JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 68 of 1989

BEFORE: THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.
THE HON. MR. JUSTICE BINGHAM, J.A. (Ag.)

BETWEEN	VIOLET TAYLOR	
AND	REDVERS CHAMBERS (Representatives of the estate of FLORENCE MUIR, dec'd)	DEFENDANTS/ APPELLANTS
AND	RAYMOND MAIR	PLAINTIFFS/ RESPONDENTS
AND	HERMA MAIR	

Norman Wright and Sonia Jones for the appellants instructed by Gresford Jones

Dennis Goffe and Minnette Palmer for the respondents instructed by Myers, Fletcher & Gordon, Manton & Hart

July 15, 16, 17, 18, and October 30, 1991

WRIGHT, J.A.:

This appeal is against the following order made by Theobalds, J. on March 1, 1989:

"1. The Defendants are hereby ordered to specifically perform the Contract dated 17th January 1984 entered into by the Plaintiffs and the Defendant, Florence Muir, now deceased.

2. That the $20,000.00 deposit made by the Plaintiffs together with all interests on the Deposits be for the credit of the Plaintiffs' in the final accounting between the parties.

3. Costs of this action to the Plaintiffs to be agreed or taxed.

4. Stay of execution for twenty-one (21) days."

The action brought by the respondents sought Specific Performance of an agreement for sale of land entered into between them and Florence Muir on January 17, 1984. Florence Muir has since died on March 25, 1984. On March 6, 1986, by an order of the Court, the appellants were appointed as representatives of the estate of Florence Muir, deceased, limited to their defending the proposed action being brought by the respondents against the estate of Florence Muir for Specific Performance and for damages in relation to the aforesaid agreement for sale.

Apart from evidence by the appellant Redvers Chambers tendering the grant of Probate, which really served no purpose in the case, no evidence was called by either side. Reliance was placed on the Pleadings and correspondence which passed between the attorneys-at-law for both sides. In the circumstances, it will be necessary to set out the Pleading in full. The agreement for sale is pleaded in the Amended Statement of Claim which reads:

> "1. The Plaintiffs were at material times husband and wife and were the purchasers of property situated at 6 Spring Ways, Manor Park in the Parish of Saint Andrew being lands comprised in Certificate of Title registered at Volume 1000 Folio 191 of the Register Book of Titles by virtue of an Agreement in writing dated the 17th day of January 1984 with one Florence Muir as Vendor who subsequently died.
>
> 2. The Defendants are the Representatives of the Estate of Florence Muir deceased appointed by virtue of an Order made in Suit No. M 2 of 1986 for the purposes of this action.
>
> 3. Florence Muir prior to her death was at all material times the vendor of the abovementioned property and by virtue of the aforesaid Agreement of Sale contracted with the Plaintiffs to sell them the said property on the terms and conditions set out hereunder:
>
> VENDOR: FLORENCE MUIR of No. 11 Barbican Road, Kingston 8 in the parish of Saint Andrew.
>
> PURCHASER: RAYMOND MAIR of No. 53 Waterworks Circuit, Kingston 8 in the parish of Saint Andrew,

	AND HERMAN MAIR his wife as Joint Tenants.
DESCRIPTION OF PROPERTY:	ALL THAT parcel of land part of No. 6 Springway, Manor Park in the Parish of Saint Andrew and comprised in Certificate of Title registered at Volume 1060 Folio 191.
PURCHASE MONEY:	TWO HUNDRED THOUSAND DOLLARS ($200,000.00).
HOW PAYABLE:	A deposit of ($20,000.00) payable on the signing hereof; balance on completion.
COMPLETION:	On or before the 19th day of March, 1984 on payment of the balance of the purchase money and the Purchasers share of the costs referred to below in exchange for Duplicate Certificate of Title endorsed with Transfer of land thereon.
POSSESSION:	On completion.
TAXES, WATER RATES & INSURANCE:	To be apportioned as at date of possession.
TITLE:	Under the Registration of Titles Act registered at Volume 1060 Folio 191 of the Register Book of Titles.
COST OF TRANSFER:	Purchasers to pay Vendor one-half of Stamp Duty, registration fee and Attorneys' cost of the Transfer in accordance with the approved scale of fees of the Jamaican Bar Association.
ENCUMBRANCE & RESTRICTIONS:	Free from encumbrances save those as are evident and apparent and/or endorsed on the said Certificate of Title or protected by Caveat.
VENDOR'S ATTORNEYS-AT-LAW	Silvera & Silvera, Attorneys-at-Law of Nos. 42-44 East Street, Kingston.
PURCHASER' ATTORNEYS-AT-LAW	Myers Fletcher & Gordon, Manton & Hart, Attorneys-at-Law of No. 21 East Street, Kingston

SPECIAL CONDITIONS:

1. It is understood and agreed that the Vendor's Attorneys-at-law shall be entitled to stamp this agreement for Sale with stamp duty and transfer tax from the deposit and that if for any reason whatsoever the deposit has to be returned to the Purchasers the Purchasers shall not demand the same until a refund of the said stamp duty and transfer tax have been received from the Stamp Commissioner AND the Attorneys' fee for obtaining the said refund shall be borne by the Purchasers.

2. It is understood and agreed that the Purchaser shall apply to a reputable lending institution for a loan of not less than $180,000.00 on the security of the said premises. In the event of the Purchasers not obtaining and delivering to the Vendor's Attorneys-at-Law a written commitment for such loans by the 20th day of January, 1984 either party shall be entitled to rescind this Agreement within fourteen (14) days thereof failing which this Agreement shall remain absolute and binding on the parties thereto. In the event of this Agreement being rescinded all moneys paid hereunder by the Purchasers shall be refunded without interest and free from deductions SAVE AND EXCEPT that the Purchasers HEREBY agree to pay to the Vendor's Attorneys-at-Law the sum of $500.00 for professional services rendered in respect of work incidental hereto and the Purchasers HEREBY irrevocably authorise the Vendor to deduct the amount of such fee from deposits paid to the Vendor and pay the same to the Vendor's Attorneys-at-Law on termination of this Agreement.

3. Subject to the Restrictive Covenants (if any) endorsed on the Certificate of Title registered at Volume 1080

Folio 191 of the Register Book of Titles.

4. The Attorneys-at-Law cost for the preparation of this Agreement for Sale is fixed at the sum of $300.00 and shall be borne by the Vendor and the Purchasers equally and each party shall pay their share on the signing of this Agreement.

5. This Sale also includes 4 mirrors - 2 Upstairs and 2 Downstairs, 1 bar and sink and 3 Air Conditioning Units.

6. 5% commission to be paid by the Vendor to Messrs. Stiebel & Company Limited on completion.

4. Pursuant to the said Agreement the Plaintiffs paid their deposit of $20,000.00 on the 17th January 1984 on the signing of the said Agreement.

5. That due to the fact that the said executed Agreement of Sale was only received by the Plaintiffs on the 18th January 1983 the Plaintiffs through their Attorneys-at-Law Messrs. Myers, Fletcher & Gordon, Manton & Hart requested an extension of Special Condition 2 aforementioned to February 29 1984.

6. The Plaintiff pursuant to the said Agreement obtained a commitment for a mortgate loan of $153,000 from the Bank of Commerce Trust Limited on the 24th February 1984 for which they paid the said bank a mortgage commitment fee of $1,530.00 and on the 28th February 1984 the Plaintiff through their said Attorneys-at-Law advised the said Florence Muir's Attorneys-at-Law Messrs. Silvera & Silvera, that they had a commitment for $153,000 and that the balance of the purchase price would be provided by the male plaintiff's employers by way of a loan to him.

7. On the 2nd March 1984 the Vendor's said attorneys sought to terminate the said Agreement on the ground that the mortgage commitment was not in accordance with Special Condition 2 of the said Agreement. The Plaintiff's Attorneys protested that the Special Condition was adhered to and in furtherance of the said Special Condition provided the Vendors' Attorneys-at-Law with a further written letter of Commitment from American International Underwriters (Jamaica) Limited for the balance of the purchase money of $27,000.00. On or about the 20th day of March 1984.

8. The Vendor Florence Muir died on or about the end of March 1984 and despite numerous requests of the Vendor's said Attorneys-at-Law

"to complete the said transaction they have failed and or refused and or neglected to complete same.

9. In accordance with the terms of and pursuant to the said Agreement the Plaintiffs have at all material times been and are now ready willing and able to fulfil and perform all their obligations under the said agreement.

10. The Agreement was to be completed on or before the 19th day of March 1984 and the Plaintiffs were at that date ready, willing and able to complete the said transaction.

11. That the Vendor Florence Muir died testate and the Plaintiffs waited for a reasonable period for the appointment of the personal representatives in her Estate but to date no steps have yet been taken by the named Executors in the said Will of Florence Muir to have same probated.

12. The Estate of Florence Muir is in the circumstances guilty of gross and unreasonable delay in performing and finalising the said contract as a consequence of which the Plaintiffs through their Attorneys-at-Law on the 5th November 1984 served on the personal representatives Messrs. Silvera & Silvera a Notice to the Vendor requiring completion of the transaction within thirty (30) days of the date thereof and Making Time of the Essence of the said Agreement.

13. In breach of the said Agreement and notwithstanding the numerous requests made by the Plaintiffs and their Attorneys-at-Law on their behalf the Estate of Florence Muir deceased wrongfully failed and refused and continues to neglect and refuse to complete the said sale or to take any steps towards such completion.

14. By reason of the abovementioned breach of contract the Plaintiffs have lost the use of the money paid by them as the deposit aforesaid and of other monies paid by them for the completion of the said purchase and have lost the expenses incurred by them in securing mortgage financing and investigating the title of the vendor. The Plaintiffs have also lost their bargain.

15. By reason of the matters aforesaid the Plaintiffs have suffered significant loss, damage and incurred expense.

PARTICULARS OF SPECIAL DAMAGE

Deposit	$20,000.00
Commitment Fee on Mortgage	$ 1,530.00
Legal Expenses	$ 500.00
	$22,030.00

The Plaintiffs therefore claim:-

(a) An order for Specific Performance of aforesaid Agreement.

"(b) Damages for breach of contract in lieu of or in addition to Specific Performance.

(c) Alternatively recission of the said Agreement with all the necessary accounts and consequential orders.

(d) Such further and other reliefs as to the Honourable Court seems just.

(e) Interest

(f) Costs."

The Defence was in the following terms:

"1. The Defendants admit paragraphs 1, 2, 3 and 4 of the Statement of Claim.

2. No admission is made to paragraphs 5 and 6 of the Statement of Claim.

3. Save that the Defendants admits that the Attorneys-at-Law for the Vendor treated the said Agreement as being terminated and rescinded, no admission is made to paragraph 7 of the Statement of Claim.

