is still prepared to sell the balance of the land to your client and in this regard I have instructed him to obtain his own valuation, after which negotiations for a price of the sale thereof can take place</u>".
>
> (Emphasis added)

From the above, it is clear that even up to this stage the vendor was quite willing to negotiate a sale to the purchaser in respect of the remainder of the land on the terms set out in the Agreement for Sale. The purchaser, however, through his Attorney's letters of the 3rd May and 8th June, 1989 in contradiction of the terms of the Agreement sought to arbitrarily fix the price at which the vendor should sell the property. Whether or not the purchaser's attorneys-at-law were of the opinion that the sum being offered was a fair market price or not, was of no moment. What is clear is that it was not in compliance with the essential terms of the Agreement whereby the vendor was prepared to dispose of the property. Neither the purchaser nor his attorneys-at-law were fixed with the authority to circumvent the clear terms laid down in the Agreement for Sale in this regard.

In the result, the effect of what took place could not lead one to determine that there was a concluded contract. In the circumstances, the Court could not properly come to a determination in favour of the purchaser as it would not be in accordance with the clear terms of the written Agreement. In short the Court could not re-write a contract for the parties.

Assuming that the terms in the Agreement for Sale gave to the purchaser "a right of first refusal" to purchase the remainder of the land at 128 Brunswick Avenue, on a proper construction of the term in the Agreement, a purchase if it resulted from an offer, had to be at a price acceptable to both parties. On the evidence all attempts by the vendor between June 1987 and February 1989, to make an offer acceptable to the purchaser failed. On somewhat similar facts Brightman, J. (as he then was) in ***Smith v Morgan*** [1971] 2 All E.R. 1500 at 1504(E) in construing a similar term in a conveyance said:

> "Paragraph 1 of Sch. 2 of the conveyance states nothing whatever about market price and

> nothing about a reference to the court, even if the court were willing to accept such a reference. In my view it is implicit in paragraph 1 of Sch. 2 that a purchase if it results from an offer, should be at a price acceptable to both parties. On that basis <u>it appears to me that paragraph 1, can only mean one thing, that the obligation on the vendor, should she wish to sell, is an obligation to make an offer to the purchaser at a price and at no more than the price at which she is, as a matter of fact, willing to sell. If that offer is accepted by the purchaser, then there will be a purchase at a figure which has been agreed on. If the offer is rejected, then cadit quaestio</u>".
>
> (Emphasis added)

The relevant provision in the conveyance referred to stated inter alia:

> " ... at the expiration of the said period or at any later date should the vendor wish to sell the same, the first option of purchasing the said land edged and hatched blue as aforesaid shall be given to the purchaser at a figure to be agreed upon ..." (p. 1501 g)

In the instant case the obligation being on the vendor, if and when he should wish to sell the remainder of the land in question was to make an offer to the purchaser at a price and no more than the price which he was, as a matter of fact willing to sell, and having complied with the condition without any acceptance of the terms of his offers by the purchaser, there was in effect no concluded contract. As first refusal can be construed to be what it states, in my opinion the vendor could properly have sought other interested buyers when his first offer was refused by the purchaser.

The learned trial judge also found that the offers made to the purchaser by the vendor were not far in excess of the valuation price obtained by the purchaser. There was accordingly, no logical or reasonable basis therefore for the learned trial judge to conclude either that there was a lack of bona fides on the vendor's part in making the offers he did, or for that matter to conclude that he had acted in a manner which deprived the purchaser of the opportunity to exercise the right of first refusal.

Conclusion

This was a matter the outcome of which turned on a proper construction of the Agreement for Sale executed by the parties on September 26, 1986. It contained provisions which related originally to the land on which the unfinished church building was situated. The purchase price in respect of this portion was $230,000.00 of which a deposit of $100,000.00 was made. The balance of $130,000.00 was to be paid in monthly instalments commencing from April 1, 1990.

The purchaser, through his attorneys-at-law sought to vary the terms of payment in a written memorandum offering to pay the amount of $130,000.00 in two instalments of $70,000.00 and $60,000.00. They sought to make the second payment conditional on the vendor making title in the purchaser's name before the receipt of the balance of $60,000.00

was made. This condition was not in keeping with the terms of the Agreement as to the manner in which title was to be delivered.

The vendor accepted the proposal in relation to the offer of an earlier payment of the balance of the purchase price while adhering to terms laid down in the Agreement as to when title would be obtained. Up to the moment in time when the purchaser through his attorneys-at-law filed the claim seeking specific performance, no payment had been made in keeping with either the timetable laid down in the Agreement for Sale or as called for in the varied contract. By such conduct the purchaser ~~not only failed to~~ carry ~~out his part of the agreement~~ in relation to payment of the balance of the purchase price, but this failure on his part showed that he was not ready, willing and able to complete the sale so as to entitle him to obtain the remedy which was sought: ***Australian Harwoods Property Ltd. v Commissioner for Railways*** (supra).

The Contract for Sale of the remainder of the property (The right of first refusal)

There can be no issue that had both contracts been completed, there would have been no difficulty in the vendor making title to the purchaser. There was from the outset of the Agreement for Sale, a Registered Title in existence by which the vendor would have been able to execute a registrable transfer to the purchaser. The purchaser had expressed the desire to obtain ownership of both parcels of land which the title covered in order to extend the church property.

If on the other hand two titles were requested, again, given the existence of an approved sub-division in respect of the entire property all that would be required was for an application to be submitted to the Registrar of Titles for a cancellation of the common title and the issuance of the separate titles with the diagrams in respect of each portion. In either case, therefore, it could not be said that the vendor had not shown that he could make title for the entire parcel of land or for two separate parcels. The mechanism for achieving this objective was already in place.

As the evidence on an examination of the correspondence showed, it was the purchaser at the outset who by his own conduct and later his attorneys'-at-law by seeking to introduce new terms into the Agreement relating to the conditions as to the manner in which the vendor had agreed to sell the property, that eventually led to there being no concluded contract.

The learned trial judge found that it was the vendor who by his conduct, had demonstrated an unwillingness to arrive at a concluded agreement in relation to the remainder of the property. In our considered opinion however, that finding was untenable as:

1. It was not borne out by a proper examination of the correspondence passing between the parties.

2. In any event the vendor's offer to the purchaser of $70,000.00 for the exercise of the right was not

> accepted to create a binding contract and had
> the effect of the right being determined.

The foregoing are our reasons for arriving at the decision that is stated at the commencement of this judgment.

FORTE, P

I agree.

PANTON, J.A.

I agree.