JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 1/98

SUIT. NO: E 224 OF 1990

COR. THE HON. MR. JUSTICE FORTE,P.
THE HON. MR. JUSTICE HARRISON J.A.
THE HON. MR. JUSTICE COOKE, J.A. (Ag)

BETWEEN	**PARK TRADERS [JAMAICA] LIMITED**	**PLAINTIFF/APPELLANT**
A N D	**BEVAD LIMITED**	**FIRST DEFENDANT/RESPONDENT**
A N D	**TRANSOCEAN SHIPPING LTD.**	**SECOND DEFENDANT/RESPONDENT**

D.A. Scharschmidt Q.C. and **Christopher Malcolm** instructed by John G. Graham & Co. for the appellant.

Pamela Benka –Coker, Q.C. and **Mrs. Lanza Bowen** Instructed by Jennifer Messado & Co. for the 1st defendant/respondent.
Mrs. Michele Champagnie instructed by Myers Fletcher & Gordon for the 2nd defendant/respondent

9th, 10, & 11th October and 20th December, 2000

FORTE, P:

Having read in draft the judgment of Cooke, JA. (Ag), I agree with the reasoning therein. I have nothing useful to add.

HARRISON, J:

I have read the judgment of Cooke, JA, (Ag). I agree with his reasoning and conclusion and I have nothing to add.

COOKE, J.A. (Ag):

At the conclusion of the hearing of this appeal, the appellant succeeded and there was an award in damages. The central issues concerned:

(a) Whether the document relied on by the 1st respondent was a memorandum for the purpose of section 4 of the Statute of Frauds;

(b) Whether or not there should be an order for specific performance; and

(c) If there was to be no order for specific performance what was the appropriate date for the assessment of damages.

I will begin by setting out the background which gave rise to these issues: In 1989 the first respondent was involved in the development of property described as Old Church Court. This consisted of 11 apartments. On the 14th of June 1989, Mr. Stanford Cocking the managing director of the appellant company paid a visit to the offices of Mrs. Jennifer Messado. The latter was the attorney-at-law representing the interests of the 1st respondent. The parties were of long social acquaintance and there had been previous professional contact in prior transactions. On that day Cocking's visit was in respect of making payment in respect to another property. While in the office he became aware of the Old Church Court Development. His interest was immediately aroused. He went to inspect the site and on that very day he paid to Mrs. Messado a cheque for $75,000.00, the required deposit on the sale price of $450,000. It was the uncontradicted evidence of Cocking that it was to be a cash sale and "at the end of the sale Citizen's Bank would pay her." By letter dated August 31, 1989, Jamaica Citizens Bank Ltd. wrote to Jennifer Messado & Company undertaking to pay $375,000 on behalf of the appellant under the following terms:

(a) "Upon receipt of Duplicate Certificate of Title for Apartment #1B, 1B Old Church Street, Drumblair duly registered in the name of Park Traders Limited, the said title being free and clear from all encumbrances save the usual restrictive covenants endorsed thereon.

(b) That you provide us with receipts/certificates evidencing payment of up-to-date land taxes, water rates, and/or maintenance fees.

(c) Satisfactory Surveyor's Identification Report.
This undertaking expires December 31, 1989".

By letter dated June 19, 1989, Mrs. Messado wrote to Messrs. Broderick & Graham. This letter is now reproduced:

> **"Attention: Mr. John Graham**
>
> Dear Sirs:
>
> Re: Sale of Apt. 1B Old Church Court –Bevad Limited to Park Traders (Ja.) Limited and/or nominee
>
> We understand that you act on behalf of Park Traders (Jamaica) Limited with reference to the purchase of the above premises from our clients, Bevad Limited.
>
> We now enclose herewith Agreement for Sale in triplicate to be executed by the Purchasers.
>
> We have already received the first deposit of Seventy-five Thousand Dollars ($75,000.00). The second deposit is due and payable sixty (60) days from the date hereof.
>
> Yours faithfully
> JENNIFER MESSADO & Co."