4. In further answer to paragraph 7 of the Statement of Claim the Defendants will rely on Special Condition 2 of the Agreement for Sale pleaded at paragraph 3 of the Statement of Claim and they will contend that Special Condition 2 was not complied with by the Plaintiffs and that the Agreement was rescinded under the provisions of this Special Condition by letter dated March 2, 1984 written by the Vendor's Attorneys-at-Law to the Purchaser's Attorneys-at-Law.

5. Paragraph 8 of the Statement of Claim is admitted.

6. No admission is made to paragraphs 9, 10 and 11 of the Statement of Claim.

7. Save that the Defendants deny that the Estate of Florence Muir, Deceased, is guilty of the alleged or any delay in finalising the said Agreement, inasmuch as they contend that the Agreement was terminated in March 1984, paragraphs 12 and 13 of the Statement of Claim is admitted.

8. In answer to paragraph 14 of the Statement of Claim the Defendants say that the Estate of Florence Muir, Deceased, through Silvera & Silvera, Attorneys-at-Law, placed the deposit made under the Agreement for Sale on fixed deposit and so informed the Plaintiffs' Attorneys-at-Law by letter dated March 8, 1984. In the premises the Defendants deny that the Plaintiffs have lost the use of the money paid by the Plaintiffs as a deposit under the Agreement for Sale. The Defendants further contend that the Agreement for Sale having been terminated in March 1984 the Plaintiffs have suffered no loss and incurred no expenses in procuring

"mortgage financing and investigating the Vendor's title by reason of the alleged or any loss of bargain.

9. Paragraph 15 of the Statement of Claim is denied.

10. Save as is hereinbefore expressly admitted, the Defendants deny each and every allegation contained in the Statement of Claim as if the same were specifically set out and traversed seriatim."

It is clear that the problem to be resolved was spawned by Special Condition 2.

After hearing submissions, Theobalds, J. delivered the following Oral Judgment:

"In this case the Plaintiffs filed a Statement of claim seeking from this Court an Order for Specific Performance of an Agreement for Sale entered into on the 17th day of January 1984 between the Plaintiffs and the deceased Florence Muir who was represented by her Executors. The premises in question was situated at No. 6 Spring Way, Manor Park, in the parish of Saint Andrew, and from the outset, certain documents and correspondence were agreed and admitted as an agreed Supplementary Bundle.

The only witness called for the Defence was one Redvers Chambers who produced the Probate which had been granted to the Defendants who appear as representatives of the Estate of the late Florence Muir.

From the outset it was conceded that there was not much of an issue relative to the facts and it was conceded that the decision of the Court would rest ultimately on its interpretation of the Special Condition 2 of the Purchase Agreement.

There was disagreement as to the Order of addresses and on this point I made up my ruling. It has been urged that a new case has been put forward by the Plaintiffs but it is my view having regard to the pleadings and the agreed Bundle, that clearly the question of the interpretation of Special Condition No. 2 was always the issue. This was actually conceded and once this concession was made, the Defendants cannot say that a new case has been put forward and that there was no opportunity to answer this case, and as such I ruled against the Defendant on both issues.

There is no doubt that on the basis of the documentary evidence in the case the Plaintiffs paid scant regard to the terms of the Purchase Agreement in relation to the furnishing of a written letter of commitment for a loan of $180,000.00 by the 20th January 1984.

The Defendants made long and detailed submission in support of that contention and emphasised that the Plaintiffs were lax in providing the

"letter of commitment and the Defendants have argued quite properly that as a result of this laxity they had every right to rescind the Purchase Agreement and this they purported to do by letter dated the 2nd March 1984.

It cannot be said otherwise than that Special Condition No. 2 did provide for the delivery of the letter of commitment by the 20th January 1984, but that the same Special Condition provided for either party to rescind the Purchase Agreement and the Specification sets out 'within 14 days of the 20th January 1984'. It went on to say that failing this recission (sic) the purchase agreement 'remained absolute and binding on the parties'. The agreement inclusive of Special Condition No. 2 is set out at length in the Statement of Claim.

It is the Court's duty in my view to see that the terms of the Agreement are carried out. There is no evidence on which a Court could properly find that the date in the Agreement for Special Condition has been extended or that date for the extension to expire.

I accept the Plaintiffs submission that the parties are bound by the terms of the Agreement and I am of the view that recission of the Agreement could only be properly achieved by strict compliance with the requirement with Special Condition No. 2 i.e. the requirement that either party may rescind within 14 days of the 20th January 1984 otherwise the Agreement to remain absolute and binding.

I do not intend to deal with the authorities cited as the issue is the legal interpretation of the Special Condition and I have interpreted it in the way the Plaintiffs have. I can find no reason for departing from strict compliance in the case and in any event it is my view that the interpretation of the Special Condition is the key issue.

Accordingly, I give Judgment for the Plaintiffs and an Order for Specific Performance of the Contract dated the 17th day of January 1984 between the Plaintiffs and the Defendants Florence Muir (now deceased) and in addition the Court Orders that the $20,000.00 deposit made by the Plaintiffs together with all interest accrued on that sum be for the credit of the Plaintiffs at the time of the final accounting of Purchase money between the parties.

Costs of the case (to be agreed or taxed) to the Plaintiffs."

That decision is challenged by the under-mentioned five Grounds of Appeal:

" (1) The Learned Trial Judge erred in law in granting the Defendants/Appellants an Order for Specific Performance in that:-

(a) The Plaintiffs/Respondents gave no evidence on the basis of which the Court could have exercised its discretion to grant them such equitable relief.

(b) He found that the Plaintiffs/Respondents had shown scant regard in complying with the terms of Special Condition No. 2, of the Agreement for Sale for the Provision of a written letter of commitment for a loan of $180,000.00 by the 20th January, 1984; and

(c) He found that the Plaintiffs/Respondents had been 'lax' in providing the letter of commitment and that as a result of this 'laxity' the Defendants/Appellants had 'every right' to rescind the Agreement for Sale by their letter of the 2nd March, 1984.

(2) That the Learned Trial Judge in expressly limiting his decision of the case to the interpretation of Special Condition No. 2, failed to properly assess the rest of the evidence as it affected the implementation of the said Special Condition No. 2.

(3) That the decision of the Learned Trial Judge that there was no evidence on which a Court could properly find that the date in the Agreement for Special Condition No. 2, had been extended is contrary to the evidence and makes doubtful the Learned Trial Judge's assessment in respect of the documentary evidence in the case.

(4) Further and in the alternative, that it was not open to the Learned Trial Judge to find that the date in the Agreement for compliance with Special Condition No. 2 had not been extended in light of the following:

(a) The Plaintiffs/Respondents had requested an extension to the 29.2.84 by letter dated 1.2.84;

(b) The Plaintiffs/Respondents by their letter of the 28.2.84 acted on the faith of the grant of such an extension;

(c) The Defendants/Appellants by their forbearance and/or acquiescence in the Plaintiffs/Respondents' conduct up to the 28.2.84 acted to their detriment in not having earlier rescinded the said Agreement for Sale; and

(d) The Plaintiffs/Respondents are accordingly estopped from denying the grant of such an extension.

(5) The Learned Trial Judge in ruling that the Defendants/Appellants should open the submissions and in ruling against allowing them a right of reply fell into error in that:-

(i) The Plaintiffs/Respondents not having opened their case or called any evidence the Defendants/Appellants were not fully aware of the case they had to meet;

(ii) The Plaintiffs/Respondents presented a case which did not arise on and/or was inconsistent with their pleadings; and

(iii) The Defendants/Appellants had no opportunity to deal with the case presented by the Plaintiffs/Respondents."

I do not find myself constrained to follow the order in which counsel dealt with the grounds of appeal. Accordingly, I will consider first Ground 5, which deals with the order of addresses. At the outset, having called his witness, Mr. Wright had sought a ruling on the order of addresses contending that the plaintiff should open and give his interpretation of the documentary evidence. The trial judge ruled that no case had been made out to depart from the established procedure and accordingly ruled that the defendant should address first.

Before us Mr. Wright contended that such a ruling put him at a disadvantage as he was not fully aware of the plaintiff's case. It was his contention that the plaintiff ought by his presentation to invoke the Court's discretion failing which there would be no case for the defendant to answer. On the other hand, Mr. Goffe maintained that the disadvantage complained of has to be faced by any counsel

addressing first. Mr. Goffe pointed also to the fact that the matter had gone beyond the point of there being no case to answer because both parties, by presenting an agreed bundle of documents for the Court's consideration, had thereby agreed on the evidence to be considered. Finally, he submitted that the plaintiff had done nothing to lose the last word to which the plaintiff has the right. Furthermore, he pointed out, Mr. Wright had effectively found a way to overcome the hurdle and to deal with the main issue in the case. In any event, we are not here concerned with an irregularity which would render the trial a nullity. In my judgment, Mr. Goffe's submissions are sound. This ground of appeal accordingly fails.

Ground 1 complains that the trial judge was wrong in granting Specific Performance for two reasons:

> (a) No basis had been laid for the exercise of the judge's discretion.
>
> (b) The respondent had violated the stipulations as to time provided in the Agreement for Sale.

This ground invokes the consideration of the principles of equity but the contention of the appellant is that this requirement was not observed. There is in the oral judgment reference to (b) (supra) but as to (a) (supra) there is complete silence. The reference to (b) (supra) is as follows:

> "There is no doubt that on the basis of the documentary evidence in the case the Plaintiffs paid scant regard to the terms of the Purchase Agreement in relation to furnishing of a written letter of commitment for a loan of $180,000.00 by the 20th January, 1984. The defendants made long and detailed submissions in support of that contention and emphasized that the Plaintiffs were lax in providing the letter of commitment and the Defendants have argued properly that as a result of this laxity they had every right to rescind the Purchase Agreement and this they purported to do by letter dated the 2nd March, 1984."

In this regard, however, it is pertinent to note a change in attitude towards the application of these principles of equity. This question was dealt with recently by Sir Robert Megarry, V.C. in **Lazard Brothers & Co. Ltd. v. Fairfield Properties Co. (Mayfair) Ltd.** (1977)

Times 13.10.77 in which he said that if between the plaintiff and the defendant it was just that the plaintiff should obtain a decree of Specific Performance, the Court ought not to withhold it merely because the plaintiff had been guilty of delay. He said further:

> "The classic phrase of Sir Richard Arden, Master of the Rolls, in **Milward v. Earl of Thanet** (1801) 5 Ves 720n) was that a plaintiff seeking specific performance must show himself 'ready, desirous, prompt and eager'. If specific performance was to be regarded a prize to be awarded by equity to the zealous and denied to the indolent, then plainly the plaintiff vendors in the present case must fail. Whatever might have been the position a century and more ago, when there were separate courts of equity, that seemed to be the wrong approach today and in a court which administered both law and equity.
>
> There might be a case of gross delay by a plaintiff which had done the defendant no harm at all, or might even have been to his advantage. In such a case there was no reason why the court should in effect punish the plaintiff for his delay by refusing to decree the specific performance that he sought, and leaving him to his remedy in damages. On the other hand, a much shorter period of delay might have resulted in the position of the defendant having changed to his disadvantage in such a way as to make it unjust specifically to enforce the contract, and then specific performance should be refused.
>
> In the present case, counsel for the purchaser defendants was unable to point to any evidence of any detriment to the purchasers having resulted from the delay. The transaction seemed to have been regarded by both sides in a remarkably leisurely way, with no more than intermittent spurts of activity. There was no ground on which delay could properly be said to be a bar to a decree of specific performance."

