JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 19/91

COR: THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE WOLFE, J.A. (AG.)

| | | |
|---|---|---|
| BETWEEN | CRAFTON S. MILLER | 2ND DEFENDANT/APPELLANT |
| | CECIL J. MITCHELL | 3RD DEFENDANT/APPELLANT |
| AND | DESIGNS AND DRAFTING CO LTD | PLAINTIFF/RESPONDENT |

Dr. L. Barnett, Dr. Adolph Edwards & Miss Nancy Anderson for Appellants

R.N.A. Henriques, Q.C. & Andrew Rattray for Respondent

October 26, 27, 28 & December 18, 1992

FORTE, J.A.

The respondent is a company owned in equal shares by the 1st defendant Bradford and the third and fourth parties (Thompson and Rutowski) who are not concerned in this appeal. In 1976, the respondent through its three Directors decided to offer for sale properties situate at 7 - 9 Cecelio Avenue in St. Andrew. In spite of the efforts of all the partners, all attempts to sell failed. Included in this effort was negotiation with the Jamaica Telephone Co., which almost ended with a sale to that company, but in early 1979 the transaction was discontinued by them. As a result, the Directors of the respondent company met and agreed that they would make a determined effort to sell the property at a price of $1,000,000 excluding all necessary expenses. Thereafter in July of 1978, the 1st defendant Bradford informed the company per Thompson that he had a potential purchaser for the property, but declined to disclose the identity, as the purchaser had superiors who would have to approve the decision to buy. He also informed that the price provisionally agreed was equivalent to the

minimum sum which had been decided upon by the Directors of the respondent company. Then, according to Thompson, the 1st defendant for the first time disclosed that a negotiation fee had to be paid. Bradford then produced a letter addressed to himself and to be signed by Thompson and himself on behalf of the respondent giving him authority "to sell the above property to any purchaser who is ready and able to pay the sum of $1,000,000 as the purchase price plus payment of any negotiation fee which may become payable." On being asked what was the purpose of the letter, Bradford stated that the buyer's superiors needed to see authority that he had to carry through the sale on behalf of the company. The negotiation fee, he said, was not included in the letter, as it had not yet been agreed with the "person who was acting as middle man i.e. the person who was making sale possible." He however, assured Thompson that it would be between $50,000 and $100,000. Thompson thereafter signed the letter.

In September, 1978 a draft agreement was sent to the company and in November it was duly signed by Thompson and Bradford for the company, and the purchaser's representative. Of importance to the issue joined, are some of the provisions thereof. It disclosed that the purchaser was the N.C.R. Jamaica Ltd and that the consideration was $1,000,000 with a deposit of $130,000 payable "on the signing" of the Agreement. It also had a special condition which reads as follows:

> "The purchaser will pay direct to Messrs Miller, Mitchell & Co such negotiation fees as agreed upon between the said purchaser and the vendor."

A transfer to give effect to the agreement was subsequently signed on the 22nd December, 1978 by the same parties for the company. Their signatures were witnessed by the 2nd defendant.

The sum of $1,300,000 was paid over to the legal firm of the appellants, who produced written accounts to the company in respect of $1,000,000 which they maintained to be the purchase price for the property, but refused to disclose any information in respect of the $300,000 contending that that sum represented a negotiation fee which was paid to them by the purchaser on behalf and for the benefit of an undisclosed negotiator.

Of significance is the fact that the appellants, had by letter dated 6th March, 1978 been appointed by the respondent, to act on behalf of the company in the sale of No. 7 Cecilio Avenue St. Andrew "as soon as current negotiations with the Jamaica Telephone Company are concluded." As at that time the proposed sale to the Jamaica Telephone Company had been discontinued, the reference to "current negotiations" with that company is unclear. Nevertheless, it is agreed that the appellants were retained by the company for the transaction and that they were the Attorneys having the carriage of sale in respect of the respondent's property to N.C.R. Jamaica Ltd, that fact being stated in the Agreement.

As a result of the non-disclosure in respect of the $300,000 the respondent thereafter brought an action against the 1st defendant and the appellants for monies had and received, being the said $300,000. The learned trial judge at the trial, having ruled against a no-case submission by counsel for the appellants, and having put the appellants on election, thereafter entered judgment against them for the sum of $300,000 being the balance of purchase price not accounted for by the appellants.

It is from this order, that the appellants now appeal.

As the appellants were not given an opportunity to adduce any evidence, the submissions before us were necessarily based upon the viva voce evidence given by the witnesses for the respondent at the hearing, in addition to the contents of certain documents which were tendered by agreement at the trial. The appeal

therefore concerns itself with whether that evidence was sufficient to establish the claim brought by the respondent. In those circumstances, the issues were confined to the following:

> (i) Whether the sum of $300,000 received by the respondent from the purchaser was part of the purchase price received on behalf of the appellant, or was it an amount separate and apart from the purchase price and which was paid over to the respondent as a negotiation fee to be paid to the negotiator, and not to the account of the respondent.
>
> (ii) If it were part of the purchase price, given the fact that the appellants acted upon the instructions of the 1st defendant, who had authority from the respondent, would the appellant be liable on the claim for monies had and received for the benefit of the respondent.

The appellants naturally, contend that the sum of $300,000 was an amount paid by the purchaser to the appellants not to be paid over to the respondent as part of the purchase price, but on behalf of a third person who it is alleged negotiated the agreement. Dr. Barnett contended that the Directors of the respondent company had admitted in evidence that they knew at all relevant times that a negotiation fee would be paid by the purchaser and would be payable to the negotiator, their interest being that the property would be sold for $1,000,000.

In order to assess the strength of this contention it is necessary firstly to look at the agreement. It states that the consideration for the sale of the property is $1,000,000, but it has a special condition which was referred to earlier in this judgment, but which is repeated here for ease of reference:

> "The purchaser will pay direct to Miller, Mitchell & Co such negotiation fee as agreed upon between the said Purchaser and the vendor."

On the face of it therefore in order to acquire the property, the purchaser would be required to pay $1,000,000 plus an agreed sum, for a negotiation fee. The evidence revealed that it was the vendors who were anxious to sell their property, and who through Bradford thought it necessary to employ a negotiator, given the difficulty on the market during that particular period to dispose of property. The negotiator therefore would be a negotiator for the vendor. However, in keeping with the decision of the Directors of the respondent company, any fee payable to the negotiator would have to be asked of the purchaser, if the respondent were to recover $1,000,000 clear of expenses for the property. The purchaser would therefore have to be asked to pay $1,000,000 plus the agreed negotiation fee, and that in my opinion is exactly what the agreement required. The respondent contended that the special condition in the Agreement has not been fulfilled in that there was in fact no agreement between the vendor and the purchaser, as to the amount of the negotiation fee, the agreement requiring that such agreement should be arrived at, at some date subsequent to the date of the agreement. Dr. Barnett for the appellants however contends, that the words in the special condition "as agreed" relate not to some future agreement, but in fact to an agreement already made. The evidence apparently supports the latter contention, as demonstrated in the following:

(a) Further and Better Particulars supplied as a result of an Order of the Court reveal that the negotiation fee was paid by N.C.R. Jamaica Ltd in three parts, the first on the 25/7/78, the second on 8/11/78 and the third on the 30/11/78; and

(b) Letter dated 30/11/78, in the 'agreed bundle' from the General Manager of N.C.R. Jamaica Ltd to the appellants in which he writes:

> 'We hereby instruct you to dispose of the Negotiation fees of Three Hundred Thousand Dollars (J$300,000.00) paid over to you in respect of the sale of the above properties to our Company and in keeping with the terms of the Agreement for Sale dated the 30th November, 1978.
>
> In due course you will be instructed how to dispose of same in accordance with instructions to be received from our negotiators by telephone.
>
> Please accept this letter as our irrevocable authority. We further indemnify you and your firm against any liability to any form of duty or taxation which if any should become due and payable resulting from the disbursement of this Negotiation fees.'

These documents support the fact that an amount of $300,000 was paid to the appellants in respect of negotiation fee and that this payment was completed on or before the date of the agreement i.e. 30th November, 1978. In my view however, this does not weaken the contention of the respondent for the following reason.

Interrogatories were served by Order of the Court on the 1st defendant Bradford in relation to whether or not there was a negotiation fee of $300,000. Those interrogatories were obviously required, as the respondent had entrusted to the 1st defendant the responsibility of selling the property as is evidenced by discussions between the Directors and which culminated in the company's letter to him on the 21st July, 1978 giving him such authority (supra). In addition the agreement required in its special condition, an agreement between the vendor and the purchaser as to the negotiation fee.