By letter dated July 31, Mrs. Messado again wrote to Messrs. Broderick & Graham complaining that after all this time "the agreement for sale had not been signed". There was no response from Messrs. Broderick & Graham and by letter dated 13th September,

1989 Mrs. Messado further wrote to the former. Part of that communication was in these terms:

> "We refer to the Agreement of Sale that you have had for nearly three (3) to six (6) months for signature by Park Traders Ltd. It is more than unique to have received a Banker's Undertaking for payment of the balance purchase money as per copy letter dated 31st August, 1989 from Jamaica Citizens Bank Limited and not received the signed Agreement of Sale.
>
> Please therefore attend to same as a matter of urgency as the contract should have been endorsed with payment of Stamp Duty and Transfer months ago."

By the 8th December 1989 it would appear that Mrs. Messado's patience had been sorely tested. She wrote as follows:

> "**Attention: Mr. John Graham**
>
> Dear Sirs:
>
> Re: Apartment 1B Old Church Court
> 1B Old Church Road – Park Traders Limited
>
> We refer to our discussions.
>
> The time for levity has now passed when dealing with your client and the completion of the purchase of the above premises.
>
> Firstly, we await:-
>
> 1) Receipt of the signed Agreement of Sale;
>
> 2) Payment of the escalation as per the enclosed certificate from the Quantity Surveyor and copy of letter to your client dated 21st November, 1989;
>
> 3) Payment of the contribution to equipment of the Common Area.

We only have a Banker's Undertaking for payment of the sum of $375,000.00 which has been given credit for in the enclosed Statement of Account.

We also enclose Instrument of Transfer for your client's signature.

Please be advised that failure to respond to this letter will result in us giving Notice Making Time of the Essence of the Contract of Sale.

Yours faithfully
JENNIFER MESSADO & CO."

The statement of account showed that the total financial obligation of the appellant was $492,606.65.

By notice dated 16th January, 1990 making time of the essence of the contract, the appellant was required to complete the agreement by paying the balance of the purchase price within fourteen (14) days of the date hereof: As yet Broderick & Graham had ignored Mrs. Messado's letters. However, the receipt of the notice making time of the essence of the contract appeared to have had an immediate catalytic effect because by letter dated January 18, 1990, Broderick and Graham wrote to Mrs. Messado stating that both the executed agreement for sale and transfer were enclosed. It was also said in that letter that "an extension of the undertaking from Jamaica Citizens Bank Ltd. and the cheque for the half costs will follow shortly." It would seem that no executed instrument of transfer was sent to Mrs. Messado as stated in that letter. Mrs. Messado was not comforted by that letter. She responded by letter dated January 19, 1990 inter alia as follows:

"Attention: Mr. John Graham

Dear Sirs:

Re: Apartment No. 1B Old Church Court
Park Traders Limited

> We have your letter of January 18, 1990 and as usual can only continue to be amazed at the audacity of your clients.
>
> As discussed, with you and them, there is no agreement in place at all for the purchase of the abovementioned apartment. The Agreement for Sale was never signed by the Vendor. The Letter of Undertaking from the bank for the incorrect sum of money expired on December, 1989.
>
> Yours faithfully
> JENNIFER MESSADO & COMPANY"

In a letter dated 29th January, 1990 Jamaica Citizens Bank Ltd. sent another undertaking in terms similar to the earlier one. This undertaking was to expire on March 30, 1990. On January 30, 1990 the 1st respondent informed Broderick & Graham by letter that:

> "Accordingly, in view of the fact the Notice Making Time of the Essence of the contract dated the 16th day of January, 1990 has NOW EXPIRED, our clients, Bevad Limited, have advised us with immediate effect to TERMINATE the contract for the purchase and to refund to your clients the said sum of Seventy Five Thousand Dollars ($75,000 as per the enclosed cheque in your favour".