It would seem to me that if the trial judge in this case agreed that the submission by the defendants was properly made then that should have been followed by a conclusion in favour of the defendants. But such was not the case. Consideration was diverted to the conditions for rescission in Special Condition 2 of the Agreement and the conclusion did not favour the submission which had been properly made.

As to (a) (supra), Mr. Wright submitted that there was no evidence at the time of trial of the purchaser's financial standing. This must be considered against the background that it was the purchaser's failure to meet their financial responsibility in the time specified which precipitated this action. Required to provide a

written commitment in three days, viz., on January 20, 1984, the purchasers by their attorneys-at-law on February 28, 1984, i.e. thirty-nine days later, forwarded the following letter with enclosure to the appellants' attorneys-at-law:

> "Messrs. Silvera & Silvera
> Attorneys-at-Law
> 42-44 East Street
> Kingston.
>
> Dear Sirs:
>
> Re: Sale of No. 6 Springway, Manor Park -
> Florence Muir to Raymond Mair et ux -
> Your Ref: BAT/V.McT.
>
> We refer to previous correspondence herein ending with ours of 1st February, 1984, and now enclose herewith photocopy of Letter of Commitment received from our clients. The balance of purchase price will be loaned to Mr. Mair by his employers American International Underwriters (Jamaica) Limited.
>
> We shall shortly be advising you as to the preparation of the Transfer.
>
> Yours faithfully
> MYERS, FLETCHER & GORDON
> MANTON & HART
>
> Per:
> Lynda Mair (Miss)
>
> Enc."

It is patent that up to that date there was no written commitment for any portion of the outstanding balance. The photocopy Letter of Commitment was useless for that purpose and so was the statement that the difference would be met by another loan. But relevant to present considerations is Condition 8 of 14 Conditions attached to the photocopy commitment for $153,000:

> "This offer will be deemed to expire if not accepted by March 15, 1984 and if accepted will lapse if documentation is not completed and funds drawn by June 15, 1984, completion expiry date."

On March 20, 1984, a Letter of Commitment dated March 13, 1984, from the purchaser's employer was forwarded to the appellant's attorneys-at-law. It reads:

"Myers, Fletcher & Gordon,
Manton & Hart,
21 East Street,
Kingston.

ATTENTION: MISS LYNDA MAIR

Dear Sirs:

Re: Purchase of 6 Springway, Manor Park - Raymond Mair et ux from Florence Muir

We wish to confirm that we have granted a loan of J$27,000 to our employee, Mr. Raymond Mair, in connection with the above purchase. This loan is to be secured by means of an equitable charge in favour of American International Underwriters (Jamaica) Limited.

We trust the above is satisfactory.

Yours faithfully,

GRANVILLE ST. P. HARRISON
DIRECTOR

/bww."

Clearly, therefore, argued Mr. Wright, the commitment from the Bank, having expired almost five years before the trial and with nothing new from either the Bank or the purchasers' employers, there was no knowledge of the respondents' ability to perform. And that is so despite paragraph 9 of the Statement of Claim dated 14th March, 1986, almost three years prior to the trial date. The paragraph reads:

> "In accordance with the terms of and pursuant to the said agreement the plaintiffs have at all material times been and are now ready willing and able to perform all their obligations under the said agreement."

Though to my mind this ground of appeal addresses a matter of substance when viewed in the light of the respondents' failure to meet their financial obligations in the time specified, yet having perused the recorded submissions made before the trial judge, I can find no reference to this aspect of the case. It is apparent, therefore, that the trial judge was not required to make a finding thereon. In those circumstances, I do not think that that question can properly be canvassed before us.

The remaining three grounds - 2, 3 and 4 - call for a consideration of the evidence. To avoid repetition, I will first set out such

evidence as there is and then deal with the issues raised.

For reasons best known to the parties who were both legally represented, a most unrealistic time-frame was agreed upon for the performance of the agreement. Three days ending January 20, 1984, were permitted in which to obtain a Letter of Commitment for $180,000 and it was agreed that even if there was failure in this regard both parties would end up with an absolutely binding contract unless either party within fourteen days from January 20 rescinded the contract. But it soon became clear that there was no banker standing by ready to hand over such a Letter of Commitment and when one was found who would offer some accommodation he required not three days but four weeks. Hence a plea on behalf of the respondents for an extension as is evidenced in letter dated 1st February, 1984 -

> "Messrs. Silvera & Silvera
> Attorneys-at-Law
> 42-44 East Street
> Kingston.
>
> Dear Sirs:
>
> Re: Sale of No. 6 Springway, Manor Park - Florence Muir to Raymond Mair et ux
> Your Ref: BAT/V. McT
>
> We refer to previous correspondence herein ending with ours of 19th January, 1984, and to the recent telephone conversation with your Mr. Silvera in which he agreed that the time for obtaining the letter of commitment would be extended, in view of the fact that the copy agreement signed by the Vendor was received by us only on the 16th January, 1984.
>
> Our clients have now advised that they will be getting a mortgage from the Bank of Commerce Trust Company Limited. We have spoken to Mr. Richard Campbell of Bank of Commerce Trust who has promised to let us have the letter of commitment within the next four weeks. We should appreciate your advising whether your client is agreeable to extending the time set in special condition (2) of the Agreement, to 29th February, 1984.
>
> Please let us hear from you as soon as possible.
>
> Yours faithfully
> MYERS, FLETCHER & GORDON
> MANTON & HART
>
> Per:
> Lynda Mair (Miss)
>
> c.c. Mr. Raymond Mair."

No reply to this letter has been exhibited. Reference has already been made to the follow-up letter of February 28 forwarding the photo-copy Letter of Commitment.

The first letter on record from Messrs. Silvera & Silvera, the vendors' attorneys-at-law, was in response to the letter of February 28 and sought to rescind the Agreement for Sale. Dated March 2, 1984, it reads:

> "Messrs. Myers, Fletcher & Gordon,
> Manton & Hart,
> Attorneys-at-Law,
> 21 East Street,
> KINGSTON.
>
> ATTENTION: MISS LYNDA MAIR
>
> Dear Sirs,
>
> Re: Sale of No. 6 Springway, Manor Park - Florence Muir to Raymond Mair et ux
>
> We are in receipt of your letter dated 28th February, 1984. Our instructions are, however, that as the Mortgage Commitment is not in accordance with Special Condition 2 of the Agreement for Sale the matter be terminated.
>
> We, therefore, enclose our cheque for $20,000.00, being a refund of the deposit paid herein.
>
> Yours faithfully,
> SILVERA & SILVERAA
>
> PER:
>
> Enc."

Objection to this course was raised by letter dated March 5, which reads:

> "Messrs. Silvera & Silvera
> Attorneys-at-Law
> 42-44 East Street
> Kingston.
>
> Dear Sirs:
>
> Re: Sale of No. 6 Springway, Manor Park - Florence Muir to Raymond Mair et ux
> Your Ref: BAT/VMcT.
>
> We acknowledge receipt of your letter dated 2nd March, 1984. We cannot agree with the position taken in your said letter as the Purchasers have clearly complied with the Special Condition, having raised the necessary financing, albeit from two financial institutions.

"The Purchasers, therefore, require your client to complete this transaction, and we return herewith your cheque numbered 8401713.

Yours faithfully
MYERS, FLETCHER & GORDON
MANTON & HART

Per:
Lynda Mair (Miss)"

Messrs. Silvera & Silvera by letter dated March 8, 1984, set out quite clearly the reason for the step they had taken. Their letter reads:

"Messrs. Myers, Fletcher & Gordon,
Manton & Hart,
Attorneys-at-Law,
21 East Street,
KINGSTON.

ATTENTION: MISS LYNDA MAIR

Dear Sirs:

Re: Sale of premises No. 6 Spring Way, Manor Park - Florence Muir to Raymond Mair et ux

We are in receipt of your letter dated 5th March, 1984 and return our cheque No. 8401713 for the deposit of $20,000.00 in the above transaction.

We disagree with the opinion expressed by you that the Special Condition has been complied with as same required a written letter of commitment for a loan of $180,000.00, whereas we received from you a photocopy of such a letter of commitment from the Bank of Commerce Trust Limited in respect of a loan of $153,000.00

The statement contained in your letter dated 28th February, 1984, that 'The balance of purchase price will be loaned to Mr. Mair by his employers ....' cannot be regarded as a 'written commitment' in respect of the difference of $27,000.00.

Yours faithfully,
SILVERA & SILVERA

PER:

Encl."

Such is the extent of the relevant evidence on record. There are six other letters but these are in no way relevant to the issues to be resolved.

Ground 2 took issue with the trial judge's approach to the case in that he expressly limited his decision of the case to the interpretation of Special Condition 2 and in so doing failed to

properly assess the rest of the evidence as it affected the implementation of Special Condition 2.

It was, indeed, the case, as the trial judge stated at page 1 of his judgment, that it was conceded that the decision of the Court would rest ultimately on its interpretation of the Special Condition 2 of the Purchase Agreement. But such concession certainly could not be taken to have ruled out a consideration of the relevant evidence as the trial judge appears to have done. The interpretation of Special Condition 2 could not be done in vacuo but with reference to the relevant evidence. Even if consideration of the evidence would not have led to a contrary conclusion it is necessary in order that justice may, indeed, appear to be done to demonstrate that the appellants' contention could not be supported by the evidence. It would be relevant to consider whether there was any extension of the time specified in Special Condition 2. At this point, Ground 2 merges into Ground 3 which complains that the trial judge's decision "that there was no evidence on which a Court could properly find that the date in the Agreement for Special Condition 2 had been extended is contrary to the evidence and makes doubtful the learned trial judge's assessment in respect of the documentary evidence in the case".

Now under the terms of the Agreement the following important dates are specified: Written Commitment by January 20, 1984; Rescission within fourteen days of January 20, i.e. February 3; Completion on or before March 19, 1984. There was in fact a purported rescission on March 2, 1984. The question must be asked, "What is the relevance of this date, i.e. March 2, 1984, to the date for rescission provided in the Agreement?". If this date is to be of any validity it must fit into an extension of the date for rescission specified in Special Condition 2, the determination of which requires a consideration of the evidence.