In this regard, the relevant section of the interrogatories is set out hereunder:

> Q. 1 (b) Is it true that the negotiation fee was $300,000?
>
> A. The First Defendant was informed by D.H. Semper that the negotiation fee was $300,000. Messrs Miller, Mitchell & Co, similarly

A. so informed the first Defendant but the First Defendant has no knowledge of his own. (Emphasis added)

The viva voce evidence of the other two Directors of the respondent company reveal that neither of them agreed on a negotiation fee with the purchaser. The reference to D.H. Semper is unclear, as that person, was the person to whom it is alleged a sum of $50,000 was paid as a Commission for sale of the property, he being the Real Estate Dealer, who introduced the purchaser to the vendor.

The state of the evidence therefore, is that no-one on behalf of the vendor (i.e. the respondent) came to any agreement with the purchaser, as to the amount of the negotiation fee. The special condition was therefore not fulfilled. An amount of $300,000 was nevertheless paid over to the appellants by the purchaser and is in fact referred to by that company, as the negotiation fee when it wrote to the appellants on the 25th July, 1978 stating:

> "... we wish to confirm our Firm's interest in the acquisition of these properties for the sum of $1m together with the payment of negotiation fees amounting to $300,000.00 to Messrs Miller Mitchell & Co., on or before the completion of the above transaction."

These words clearly indicate, in my opinion that the purchaser had agreed, subject to final approval of M.C.K. Dayton Ohio (subsequently stated in the letter referred to above) to pay a total of $1.3 million in exchange for the transfer of the property to that company.

After this sum was received by the appellants a letter dated 20th October, 1978 was written by the 1st defendant signing as a Director of the respondent company to the appellants in the following terms:

> "In accordance with the terms and conditions of the Agreement for Sale between Designs & Drafting Co Ltd and NCR Jamaica Limited, kindly deduct transfer tax, stamp duty and your legal fees from whatever sum paid over to your firm in respect of Negotiation fees.
>
> The Transfer Tax and Stamp Duty so deducted should be held in escrow by you and should be paid over to the Commissioner of Stamps and Estate Duty should in case he at any-time regard the Negotiation fees as part of the purchase price of the above properties, in which event no liability would fall due to Designs & Drafting Co. Ltd."

The 1st defendant, himself in those words, expressed reservation on whether the "negotiation fee" might not have been regarded as part of the purchase price. Significantly too, he authorised the appellants to deduct legal fees therefrom.

He thereafter empowers the appellants to -

> "... pay over the balance of what remains of such negotiation fee to whomsoever or in what account at any Bank in Jamaica, NCR Jamaica Ltd or its nominee instruct you so to pay over same.
>
> Please accept this as our irrevocable authority so to do."

This letter of instructions to the appellants, it must be noted, was written on the 20th October, 1978 before the parties entered into the Agreement on the 30th November, 1978. That the contract did not become effective until the latter date is evidenced by the purchaser's letter of the 25th July, 1978 (supra) which indicated that the agreement was conditional on the approval of N.C.R. Dayton, Ohio and pointing out that in the event of a non-approval the deposit of $130,000 was refundable. In addition, on the 8th November, 1978, the purchaser again addressed Miller, Mitchell & Co (the appellants) enclosing cheque for $25,000 in consideration of an extension of the option to purchase, to 5.00 p.m. on the 30th November, 1978.

It is at least strange, that instructions on the payment of the $300,000 were being given both by the 1st defendant and the purchaser at dates preceding the Agreement for Sale, especially having regard to the fact that at least up to the 8th November, 1978, there was no certainty on the part of the purchaser that the

Agreement would be concluded.

Nevertheless, apparently in keeping with the letter of the 1st defendant (writing as a Director of the respondent company) dated 20th July, 1978 (supra) the purchaser wrote to the appellants on the 30th November, 1978 imparting the follcwing intructions:

> "We hereby instruct you to dispose of the Negotiation fees of Three Hundred Thousand Dollars (J$300,000.00) paid over to you in respect of the sale of the above properties to our Company and in keeping with the terms of the Agreement for Sale dated the 30th November, 1978.
>
> In due course you will be instructed how to dispose of same in accordance with instructions to be received from our negotiators by telephone. [Emphasis added]

For the first time, the negotiator is referred to as the negotiator of the purchasers and not that of the vendors (the **respondent**), a factor which runs contrary to the evidence which portrayed a picture of the respondent company agreeing to negotiation fees thereby lessening its net intake in order to sell its property in a difficult market.

All this correspondence must be viewed on the background of **there** being evidence that no negotiation fee had been agreed between the 'vendor and the purchaser' as required in the Agreement for Sale. In my view, the $300,000 paid over in these circumstances, must be considered as a part of the purchase price for the reason that it was monies paid by the purchaser as the consideration for the transfer of the property to its ownership.

Against this background, on what evidence could the appellants be said, to be liable for monies had and received on behalf and for the benefit of the respondent?

To begin with, the appellants were the Attorneys for the respondent, and were retained to protect the legal interest of their client **and had a fiduciary relationship with the respondent.** Dr. Barnett in his submissions contends that the

appellants, having been appointed the Attorneys for the carriage of the sale, were presented with a letter of authority dated 21st July, 1978 from the company authorising the 1st defendant to sell the properties for $1,000,000 plus a negotiation fee which may become payable. On this basis, the appellants acted on the instructions contained in letter dated 20th October, 1978 (supra) authorising them to pay out negotiation fee in accordance with instructions to be received by the purchaser.

The appellants, however, as can be inferred by the Agreement for Sale knew that any negotiation fee, in the terms of the Agreement had to be agreed between the vendor and the purchaser. In spite of this, when the appellant Miller was visited by the two Directors of the company - Rutowski and Thompson on the 23rd January, 1979 together with the 1st defendant, and asked what was the negotiation fee, he declined to reveal it, on the ground that it was confidential. He was again visited about one week later by Thompson who was by then dissatisfied with the accounts which had been presented to the respondent. At this meeting, Thompson pointed out that by virtue of the Agreement the negotiation fee ought to be agreed by the vendor and purchaser and indicated that neither Rutowski nor himself was a party to any such agreement and as shareholders and Directors of the company they were entitled to know the full details of the transaction carried out on their behalf. The appellant Miller became vexed, and again did not disclose the amount of the negotiation fee. Nevertheless, the appellant Miller, writing on the 28th December, 1979 in reply to an enquiry letter from the respondent's Attorneys was able to write the following:

> "Neither of these letters has changed the situation as they confirm what we have been stating all along that we have acted at all **material** times in accordance with our instructions to which all the Directors of Designs and Drafting Co. Ltd were in Agreement and privy to."

In so far as the confidentiality is concerned the respondent's position on that is revealed in the cross-examination of Thompson by learned counsel for the 1st defendant Bradford, hereunder set out:

> "Q. Suggest that agreement obviously to be carried out between Company's Agent Bradford on behalf of the Company.
>
> A. Yes, but not without their knowledge.
>
> Q. Suggest Company had by its agreement relieved themselves of any entitlement to this information and delegated it to Bradford in the secret and confidential circumstances already suggested.
>
> A. No sir.
>
> Q. Was Bradford instructed and empowered to proceed in confidential manner?
>
> A. Confidential to the outside world. No need for confidentiality in discussions."

The evidence then, there being no evidence adduced by the appellant, is that there was no agreement by the two other Directors of the company - Thompson and Rutowski to forgo any participation in the settling of the Negotiation Fee on the basis of confidentiality. It is indeed difficult to understand the reason for the appellant Miller's refusal to divulge to the majority shareholders of his client company, details of a transaction in which he acted for the company. The allegation in his letter later written that he acted at all material times in accordance with instructions which all the Directors were in agreement and privy to, is of course in severe contradiction of the viva voce evidence of the witnesses for the respondent. In any event, had he not known before, he certainly knew on the 23rd January 1979, that the majority shareholders of the respondent company had no knowledge of the sum agreed as the negotiation fee, and that being so the question of whether the special condition of the Agreement had been fulfilled ought thereafter to have given him great concern. Instead, the evidence shows that he later, paid out a sum of $89,053 to the Worker's Savings &

Loan Bank by cheque dated 21st February, 1979 on the apparent instructions of the purchaser, this amount being paid to no named account. In addition, the Further and Better Particulars supplied by the appellants show that an amount of $183,059 was paid over to H.G. Bradford, the 1st defendant. The authority for so doing however is not to be found in the evidence. Bradford was the Director in the respondent company who undertook to oversee the sale of the property on behalf of the company. There was no agreement for him to benefit financially for his efforts. In his evidence Thompson in replying to questions asked by Counsel for Bradford testified that Bradford had never asked for remuneration for services in sale after June 1977, and again replied in the negative to the following suggestion:

> "Suggest in light of this that Rutowski suggested and you all agreed that so far as Bradford's expenses concerned, the Company would not be concerned with regard to how the negotiation fee was applied or paid provided the contract was for $1 million which was in fact in keeping with instructions?"