On the 31st January, 1990 the later banker's undertaking was returned. On the 26th February, 1990, an agreement for sale for the same apartment was executed between the 1st and 2nd respondents. The purchase price was $600,000. Before this a caveat was lodged on behalf of the appellant on the 8th January, 1990.

In July 1990 the appellant by Writ of Summons and Statement of Claim, which were subsequently amended, sought specific performance "of an agreement evidenced in writing", in respect to the subject apartment. In the alternative there was a claim for damages in breach of contract in lieu of or in addition to specific performance.

The appellant relied on the sale agreement which was executed and sent to Mrs. Messado by letter dated 18th January, 1990 (supra). The 1st respondent in its defence to the suit denied that the executed agreement for sale should be the founding document which the Court should construe. Instead its position was stated as follows:

> "4. The defendant states that by oral agreement entered into on or around the 14th June, 1989, the Defendant agreed to sell and the Plaintiff agreed to buy the said property referred to at paragraph 3 of the within Statement of Claim at a purchase price of $450,000.00.
>
> 5. That pursuant to the terms of the said oral agreement the Plaintiff paid to the Defendant's Attorneys-at-law Jennifer Messado & Company a deposit of $75,000.00 on the said purchase price on or around the 14th June, 1989.
>
> 6. That the said oral agreement was evidenced by a Memorandum in writing as required by Section 4 of the Statute of Frauds. This Memorandum in writing was signed by the Defendant on or around the 19th June, 1989 and sent to the Plaintiff's Attorneys-at-law Messrs. Broderick & Graham under cover of letter dated the 19th June, 1989 and written by the Defendant's Attorneys-at-Law. This Memorandum in writing of the Agreement for Sale was sent to have the Purchaser's signature appended to the said Memorandum. The said Memorandum will be referred to at the hearing of this Suit for its full terms and effect.
>
> 7. It is the Defendant's contention that the said Memorandum accurately reflects and expresses all the material terms of the Contract for Sale agreed on between the Plaintiff and the Defendant and these are the terms by which the parties thereto were bound when they entered into the said oral agreement on or around the 14th July, 1989.
>
> 8. In the premises, the Defendant avers that the Contract for the sale of the said premises by the Defendant to the Plaintiff came into existence, and was valid and subsisting from the 14th June, 1989, and said Contract became enforceable in law when the Defendant executed the Memorandum in writing which recorded all the material terms of the Contract.

9. The Defendant states that the Plaintiff neglected, failed and or refused to execute the said Memorandum from the 19th June,1989 when same was forwarded to its Attorneys-at-Law up until the 22nd January, 1990 when the Defendant, owing to the Plaintiff's repeated breaches of the Contract had already taken effective steps to determine same. The defendant avers that the contract entered into on or around the 14th June, 1989 is at an end and therefore cannot be enforced.

10. The material facts are these. Under cover of letter dated 19th June, 1989 the Defendant's Attorneys-at-Law sent the written agreement for sale to the plaintiff's Attorneys-at-Law to secure the Plaintiff's signature to same. This written agreement merely recorded the oral agreement for sale which had been entered into between the Plaintiff and the Defendant from on or about the 14th June, 1989 and pursuant to the oral agreement the Plaintiff had paid a deposit of $75,000".

By its counter claim the following was sought:

"(a) A declaration that a valid and enforceable contract came into existence between the Plaintiff and the Defendant on around the 19th June, 1989 after the first deposit of $75,000.00 was paid by the Plaintiff to the Defendant's Attorneys-at-law and after the Defendant had executed the Memorandum in writing containing all the material terms of the said Agreement for Sale.

(b) A declaration that the Defendant had a right in law to issue the Notice Making Time of the Essence of the contract dated the 16th January, 1990, and that the said Notice was valid and effective in law.