The reference to an extension of Special Condition 2 arose on the Pleadings in this way. Paragraph 5 of the Statement of Claim states:

> "That due to the fact that the said executed Agreement of Sale was only received by the Plaintiffs on 18th January, 1983 (sic) the Plaintiffs through their attorneys-at-law Messrs. Myers, Fletcher & Gordon, Manton & Hart requested an extension of Special Condition 2 aforementioned to February 29, 1984."

To this paragraph the Defence pleaded no admission and the plaintiffs joined issue with the defendants on their Defence save in so far as the same contained admissions. The letter of February 1, 1984, asserts that prior to the writing of the letter, Mr. Silvera of Silvera & Silvera, who then represented the appellant, had acceded to the request for an extension. But it is apparent that at that time the length of the extension was not known. However, the respondents now knew where they stood and was supplying February 29, 1984, as the date to which the extension was required. Here is the letter:

> "1st February, 1984
>
> Messrs. Silvera & Silvera
> Attorneys-at-Law
> 42-44 East Street
> Kingston.
>
> Dear Sirs:
>
> Re: Sale of No. 6 Springway, Manor Park -
> Florence Muir to Raymond Mair et ux
> Your Ref: BAT/V. McT
>
> We refer to previous correspondence herein ending with ours of 19th January, 1984, and to the recent telephone conversation with your Mr. Silvera in which he agreed that the time for obtaining the letter of commitment would be extended, in view of the fact that the copy agreement signed by the Vendor was received by us only on the 18th January, 1984.
>
> Our clients have now advised that they will be getting a mortgage from the Bank of Commerce Trust Company Limited. We have spoken to Mr. Richard Campbell of Bank of Commerce Trust who has promised to let us have the letter of commitment within the next four weeks. We should appreciate your advising whether your client is agreeable to extending the time set in Special condition (2) of the Agreement to 29th February, 1984.
>
> Please let us hear from you as soon as possible.
>
> Yours faithfully
> MYERS, FLETCHER & GORDON
> MANTON & HART
>
> Per:
> Lynda Mair (Miss)
> c.c. Mr. Raymond Mair."

There was in evidence no response to this letter but Mr. Wright submitted that there was a forbearance on the part of the appellants which evidenced an acquiescence to the request and amounted to a waiver of the date in Special Condition 2. Copious submissions have been made and several authorities referred to regarding extension, waiver and the need for writing to make a waiver effective. Mr. Wright's strong point was the question of waiver evidenced by forbearance.

The position on this question is stated in Chitty On Contracts 24th Edition paragraph 1383 thus:-

> "Where one party has induced the other party to accede to his request the party seeking the concession will not be permitted to repudiate the waiver and to set up the original terms of the agreement Ogle v. Earl Vane (1868) L.R. 3 Q.B 272: Hickman v. Haynes (1875) L.R 10 C.P 598.
>
> Thus in Levey and Co. v. Goldberg (1922) 1 KB 688 the defendant agreed in writing to buy from the plaintiffs certain pieces of cloth over the value of £10 to be delivered within a certain period. At the oral request of the defendant, the plaintiffs voluntarily withheld delivery during that period. The defendant subsequently refused to accept delivery, and, when sued, contended that the plaintiffs themselves were in breach, as the oral agreement was insufficient to vary the term of the contract which was required by law to be evidenced in writing. It was held that the forbearance by the plaintiffs at the request of the defendant did not constitute a variation but a waiver and that the plaintiffs were entitled to maintain their action."

It was Mr. Goffe's submission that the oral agreement by Mr. Silvera to extend the time as was contended in the letter dated 1st February, 1984 was ineffectual because this was a variation and was required to be evidenced in writing. But

Levey and Co. v. Goldberg is authority against such contention. What he was seeking to do is to obtain a benefit from that which is held to be impermissible. How could the respondent who had requested the extension of time after securing the concession requested and supplying proof for the postponed date of the rescission be allowed to question the manner in which the concession had been granted? No mystery therefore attaches to March 2, the date on which the vendor's attorney rescinded the agreement. The fourteen days available to both parties under Special Condition 2 by virtue of the extension was moved forward and March 2 fell within that period. It was an effective date because even at that date the requirement for a letter of commitment for $180,000 had not been met.

Accordingly, there is merit in the complaint that the learned trial judge erred in failing to find that there had been an extension of the date in Special Condition 2.

But even if the learned trial judge had been correct concerning the extension, since Specific Performance is a discretionary remedy the question remains whether it ought to have been decreed. In making his decree, the trial judge gave no reasons so that the result appears to be as of right. The English Court of Appeal in Eagil Trust Co. Ltd. v. Pigott-Brown and another (1985) 3 ALL E.R. 119 pointed to the need for judges, as a general rule, to give reasons for decisions involving the exercise of a judicial discretion. The headnote reads:-

> "In decisions involving the exercise of judicial discretion a judge should, as a general rule, give reasons for his decision, the particularity of such reasons being dependent on the circumstances of the case and the nature of the decision: Thus, when dealing with an application in chambers to strike out an action for want of prosecution, a judge should give his reasons in sufficient detail to show the Court of Appeal the basic principles on which

> "he has acted and the reasons that have led to his conclusion. In giving reasons the judge is not required to deal with every argument presented by Counsel in support of his case, and where a particular argument has not been dealt with but it can be seen that there are grounds on which the judge would have been entitled to reject it the Court of Appeal will assume that he acted on those grounds unless the appellant can point to convincing reasons leading to a contrary conclusion. The requirement that reasons be given is subject to certain well-established exceptions, such as the award of costs (unless the award is unusual) and the refusal of leave to appeal to the Court of Appeal from an arbitrator's award.
>
> Although the exercise of a judge's discretion may be attacked if it is clearly wholly wrongly exercised, the Court of Appeal will not use this as a means of substituting its own discretion for that of the judge."

However, inasmuch as the case involves only the consideration of documents, this Court is equally competent to consider whether the discretion ought to be exercised in favour of the respondents. Relevant matters for consideration include the following:

> "1. It is evident that the Agreement for Sale was intended to be completed within a short time and that such date as were specified for compliance were material.
>
> 2. There was non-compliance with Special Condition 2 for the provision of a Letter of Commitment from a reputable lending institution for the amount of $180,000.
>
> 3. There was only partial compliance with Special Condition 2 on March 20 instead of January 20, 1984 and this was by means of a Letter of Commitment dated 13th March, 1984 - the closing date being March 19, 1984.
>
> 4. The finding of laxity on the part of the respondents by the trial judge is clearly justified since it is evident that from the start they showed a

"lack of respect for the spirit and
intendment of the Agreement for Sale."

Having accorded these matters due consideration, it is my opinion that it would not be just that the respondents should have a decree of Specific Performance.

In so far as the deposit of $20,000 is concerned the responent suffers no loss since it had been placed in an interest bearing account after it had been returned by the purchasers by letter dated March 5, 1984.

In the result I would allow the appeal and set aside the judgment of the Court below. The appellants are to have their costs of appeal and in the Court below to be taxed if not agreed. The deposit of $20,000 with accrued interest must be returned to the respondents.

MORGAN, J.A.

This is an appeal against the judgment of Theobalds, J. wherein he ordered Specific Performance of a Contract of Sale of land made between the plaintiffs/respondents (hereinafter called "the purchasers") and the defendants/appellants (hereinafter called "the vendors") being the executors of the Estate Florence Muir (deceased) who died subsequent to the filing of this suit.

The contract made on the 17th January, 1984 is in respect of property situated at 6 Spring Way, Manor Park, St Andrew which Florence Muir as owner agreed to sell and Raymond and Herman Mair to purchase for the sum of Two hundred thousand dollars ($200,000.00). A deposit of $20,000.00 was payable on the signing of the agreement with the balance due and payable on the completion date which was on or before the 19th March, 1984. Six Special Conditions are inserted but the condition relevant to this matter is Special Condition 2 which reads thus:

> "It is understood and agreed that the Purchaser shall apply to a reputable lending institution for a loan of not less than $180,000.00 on the security of the said premises. In the event of the Purchasers not obtaining and delivering to the Vendor's Attorneys-at-Law a written commitment for such loans by the 20th day of January, 1984 either party shall be entitled to rescind this Agreement within fourteen (14) days thereof failing which this Agreement shall remain absolute and binding on the parties thereto. In the event of this Agreement being rescinded all moneys paid hereunder by the Purchasers shall be refunded without interest and free from deductions SAVE AND EXCEPT that the Purchasers HEREBY agree to pay to the Vendor's Attorneys-at-Law the sum of $500.00 for professional services rendered in respect of work incidental hereto and the Purchasers HEREBY irrevocably

authorise the Vendor to deduct
the amount of such fee from
deposits paid to the Vendor and
pay the same to the Vendor's
Attorneys-at-Law on termination of
this Agreement."

The deposit was paid but the contract left only two days (20th January, 1984) for the purchasers to apply and obtain a written commitment from a reputable institution for the loan of $180,000.00. It genuinely required more time and consequently the purchasers' lawyers spoke with and then wrote to the vendors' lawyers by letter dated 1st February, 1984, the following:-

"Re: Sale of No. 6 Springway, Manor Park -
Florence Muir to Raymond Mair et ux
Your Ref: BAT/V. McT

We refer to previous correspondence herein ending with ours of 19th January, 1984, and to the recent telephone conversation with your Mr. Silvera in which he agreed that the time for obtaining the letter of commitment would be extended, in view of the fact that the copy agreement signed by the Vendor was received by us only on the 18th January, 1984.

Our clients have now advised that they will be getting a mortgage from the Bank of Commerce Trust Company Limited. We have spoken to Mr. Richard Campbell of Bank of Commerce Trust who has promised to let us have the letter of commitment within the next four weeks. We should appreciate your advising whether your client is agreeable to extending the time set in special condition (2) of the Agreement, to 29th February, 1984.

Please let us hear from you as soon as possible."

On the 24th February, 1984 the vendor obtained from the Bank of Commerce Trust Limited a letter of commitment which covered a loan of $153,000.00 to the purchasers. This was short by $27,000.00 for the required commitment of $180,000.00. By letter dated 28th February, 1984 a photocopy of the letter of commitment was sent to the vendors' lawyers by the purchasers' lawyers the contents of which read:-

> "We refer to previous correspondence herein ending with ours of 1st February, 1984, and now enclose herewith photocopy of Letter of Commitment received from our clients. The balance of purchase price will be loaned to Mr. Mair by his employers American International Underwriters (Jamaica) Limited.
>
> We shall shortly be advising you as to the preparation of the Transfer."

The vendors' lawyers by letter dated 2nd March, 1984 refunded the deposit of $20,000.00 paid stating:-

> " We are in receipt of your letter dated 28th February, 1984. Our instructions are, however, that as the Mortgage Commitment is not in accordance with Special Condition 2 of the Agreement for Sale the matter be terminated."