On the basis of the above analysis, I would conclude, that there was evidence upon which it could be found that the sum of $300,000 purported to be a negotiation fee, was in fact nothing more than a part of the total purchase price paid by the purchaser for the property. That the purchaser having paid over to the appellants a sum of $300,000 together with the stated sum of $1,000,000 as consideration, for the property, the appellants received it on behalf of their clients, the respondent company. In my opinion the Agreement for Sale indicated that the specified consideration together with the agreed negotiation fee would form the total price to be paid by the purchaser. In the circumstances as heretofore outlined the learned trial judge was correct in entering judgment against the appellants, they having elected to stand on their no-case submission, and thereby having deprived themselves of the benefit of advancing their case by way of testimony.

I would dismiss the appeal and order the appellants to pay the cost of the respondent both here and below to be taxed, if not agreed. For the reasons advanced by Downer, J.A., I would order interest on the $300,000 to be paid by the appellants at the rate of 10% for the period stated in his judgment.

**DOWNER, J.A.**

In this appeal it has to be decided whether Chester Orr, J., was correct in adjudging the appellants, Mr. Crafton Miller & Mr. Cecil J. Mitchell liable to pay $300,000 to the respondent company, Designs & Drafting Co. Ltd. The appellants are attorneys-at-law and they admit in their Further and Better Particulars, that they received negotiation fees amounting to $300,000 from N.C.R. Jamaica Ltd. in three parts during July and November of 1978. The date of the third payment, 30th November, 1978 is significant, for on that day an agreement for sale was signed between the respondent company as vendor, and N.C.R. Jamaica Ltd. as purchasers in respect of a valuable commercial property for a consideration of $1,000,000. The $300,000 awarded by the court was paid over to the appellants in pursuance of the special condition in the contract.

The special condition of this agreement for sale is at the heart of this dispute. It is the final term in the contract and it reads:

> "SPECIAL CONDITIONS: The Purchaser will pay direct of Messrs. Miller, Mitchell & Co. such negotiation fees as agreed upon between the said Purchaser and the Vendor."

Its true construction will determine the outcome of this appeal. This must be done in the light of the contract as a whole. Also the circumstances surrounding its formation, and the common law and equitable provisions on the law of restitution, must be given force and effect.

**The construction of the special condition**

That the construction of the sale agreement is the principal issue of dispute in this case, was recognised from the outset by the appellants. Paragraph 3 of their defence stated that the second and third defendants would, at the trial, refer

to the agreement for its full terms and legal effect. They were the agents for the respondent company and this is borne out by the following clause in the sale of agreement. It states:

> "CARRIAGE OF SALE: CRAFTON S. MILLER of Messrs. Miller, Mitchell & Co. Attorneys-at-Law, 1 Duke Street, Kingston."

The respondent company has relied on a claim for money had and received by the defendants to the use of the plaintiffs, and the gist of the claim is stated thus:

> "6. That the Defendants received the said sum of $300,000.00 for and on behalf of the Plaintiff and still hold to the use of the Plaintiff the said balance of $350,000.00.
>
> AND THE PLAINTIFF CLAIMS the sum of $350,000.00 together with interest thereon at the rate of 10% per annum from the 17th January 1979 until payment or Judgment herein." (Emphasis supplied)

The basis of the claim was that by the terms of the special condition, the negotiation fees to be paid by the purchaser must be agreed to by the respondent company and purchaser. Further, at common law the necessary implication must be that fees received by the appellant as an agent, must be for the vendor's account. In the circumstances of this case, these fees would be kept in a client's account. From the stand point of equity, since it was specifically averred and admitted that the appellants were the attorneys-at-law and agents for the respondent company, they were in a fiduciary relationship to it, and so bound to give independent advice and account to, and pay over any funds received pursuant to the contract. The respondent company had an equitable proprietory interest in the fund. This is the equitable aspect of the claim for money had and received to the plaintiff's use.

The respondent company has contended that there was no prior agreement as to the amount to be paid as required by the terms of the contract. However, since $300,000 was paid pursuant to the special condition of the contract, it was submitted that Chester Orr, J., was correct to find the appellants liable to pay that amount to the respondent company. In any event, the conduct of the respondent company indicates that they were subsequently satisfied with the amount of $300,000 as a negotiation fee. If there was a prior agreement as to the amount of the negotiation fee, it would have been expressly stated in the special condition.

The appellants' admission in their Further and Better Particulars are crucial and explains the nature of their defence. Paragraph 1 **(d)** & **(e)** states why the funds were disbursed. It said:

> "The Second and Third named Defendants in answer to paragraph 1, say that:
>
> ...
>
> (d) instructions were given by the Plaintiff's agent (Bradford), namely the First named Defendant, by letter dated on the 20th October, 1978 to the Second and Third named Defendants (Miller & Mitchell) and by letter from the purchaser to the Second and Third named Defendants dated the 30th November 1978.
>
> (e) the negotiation fee was paid as follows:
>
> | | |
> |---|---|
> | To H.G. Bradford or his account: | $183,659.00 |
> | To Workers Savings & Loan Bank: | $ 89,053.00 |
> | | $272,712.00 |
>
> The balance of $27,288.00 is still held by Miller Mitchell & Company to meet legal expenses and possible Stamp Duty & Transfer Tax liabilities."

The appellants never seemed to have applied their minds to the nature and quality of those "instructions" although the evidence discloses that they were paid fees for legal advice by the respondent company. Then paragraph 3 (b) averred on whose behalf the appellants considered they received the funds:

> "3. The Second and Third named Defendants in answer to paragraph 3, say that:
>
> ...
>
> (b) they received the $300,000 on behalf of undisclosed negotiators."

This was an unusual averment, for it presumes that funds paid over to the appellants as agents of the vendors in pursuance of a contract, were for the account of undisclosed negotiators. This presumption runs throughout the pleading. It was on that presumption that the instructions were accepted and disbursements made of $272,712 and the balance retained without recourse to the respondent company. If such a presumption was in accordance with our laws, it would permit an agent to disregard his principal's interest. The common law does not sanction such conduct: see **Ellis v. Gulton** [1893] 1 Q.B. 352 where the Court, in deciding to whom deposits were paid, laid down the principle that proceeds of the sale of land paid to an agent were held to be for the account of the vendor. At page 353 Bowen, L.J. said:

> "The solicitor of the vendor is, unless the contrary has been agreed on, the agent for the vendor to receive a deposit on his behalf - the three cases **Edgele v. Day** Law Rep. 1 C.P. 80, **Banford v. Shuttleworth** 11 Ad & E 926 and **Duke of Norfolk v. Worthy** 1 Camp. 337 abundantly show this and carry as far back as the time of Lord Ellenborough." [Emphasis supplied]

See also **Stevens v. Hill** which will be adverted to later.

Equity, which presumes a fiduciary relation between an attorney-at-law and client, follows the common law in this regard. Further, such relationships are confidential both in

equity and at common law. There was a prior averment in the defence which emphasised the appellants' presumption and sets it out with clarity. At paragraph 6 the appellants averred:

> "6. The Second and Third Defendants deny paragraph 4 of the Statement of Claim. The Second and Third Defendants say that the purchase price was $1,000,000.00 as stated in the agreement for sale referred to in paragraph 3 above. The said agreement further provided that the purchaser pays to Miller, Mitchell & Co. negotiation fees as agreed upon between the Purchaser and the Vendor which said negotiation fee was agreed upon between the Plaintiff and the Purchaser at $300,000.00. This said negotiation fee which was to be paid by the Purchaser at no time formed a part of the purchase price and was for the purchaser's account. The Plaintiff gave written instructions that this said negotiation fee was to be paid out in accordance with the instructions of the Purchaser. In the premises the Second and Third Defendants deny that they are entitled to account to the Plaintiff for the said sum of $300,000.00 or any part thereof."