(c) A declaration that the Defendant had a right in law to rescind the said contract on the 30th January, 1990".

At the conclusion of the trial the learned trial judge granted a declaration that the contract for the sale of the said premises was properly rescinded by the First Defendant (1st Respondent).

I have set out the pleadings of the 1st respondent at some length in order to demonstrate its stance. Firstly there is reliance on an oral agreement entered into on or around the 14th June, 1989 - (para 4). Secondly, there is reliance on a memorandum in writing. This memorandum is said to be the agreement of sale signed by the 1st respondent on or around the 19th June, 1989 - (para 6). Thirdly, it is asserted that the "said contract became enforceable in law when the defendant (1st respondent) executed the memorandum" - (para. 8). Fourthly, it is contended that because of breaches by the appellant the contract had been terminated (para 9). It is to be noted that at no time in its pleadings did the 1st respondent rely on the executed agreement for sale dated 22nd January, 1990 as a memorandum. The memorandum relied on was a document signed only on behalf of the 1st respondent.

Section 4 of the Statute of Frauds states:

> "No action may be brought upon any contract for the sale or other disposition of land or any interest in land, unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged or by some other person thereunto by him lawfully authorised."

When this section is read together with the pleadings which have been set out above it is obvious that the stance of the 1st respondent is untenable. It would seem that the 1st respondent appears to be saying that since the contract is enforceable against it by virtue of a memorandum signed on behalf of the 1st respondent, then somehow it had acquired legally enforceable rights thereunder. This is a misconception and indicates a misunderstanding of Section 4 of the Statute of Frauds. If in fact the agreement of sale which was sent to the appellant was already signed on behalf of the 1st respondent (and there is a big dispute about this) it is only the former which could utilize that

document, if at all. The pleadings on behalf of the 1st respondent does not appear to be founded on any legal principle.

The agreement for sale is dated 22nd January, 1990. The learned trial judge regarded this document as a sufficient memorandum to satisfy section 4 of the Statute of Fraud. This is what he said in his judgment:

> "The memorandum may come into existence after the contract has been formed and in ***Barkworth v Young*** (1856) 4 Drew I it was held that a memorandum made over fourteen years after the contract, suffice.
>
> It therefore follows that once it is established that there was an oral agreement between the parties on June 14, 1989, the agreement which was eventually signed by the parties by January 18, 1990 would be sufficient to satisfy the requirements of the Statute of Frauds".

It has already been observed that in its pleadings the 1st respondent did not rely on the executed agreement for sale as a memorandum. However, it is necessary to examine the significance of this executed agreement for sale viz-a- viz the transactions between the appellant and the 1st respondent. I now turn to the agreement for sale. This is how the agreement for sale is headed.

"BEVAD LIMITED

UNIT NO: APARTMENT 1B OLD CHURCH COURT

STRATA LOT NO.

AGREEMENT FOR SALE"

This document is of some 15 foolscap pages. It is a very detailed document with 15 paragraphs and a number of sub-paragraphs. A ground of appeal is that :

> "The learned trial judge failed to consider the Plaintiff's case sufficiently or at all and in particular the learned trial judge failed to consider the legal effect of the document signed by both parties and dated by the First Defendant and which

> document expressly states that 'This AGREEMENT FOR SALE is made on the 22nd day of January ONE THOUSAND NINE HUNDRED AND NINETY..."