The purchasers replied returning the cheque with a protest. In response the vendors by letter of the 8th March wrote:-

> " We are in receipt of your letter dated 5th March, 1984 and return our cheque No. 3401713 for the deposit of $20,000.00 in the above transaction.
>
> We disagree with the opinion expressed by you that the Special Condition has been complied with as same required a written letter of commitment for a loan of $180,000.00, whereas we received from you a photocopy of such a letter of commitment from the Bank of Commerce Trust Limited in respect of a loan of $153,000.00.
>
> The statement contained in your letter dated 28th February, 1984, that "The balance of purchase price will be loaned to Mr. Mair by his employers ...." cannot be regarded as a "written commitment" in respect of the difference of $27,000.00."

On the 20th March the purchasers forwarded a letter of commitment from American International Underwriter (Jamaica) Limited with respect to the short-fall of $27,000.00.

At the trial, evidence to the extent of tendering a document, a grant of Probate, was offered by the defendant and thereafter the case proceeded on submissions made on the plead-

ings, firstly by the defendants, the learned trial judge having ruled that they should begin.

The judgment of the learned trial judge stated that on the basis of the documentary evidence in the case the plaintiffs paid scant regard to the terms of the purchase agreement in relation to the furnishing of a written letter of commitment for a loan of $180,000.00 by 20th January, 1984 "that the defendants have argued quite properly that as a result of this laxity they had every right to rescind the purchase agreement and this they purported to do by letter dated March 2, 1984." He considered that the real issue was the legal interpretation of Special Condition 2 (supra) and on this issue he said "there is no evidence on which a Court could properly find that the date in the agreement for Special Condition has been extended or that (sic) date for the extension to expire." Accordingly, he found that "rescission of the agreement could only be properly achieved by strict compliance with the requirement of Special Condition 2, the requirement that either party may rescind within fourteen days of the 20th January, 1984 otherwise the agreement to remain absolute and binding."

The learned trial judge found there was an absolute binding contract, made an order for Specific Performance of the contract and that the deposit of $20,000.00 with interest accrued be for the credit of the plaintiff.

It is from this Order that the defendants have appealed and the grounds of appeal very briefly put are as follows:-

Ground 1. Specific Performance ought not to have been granted on the basis of

(a) absence of evidence to exercise the equitable relief and

(b) his finding of scant regard and laxity on the part of the purchasers in complying with the terms of Special Condition 2.

Grounds 2, 3 and 4...............

That the learned trial judge erred in resting his decision on Special Condition 2 of the agreement only and in finding that there was no extension of time.

Lastly, there was a complaint that he fell in error in ruling

(1) that the defendant should open the submission and

(2) the defendant had no right of reply.

The appellants' (vendors) submissions neatly put were that the purchasers paid little regard to the terms of Special Condition 2, that in light of the conduct of the parties, circumstances of transactions and dates, time frames chosen by the parties, time was of the essence at all material times and because of their laxity in complying the vendors had a right to rescind. That there was an extension of time and the right to rescind became operative within fourteen days after that new date had passed, and that period had not expired prior to rescinding.

The respondent, however, argued that there was no extension of time granted. A request was made but no reply was ever received so the right to rescind ceased to exist at the date set out in Special Condition 2, that is, fourteen days from January 20, 1984 to February 9, 1984. Any notice given after that date was ineffective so when the purported rescission effected exclusively under Condition 2 the right had already self-destructed. He submitted that the completion date was March 19, 1984, so when the letter of commitment in respect of the balance of $27,000.00 was tendered on March 20, the contract was still subsisting.

Was there an extension of time?

Although the vendors appeared equivocal in the Court below as to whether or not there was a grant of extension of

time, Counsel eventually contended before us that there was extension of Special Condition 2 granted to February 29 as requested. Mr. Goffe objected to this line of argument as, he urged, it was neither argued in Court nor admitted in the pleadings. There was no change of date he submitted only an attempt. Indeed there was no assertion in the pleadings that there was a grant of extension of time and when Counsel was asked by the learned trial judge if there was a grant, the response was "It was not pleaded". Whether Counsel thought that he was not entitled to answer what was not pleaded or he was being evasive is difficult to say but he totally ignored its importance.

Before us both parties disagreed as to the grant of an extension of time. It was an issue in the Court below and the learned trial judge made a finding on it - one which influenced his judgment. It forms part of a ground of appeal. It is an aspect in the case and contra Mr. Goffe's submission it must be considered. Whether or not there was an extension is a question of mixed fact and law and though an appellate Court would not normally question a finding of fact by the learned trial judge, it is the duty of this Court to look at the history of the case and conclude whether the existing facts amount in law to an extension of time, whether oral, written or by conduct. What happened appeared to be partly oral, partly written and partly by conduct. I start with the letter dated February 1, 1984 (supra) from the purchasers' lawyers. In my view the contents clearly indicate that the lawyers for the parties had a telephone conversation in which it was stated that the copy agreement for sale was received on the 18th January and that the period was too short to obtain a letter of commitment. The lawyers for the vendor were satisfied and for that reason agreed that the purchasers have more time to obtain it. There is no

challenge to this oral agreement by either party. At the time of this oral agreement, however, no date was specified, in which case one would expect a reasonable time.

The letter, however, not only confirmed the oral agreement but specified a fixed date - the 29th February, 1984. The absence of a reply by the vendors in my view in these circumstances was unimportant as silence indicated acquiescence of the date specified as the new postponed date for compliance with Special Condition 2. The time set for compliance having passed, and the failure of the vendors to act, is clear conduct on the vendors' part that having orally agreed to the forbearance they now accept the specified date as the postponed date of compliance in place of the original date. In clear terms the date previously set for compliance in the contract - the 20th January, 1984 - is now the 29th February, 1984. There can be no mistake that both vendors and purchasers were ad idem and that they acted as they understood each other to mean, that is, both acting in reliance on the letter of 1st March. This view is further supported by evidence of their conduct.

The purchasers: By forwarding the photocopy of the purported letter of commitment on the 28th February, 1984, a day before the final compliance day.

The vendors: By rescinding the contract on 2nd March, 1984 a date subsequent to the final compliance day, the 29th February, 1984.

The only inference that can be drawn from all these circumstances is that the vendors and purchasers had agreed to an extension of time, a postponement of the compliance day to the 29th February, 1984.

The vendors could have rescinded on any day between January 20, 1984 and February 9, 1984 but for the agreement on request of the purchasers to extend time. Mr. Coffe's argument

is that once that fourteen day period had passed they forfeited their right. It is a settled principle of law of great antiquity and authority that in these matters no one can take advantage of the existence of a state of things which he himself has produced. New Zealand Shipping Co. v. Societe des Ateliers et Chambers de France (1918-19) (H.L.) ALL E.R 552

Surely the purchasers cannot be allowed to approbate and then reprobate.

Mr. Goffe argued that any extension of time would be a variation of the contract and must be evidenced in writing. Mr. Wright contends that it is a waiver or forbearance. The distinction between variation and waiver is said to be a difficult one to apply in practice. The Statute of Frauds requires contracts for the sale of land to be evidenced by writing. So any variation must be in writing and has no effect if oral. To effect a variation the contract may be modified or altered by mutual agreement Chitty on Contract 23rd Edition paragraph 1496.

A waiver or forbearance in one of its terms occurs where one party voluntarily accedes to a request by the other that he should forbear to insist on the mode of performance fixed by the contract. It may be oral or written or inferred from conduct even though the provision waived is found in a contract required to be evidenced in writing: Chitty on Contract 25th Edition 1495, 1496.

Whatever may be the difficulty in other cases there is no difficulty in applying the above principles to this case to conclude that what was sought and what had occurred was not a variation. This was a waiver or forbearance - a request from the purchasers to the vendors to be patient and allow some extra time to acquire the letter of commitment. It follows then that the postponed date need not be evidenced in writing.

Now what then, is the effect of the extension of time and this waiver? The effect is well expressed in Barclay v. Messenger L.T. Vol xxx section 5 page 35:

> "Where time is of the essence of the contract the mere extension of time is only a waiver to the extent of substituting the extended time for the original time and not an utter destruction of the essential character of the time .... and
>
> The mere giving of time where time was of the essence would have no effect except by extending the time."

Time was of the essence as evidenced by the agreement to deliver a letter of commitment on a given date and if not either party might rescind within a given time. Time was therefore extended leaving the obligations of the Special Condition intact.

Was there compliance with the Special Condition?

In the vendors' letter of March 2 they stated that "the Mortgage Commitment is not in accordance with Special Condition 2 of the Agreement for Sale" and on March 8 the vendors elaborate that the Special Condition required a letter of commitment for $180,000.00 and what was received was a photocopy of such a letter of commitment from the Bank of Commerce Trust Limited in respect of a loan of $153,000.00, also there was no letter of commitment in respect of the difference of $27,000.00.

Issue is taken by the vendors of receipt of a "photocopy" of the letter of commitment. Photocopy is regarded generally in law as secondary evidence of the original. It is expected that in these transactions the original with a copy would be sent by the purchasers with a request to return the original, if it is imperative that the document should remain with the purchasers. Failing that, a certified or examined copy would suffice. Technology has indeed moved apace but it is

generally known that photocopies can be subject to tampering. Much depends on the custom in the profession. However, the issue amounts to nothing as the contents of the photocopy were in any case inadequate. It is observed that the belated letter of commitment for the balance of $27,000.00 was sent on March 20, in a letter which did not state that it was a "photocopy". Notwithstanding, the real cause for complaint was the failure to provide a letter of commitment for $180,000.00 as stated in Special Condition 2 by the 29th, the postponed day of compliance. Indeed there was non-compliance with the Special Condition 2 by the purchasers up to midnight of the 29th.

Did the vendors have a right to rescind?

In Aberfoyle Plantations Limited v. Cheng (1960) A.C. pages 115, 124, 125 the Board of the Privy Council set out the general principles governing the operations of conditions precedent in conditional contracts for sale and purchase of land thus:

> "... their Lordships would adopt, as warranted by authority and manifestly reasonable in themselves, the following general principles: (i) Where a conditional contract of sale fixes a date for the completion of the sale, then the condition must be fulfilled by that date; (ii) where a conditional contract of sale fixes no date for completion of the sale, then the condition must be fulfilled within a reasonable time; (iii) where a conditional contract of sale fixes (whether specifically or by reference to the date fixed for completion) the date by which the condition is to be fulfilled, then the date so fixed must be strictly adhered to, and the time allowed is not to be extended by reference to equitable principles."