If the $300,000 was for the purchaser's account as averred, it is difficult to understand why the respondent company had to give instructions for its disbursement. However, in view of this defence, it is necessary to examine the documentary evidence on which the appellants rely. Before the evidence is examined, it is essential to note that the appellants were retained as early as 6th March 1978 to act on behalf of the respondent company in the sale of the property. The fiduciary relationship commenced on that date. The purported instructions state:

> "20th October, 1978
>
> Messrs. Miller, Mitchell & Co.
> Attorneys-at-Law,
> 1, Duke Street,
> KINGSTON.
>
> Attention: Mr. C.S. Miller
>
> Dear Sirs:
>
> Re: Sale of 7 & 9 Cecelio Avenue, Kingston 10 Designs & Drafting Co. Ltd. to N.C.R. Jamaica Limited

"In accordance with the terms and conditions of the Agreement for Sale between Designs & Drafting Co. Ltd. and NCR Jamaica Limited, kindly deduct transfer tax, stamp duty and your legal fees from whatever sum paid over to your firm in respect of negotiation fees.

The Transfer Tax and Stamp Duty so deducted should be held in escrow by you and should be paid over to the Commissioner of Stamps and Estate Duty should in case he at anytime regard the negotiation fees as part of the purchase price of the above properties, in which event no liability would fall due to Designs & Drafting Co. Ltd.

After deduction of the Transfer Tax, Stamp Duty and legal fees stated above you should then pay over the balance of what remains of such negotiation fees to whomsoever or in what account at any Bank of Jamaica, NCR Jamaica Limited or its nominee instruct you so to pay over same.

**Please accept this as our irrevocable authority so to do.**

**Yours faithfully**

**H.S. Bradford**
**DESIGNS & DRAFTING CO. LTD."**

It is important to note that this "instruction" was dated 20th October, 1976 and it is admitted by all, that the sale agreement in issue is dated November 30, 1976. Also there is no evidence in this letter on the size of the fee. There is a curious statement at the end of the "instruction" stating that the authority was irrevocable. Although the laws of the Medes and Persians were regarded as immutable, such qualities cannot be attributed to mere statements by the course of the common law. So neither an agent nor a director of a corporate body is empowered to make such a statement which carries out the legal effect envisaged. The canons of construction developed by the courts must give force and effect to the special condition in the sale agreement, which must govern the quantum and disbursement of the funds. This letter is crucial to the appellants' case, but it speaks to the future once it is decided, that neither Bradford nor the respondent company, had the power to give irrevocable orders.

Then this letter was of no effect as regards the disbursement of the negotiation fee. It could not be regarded as "the contrary has been agreed on" so as to exonerate the appellants from their primary obligations as agents with a fiduciary relationship with the respondent company. They were under an obligation to examine their client's articles to ascertain if Bradford had the powers he assumed.

There is no indication in the Articles of Association in paragraphs 85 to 102 that Bradford, as a director, had any power to make such an irrevocable commitment in the company's name. Certainly, the company could not bind itself by such a letter. It could ratify the letter, but it did not. Since the appellants also rely on the authority given to Bradford to sell the property, it is necessary to quote that document in full so as to disclose its limited remit. It reads thus:

> "DESIGNS & DRAFTING CO. LTD.
>
> 21st July 1970
>
> Mr. H.G. Bradford
> Designs & Drafting Co. Ltd.
> 9 Cecelio Avenue
> Kingston 10
>
> Dear Mr. Bradford,
>
> Re: Property 5-7-9 Cecelio Avenue,
> Kingston 10
>
> We hereby instruct you to sell the above property to any purchaser who is ready and able to pay the sum of $1,000,000 as the purchase price plus payment of any negotiation fee which may become payable.
>
> Yours faithfully,
> DESIGNS & DRAFTING CO. LIMITED
>
> Sgd/.....J.S. Thompson )
> ) DIRECTOR(S)"
> .....H.G. Bradford )

It is an authority to sell for a price of $1,000,000 plus a negotiation fee which might become payable. So this agency is of no help to determine the scope of the special condition which expressly deals with how the negotiation fee is to be determined

and provides by implication of law for it to be paid to the appellants. A point to note was that Bradford, as a director, was also in a fiduciary relationship to the respondent company. This factor should have been examined by the appellants and Bradford advised that he had no power to give the instructions in issue.

As the appellants aver that they received the $300,000 on behalf of undisclosed negotiators, it was necessary to spell this out at the trial. They did, in terms of the following letter:

> "NCR JAMAICA LIMITED
> NCR Building
> Caledonia Avenue
> P.O. Box 22
> Kingston, Jamaica
>
> 30th November, 1978
>
> Messrs. Miller, Mitchell & Co.
> Attorneys-at-Law,
> 1, Duke Street
> KINGSTON
>
> Attention: Mr. C.S. Miller
>
> Dear Sirs:
>
> Re: Negotiation Fees on purchase of
> 7 & 9 Cecelio Avenue, St. Andrew,
> Volume 1082 Folios 36 & 37 and
> Volume 1151 Folio 438 from Designs
> & Drafting Co. Ltd.
>
> We hereby instruct you to dispose of the Negotiation fees of Three Hundred Thousand Dollars (J$300,000.00) paid over to you in respect of the sale of the above properties to our Company and in keeping with the terms of the Agreement for Sale dated the 30th November, 1978.
>
> In due course you will be instructed how to dispose of same in accordance with instructions to be received from our Negotiators by telephone.
>
> Please accept this letter as our irrevocable authority. We further indemnify you and your firm against any liability to any form of duty or taxation which if any should become due and payable resulting from the disbursement of this Negotiation fee.
>
> Yours faithfully,
> NCR JAMAICA LIMITED
>
> Sgd/ .....
> D.M. KALSALL - GENERAL MANAGER"

There are a number of points to take into account in this aspect of the correspondence. The ineffective letter from Bradford of 20th October on behalf of the company, must be read subject to the sale agreement of November 30. By then the respondent company had entered into a contract, where the final clause deals with a specific provision on the negotiation fee. The appellants, by their own admission, in their Further and Better Particulars, on that day had $300,000 in their hands as negotiating fees and this letter makes it clear that Halsall, on behalf of the purchasers, or his nominees would give subsequent instructions as to how to pay out such fees. He had no power to do so, yet the appellants admit presumably on Halsall's instructions, to paying to one H.C. Bradford or his account and to an account at the Workers Bank, a sum of $272,712. Halsall also presumes he could bind the purchasers by stating that his letter was an irrevocable authority. On the other hand, Halsall's letter makes it clear that the negotiation fee of $300,000 was paid in pursuance of the special condition in the contract.

An earlier letter of July 25, 1978 suggests that there was a draft contract in existence at that date and that the $300,000 negotiating fee was a label, as in substance, the price to be paid for the property was $1,300,000. The letter also emphasises why the deposit in the contract was $130,000 or 10% of the effective purchase price. Perhaps the existence of this earlier draft contract explains the error of the completion date stated to be 31st October, 1978 in a contract dated 30th November, 1978. Be it noted, however, this letter cannot provide conclusive proof that the negotiation fee of $300,000 was agreed to by the respondent company when the contract was signed. What it does, is to explain why the purchaser paid that sum to Crafton Miller & Co. as the negotiation fee. As reliance was placed on that letter, it is appropriate to cite it. It says:

"July 25, 1978

NCR JAMAICA LIMITED
NCR BUILDING
Caledonia Avenue
P.O. Box 22
Kingston

Private & Confidential

Miller Mitchell & Co.,
1 Duke Street,
Kingston.

Attention: Mr. Crafton Miller

Dear Sirs,

Further to a letter dated July 20, 1978, from Designs and Drafting Co. Ltd., and the Agreement of Sale enclosed therein in respect of 5, 7 and 9 Cecelio Avenue, Volumes 1061, 1062 and 192, Folios 36, 37 and 54 respectively, we wish to confirm our Firm's interest in the acquisition of these properties for the sum of $1m together with the payment of negotiation fees amounting to $300,000.00 to Messrs. Miller Mitchell & Co. on or before the completion of the above the transaction.

This confirmation, however, is subject to the final approval by NCR Dayton, Ohio, within forty-five days from the signing of this letter. In order, however, to show our good faith and our interest in the transaction, we enclose herewith our Cheque No. 0027770 for $130,000.00.

The aforesaid deposit of $130,000 will be refundable to the purchasers, NCR Jamaica Ltd., should the Agreement of Sale be not finally accepted, and the said sum will therefore be held in escrow by you pending final acceptance by our Principals, NCR Dayton, Ohio.

Yours very truly,

D.M. Halsall
General Manager."