Mr. Scharschmidt, Q.C. submitted that an analysis of the document clearly showed that it was the document by which the parties intended to be bound. As Mrs. Benka-Coker Q.C. did not find it able to resist the force of Mr. Scharschmidt's submission in this regard, I do not find it necessary to recount the very detailed analysis which was demonstrated to the court. Suffice it to say that the very first sentence of the agreement for sale states:

> **"THIS AGREEMENT FOR SALE** is made on the 22nd day of January (One Thousand Nine Hundred and Ninety)"

This document sets out all the obligations to be undertaken by the respective parties. As regards the payment of the deposit of $75,000 such payment is referred to as " a deposit on the signing hereof of $75,000". Mr. Scharschmidt made telling observations when he pointed out in his skeleton arguments that:

> "12. Contrary to the contention of the First Defendant/Respondent in the pleadings, it was always the intention of the First Defendant/Respondent that the only contract by which it intended to be bound was a written contract. In all the correspondence emanating from the First Defendant/Respondent the document was referred to as either 'the Agreement' or as 'the contract'. Not once was it referred to as a 'memorandum'. Nowhere was it stated that there was already in existence an oral contract.
>
> 13. The very first time the document was referred to as a memorandum was in the Defence and Counter claim settled in September, 1990. This should be viewed especially in light of the several letters written by Mrs. Jennifer Messado, an attorney-at-law."

These observations I regard as poignant and entirely justified. Indeed in the defence, reliance is placed on various paragraphs of the Agreement for Sale to ground the right of the 1st respondent to terminate the contract. The appellant has submitted

that there was no oral contract. The learned trial judge found that there was such a contract. Without coming to a decision in this debate it is my view that even if there was an oral contract the executed agreement for sale would have entirely displaced any oral agreement. In Salmond & Williams on Law of Contract 2nd Edition the authors made a distinction between a written contract and one that is proved by evidence in writing. They then proceed to state what I regard as a correct statement of the law. It is at page 138:

> "The distinction which we have indicated is not inconsistent with the fact that an unwritten contract is often superseded by and merged in a subsequent written contract to the same effect. It frequently happens that parties, after entering into a binding unwritten contract, thereafter for the sake of greater security and certainty transform it into a contract in writing. That is to say, they enter into a second and subsequent contract to the like effect constituted by an operative instrument, with the intent that the prior unwritten contract shall be wholly cancelled and superseded in favour of the written contract which has been substituted for it. The subsequent writing in such a case is not merely an evidential document for use in proof of a prior and subsisting unwritten contract; it is itself an operative contractual instrument constituting the authentic and final expression of the new and substituted contract thereby entered into ***Leduc v Ward*** (1888), 20 Q.B.D.475,479 –480. It makes no difference in this respect whether the parties, when they entered into the prior verbal contract, intended or did not intend that any such substituted written contract should be entered into. Where, however, a subsequent written contract was so intended, it is sometimes a question of some difficulty whether the prior unwritten arrangement was intended to constitute in itself a binding unwritten contract, or was intended, on the contrary, to have no binding force until and unless by mutual consent the parties subsequently entered into a written contract in pursuance thereof".

It would seem uncontestable that even if there was an oral agreement the tenor of Mrs. Messado's letters (supra) indicate that it was the Agreement of Sale which was to be decisive. Hence her anxiety to have the appellant sign the Agreement for Sale.

Specifically as will be recalled Mrs. Messado stated in her letter of January 19, 1990 that "as discussed with you and them there is no agreement in place at all for the above-mentioned apartment". It is therefore my view that the learned trial judge was in error when he held that the sale agreement dated 22nd January was a memorandum. It was the contract by which the parties were to be bound. Mr. Scharschmidt, Q.C. has also correctly pointed out that the date of the purported termination of the contract i..e. 30th January, 1990 was before the time, prescribed by the notice making time of the essence, had expired. This notice was dated 16th January, 1990. As such, in the computation of time, the date of the notice is to be excluded. The said notice did not expire until midnight 30th January, 1990. Therefore, the purported termination was of no effect,

Having come to the decision that the purported determination of the contract by the 1st respondent was unlawful, it now falls to be decided if the court should exercise its discretion to make an order for specific performance. I do not think it should. It was some seven months before the agreement of sale was executed and returned to the 1st respondent. Mr. John Graham of Broderick & Graham, in his evidence, candidly and rather euphemistically said that the matter could have been "dealt with more expeditiously". Then there was a delay of six months after being informed that the agreement was terminated before the appellant filed its suit. This want of urgency militates against the award of specific performance.