The equitable principles to which their Lordship refer are at page 126 and read:

> "Courts of equity in dealing with actions for specific performance relating to land have been accustomed to give effect to the real intention rather than to the precise words fixing the date for completion. The effect is that a clause fixing the date for completion is equivalent to a clause stating that completion shall be on that or within a reasonable time thereafter ....
>
> Equity has, I think never applied its liberal views as to time to such a condition. If a date is mentioned the condition must be exactly complied with. ...."

In this case being considered there was a Special Condition agreed to by both parties and accordingly no equitable principles can apply. The principle which is applicable is as at (iii) in the quotation above. Strict compliance with a condition is required and Special Condition 2 is a condition precedent. The following is instructive: "When the liability only arises on the happening of the contingency or performance of the condition, the conditon is called a condition precedent and when the liability ceases thereon it is called a condition subsequent." Halsbury's Laws of England 3rd Edition page 196 paragraph 329.

The contract was signed on January 18. A Special Condition was that a letter of commitment was to be delivered on January 20. In the case of non-compliance with the condition either party had the right to rescind within 14 days of January 20 - extended to February 29. At midnight on the night of February 29 the appropriate letter of commitment was not in place and the 14 days in which either party could elect to rescind had commenced to run. It was a condition precedent for the sale, fixed by the parties, with the intention that the condition had to be satisfied before the contract would be binding as a contract of sale. Time was already of the essence.

As the obligation was on the purchasers the conclusion is that both parties intended that the fixing of the date of delivery of the letter of commitment, was to make time the essence of the contract. There was no obligation on the vendors' part to serve any Notice of time being of the essence.

The vendors acted promptly by making their election to rescind and so expressed on March 2, in an unequivocal manner that by reason of the non-compliance the vendors had resolved to rescind the contract and refused to be bound by it.

Having done so it is my view that the contract ceased to be binding from the date of rescission - as if it never existed.

For the reasons I have stated above, I would allow the appeal and order that judgment be entered for the appellants with costs here and below and that the deposit of $20,000.00 be returned to the plaintiffs/respondents in terms as agreed by the parties in Special Condition 2.

BINGHAM, J.A.(AG.):

By a written agreement for sale dated the 17th day of January, 1984 and entered into between the vendor Florence Muir, now deceased and the respondents Raymond and Herma Mair as purchasers, the vendor agreed to sell and the respondents to purchase a dwelling house situate at 8 Spring Way, Manor Park in the parish of Saint Andrew.

The consideration price was $200,000 of which the sum of $20,000 being the deposit was payable upon the execution of the agreement.

The agreement contained the usual terms and called for completion on or before 19th March, 1984. In addition there were the following special conditions:-

"SPECIAL CONDITIONS:

1. It is understood and agreed that the Vendor's Attorneys-at-Law shall be entitled to stamp this Agreement for Sale with stamp duty and transfer tax from the deposit and that if for any reason whatsoever the deposit has to be returned to the Purchasers the Purchasers shall not demand the same until a refund of the said stamp duty and transfer tax have been received from the Stamp Commissioner AND the Attorneys' fee for obtaining the said refund shall be borne by the Purchasers.

2. It is understood and agreed that the Purchaser shall apply to a reputable lending institution for a loan of not less than $180,000.00 on the security of the said premises. In the event of the Purchasers not obtaining and delivering to the Vendor's Attorneys-at-Law a written commitment for such loans by the 20th day of January, 1984 either party shall be entitled to rescind this Agreement within fourteen (14) days thereof failing which this Agreement shall remain absolute and binding on the parties thereto. In the event of this Agreement being rescinded all moneys paid hereunder by the

Purchasers shall be refunded without interest and free from deductions SAVE AND EXCEPT that the Purchasers HEREBY agree to pay to the Vendor's Attorneys-at-Law the sum of $500.00 for professional services rendered in respect of work incidental hereto and the Purchasers HEREBY irrevocably authorise the Vendor to deduct the amount of such fee from deposits paid to the Vendor and pay the same to the Vendor's Attorneys-at-Law on termination of this Agreement.

3. Subject to the Restriction Covenants (if any) endorsed on the Certificate of Title registered at Volume 1080 Folio 191 of the Register Book of Titles.

4. The Attorneys-at-Law cost for the preparation of this Agreement for sale is fixed at the sum of $300.00 and shall be borne by the Vendor and the Purchasers equally and each pa party shall pay their share on the signing of this Agreement.

5. This Sale also includes 4 mirrors - 2 Upstairs and 2 Downstairs, 1 Bar and sink and 3 Air Conditioning Units.

6. 5% commission to be paid by the Vendor to Messrs. Stiebel & Company Limited on completion."

Consistent with their stance in the Court below counsel maintained before us that the determination of this appeal turned on the interpretation of special condition 2 when examined against the background of the documentary evidence contained in the correspondence included in the agreed bundle of documents below in the record of this appeal. It may be convenient at this stage to summarise the facts leading up to this matter.

Upon the execution of the agreement for sale, the purchasers undertook (special condition 2) to furnish a written commitment for $180,000 being the balance of the purchase price by the 20th January, 1984. This would, from the outset, unless they had access to large capital reserves set aside for such a purpose, seem to be not an easy task. As events showed so it proved. The purchasers had difficulty meeting this deadline.

Following oral discussions between the attorneys-at-law acting for the parties, on 1st February, 1984 the attorneys-at-law for the purchasers wrote to the vendors' attorneys-at-law a letter couched in the following terms:-

> "1st February, 1984
>
> Messrs. Silvera & Silvera
> Attorneys-at-law
> 42-44 East Street
> Kingston.
>
> Dear Sirs:
>
> Re: Sale of No. 6 Springway, Manor Park
> Florence Muir to Raymond Mair et ux
> Your Ref: BAT/V. McT
>
> We refer to previous correspondence herein ending with ours of 19th January, 1984, and to the recent telephone conversation with your Mr. Silvera in which he agreed that the time for obtaining the letter of commitment would be extended, in view of the fact that the copy agreement signed by the vendor was received by us only on the 18th January, 1984.
>
> Our clients have now advised that they will be getting a mortgage from the Bank of Commerce Trust Company Limited. We have spoken to Mr. Richard Campbell of Bank of Commerce Trust who has promised to let us have the letter of commitment within the next four weeks. We should appreciate your advising whether your client is agreeable to extending the time set in special condition (2) of the Agreement, to 29th February, 1984.
>
> Please let us hear from you as soon as possible.
>
> Yours faithfully
>
> MYERS, FLETCHER & GORDON
> MANTON & HART
>
> Per
> Lynda Mair (Miss)
>
> c.c. Mr. Raymond Mair"

There is no evidence that there was any verbal acceptance of the request made in the letter of 1st February, 1984 to extend the date for providing the commitment letter. What is clear, however, from the contents of the letter is that there was an agreement to

extend the date beyond 20th January 1984, but no specific date was given as to the new deadline. The 29th February, 1984 was the date of the extension requested by the purchaser's attorneys. There is no evidence that the vendors' attorneys raised any objection to this request.

The purchasers were anticipating obtaining the total balance of the purchase price from one source. This can be gathered from the contents of the letter of 1st February, 1984.

When the 28th February, 1984 came however, they had not yet managed to obtain all the necessary financing. The purchasers' attorneys in one more attempt to stave-off the inevitable, again wrote to the vendors' attorneys in the following terms:-

> "28th February, 1984
>
> Messrs. Silvera & Silvera
> Attorneys-at-Law
> 42-44 East Street
> Kingston
>
> Dear Sirs:
>
> Re: Sale of No. 6 Springway, Manor Park
> Florence Muir to Raymond Mair et ux
> Your Ref: EAT/V. McT
>
> We refer to previous correspondence herein ending with ours of 1st February, 1984, and now enclose herewith photocopy of Letter of Commitment received from our clients. The balance of purchase price will be loaned to Mr. Mair by his employers American International Underwriters (Jamaica) Limited. We shall shortly be advising you as to the preparation of the Transfer.
>
> Yours faithfully
>
> MYERS, FLETCHER & GORDON
> MANTON & HART
>
> Per:
> Lynda Mair (Miss)"

The response to the vendors' attorneys was brief and direct. Their letter dated 2nd March, 1984 and addressed to the purchasers' attorneys read:-

2nd March, 1984

Messrs. Myers, Fletcher & Gordon
Manton & Hart
Attorneys-at-Law
21 East Street
Kingston

Attention: Miss Lynda Mair

Dear Sirs:

Re: Sale of No. 6 Springway,
Manor Park - Florence Muir
to Raymond Mair et ux

We are in receipt of your letter dated 28th February, 1984. Our instructions are, however, that as the Mortgage Commitment is not in accordance with Special Condition 2 of the Agreement for Sale the matter be terminated.

We therefore, enclose our cheque for $20,000.00, being a refund of the deposit paid herein.

Yours faithfully,

SILVERA & SILVERA"

As a commitment letter for a part of the balance outstanding on the consideration price could hardly be regarded as compliance within the terms as set out in special condition 2, the stance of the purchasers' attorneys in answer to this letter seemed somewhat surprising. Not to be outdone they now wrote to the vendors' attorneys the following letter:-

"5th March, 1984

Messrs. Silvera & Silvera
Attorneys-at-Law
42-44 East Street
Kingston.

Dear Sirs:

Re: Sale of No. 6 Springway, Manor Park -
Florence Muir to Raymond Mair et ux
Your Ref. DAT/VMcT.

We acknowledge receipt of your letter dated 2nd March, 1984. We cannot agree with the position taken in your said letter as the Purchasers have clearly complied with the Special Condition, having raised the necessary financing, albeit from two financial institutions.

The Purchasers, therefore, require your client to complete this transaction, and we return herewith your cheque numbered 8401713.

Yours faithfully
MYERS, FLETCHER & GORDON
MANTON & HART"

Although the completion date was fixed for 19th March, 1984 it is common ground that there was a failure by the purchasers to complete the transaction by that date. They were eventually in a position to complete on a date sometime subsequent to 20th March, 1984. This can be gathered from a letter dated 20th March, 1984 from the purchasers' attorneys addressed to the vendors' attorneys which reads:

" 20th March, 1984

Messrs Silvera & Silvera
Attorneys-at-Law
42-44 East Street
Kingston

Dear Sirs:

Re: Sale of premises No. 6 Spring Way, Manor Park - Florence Muir to Raymond Mair et ux

We refer to your letter of 8th March, 1984, and now enclose:

1. Letter of Commitment from American International Underwriters (Jamaica) Ltd.

2. Your cheque in the amount of $20,000.00

Our clients have, therefore, satisfied all your requirements and we expect that the Vendor will complete this transaction.

Yours faithfully
MYERS, FLETCHER & GORDON
MANTON & HART

Per:
Lynda Mair (Miss)

It has been contended before us by Mr. Wright for the appellants that the date when this letter and its contents reached the hands of the vendors' attorneys is uncertain. In any event, whenever that was by that date the vendor through her attorneys had by letter dated 2nd March 1984 treated the contract for sale as rescinde-

A letter dated 5th March, 1984 from the purchasers' attorneys then followed returning the deposit and requesting completion of the contract.