The contents of this letter was never communicated to the respondent company. It is to be noted that at that juncture, the contract was not yet formed and when it was formed, it made a specific provision regarding the negotiation fee. Also to be noted is that the contract specifically conforms to section 3 of the Transfer Tax Act. It provides that, that tax is to be borne by the respondent company as vendor. The appellants have admitted

that they hold $27,288 out of the $300,000 to meet transfer tax liabilities. For completeness it must also be stated that it must be inferred that the respondent company agreed subsequently to the negotiation fee of $300,000 once they started proceedings to recover it from the appellants. In legal language the subsequent acceptance by the respondent company had a retrospective effect. Cheshire and Fifoot The Law of Contract 6th edition pages 36 - 37 illustrates this by citing **Trollope & Colls Ltd. v. Atomic Power Constructions Ltd.** [1962] 3 All E.R. 1035 at 1040. Megaw, J. said:

> "The parties have assumed that when the contract is made - when all the terms have been agreed in their final form - the contract will apply retrospectively to preceding transactions."

See also **Ex parte Starke** [1897] 1 Ch. 575 at 600. Had the appellants informed the respondent company of this offer it would have been accepted then, having regard to the deposit of $130,000. Be it noted that there is no action against N.C.R. Jamaica Limited on quantum. The issue is recovery from the appellants.

It is against that background that it is now possible to pose the important questions on this aspect of the case. The issue may be posed thus: Where the special conditions of a contract for sale of land expressly provided for negotiation fees as agreed upon by the parties, were the prior "instructions" of the vendors regarding disbursement of those fees, binding on their attorney-at-law after the formation of **the contract? Furhher**, after the contract, could the attorneys-at-law pay out the negotiation fees received without the authorisation of the vendors? On the above analysis, the answers are in the negative especially having regard to the status of the respondent as a company and the nature of the instructions. So the appellants' defence that they were authorised to pay out the fee has failed.

**Does the respondent company have a good cause of action against the appellants for money had and received?**

The only party having authority to disburse the negotiation fee of $300,000 in the hands of the appellants, was the respondent company. That fee was part of the proceeds of sale of the property sold by the respondent company to N.C.R. Jamaica Ltd. Since it was in the hands of the appellants, as attorneys-at-law having carriage of sale, they were, in law, obliged to pay it over to the respondent company who were the vendors. The fact that the appellants refrained from informing the respondent company of the amount of the fee until further and better particulars were ordered against them, does not alter the situation. Once Chester Orr, J. decided that the no-case submission should be overruled as a matter of law on the uncontradicted documentary evidence, the agreed bundle, and admissions made in the Further and Better Particulars and the defence, he gave a brief ruling which was akin to a trial on a preliminary point of law. I quote it in full:

> "Second and third defendants-
> Submission overruled. Defendants
> liable for $300,000.00 only not for
> $50,000.00."

It was as if he stood over his reasons pending judgment on the other parties in the case. This award was not damages, but restitution, on the basis that by refusing to pay over the $300,000, the appellants were being unjustly enriched at the expense of the respondent company. That was correct both at common law and in equity and the only omission **was** the failure to award interest which was pleaded and to state that costs followed the event.

As for the criticism raised by Dr. Barnett, of the ruling, it is pertinent to quote the learned judge's note at the start of the submissions at p. 116. It reads:

> " Defence
>
> Barnett elects to stand on submission.
> Cases Halsbury Vol. 37 4th ed. Par. 516."

Then, here is how the learned judge's note at the end of Dr. Barnett's submissions runs. It quotes Dr. Barnett as submitting:

"Plaintiffs action on their own evidence must fail."

To show that the learned judge was fully aware of what he was doing, the following passage from **Yuill v. Yuill** [1945] 1 All E.R. 183 is cited. Lord Greene, M.R. at p. 185 said:

> "... The practice is discussed in **Alexander v. Rayson** [1936] 1 K.B. 169; Digest Supp; 105 L.J.K.B. 146; 154 L.T. 205, **Parry v. The Aluminium Corpn., Ltd.** [1940] 162 L.T. 236; Digest Supp. and **Laurie v. Raglan Building Co. Ltd.** [1942] 1 K.B. 152; [1941] 3 All E.R. 332; 111 L.J.K.B. 292; 166 L.T. 63, and I will assume that it is a proper practice to follow in the Divorce Division. It does not mean that counsel by submitting no case ipso facto loses his right to call evidence if his submission fails. He only loses that right if he definitely elects to call no evidence. He may make this election expressly or (as in **Laurie v. Raglan Building Co. Ltd.**) (supra) impliedly. The practice which has been laid down amounts to no more than a direction to the judge to put counsel who desires to make a submission of no case to his election and to refuse to rule unless counsel elects to call no evidence. Where counsel has so elected he is, of course, bound;"...

Be it noted that the appellant was exonerated as regards the amount of $50,000 in accordance with the submissions made on his behalf. The ground of appeal pertaining to this issue of "no case to answer" states:

> "(4) The learned trial judge further erred in law in entering judgment against the Defendants/Appellants for the sum of THREE HUNDRED THOUSAND DOLLARS - ($300,000.00) without giving the Defendants/ Appellants an opportunity to be heard on the quantum of damages or to comment on any evidence which might have been given by the First Defendant/Appellant (Bradford) on the issue of the quantum of damages."

Since damages were neither claimed nor awarded, this ground of appeal was superfluous. It also shows that no effective criticism was made of the judge's ruling as he followed the law stated in Vol. 37, 4th edition Halsbury's Laws paragraph 516 by ruling on the no case submission, since counsel indicated that he was not going to call any evidence.

As regards its cause of action, the following passage from Cheshire, Fifoot and Furmston's Law of Contract 11th edition illustrates the principle relied on by the respondent company. At p. 646 it reads:

> "... A few scattered cases are reported in the eighteenth and early nineteenth centuries. Perhaps the most instructive is the case of **Stevens v. Hill** in 1805 5 Esp. 247
>
> > The defendant was a 'navy agent' he received moneys payable to naval officers. Admiral Smith wrote the following order 'Out of my half-pay, which will become due the 1st of January, pay to Stevens £15.' He sent the order to the plaintiff. The plaintiff brought it to the defendant, who said that 'he had then no money of Admiral Smith's in his hands, but that he would pay it out of the Admiral's money when he received it.' The defendant later received £40 on the Admiral's account, but did not pay the plaintiff.
>
> The plaintiff sued the defendant in quasi-contract and obtained judgment. In the words of Lord Ellenborough, 'it was an appropriation of so much to the use of the holder of the draft and made him liable on the receipt of any money upon the credit of which it was drawn."

The appellants were like the "navy agent" in **Stevens v. Hill** [1805] 5 Esp. 247 so when this principle is applied to the facts of this case, it makes the appellants liable to the respondent company for the proceeds of the negotiation fee.

Then Vol. 9 Halsbury's Laws 4th edition, states at paragraph 683:

> "The action for money had and received lies at the suit of a principal against his agent for money of the principal in the agent's hands. ..."

The note states that the agency and the receipt must be clearly proved and **Clarence v. Marshall** [1834] 2 Cr. & M 495 and **Wells v. Ross** [1817] 7 Taunt 403 are cited.

To my mind, the respondent had a good claim and has succeeded in proving it. The appellants as attorneys-at-law, had

the carriage of sale for the vendors, so they were bound to account to them for any proceeds paid by the purchasers pursuant to the contract. Again to reiterate, the appellants stood in a fiduciary relationship to the respondent company from March 6, 1978 and this issue was adverted to in the statement of claim at paragraph 2. See **Shamia v. Joory** [1958] 2 W.L.R. 64 and **Nocton v. Asburton** [1914] A.C. 932. Here also the remedy is restitution which includes the interest claimed. Goff & Jones on the Law of Restitution, 3rd edition, relied on by Mr. Henriques, states the equity position thus at p. 520:

> "... it is our view that the plaintiff, to whom the holder of a fund has attorned, **should have the benefit of an equitable** proprietary claim to the fund so as to prevent the general creditors of the holder taking advantage of it in the event of his insolvency."

In this case the appellants are bound to attorn to the respondent company. The pleading in the statement of claim of the respondent company at paragraph 2 reads:

> "2. That the second and third named Defendants at all material times practised as Attorneys-at-Law under the firm name of Messrs. Miller, Mitchell & Co. and were at all material times the Attorneys-at-Law and agents of the Plaintiff in the sale of the Plaintiff's premises situate at Nos. 5, 7 and 9 Cecelio Avenue, Kingston 10, to N.C.R. Jamaica Limited."

It was a sufficient plea to cover both the common law and equity claim for money had and received. **Moses v. Macferlan** [1760] Burr 1005 emphasises this well. In that case Lord Mansfield said:

> "One great benefit which arises to suitors from the nature of this action, is that the plaintiff need not state the 'special circumstances from which he concludes that ex aequo and bono (in natural justice and equity) the money recieved by the defendant ought to be deemed as belonging to him.' He may declare generally 'that the money was received to his use' and make his case at the trial."