In ***Casey v Wharawhara Haimona*** [1922] NZLR 455 the Supreme Court of New Zealand had to consider whether delay in instituting a suit for specific performance in respect of an agreement for the sale of land was a bar to such an award. In his judgment, Sim ACJ inter alia said at. 463-4:

> "The delay therefore was quite inexcusable, and it continued, as we have said, for more than eight months. 'A party cannot call upon a 'Court of equity for specific performance' said Lord Alvanley M.R. in ***Milward v Earl Thanet*** 5Ves.720, n 'unless he has shown himself ready, desirous, prompt, and eager'. This statement of the law was quoted with approval by Cotton, L.J. in delivering the judgment of the Court of Appeal in ***Mills v Haywood*** 5Ch.D.196,202. Where one party to the contract has given notice to the other that he will not perform it, acquiescence in this by the other party by a comparatively brief delay in enforcing his right will be a bar; Fry on Specific Performance 5th ed. 542, para. 1109; ***Parkin v Thorold*** 16 Beav. 59. It is a question in each case of what in the circumstances is a reasonable time, and not whether the delay has been one of twelve months or any definite number of months; ***Hurham v Llewellyn*** 21 W.R. 570. In that case an unexplained delay of five months was held to be fatal. In ***Glasbrook v Richardson*** 23 W.R. 51 a delay of three months and thirteen days was also held to be fatal. In both these cases the contracts related to collieries. In ***Peddle v Orr*** 26 N.Z.I.R 1240; 9 C.I.R.162 the contract was for the sale of land. There had been a delay of about four months in commencing the action after repudiation. It is clear from the judgment of His Honour the Chief Justice in the Supreme Court and of the Court of Appeal that this delay would have been fatal to the plaintiff's claim if it has not been held to be justified in the circumstances. In ***Wilson v Moir*** [1916] N.Z L.R; 637; G.L.R, 441 and ***Dryden v McCoy*** [1921] N.Z.L.R. 882; G.J.R.113 the contracts were for the sale of land. In the first named case an unexplained delay for nine months was held to be a bar to specific performance. In the other case a similar delay for over four months was held to be fatal. In the present case the delay of over eight months was, we think, unreasonable, and ought to be treated as a bar to specific performance."

I hold that the approach of Sim ACJ is correct. This delay of six months in the context of the circumstances is a bar to a decree of specific performance. Consideration must also be given to the fact that the 2nd Respondent has paid for and been in possession of the apartment since 1990. It cannot be said that this party did not at all times have clean hands. It is true that a caveat had been lodged on the 8th January, 1990. However, as has been decided in this court, the lodging of a caveat is not notice

to the world - ***Life of Jamaica Ltd. v Broadway Import and Export Ltd, Micheal Levy v Broadway Import & Export Ltd***. and ***Life of Jamaica*** SCCA No. 17/96 and No 33/96 (unreported) delivered October 27, 1997. It would not be just that the proprietary right which the 2nd respondent now enjoys in respect of the apartment should be disturbed.

I now address the issue of the quantum of damages to be awarded. At the date of the trial the accepted valuation of the apartment was $3,108,000.00. There is no dispute that the measure of damages should be computed in accordance with the principle of loss of bargain. Mrs. Benka Coker, Q.C. submitted that the loss of bargain should be calculated at the date of the breach. If so the amount she suggested was $150,000 which was the difference between the purchase price in the agreement for sale and the amount for which the apartment was sold to the 2nd respondent. Mr. Scharschmidt, Q.C. disagreed. He submitted that the loss of bargain should be calculated at the date of judgment in which case the amount of damages would be $2,658,000.