The vendors' attorneys by letter dated 6th March, 1984 wrote to the purchasers' attorneys in the following terms:-

" 6th March, 1984

Messrs. Myers, Fletcher & Gordon,
Manton & Hart,
Attorneys-at-Law,
21 East Street,
KINGSTON

ATTENTION: MISS LYNDA MAIR

Dear Sirs:

Re: Sale of premises No. 6 Spring Way, Manor Park - Florence Muir to Raymond Mair et ux

We are in receipt of your letter dated 5th March, 1984 and return our cheque No. 8401713 for the deposit of $20,000.00 in the above transaction.

We disagree with the opinion expressed by you that the Special Condition has been complied with as same required a written letter of commitment for a loan of $180,000.00, whereas we received from you a photocopy of such a letter of commitment from the Bank of Commerce Trust Limited in respect of a laon of $153,000.00.

The statement contained in your letter dated 28th February, 1984, that 'The balance of purchase price will be loaned to Mr. Mair by his employers ......' cannot be regarded as a 'written commitment' in respect of the difference of $27,000.00.

Yours faithfully,
SILVERA & SILVERA

It was in those circumstances that proceedings were commenced by the purchasers' attorneys in the Court below on 14th March, 1984 seeking specific performance, among other reliefs, of the agreement for sale.

In the interim, in fact very shortly after the completion date set out in the agreement for sale, the vendor died. Probate was eventually granted to the executors, the present appellants, limited to representation in respect of this suit.

The hearing below consisted in the main of legal arguments from counsel for both parties before Theobalds, J. who following lengthy submissions from counsel made an order for specific performance in favour of the purchasers.

The learned judge in coming to this conclusion in so far as is relevant found inter alia that:-

> " There is no doubt that on the basis of the documentary evidence in the case the Plaintiffs paid scant regard to the terms of the Purchase Agreement in relation to the furnishing of a written letter of commitment for a loan of $180,000.00 by the 20th January, 1984.
>
> The Defendants made long and detailed submissions in support of that contention and emphasised that the Plaintiffs were lax in providing the letter of commitment and the Defendants have argued quite properly that as a result of this laxity they had every right to rescind the Purchase Agreement and this they purported to do by letter dated the 2nd March, 1984.
>
> It cannot be said otherwise than that Special Condition No. 2 did provide for the delivery of the letter of commitment by the 20th January 1984, but that the same Special Condition provided for either party to rescind the Purchase Agreement and the Specification sets out "within 14 days of the 20th January 1984." It went on to say that failing this rescission the purchase agreement "remained absolute and binding on the parties." The Agreement inclusive of Special Condition No. 2 is set out at length in the Statement of Claim.
>
> It is the Court's duty in my view to see that the terms of the Agreement are carried out. There is no evidence on which a Court could properly find that the date in the Agreement for Special Condition has been extended or that date for the extension to expire.
>
> I accept the Plaintiffs submission that the parties are bound by the terms of the Agreement and I am of the view that rescission of the Agreement could only be properly achieved by strict compliance with the requirement with Special Condition No. 2 i.e. the requirement that either party may rescind within 14 days of the 20th January 1984 otherwise the Agreement to remain absolute and binding."

I do not intend to deal with the authorities cited as the issue is the legal interpretation of the Special Condition and I have interpreted it in the way the Plaintiffs have. I can find no reason for departing from strict compliance in the case and in any event it is my view that the interpretation of the Special Condition is the key issue.

Accordingly, I give Judgment for the Plaintiffs and an Order for Specific Performance of the Contract dated the 17th day of January 1984 between the Plaintiffs and the Defendants Florence Muir (now deceased) and in addition the Court Orders that the $20,000.00 deposit made by the Plaintiffs together with all interest accrued on that sum be for the credit of the Plaintiffs at the time of the final accounting of Purchase money between the parties."

Some five grounds of appeal were filed by the appellants. Of these they can be considered as directed at two main areas of the learned judge's findings. These are set out at grounds 1 - 4. The grounds being advanced read:-

"(1) The learned Trial Judge erred in law in granting the Defendants/Appellants an Order for Specific Performance in that:-

(a) The Plaintiffs/Respondents give no evidence on the basis of which the Court could have exercised its discretion to grant them such equitable relief.

(b) He found that the Plaintiffs/Respondents had shown scant regard in complying with the terms of Special Condition No. 2, of the Agreement for Sale for the provision of a written letter of commitment for a loan of $180,000.00 by the 20th January, 1984; and

(c) He found that the Plaintiffs/Respondents had been 'lax' in providing the letter of commitment and that as a result of this 'laxity' the Defendants/Appellants had 'every right' to rescind the Agreement for Sale by their letter of the 2nd March, 1984.

(2) That the Learned Trial Judge in expressly limiting his decision of the case to the interpretation of Special Condition No. 2, failed to properly assess the rest of the evidence as it affected the implementation of the said Special Condition No. 2.

(3) That the decision of the Learned Trial Judge that there was no evidence on which a Court could properly find that the date in the Agreement for Special Condition No. 2, had been extended is contrary to the evidence and makes doubtful the Learned Trial Judge's assessment in respect of the documentary evidence in the case.

(4) Further and in the alternative, that it was not open to the Learned Trial Judge to find that the date in the Agreement for compliance with Special Condition No. 2 had not been extended in light of the following:-

(a) The Plaintiffs/Respondents had requested an extension to the 29.2.84 by letter dated 1.2.84;

(b) The Plaintiffs/Respondents by their letter of the 28.2.84 acted on the faith of the grant of such an extension;

(c) The Defendants/Appellants by their forbearance and/or acquiesence in the Plaintiffs/ Respondents' conduct up to the 28.2.84 acted to their detriment in not having earlier rescinded the said Agreement for Sale, and

(d) The Plaintiffs/Respondents are accordingly estopped from denying the grant of such an extension."

Ground 5 which complained about the order in which counsel were required to address was found to be without any merit.

Mr. Goffe for the respondents also raised strong objection to any argument being advanced by the appellants in support of ground 4 as:-

1. It had not been part of the defendant's pleadings below;

2. There had been no argument raised on the matter at the trial.

It is clear from the findings of the learned judge (supra) that this ground which related to the question as to whether or not an extension was granted by the vendors' attorneys to the request made by the purchasers' attorneys by their letter of 1st February, 1984 was a live issue below and was the subject of a finding by the learned trial judge.

Mr. Wright was therefore entitled to raise the matter of the extension as this was an issue which fell to be determined on appeal.

Grounds 2 - 4

The main thrust of the submissions by counsel were directed at special condition 2. As all three grounds in my view, are inter-related they may be conveniently considered together.

It is clear from the terms of the agreement for sale and the submissions of counsel that the interpretation of special condition 2 lay at the very heart of the determination of the matter below and was the matter upon which the outcome of this appeal turns.

Being a conditional contract, it is to the special conditions that one had to look in order to discover the intention of the parties as on a plain reading of these conditions, and condition 2 in particular, the purchasers were fixed with the obligation of obtaining the balance of the purchase price of $180,000 within a given time frame. In default of the purchasers obtaining the necessary financing by 20th January 1984 either party could rescind the agreement within 14 days. In such an event, they would be restored to their original positions as they were prior to the signing of the agreement. The vendor would no longer be obliged to transfer the property and the purchasers would recover their deposit.

If neither party did anything to rescind the agreement within the period stated, then an absolute and binding contract came into being and the purchasers could move to compel performance of the agreement if they were ready, willing and able to complete the

contract on or before 19th March, 1984, the completion date as set out in the agreement.

The law relating to conditional contracts containing special conditions is clear. Where such conditions exist they fall to be construed strictly. Unlike in open contracts where time can be made of the essence of the contract by a written notice on the part of either party, in contracts containing special conditions e.g. the obtaining of financing within a particular time, time is of the essence from the moment that the agreement for sale is executed. What the parties are saying by the special conditions is that by the agreement for sale a contract comes into existence but that it is subject to defeasance if the special condition is not fulfilled by the purchasers being able to procure the necessary mortgage financing within the period as prescribed in the agreement, and **either party** exercises the right to rescind within 14 days of such failure.

A leading case which is illustrative of these principles relating to conditional contracts is **Aberfoyle Plantations Ltd. vs. Khaw Bian Cheng** [1960] A.C. 115.

The facts were that a clause in an agreement provided that:-

> "...The purchase is conditional on the vendor obtaining at the vendors expense a renewal of the seven (7) leases described in the schedule hereto so as to be in a position to transfer same to the purchaser and if for any cause whatsoever the vendor is unable to fulfil this condition this agreement shall become null and void and the vendor shall refund to the purchaser the deposit or deposits made under clause 2 hereof."

Notwithstanding anything contained in clause 10 hereof, this clause was held to be a condition precedent.

The agreement in clause 9, stipulated that completion was to take place on or before April 30, 1956 (subsequently extended by the purchaser to May 31, 1956) and:-

> "... that on the purchaser paying the balance of the purchase price the vendor shall as soon as possible thereafter execute a transfer of the property to the purchaser. The condition not having been fulfilled by June 11, 1956 the purchaser on that date brought the present action against the vendor claiming the return of the deposit paid.
>
> Held that on the true construction of the agreement the condition in clause 4 had to be performed at latest by April 30, 1956, the date fixed for completion of the purchase (or by the extended time granted by the purchaser) and accordingly the respondent was entitled to the return of his deposits. Until the condition was fulfilled there was no contract for sale to be completed and by fixing a date for completion the parties must by implication be regarded as having agreed that the contract must have become absolute through performance of the condition by that date at the latest."

This case followed the dicta earlier laid down in **Smith v. Butler** [1900] 1 Q.B. 694. In re **Sandwell Colliery Company Field v. The Company** [1929] Ch. D. 277. These cases and the principles to be extracted from them were applied by the New Zealand Court of Appeal in **Scott v. Rania** [1966] N.Z.L.R. 527 and were considered and applied by Wolfe, J. in E. 63/1981 **Wilfred Calu Et ux v. Loris Wynter and Maxwell Wynter** (unreported) delivered on 19th December, 1985. The facts there related to a written agreement entered into on 15th January, 1981 for the sale of a dwelling house at 41 Stilwell Road, St. Andrew. The consideration price was $90,000 and the completion date was for 30th March, 1981. The terms of the special condition was "subject to mortgage." The purchasers, despite their efforts were unable to obtain the necessary financing for the balance of the purchase price. A request by the purchasers for an extension to 30th April, 1981 to raise the balance of the purchase price was refused and by a letter of 22nd April, 1981 the deposit of $9,000 was returned to the purchasers' attorneys-at-law, rescinding the contract. Following this the purchasers attorneys lodged a caveat against the vendor's title and proceeded to lodge a writ of summons seeking specific performance of the contract.