I would however, like to add that even the most able and experienced lawyers or judges may, and do make errors in interpreting the law. To my mind the appellants did, in this difficult and complex matter. I am also aware of the hardships which might be borne by the appellants, especially as they did not seek an indemnity and join the ultimate recipients of the disbursements in third party proceedings.

In the Court below, this case had some unusual turns. It might be that proceedings could have been shortened, had the respondent company relied on section 307 of the Judicature (Civil Procedure Code) and sought judgment on the admissions of the appellants that they were attorneys-at-law for the appellant and as such, had received $300,000 as negotiation fees pursuant to the contract for sale. Had this been done, the submissions on "no case to answer" would have turned on the interpretation of the agreed documents and the legal position of the appellants in the light of the contract for sale. The learned judge grasped this, and it accounts for his laconic judgment. This appeal, concludes at this level, the case of the respondent company against the appellants. But the case of the respondent company against Bradford, the first defendant is part-heard in the Supreme Court. It ought to be continued or terminated as a matter of urgency. Since the only cause of action pleaded is a case of money had and received, that case now concerns a payment of $50,000 as commission fees which is set out in paragraph 5 of the respondent company's statement of claim. Bradford had obtained leave to appeal, but there is no indication that such an appeal has been pursued. In substance, that aspect of the case was adjourned in the Court of Appeal which was impermissible.

The ruling that he had a case to answer was neither a final nor interlocutory order in terms of section 579 (1) of the Civil Procedure Code. It was a ruling during the course of trial on the merits of the case. This Court therefore, would have no

jurisdiction to hear such an appeal at that stage: see **Moncris Investments Ltd. & Ors. v. Lans Efford Francis & Ors.** (unreported) S.C.C.A. 50/92 delivered 23rd June, 1992. That the position is similar in England, see **W.E.A. Records Ltd. v. Visions Channel 4 Ltd. & Ors.** [1983] 2 All E.R. 589 where Lord Donaldson, M.R. said at p. 593:

> "... Whilst on the subject of jurisdiction, it should also be said that there is no power enabling a judge of the High Court to adjourn a dispute to the Court of Appeal which, in effect, is what Peter Gibson J seems to have done. The Court of Appeal hears appeals from orders and judgments. Apart from the jurisdiction (under RSC Ord 59, r 14(3)) to entertain a renewed ex parte application, it does not hear original applications save to the extent that they are ancillary to an appeal." (Emphasis supplied)

Another unusual turn was the ruling by the learned judge which stated "Stay of proceedings vs second and third defendants pending completion of the hearing." Once a formal order was presented to this Court, the presumption was that the Registrar had complied with section 579 of the Civil Procedure Code and a minute was approved by the judge, from which the order or judgment was prepared. There was therefore no point in invoking the inherent powers of the Court to stay proceedings against the appellants, since those proceedings could be, and were appealed. The purported stay must be regarded as surplusage.

Yet another aspect to note is that the first defendant, Bradford, brought his fellow directors into the trial as third and fourth parties, so that aspect of the trial is still pending. As there may yet be a final appeal, it would be appropriate and cost effective to have matters re-consolidated so that if required, there could be one appeal. Also, it is somewhat surprising that although the learned judge ruled, "Adjourned for a date to be fixed," the relevant parties have not sought to resume the hearing. The appellants, however, with some justification, have complained that they had to await a long period for the hearing below to be

resumed after the submission of no case to answer. Yet, they filed a notice of appeal since 11th April, 1991. The formal order, conferring jurisdiction on this Court, was not filed until 28th October, 1992, the last day of this hearing and it was done because this Court insisted on it. There is no evidence that the appellants complained to the Registrar of the Supreme Court about the failure on the part of the respondent company to file a formal order.

There are other unusual aspects of this case. I have deliberately refrained from considering the oral evidence because documentary evidence tends to be more reliable than oral evidence: see **A.G. of Trinidad v. Kalickal Bhoopial Samial** [1987] 36 W.I.R. p. 382 and **Bigsby v. Dickson** [1868-77] IV Ch. 24. So in the event the hearing is resumed in the Supreme Court, the trial will be conducted more satisfactorily without any assessment of the oral evidence in this Court. Then again, the respondent company rightly pleaded interest, yet no award was made. I would award 10% from the filing of the writ to 4th March, 1989 when judgment was reserved to consider the submissions on no case to answer. Also, there was the question of costs. The judge stated "costs of today reserved." The inference is clear that he intended to make an award of costs when the hearing was resumed and the purported stay of proceedings against the appellants lifted. It must be borne in mind that all this confusion was caused because leave to appeal was sought and granted to Bradford as first defendant on a misreading of **The Gleaner Co. Ltd. & John Hearne v. Michael Manley** (unreported) S.C.C.A. 4/83 delivered May 13, 1983. It is clear from a close reading of the majority judgments (Zacca,P & Rowe, J.A.), that the decision in the court below discharging the foreman of the jury and ordering the trial to continue, was treated as an interlocutory order thus permitting an appeal. White, J.A. dissenting, described the decision below as a ruling during the course of a trial, and he assumed jurisdiction with reluctance.

The jurisdictional point as to whether the ruling was interlocutory, was never in issue. That case therefore cannot be authority to disregard the statutory provisions that appeals are only permissible from interlocutory or final orders. Leave to appeal was wrongly granted to Bradford, the first defendant and it seems, he has rightly not sought to exercise it.

In these circumstances, the learned judge overlooked the final order which enabled the appellants to come to this Court. Because of that error, he omitted to make an order for costs and an award for interest which was claimed. On a re-hearing these omissions can be repaired in the interest of justice - see paragraph 18 (1) (3) and (4) Court of Appeal Rules, 1962 Jamaica Gazette Proclamations Rules & Regulations October 11, 1962 which empowers this Court to make any order which ought to have been given or make such further order as the case may require without reliance on a respondent's notice. So the appellants must pay the agreed or taxed costs both here and below. As for interest, a general averment is a sufficient plea where interest is claimed as an ingredient for restitution. It arises as an inference of law and no evidence is required to prove it. This was recognized in **Karberg's** case [1892] 3 Ch. 1 at 17 where the Court of Appeal (Lindley, Bowen, Kay, LJJ) is reported thus:

> "The Court held that where a contract was rescinded, interest on money actually paid under it ought to be allowed, not by way of damages, but on the ground that the parties were to be restored as far as possible to their original position. The appellant must have interest at 4 per cent on the money which he paid from the time when he paid it."

So the interest on the sum of $300,000 adjudged to the respondent company ought to be paid at the rate of 10% from the time the writ was served to 4th March, 1991 when the submissions on no case to answer were concluded.

**WOLFE, J.A.(AG.)**

The respondents entered into an agreement for sale with N.C.R. Jamaica Ltd. to sell premises Nos. 5, 7 and 9 Cecelio Avenue, St. Andrew. The essential clauses of the said agreement are set out hereunder:

| | | |
|---|---|---|
| "1. | DATE OF AGREEMENT: | 30th November, 1978 |
| 2. | CONSIDERATION: | One Million Dollars (J$1,000,000.00) |
| 3. | TERMS OF PAYMENT: | A deposit of J$130,000.00 on the signing of this Agreement. The balance on completion. |
| 4. | COMPLETION: | On presentation of Registrable Transfer and Duplicate Certificates of Title on or before the 31st October, 1979 |
| 5. | CARRIAGE OF SALE: | Crafton S. Miller of Messrs Miller, Mitchell & Co., Attorneys-at-law, 1 Duke Street, Kingston |
| 6. | SPECIAL CONDITION: | The purchaser will pay direct to Messrs Miller, Mitchell & Co. such negotiation fees as agreed upon between the said purchaser and the vendor." |

The purchaser paid over to Messrs. Miller, Mitchell and Co., the sum of $1,300,000. Agreed correspondence tendered in evidence unmistakably stipulate that the said amount is comprised of $1,000,000 as consideration money for the property being sold and $300,000 for negotiation fees. The amount of $300,000 designated negotiation fees was disbursed by the attorneys-at-law having the carriage of sale as follows:

| | | |
|---|---|---|
| (i) | To H.G. Bradford or his account | $183,059.00 |
| (ii) | To Workers Savings & Loan Bank | $ 89,053.00 |
| | | $272,712,00 |
| (iii) | Retained to meet legal expenses and possible Stamp Duty and Transfer tax liabilities | $ 27,288.00 |
| | | $300,000.00 |

This disbursement was made on the authority of a letter dated 20th October, 1978 by the duly authorised agent of the plaintiff. Worthy of note is that, this letter predates the date of the agreement which is the 30th November, 1978. This letter forms part of the agreed bundle of documents. It must be noted also that the negotiation fees were paid in instalments and the last instalment was paid on the 30th day of November, the date of the agreement. I will return to this aspect of the transaction when I am discussing the effect of the special condition.