No authorities were cited by counsel. The record of the trial does not reveal that apart from the putting in of the valuation report there was any concentration on this aspect of the case. The learned trial judge, no doubt because of the conclusion at which he arrived, considered it unnecessary to proffer an opinion on the question of the quantum of damages. This court therefore has to determine this issue on the material before it.

In this determination, a statement by Lord Slynn of Hadley who delivered the Opinion of the Board in the Jamaican case of ***Alcoa Minerals of Jamaica Inc. v Herbert Broderick*** Privy Council Appeal No. 68 of 1998 is very relevant. It reads:

> "It seems to their Lordships that in a case where damages are the appropriate remedy, if adoption of the breach date

> rule in assessing them produces injustice the court has a discretion to take some other date. Even in contract of sale cases where the assessment of damages is normally taken as at the date of breach, Lord Wilberforce in ***Johnson v Agnew*** [1980] A.C. 367 citing ***Ogle v Vane*** (1867) L.R. 2 Q.B. 275, (1868) 3 Q.B. 272 considered that this is not an absolute rule: if to follow it would give rise to injustice, the court has power to fix such other date as may be appropriate in the circumstances". See also Oliver J in ***Radford v De Froberville*** [1977] 1 W.L.R. 1262".

Now what are the circumstances?

(i) The appellant is a real estate development and rental company. It is not unreasonable to assume that the purpose of the acquisition of the apartment was for the purpose of rental. The purchasing of the apartment was not that of a prospective homeowner in seeking to provide personal accommodation. It was a business venture. There had been like business relationships between Mr. Cocking and Mrs. Messado before this. The appellant has not only been denied the acquisition of the apartment itself, but also suffered loss in respect of rental revenue. I am aware that there is no evidence as regards the quantum of this loss. However, it cannot be disputed that in Jamaica today and for sometime the cost of rental of apartments is quite high. Mrs. Messado must have been aware of this.

(ii) The difference between the original sale price $450,000 and the valuation sum of $3,108,000 speaks to the dramatic escalation in the cost of purchasing apartments.

(iii) The notice making time of the essence of the contract is dated the 16th January 1990. There is a letter of undertaking dated January 29, 1990 from Jamaica Citizens Bank Ltd. which gave an undertaking to pay the sum of $375,000. This undertaking was returned by Mrs. Messado by letter dated 31st January, 1990. It

will be recalled that on the 30th January, 1990 the contract had been wrongly terminated. So at the time of the wrongful termination the first respondent was assured of approximately 90% of the purchase price. The amount outstanding according to the statement of account sent by Mrs. Messado would have been $42,106.65. It is clear that between June 1988 and January, 1989 the appellant did not pursue the execution of the contract with any diligence at all. Once there was the receipt of the purported notice making time of the essence of the contract there was some urgency. There is evidence that the appellant wished to have the contract completed. Apparently Mrs. Messado was determined to embark on her regrettable, precipitate and unlawful course of terminating the contract. Since then the first respondent on wholly unmeritorious grounds has sought to resist the claims of the appellant. It is not without relevance that by the 26th January, 1990 the apartment subject of the contract was sold for $600,000. The first respondent after its wrongful termination of the contract proceeded within a short time thereafter to make a profit of $150,000.

It is my view that in the circumstances as outlined above it would be unjust to accede to the submission of Mrs. Benka-Coker, Q.C. The appropriate date at which damages should be assessed is at the date of the judgment. As such it would be the difference between the purchase price of $450,000 and the agreed valuation figure which at the time of judgment was $3,108,000 . The award is $2,658,000.

Finally at the conclusion of the hearing the following orders were made:

(i) Appeal allowed, judgment of the court below set aside;

(ii) Claim for Specific Performance refused;

(iii) There is an award of damages to the appellant against the 1st respondent in the sum of $2,658,000

(iv) The caveat lodged on behalf of the appellant is to be withdrawn forthwith;

(v) The 1st respondent is to pay the costs of the appellant and the 2nd respondent both in this court and in the court below.