Wolfe, J., in a well reasoned judgment reviewed the authorities (referred to supra) and at p. 13 opined:-

> "I take the view that where there is a Special Condition in an agreement as in the instant case, the condition must be strictly fulfilled. I have been led to this view because until the condition is fulfilled the rights of the parties thereunder remain suspended. In the same way that the purchaser would have been entitled to say to the Plaintiff (sic) (defendants) I have made all reasonable efforts to obtain a Mortgage without success and therefore the agreement is at an end, so in my view the vendor is entitled to say to the purchaser you have failed to fulfil the condition in the time allowed the contract is at an end. <u>There is no obligation on the vendor in such circumstances to make time of the essence of the contract."</u>
> (emphasis supplied)

I would adopt the above dictum of Wolfe, J., as a correct statement of the law fully warranted and supported by the authorities relied on by him.

Mr. Wright for the appellants contended that the effect of the two letters of February 1, 1984 and February 28, 1984 from the purchasers' attorneys to the vendors' attorneys suggests by implication that there was an extension of the deadline set out in special condition 2 to February 29, 1984 in keeping with the request made by the purchasers' attorneys in the earlier letter.

Mr. Goffe for the respondents, however, submitted that there was no evidence that the written request for an extension was granted by the vendors' attorneys. He further contended that such an acceptance could not be left to be inferred.

Whereas, however, a variation as to condition 2 would have to be in writing a waiver or forbearance need not be so but to be effective may be "oral or written or inferred from conduct even though the provision waived is found in a contract required to be evidenced by writing." Paragraph 1382 24th Edition of Chitty on Contracts.

The letter of February 1, 1984 (supra) in this regard indicates that it was at the purchasers' (respondents) request that a waiver or forbearance of special condition 2 as to the financing was being sought. Although there is no direct evidence of acceptance by the vendors' attorneys there is affirmative evidence of a forfearance on their part. Moreover, this is further buttressed by the fact that when the letter of February 1, 1984 was written, the fourteen (14) day period within which either party could still have moved to rescind the agreement had not yet expired. Having regard to the tenor of that letter, had the vendor sought through her attorneys to rescind by February 3, 1984, the purchasers, having asserted that there was agreement to extend the time for obtaining the letter of commitment would conceivably resist such a move.

The law in such circumstances was expressed in this manner by Bowen, L.J. in **Birmingham and District Company v. London and North Western Railway Company** (1888) 40 Ch. D. 268 at 286:-

> "If persons who have contractual rights against others induce by their conduct those against whom they have such rights to believe that such rights will either not be enforced or will be kept in suspense or abeyance for some particular time, those persons will not be allowed by a Court of Equity to enforce the rights until such time has elapsed without at all events placing the parties in the same position as they were in before."

These principles cited by the learned Lord Justice could have been resorted to by the purchasers attorneys had there been rescission by the vendors attorneys within the period as set out in special condition 2 having regard to the vendors' attorneys conduct as spelt out in the letter of February 1, 1984. The converse, however, was equally applicable in favour of the vendor in the light of the request for the extension to February 29 and the forbearance of the vendors' attorney in not rescinding by February 3. As it was the purchasers who by their request for an extension had benefited thereby they could not now rely upon the original terms as set out in special condition 2.

The law here is equally clear. At paragraph 1383 of 24th Edition of Chitty on Contract the following statement appears:-

> "<u>Effect upon party seeking concession</u>
>
> Where one party has induced the other party to accede to his request, the party seeking the concession will not be permitted to repudiate the waiver and set up the original terms of the agreement."

In the circumstances as outlined above when the time for the extension requested by the purchasers to February 29, and acceded to by way of forbearance on the vendor's part had expired, the 14 day period for either party to rescind the agreement was once more revived. As:-

> "where time is of the essence of the contract, the mere extension of time is only a waiver to the extent of substituting the extended time for the original time, and not an utter destruction of the essential character of the time"

per dictum of Sir George Jessel, M.R., in **<u>Barclay v. Messenger</u>** [1874] Vol. 30 L.T. 351 at 354.

Mr. Goffe for the respondents sought to contend that the purchasers were merely entitled to complete their end of the bargain by providing the commitment letter(s) for the balance of the purchase price "within a reasonable time." This, in my opinion, was untenable. It clearly overlooks the fact that by virtue of the special conditions, the agreement for sale made time of the essence from the moment that the agreement for sale was executed. Equity would step in however, where waiver or forbearance fell to be considered in lending its aid to either party, where the facts and circumstances so warranted.

In this case when the terms as to the completion date and the special conditions are examined, it is patent that the intention of the parties was that the proposed transfer of the property was to be expedited within the shortest possible time. The agreement for sale as to its terms called for no less - example, the special conditions as to financing and the obligations placed on

the purchasers in this regard. The completion date being fixed at two months from the execution of the agreement - these factors made it clear as to the expressed intention of the parties.

The letter from the purchasers' attorneys dated 28th February, 1984 in forwarding the photostat of a commitment letter from C.I.B.C. Trust Company for $153,000 along with a promise of a loan for the balance of $27,000 was not in compliance with the requirements of special condition 2 as extended to February 29, 1984. This letter being addressed to the vendor's attorneys just one day before the deadline for the extension date further reinforces the contention by Mr. Wright that there was a tacit understanding to be gathered from the conduct of the parties that the request for an extension to 29th February was being honoured by the vendor's forbearance by not rescinding the agreement prior to that date.

In the light of the above, I would hold that on any reasonable interpretation of the terms of the contract when read together with the correspondence passing between the vendor's and purchasers' attorneys, the failure by the purchasers to obtain the financing as to the balance of the purchase price by 29th February, 1984 meant that they were in default as to the terms of special condition 2.

The vendors' attorneys were therefore justified in rescinding the contract by their letter of 2nd March, 1984 and returning the deposit.

This would have been sufficient to dispose of the matter. The issue of specific performance (ground 1) having been fully dealt with in argument, for the sake of completeness, I propose to deal with it.

On the assumption, therefore, that the contention of learned counsel for the respondents is correct the parties would be left with what now would result in an "absolute and binding contract." This called for completion by 19th March, 1984.

From the evidence the purchasers failed to meet this deadline as well. As the agreement was one which contained special conditions and by any test had to be construed strictly, the purchasers needed to show that they were ready, willing and able to complete by that date. They did not but the learned judge nevertheless made the order for specific performance in their favour. In so doing he described their conduct thus:

> "There is no doubt that on the basis of the documentary evidence in the case the plaintiffs paid scant regard to the terms of the Purchaser Agreement in relation to the furnishing of a letter of commitment for a loan of $180,000 by 20.1.84. The defendants made long and detailed submissions in support of that contention and emphasised that the plaintiffs were lax in providing the letter of commitment and the defendants argued quite properly that as a result of this laxity they had every right to rescind the Purchase Agreement. ..." (Emphasis supplied)

Having regard to the above findings, Mr. Wright strongly contended that the purchasers had not by such conduct brought themselves within the Court's discretion entitling them to the equitable relief granted.

Mr. Goffe, on the other hand, contended that it was entirely within the learned judge's discretion as to whether to grant or refuse specific performance. His duty was to act judicially. Once he acted on the right principle then this Court ought not to substitute its views for that of the trial judge on such evidence as the learned judge had before him. He concluded that the mere late tendering of the commitment letter did not disentitle the purchasers to request completion of the contract.

Given the terms of the agreement which called for prompt performance by the parties there is no question that the purchasers were dilatory in their approach to the whole transaction. By such conduct on their part the crucial question is had they acted in a manner capable of satisfying a Court of Equity that they were entitled to equitable relief?

In **Lazard Brothers and Co. Ltd. v. Fairfield Properties Co. (Mayfair) Limited** Times Law Reports October 13, 1977, specific performance was granted in circumstances where both parties were tardy in completion of the contract and this delay proved advantageous to the vendors while the purchasers defendants were unable to point to any detriment to them having resulted from the delay.

Sir Robert Megarry V.C. had this to say:-

> "If between the plaintiff (vendors) and defendant it was just that the plaintiff should obtain a decree of Specific Performance, the Court ought not to withhold it merely because the plaintiff has been guilty of delay."

He cited from **Milward v. Earl of Thanet** (1801) 5 Ves. 720 N per dictum of Sir Richard Arden M.R. where the learned Master of the Rolls said:-

> "A plaintiff seeking Specific Performance must show himself ready desirous, prompt and eager"

The learned Vice Chancellor then said:-

> "If Specific Performance was to be regarded as a prize to be awarded by equity to the zealous and denied to the indolent, then plainly the plaintiffs/vendors must fail."

This case is distinguishable from the instant case as here the vendor by virtue of the term as to the completion date (19th March, 1984) and special condition 2 made it plain to the purchasers that the sale was to be carried out expeditiously. Such delay as was occasioned by the purchasers conduct was not acquiesced in and was detrimental to the vendor. The evidence from the record of appeal is that she died on 25th March, 1984. Such delay as was occasioned thereafter had nothing to do with the conduct of the vendors' attorneys, who had up to the time of her death represented her.

Such subsequent delay by the vendors' personal representatives was brought about primarily by the stand that was taken in treating the agreement for sale as properly terminated.

Given the findings of the learned judge as to the conduct of the purchasers in performing the terms of the agreement when pitted against the background of what was the clear intention of the parties in my opinion such conduct on their part exhibited none of the qualificiations alluded to by the learned Master of the Rolls in **Milward v. Earl of Thanet** (supra) and would disentitle them to the decree granted by Theobalds, J.

I must confess, however, that I have experienced some difficulty in attempting to discover the reasoning of the learned judge as to whether he applied the correct principles in granting what was equitable relief by the order of specific performance. Whatever delay there was in expediting completion of the agreement had to be laid at the purchasers' door. The conduct of the vendors' attorney was on the evidence available eminently reasonable in not rescinding within the time provided for in the special conditions. They acceded to the purchasers' request for an extension of forty days to furnish the commitment letter. It was not until after all this forbearance on their part proved futile that they acted to rescind the agreement.

All these factors had to be taken into consideration by the learned judge in determining whether specific performance ought to have been granted. There was no risk here of the purchasers' deposit being forfeited. The special conditions provided for its return in the event of the conditional contract being rescinded.

Moreover, after the deposit had been returned by the purchasers following the rescission letter, it had been placed on fixed deposit earning interest pending a resolution of the matter. Neither party was therefore placed at a disadvantage.

I would for these reasons refuse specific performance, allow the appeal and enter judgment for the appellant.

I would further order that the deposit of $20,000 and interest accrued thereon be returned to the purchasers, and that the costs both here and below to be the vendors', such costs to be taxed if not agreed.