The action giving rise to this appeal was framed in Quasi Contract. The writ of summons is endorsed with part of the statement of claim in the following terms:

> "The Plaintiff's claim is against the Defendants to recover the sum of THREE HUNDRED AND FIFTY THOUSAND DOLLARS ($350,000.00) being monies had and received by the Defendants to the use of the Plaintiff, the particulars whereof exceed 3 Folios and are delivered separately."

Certain extracts from the statement of claim are set out hereunder in an endeavour to create a better understanding of the plaintiff's claim:

> **Para. 3**
>
> "An agreement for sale dated the 13th day of November, 1978 made between the plaintiff and the said N.C.R. Jamaica Limited which was negotiated by the first named defendant and the second and third named Defendants on behalf of the Plaintiff stated a consideration for the sale of the said premises as $1,000,000.00 and further the first and second named Defendants rendered an account in connection with the

"said sale showing the consideration as $1,000,000.00 and also a 5% sale commission of $50,000.00."

Para. 4

"That the real purchase price for sale of the said premises was not $1,000,000.00 but $1,300,000.00 and the first, second and third named Defendants have failed, neglected and/or refused to pay over to the Plaintiff the said sum of $300,000.00 or to account to the Plaintiff for the said sum or any part thereof."

Para. 6

That the Defendant received the said sum of $300,000.00 for and on behalf of the Plaintiff and still hold to the use of the Plaintiff the said balance of $350,000.00."

Nowhere in the statement of claim is any reference made to the negotiation fee, neither is any reference made to the special condition contained in the agreement. It is not contended therein that the negotiation fee was not agreed between the parties as per the special condition. Nowhere in the statement of claim was it pleaded that the $300,000, whether it be labelled purchase price or negotiation fee, was paid out without the authority of the plaintiff.

Extracts from the Defence of the appellants are also set out hereunder:

Para. 2

"Save that the second and third named Defendants admit that at all material times they practise as Attorneys-at-Law under the firm name of Messrs Miller, Mitchell & Co. and acted as Attorneys-at-Law in the sale of the Plaintiff's premises situate at Nos. 5, 7 and 9 Cecelio Avenue, Kingston 10 to N.C.R. Jamaica Limited the second and third Defendants deny paragraph 2 of the Statement of Claim."

Para. 3

"As to paragraph 3 of the Statement of Claim the second and third named Defendants deny any knowledge of the plaintiff entering into an agreement of sale on the 13th November, 1978, but admit having knowledge of an agreement of sale entered into between

"the Plaintiff and N.C.R. Jamaica Ltd. dated the 30th day of November, 1978 in respect of the premises referred at paragraph 2 of the Statement of Claim and the Defence respectively. The second and third Defendants will at the trial refer to this agreement for its full terms and legal effects."

**Para. 4**

"Further as to paragraph 3 the second and third named Defendants deny that they together with the first named Defendant negotiated the sale of the said premises and further say that in so far as the purchase price is shown in the agreement of sale dated the 30th November, 1978 as $1,000,000.00 such was entered therein by the second named defendant acting upon the plaintiff's instructions as conveyed to them by its duly authorised agent, the first Defendant."

It is clear from the paragraphs of the defence which have been set out above, that the second and third named appellants have denied that they were the agents of the respondent for the purpose of negotiating a sale on behalf of the respondents or any other person. These pleadings make it unmistakably clear that the appellants' agency was a limited one arising out of a concluded contract and extended only to the receipt of the purchase money and any other sum which in keeping with the terms of the contract was payable to the respondent under the contract of sale.

In respect of the purchase price and the negotiation fee the appellants in their defence pleaded, inter alia, that:

**Para. 6**

The second and third Defendants deny paragraph 4 of the Statement of Claim. The second and third Defendants say that the purchase price was $1,000,000.00 as stated in the agreement for sale referred to in paragraph 3 above. The said agreement further provided that the purchaser pay to Messrs Miller, Mitchell & Co. negotiation fees as agreed upon between the Purchaser and Vendor which said negotiation fee was agreed upon between the Plaintiff and the Purchaser at $300,000.00.

"This said negotiation fee which was to be paid by the purchaser at no time formed part of the purchase price and was for the purchasers account. The Plaintiff gave written instructions that this said negotiation fee was to be paid out in accordance with the instructions of the purchaser."

Para. 8

"As to paragraph 6 the second and third Defendants deny that they received the sum of $300,000.00 from (sic) and on behalf of the Plaintiff and deny that they still hold to the use of the Plaintiff the sum of $350,000.00."

The accredited agent of the respondent, the first named defendant in his defence, pleaded as follows in respect of the negotiation fee and purchase price:

Para. 11

"Further as to paragraph 4 this Defendant states that the amount of $300,000.00 referred to therein does not form part of the sale price of the said premises but constitutes the negotiation fees referred to in the letter dated 21st July, 1978."

Para. 12

"Additionally the Defendant states that the Plaintiff company was experiencing grave financial difficulties inter alia in maintaining the said premises and servicing its debts and accordingly desired and/or was forced to seek the sale of its only or principal asset - the said premises. Accordingly this Defendant was persuaded by the Palintiff company through the other fellow Directors to undertake this assignment and in so doing to enter into such confidential arrangements as he considered expedient not to be disclosed to the other or any Director of the Plaintiff company, by way of payment of negotiation fees to facilitate a sale and accordingly this Defendant in pursuance of the said agreement and induced by the representation of the Plaintiff company through its agents and acting on its authority under-took the said negotiations through agents or otherwise both as to sale for $1,000,000.00 and the payment of a negotiation fee by the purchasers N.C.R. Jamaica Limited."

The extracts cited from both the statement of claim and the defence raised the following issues for determination:

1. What was the purchase price?

2. Was the quantum of the negotiation fee agreed between the vendor and purchaser?

3. Did the second and third defendant have the authority to disburse the amount of $300,000 which was labelled as negotiation fee?

I now turn to examine the agreement wherein lies the crux of this matter. There is absolutely no dispute that the agreement was entered into and that it contained a paragraph re consideration money and another paragraph re negotiation fee. The effect of this written agreement is that the parties who have subscribed to same are bound by whatever is stated therein. What is being challenged in respect of the agreement is that:

(a) the consideration money should be $1,300,000 and not $1,000,000 as stated in the agreement;

(b) the quantum of the negotiation fees has not been agreed upon between the vendor and purchaser.

As regards (a) the paragraph of the agreement designated consideration states in language which is simple and lucid and which provides no room for misunderstanding that the consideration for the sale of the property, the subject matter of the agreement, is $1,000,000. In the face of this plain and unambiguous language no extrinsic evidence is admissible to alter, vary or contradict that term of the agreement. The respondent seeks to impugn this term of the agreement on two bases:

1. That the deposit of $130,000 represents 10% of $1,300,000 and that it is usual that 10% is the deposit which is payable on a contract for the sale of land.

This argument is fallacious. There is no established principle of law or custom which stipulates that the deposit must be a minimum of 10% of the purchase price. The learned author of "The Law and Practice Relating to the Contract For Sale of Land and the Title to Land" 3rd edition at page 75 when dealing with

the amount of the deposit states:

> "Although it is usual in the case of a sale by auction to provide for a deposit of 10 percent of the purchase money and in case of a sale by private treaty the same is often paid (although it is not uncommon in such case to accept a deposit of 5 percent), there is no rule of law or custom as to the precise amount of the deposit. It is a matter of arrangement of special condition in every case."

In the light of this quotation, the irresistible inference is that the amount of $130,000 paid as per letter dated July 25, 1978 is that the purchasers were paying to the attorneys-at-law, the appellants, 10% of the purchase consideration and 10% of the negotiation fee.

> "Private & Confidential
>
> July 25, 1978
>
> Miller Mitchell & Co.,
> 1 Duke Street,
> Kingston.
>
> Attention: Mr. Crafton Miller
>
> Dear Sirs,
>
> Further to a letter dated July 20, 1978, from Designs and Drafting Co. Ltd., and the Agreement of Sale enclosed therein in respect of 5, 7 and 9 Cecelio Avenue, Volumes 1081, 1082 and 192, Folios 36, 37 and 54 respectively, we wish to confirm our Firm's interest in the acquisition of these properties for the sum of $1m together with the payment of negotiation fees amounting to $300,000.00 to Messrs. Miller Mitchell & Co. on or before the completion of the above transaction.
>
> This confirmation, however, is subject to the final approval by NCR Dayton, Ohio, within forty-five days from the signing of this letter. In order, however, to show our good faith and our interest in the transaction, we enclose herewith our Cheque No. 0027770 for $130,000.00.
>
> The aforesaid deposit of $130,000 will be refundable to the purchasers, NCR Jamaica Ltd., should the Agreement of Sale be not finally accepted, and the said sum will therefore be held in escrow by you pending

"final acceptance by our Principals, NCR Dayton, Ohio."

Yours very truly,

D. M. Halsall
General Manager"

This view is fortified by paragraph 1 (c) of the Further and Better Particulars supplied by the appellants:

"...The negotiation fee was paid by N.C.R. Jamaica Limited in three parts, the first on the 25th July 1978, the second on the 8th November 1978 and the third on the 30th November, 1978."

Further, the letter of July 25, 1978 set out herein indicates that all the terms of the agreement for the sale and purchase of the property had been arrived at and in good faith the purchasers paid over the sum of $130,000 subject to the final approval of their overseas principal, N.C.R. Dayton Ohio. The letter of November 8, 1978 addressed by N.C.R. Jamaica Ltd., the purchasers, to the appellants acknowledging the grant of an extension of the option to purchase as per letter dated July 25, 1978 states:

" The terms and conditions of the extension of the option shall be -

(1) The purchase price shall remain at $1,000,000 (One Million Dollars) and the terms and conditions shall be the usual terms and conditions applicable to agreements for sale."

To hold that the real purchase price is $1,300,000 and not $1,000,000 as is clearly stated in the agreement of sale, is nothing short of an attempt to rectify the contract. Rectification was not sought as a remedy in this action. In any event, the remedy of rectification is founded on the basis of a mistake common to the contracting parties thus resulting in the drawing up of a contract which militates against the intentions

of the contracting parties as revealed in their previous oral understanding. There must be an issue between the parties as to their legal rights inter se. If there is no such issue, rectification will be refused. Clearly, there was no such issue between the parties to this agreement, hence the purchasers were not joined in the action.

For the respondent to allege that the true purchase price is $1,300,000 and not $1,000,000 without alleging common mistake on the part of the parties is to impute fraud on the part of the defendants and the purchasers by their understating the consideration money to the detriment of the vendor. No fraud has been pleaded. Alternatively, if the decision to divide the real purchase money into "purchase price" and negotiation fee was made by the directors of the company, which would appear to be so by their signing the agreement on behalf of the company, then by deliberately misstating the consideration money, they have deprived the Commissioner of Stamps and Estate Duty of the proper amount of transfer tax and stamp duty payable on the transaction amounting to a fraud by the company through its directors. If indeed, a fraud has thus been perpetrated, then the respondent being itself guilty of fraud, would be barred from benefitting from its own fraud on the basis of the maxim "ex turpi causa non oritur actio."

> 2. That the special condition stipulated that the negotiation fee was to be agreed between both parties and that this condition had not been fulfilled and therefore any money paid by the purchaser prior to this condition being performed must **of** necessity be paid as part of the purchase price.

The question therefore arises - Was the special condition speaking to an agreement which had already been arrived at or was **it** contemplating an agreement to be arrived at in future? I am inclined to the view that the special condition speaks to an agreement which was a fait accompli. I am led to this view for the following reasons:

1. The purchaser in the written agreement and who it is agreed was responsible for payment of this negotiation fee said that the negotiation fee was agreed in the sum of $300,000.00.

2. The language of the special condition impels one to so conclude. "As agreed" as opposed to "as is to be agreed" or "as will be agreed." The wording suggests a past event as opposed to an event to take place in the future. Further, as earlier stated, it is significant that the first instalment of the negotiation fee was paid on July 21, 1978 and the final instalment was paid on the very date the agreement is dated.

3. The letter dated July 25, 1978 originating from the purchaser and addressed to the appellants stated in the clearest of terms that the consideration money was $1,000,000 and that the negotiation fee was $300,000. This clearly shows that the agreement was a fait accompli. The only thing left to conclude the agreement, was for the present agreed terms which were to be held in abeyance, to be approved by overseas principal to the purchasers. To show that the terms of the agreeemnt were not matters for negotiation, the purchasers sent their cheque which, as earlier stated, included ten percent of the deposit plus ten percent of the negotiation fee to be paid to whoever turned out to be the negotiators who certainly could not be the vendors, as negotiation fees are never paid to vendors but to some third party.

4. The duly authorised agent of the respondent, the first named defendant, as well as the third party John Thompson, himself a director of the respondent company, signed the instrument of transfer, conveying the property to the purchasers on the 22nd day of December, 1978 without either or both of them, raising any questions about the special condition not having been fulfilled or that the purchase consideration was any sum other than $1,000,000. It is ludicrous to think that in the light of the contents of the letter dated the 25th July, 1978 they would have gone on to sign the transfer if they had not acquiesced to the terms of the letter.

5. The entire transaction was being conducted in an atmosphere of confidentiality and this, I perceive is the reason for not spelling out in the special condition the amount of the negotiation fee already agreed between the vendor and purchaser as per the letter dated July 21, 1978 and also for the further reason as pleaded at paragraph 12 of the first defendant's defence (supra).

Assume for purpose of argument, that the special condition remains unfulfilled in that the quantum of the negotiation fees has not been agreed as submitted by the respondents.

What then would be the position? This would mean that the agreement is inchoate. Any interpretation of the special condition which produces such a result would be irrational, as the agreement has already been performed by the transfer of the property, the subject matter of the agreement, to the purchasers. Further, if the special condition has not been performed in the sense stated above then any amount paid to the appellants qua negotiation fees remains the property of the party paying same, to wit the purchaser, and is returnable to it or otherwise disposable on its instructions. On the evidence the purchasers gave instructions as to the disbursement of the amount labelled negotiation fees and this can provide no basis for complaint by the respondent.

Further, even if the special condition had not been performed by agreement of the amount, there was nothing to preclude the purchaser from paying over to the appellants any amount towards the said negotiation fee, such amount to be held in escrow until the negotiation fee was agreed. It would still remain negotiation fee returnable to the purchaser in the absence of any agreement as to the quantum and is not capable of being transformed into purchase money payable to the vendor unless with the agreement of the purchaser. There is no evidence of any such agreement, rather at the end of the day the purchaser maintains that the amount was paid to the appellants as negotiation fee.

It is indeed unfortunate that this Court has been deprived of the benefit of the trial judge's thought process in arriving at his decision. However, in the light of the clear and unmistakable language which states that the consideration was $1,000,000, his decision could only have been arrived at by using extrinsic evidence to contradict that term of the agreement. No doubt the learned trial judge was influenced by the evidence of John Thompson that the respondents expected to receive $1,000,000

after all expenses had been taken care of, which would imply a consideration in excess of $1,000,000. But this evidence was clearly inadmissible to contradict the plain term of the agreement.

No amount of dissatisfaction between the directors of the respondents company can make the appellants liable. They could only be adjudged liable if the evidence unmistakably showed that the purchase price was $1,300,000 or that $300,000 albeit a matter of agreement between vendor and purchaser, was paid over to them for and on behalf of the respondent which would, in my opinion, be untenable because negotiation fee is not payable to a vendor but rather to a third party. The evidence, in any case, does not support either contention.

The letter dated October 20, 1978 unequivocally authorised the appellants to disburse the amount of $300,000. This letter which is supported by the letter dated 30th November, 1978, both of which form part of the agreed bundle of documents, were both addressed to the appellants by the duly authorised agent of the respondent and by the purchasers. It is on the basis of these two letters that the appellants disbursed the sum of $300,000.

The purchase consideration which is clearly stated in the agreement and which, in my opinion, was the only amount held to the account of the vendor, compels me to hold that the learned trial judge erred when he adjudged the appellants liable to pay over the $300,000 as money had and received for and on behalf of the vendor respondent. I would therefore allow the appeal and set aside the judgment of the Court below and enter judgment for the second and third defendants with costs to be taxed if not agreed. The appellants are allowed the costs of this appeal to be taxed if not agreed.

**FORTE, J.A.**

In the result, by majority the appeal is dismissed with costs to the respondent here and below. Costs to be taxed, if not

agreed. The appellant is ordered to pay interest at 10% per annum on $300,000 commencing on the date the writ was served up until the 4th March, 1991.